MICHIGAN APPEALS REPORTS

CASES DECIDED

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COURT OF APPEALS

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COURT OF APPEALS CASES

PEOPLE v DICKINSON

Docket No. 332653. Submitted August 8, 2017, at Grand Rapids. Decided August 15, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 1031.

Vicki R. Dickinson was convicted after a jury trial in the Branch Circuit Court of delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(*iv*), possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(*v*), and furnishing a controlled substance to a prisoner in a correctional facility, MCL 800.281(1). In September 2014, Dickinson visited Bobby Cain at the Lakeside Correctional Facility in Coldwater, Michigan. Because prison guards had been alerted before the visit that contraband might be exchanged between Dickinson and Cain, the two were seated directly in front of the visiting room's observation window so that Lakeside Correctional Facility Sergeant Todd Riley could see them. Riley saw Dickinson get a paper towel, crumple it up, and place it on a tray she and Cain were sharing. Riley then watched Cain pick up the paper towel, cup it in his hand, transfer something from the paper towel into his hand, and replace the paper towel on the tray. Riley confronted Cain, took hold of Cain's hand, and removed from his hand a blue balloon packed with a substance later determined to be 5.68 grams of heroin. Michigan State Police Trooper Jeremy Miller took Dickinson into custody and searched her. Dickinson allowed Miller, with the assistance of a drug-detecting dog, to search her car and her purse. The dog alerted to Dickinson's car, but no drugs were found in Dickinson's car or purse. Miller had prepared two police reports after his investigation, but only one report was provided to Dickinson in response to her discovery request. Neither party was aware of the second report until trial. Dickinson moved for a mistrial on the ground that she was prejudiced by the prosecution's failure to produce the second police report. The court, Patrick W. O'Grady, J., denied Dickinson's motion for a mistrial. The trial continued, and after closing arguments and jury instructions, Dickinson again moved for a mistrial. The trial court again denied the motion. The jury issued guilty verdicts for each of the three offenses, and Dickinson was sentenced to concurrent prison terms of 18 to 240 months for delivery, 18 to 48

months for possession, and 18 to 60 months for furnishing a controlled substance to a prisoner. Dickinson appealed.

The Court of Appeals *held*:

1. The Double Jeopardy Clauses of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, protect a person from being twice placed in jeopardy for the same offense. The protection prohibits a second prosecution for the same offense after acquittal or conviction of the offense, and it prohibits multiple punishments for the same offense unless the Legislature expressly provides for multiple punishments for the same offense. Dickinson argued that she was unconstitutionally subject to multiple punishments because she was convicted of, and sentenced for, both possession of heroin and delivery of heroin. To determine whether a double-jeopardy violation has occurred, a court must apply the same-elements test articulated in *Blockburger v United States*, 284 US 299 (1932). In applying the same-elements test, the court must focus on the abstract legal elements of the offenses and not on the facts of the case. When each offense contains an element that the other does not, there is no double-jeopardy violation and the Legislature is presumed to have intended multiple punishments for the same conduct. In this case, Dickinson's sentences for possession and delivery of heroin did not violate her constitutional right to be free from multiple punishments for the same offense because the delivery and possession offenses each require proof of an element that the other offense does not require. Even though Dickinson may have possessed the heroin before she delivered it, no proof of possession was necessary for conviction of delivery, and similarly no proof of delivery was necessary for conviction of possession. The two offenses are separate crimes, and the trial court correctly sentenced Dickinson for both convictions.

2. A defendant's due-process rights are violated, and reversal is warranted, when exculpatory evidence is not preserved or when the failure to preserve evidence—even evidence that is only potentially useful—was a consequence of law enforcement's bad faith. In this case, Miller, the officer who field-tested the substance in the balloon, discarded the balloon according to police protocol after removing the substance from it. Dickinson argued that the failure to preserve the balloon that held the heroin deprived her of the opportunity to test it for DNA. According to Dickinson, the jury may have doubted that she possessed and delivered the heroin if her DNA was not found on the balloon or if another person's DNA was found on the balloon. Dickinson did not suggest that the law enforcement officer who disposed of the

balloon acted in bad faith, and she conceded that the balloon was only potentially exculpatory. Therefore, no plain error occurred, and reversal was not required.

3. In general, a defendant has no constitutional right to discovery in a criminal case; the scope of discovery in criminal cases is governed by court rule. MCR 6.201(B)(1) requires the prosecution, on request, to provide a defendant with any exculpatory evidence known to the prosecution. Specifically, MCR 6.201(B)(2) requires the prosecution, on request, to provide a defendant with any police report concerning the defendant's case with the exception of any part of a police report that addresses an ongoing investigation. The prosecution is responsible for evidence within its control even when the prosecution is unaware of that evidence. A defendant claiming that reversal is required because the prosecution failed to provide evidence to him or her must show that he or she was prejudiced as a result of not having the evidence. In this case, the prosecution and the defense did not discover until trial that there was a second police report. Dickinson claimed that the prosecution violated the discovery rule by not producing the report. But Dickinson failed to establish that she was prejudiced by the absence of the report given that her delivery of the heroin to Cain was captured on video and observed by Riley. Because Dickinson could not establish that she was prejudiced by the absence of the report, the trial court did not abuse its discretion by denying Dickinson's motion for a mistrial.

4. When a trial court sentences a defendant it may consider all the evidence in the trial court record. The court's factual determinations must be supported by a preponderance of the evidence. The statutory sentencing guidelines are advisory only, but a trial court must score the guidelines and must use the sentencing ranges corresponding to the guidelines score for reference when imposing sentence. Dickinson asserted that the trial court erred when it scored Offense Variable (OV) 14, MCL 777.44, and OV 19, MCL 777.49. Under OV 14, points are assessed for the offender's role in the commission of an offense, and 10 points are to be assessed when the offender is a leader in a multiple-offender situation. A multiple-offender situation exists when more than one person (two is sufficient) violates the law as part of a group. In this case, Dickinson exercised independent leadership to procure the heroin from someone else outside the prison, transport it to the prison, smuggle it into the prison, and transfer it to Cain. Therefore, she was a leader in a multiple-offender situation, and the trial court did not clearly err when it scored OV 14 at 10 points. Dickinson also contested her score for

OV 19, under which points are assessed for conduct that threatens the security of a penal institution. Dickinson acknowledged that smuggling drugs into a penal institution creates serious problems for inmates and prison guards but contended that the variable applied only to prisoners who smuggled weapons into prison. The language of OV 19 places no such limits on its applicability. A score of 25 points for OV 19 was warranted because placing heroin into circulation at a penal institution threatens the security of the institution.

Affirmed.

1. CONTROLLED SUBSTANCES — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — POSSESSION AND DELIVERY.

Possession of a controlled substance and delivery of a controlled substance are two separate offenses; conviction of both offenses does not violate the Double Jeopardy Clauses of the Michigan or United States Constitutions because each offense contains an element that the other does not and imposing penalties for each conviction is not prohibited by the multiple-punishments strand of double-jeopardy jurisprudence (US Const, Am V; Const 1963, art 1, § 15; MCL 333.7403(2)(a); MCL 333.7401(2)(a)).

2. CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLES — SECURITY OF A PENAL INSTITUTION.

A defendant threatens the security of a penal institution for purposes of Offense Variable 19 when he or she delivers a controlled substance to a prisoner at a correctional facility (MCL 777.49).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, *Jessica E. LePine*, Assistant Attorney General, and *Ralph Kimble*, Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

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

BOONSTRA, P.J. Defendant appeals by right her convictions, following a jury trial, of delivery of a con-

trolled substance less than 50 grams, MCL 333.7401(2)(a)(*iv*), possession of a controlled substance less than 25 grams, MCL 333.7403(2)(a)(*v*), and furnishing a controlled substance to a prisoner in a correctional facility, MCL 800.281(1). The trial court sentenced defendant to concurrent prison terms of 18 months to 240 months for the delivery conviction, 18 months to 48 months for the possession conviction, and 18 months to 60 months for the furnishing to a prisoner conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On September 22, 2014, defendant visited a prisoner, Bobby Cain, at the Lakeside Correctional Facility in Coldwater, Michigan. Before that visit, Lakeside Correctional Facility Sergeant Todd Riley was advised by another corrections officer that a contraband drop might occur that day between Cain and defendant. Riley arranged for Cain and defendant to sit in the prison visitor room directly in front of (and about 5 feet from) the room's observation window so that he could observe them. During defendant's visit, Riley observed defendant go to a vending machine, make a purchase, sit back down next to Cain, take a "brown paper towel,"[1] crinkle it up, and place it on the TV tray that Cain and defendant were using. Cain picked up the paper towel and cupped it in his hand. Riley observed Cain transfer what was in the paper towel from one hand to the other and then hold that hand cupped next to his leg. Cain placed the empty crinkled paper towel back onto the TV tray. Riley went to the visiting room, walked over to Cain, took hold of Cain's hand, and removed a blue balloon that was packed tightly with a substance. Cain was removed from the visiting room,

[1] In her testimony, defendant referred to this object as a napkin.

and defendant calmly remained sitting where she was. Although other individuals were in the prison visiting room at the time of the incident, Riley observed no suspicious interactions between them and Cain. Defendant's visit with Cain was videorecorded by one of the prison's visiting-room cameras. At trial, Riley testified to these events, and the videorecording was played for the jury during his testimony.

Michigan State Police (MSP) Trooper Jeremy Miller testified that he was dispatched to the prison to test the contraband for narcotics. Miller removed the contents from the balloon and disposed of the balloon in the trash. He then took defendant into custody and searched her. With her consent, he also searched her vehicle, as well as her purse inside the vehicle, with the assistance of a drug-detecting dog. The dog had previously given an alert indicating the possible detection of narcotics in defendant's car. No drugs were found in defendant's car or purse. Miller sent the substance seized from the balloon to the MSP lab for further testing; the testing revealed the substance to be 5.68 grams of heroin.

Miller testified that he prepared two police reports related to his investigation, an investigating-officer report and a separate report related to the drug-detecting dog's search. Although both the prosecution and defense counsel possessed the investigating-officer report, and although that report indicated that a dog was used in the search, neither party was aware that the second police report existed. After Miller's testimony, defense counsel moved for a mistrial on the ground that defendant was prejudiced by the prosecution's failure to produce the second report in response to defendant's discovery request. The trial court considered the evidence in the record and the fact that

both parties lacked knowledge of the second police report before Miller testified to its existence. The trial court observed that defense counsel had cross-examined Miller and had obtained testimony from him that was favorable to the defense. Specifically, Miller admitted on cross-examination that this drug-detecting dog would often give a false alert in order to obtain his reward from his handler. Consequently, the trial court concluded that defendant was not prejudiced and denied defendant's motion for a mistrial.

Defendant testified at trial. She stated that she had purchased an ice cream bar for Cain from the vending machine, that it had made her hand cold, and that she used a napkin to warm her hand. She set the napkin down on the TV tray but never noticed that Cain picked it up. She also explained that she took prescription pain medication that she believed the dog had detected in her purse. She stated that she never possessed the heroin that was taken from Cain and knew nothing about it.

After the parties gave their closing arguments and the jurors were instructed, defense counsel renewed defendant's motion for a mistrial on the same discovery-violation ground. The trial court again denied the motion. The jurors returned their verdict, finding defendant guilty as described.

At defendant's sentencing, the prosecution objected to the scoring of Prior Record Variable (PRV) 7, MCL 777.57, which requires an assessment of points for subsequent or concurrent felony convictions, and Offense Variable (OV) 14, MCL 777.44, which requires an assessment of points if the offender was a leader in a multiple-offender situation. The prosecution argued that defendant should have been assessed 20 points (instead of 0 points) for PRV 7 because defendant had

been convicted of two or more concurrent felonies. Defense counsel argued that defendant's convictions were for conduct in a single event and that PRV 7 applied only to separate events. The prosecution next argued that defendant was the leader in a multiple-offender situation and should have been assessed 10 points (instead of 0 points) for OV 14. Defense counsel argued that OV 14 required multiple participants, which this case did not have. Defense counsel then asked for an opportunity to brief the PRV 7 issue. Consequently, the trial court adjourned the sentencing hearing. When the trial court resumed the hearing, defense counsel argued that the trial court could not assess any points under PRV 7 because the two controlled substance offenses were based on the same facts and because considering them as concurrent convictions for purposes of scoring PRV 7 raised double-jeopardy concerns. The prosecution argued that double jeopardy did not apply because the two controlled substance offenses of which defendant was found guilty required proof of separate and distinct elements. The trial court concluded that double jeopardy did not apply because each of the offenses that defendant committed required proof of separate and distinct elements. The trial court scored PRV 7 at 20 points.

The trial court next addressed the prosecution's objection to scoring OV 14 at 0 points. The prosecution argued that defendant's conduct in sourcing, acquiring, and delivering the heroin to Cain was indicative of her leadership role for which she should have been assessed points. The defense countered that Cain was the leader and that defendant was an unsuspecting dupe. The trial court was persuaded by the prosecution's argument and assessed 10 points for OV 14.

The trial court sentenced defendant as described. This appeal followed.

While her appeal was pending, defendant filed three postconviction motions with the trial court, two of which are relevant to defendant's appeal. Defendant moved for the entry of a judgment of acquittal and also moved for resentencing. In her motion for acquittal, defendant argued that she could not be convicted and punished for both delivery and possession of heroin because that would violate the constitutional prohibition against double jeopardy. In her motion for resentencing, defendant argued that OV 19, MCL 777.49, was incorrectly scored at 25 points because defendant's conduct did not threaten the security of the penal institution. Defendant contended that OV 19 should have been scored at 0 points, which would have resulted in a lower minimum sentence range of zero to nine months.

The trial court issued a written opinion denying defendant's motion for acquittal. The trial court relied upon *People v Smith*, 478 Mich 292, 315-316; 733 NW2d 351 (2007), in which the Michigan Supreme Court adopted the double-jeopardy test articulated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), under which a court must examine whether each offense required proof of an element that the other did not. In this case, the trial court applied the *Blockburger* test and concluded that possession of a controlled substance and delivery of a controlled substance were separate offenses. The trial court held that defendant could be convicted of both offenses and punished separately for each without violating defendant's right to be free from multiple punishments for the same offense. The trial court also denied defendant's motion for resentencing because it

found that defendant's smuggling of a controlled substance into the prison presented a serious threat to the security of a penal institution and, therefore, that OV 19 was correctly scored at 25 points.

II. DOUBLE JEOPARDY

On appeal, defendant argues that the trial court violated her constitutional right to be free from multiple punishments for the same offense because she was separately convicted and punished for both possession and delivery of heroin. We disagree.

We review de novo a claim that a conviction violates a defendant's right to be free from being twice placed in jeopardy for the same offense or being subject to multiple punishments for the same offense. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). We also review de novo questions of statutory interpretation. *People v Collins*, 298 Mich App 458, 461; 828 NW2d 392 (2012).

The United States Constitution and the Michigan Constitution both prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). These Double Jeopardy Clauses "afford three related protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense." *Ford*, 262 Mich App at 447. The "purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended." *Id*. at 447-448. The Double Jeopardy Clauses, however, do not restrict or

diminish the Legislature's ability to define criminal offenses and establish punishments. *Id*. at 448.

To determine "whether the Legislature intended to impose multiple punishments for violations of more than one statute during the same transaction or incident," courts must apply the "same elements" test articulated in *Blockburger*. *Id*. Under the *Blockburger* test, a court must inquire whether each offense contains an element not contained in the other offense. *Id*. If the two offenses do not each contain at least one element that the other does not, double jeopardy bars additional punishment. *Id*. "[W]here two distinct statutes cover the same conduct but each requires proof of an element the other does not," a presumption exists that the Legislature intended multiple punishments unless the Legislature expressed a contrary intent. *Id*. at 448-449.

In *People v Ream*, 481 Mich 223, 238; 750 NW2d 536 (2008), the Michigan Supreme Court clarified that "the *Blockburger* test is a tool to be used to ascertain legislative intent." "Because the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements." *Id*.

More recently, the Court stated:

> [W]hen considering whether two offenses are the "same offense" in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent. If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in *Ream* to discern legislative intent. [*People v Miller*, 498 Mich 13, 19; 869 NW2d 204 (2015).]

Defendant argues that her rights were violated because she was punished twice for the same conduct, inasmuch as her convictions for delivering heroin and possession of heroin arose out of a single event. Defendant's argument lacks merit. In relevant part, MCL 333.7401 defines as follows the crime of delivering less than 50 grams of a controlled substance:

> (1) Except as authorized by this article, a person shall not . . . deliver a controlled substance . . . .
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in [MCL 333.7214(a)(*iv*)] and:
>
> * * *
>
> (*iv*) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

The elements of delivery of less than 50 grams of heroin are (1) a defendant's delivery (2) of less than 50 grams (3) of heroin or a mixture containing heroin (4) with knowledge that he or she was delivering heroin. *Collins*, 298 Mich App at 462. MCL 333.7105(1) defines delivery as follows: " 'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." "[T]ransfer is the element which distinguishes delivery from possession." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001) (quotation marks and citation omitted; emphasis omitted; alteration in original).

MCL 333.7403 defines the crime of possession of a controlled substance and provides in relevant part:

> (1) A person shall not knowingly or intentionally possess a controlled substance . . . unless the controlled substance . . . was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in [MCL 333.7214(a)(*iv*)], and:
>
> * * *
>
> (*v*) That is in an amount less than 25 grams of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $25,000.00, or both.

Thus, the elements of possession of less than 25 grams of heroin are (1) a defendant's knowing or intentional possession (2) of heroin (3) in a mixture that weighed less than 25 grams. MCL 333.7403(2)(a)(*v*); *People v Hartuniewicz*, 294 Mich App 237, 246; 816 NW2d 442 (2011). As explained in *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), possession is a nuanced concept:

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. [Citations omitted.]

A review of the statutory elements for each of the two offenses for which defendant was sentenced reveals that the Legislature did not expressly state its intent regarding the permissibility of multiple punish-

ments. Therefore, we apply *Blockburger*'s "abstract legal elements test," as articulated in *Ream*, to discern legislative intent. *Miller*, 498 Mich at 19. According to *Ream*, "two offenses will only be considered the 'same offense' where it is impossible to commit the greater offense without also committing the lesser offense." *Id*. Analysis under this test of the elements of the two offenses for which defendant was punished establishes that the two offenses are separate and distinct. The delivery offense required proof of the separate element of delivery of the heroin that the possession offense did not require. And the possession offense required proof of the element of possession of the heroin that the delivery offense did not require.

In the context of considering whether possession of heroin is a lesser-included offense of delivery of heroin (i.e., whether the offense of possession of heroin contains elements that are not subsumed in the elements of the offense of delivery of heroin), this Court has noted that the distinction between possession and delivery has been made "consistently" in our caselaw. *People v Binder (On Remand)*, 215 Mich App 30, 35; 544 NW2d 714, vacated in part on other grounds 453 Mich 915 (1996). The *Binder* panel addressed defendant's argument—that it is impossible to deliver heroin without possessing it—as follows:

> One might argue that it is impossible for a party to manufacture, deliver or intend to manufacture or deliver a controlled substance without at least constructive possession of it. However, in our estimation, such an analysis unnecessarily adds the element of constructive possession to the crime. Requiring proof of constructive possession inappropriately creates a doorway through which drug traffickers, particularly those high in the distribution chain, can escape.

> Earlier judicial decisions finding the crimes of possession and delivery to be cognate offenses must have been made in partial recognition of the problems any other interpretation would create. We adopt the reasoning of our predecessors and reiterate that possession of a controlled substance is not a lesser, necessarily included offense of delivery. [*Binder*, 215 Mich App at 35-36.]

The reasoning of *Binder* applies in this context, is binding on this Court,[2] and comports with our Supreme Court's directive to examine the abstract legal elements of the two offenses, rather than the facts of the case, to determine whether the protection against multiple punishments for the same offense has been violated. *Ream*, 481 Mich at 238. While this defendant may indeed have possessed the heroin before delivering it, the prosecution was not required to prove possession to convict her of delivery, or vice versa. Consequently, defendant's conviction of each offense, and the trial court's sentencing of defendant separately for each offense, did not violate defendant's rights under the Double Jeopardy Clauses of the federal and Michigan Constitutions.

III. PRESERVATION OF EVIDENCE

Defendant further argues that the MSP's failure to preserve the balloon in which the heroin was found deprived defendant of due process because she was prevented from performing DNA testing on the balloon. We disagree. Defendant did not preserve this issue by raising it before the trial court; we therefore review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Plain errors or defects affecting substantial rights may be noticed although they were not

[2] See MCR 7.215(J)(1).

brought to the attention of the court." *Id*. at 763 (quotation marks and citation omitted). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. (citation omitted).

To warrant reversal on a claimed due-process violation involving the failure to preserve evidence, a "defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). When the evidence is only "potentially useful," a failure to preserve the evidence does not amount to a due-process violation unless a defendant establishes bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). A "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). A prosecutor is not required to "seek and find exculpatory evidence" or assist in building the defendant's case, and a prosecutor is not required to "negate every theory consistent with defendant's innocence." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Further, unless the defendant can show the suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to perform DNA testing to satisfy due process. *Id*.

Defendant argues that the balloon that held the heroin should have been preserved because DNA testing may have provided a basis for the jury to doubt that

she possessed and delivered the heroin. In her brief on appeal, however, defendant concedes that the balloon was only "potentially exculpatory." Defendant has not established that the balloon was, in fact, exculpatory evidence that would have exonerated her. Defendant does not argue that the police destroyed the balloon in bad faith. Nor do we find any bad faith from our review of the record. The trial record established that Miller took the contraband from Riley, removed the contents from the balloon, field-tested the substance that had been inside it, and disposed of the balloon according to standard police protocol for processing such evidence.

Moreover, the overwhelming evidence at trial established that defendant possessed and passed the heroin to Cain. Consequently, even if the balloon had been tested for DNA and someone else's DNA (rather than defendant's) was found on it, the test results would have made no difference to the outcome of the case. Therefore, we conclude that preserving and testing the balloon would not have changed the outcome of defendant's trial or exonerated her. Accordingly, defendant's claim that she was deprived of due process because the balloon was not preserved lacks merit. *Carines*, 460 Mich at 763-764.

IV. DENIAL OF MOTION FOR MISTRIAL

Defendant also argues that the trial court abused its discretion by denying her motion for a mistrial based on the prosecution's failure to produce the second police report in response to her discovery request. We disagree.

We review a trial court's decision regarding the appropriate remedy for a discovery violation for an abuse of discretion. *People v Rose*, 289 Mich App 499, 524; 808 NW2d 301 (2010). To obtain relief for a

discovery violation, the defendant must establish that the violation prejudiced him or her. See *id*. at 525-526. Further, we review for an abuse of discretion the trial court's denial of a motion for a mistrial. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). An abuse of discretion occurs when the trial court chooses an outcome that is outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). "For a due process violation to result in reversal of a criminal conviction, a defendant must prove prejudice to his or her defense." *People v Odom*, 276 Mich App 407, 421-422; 740 NW2d 557 (2007). Further, the moving party must establish that the "error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992).

Defendant contends that the prosecution's discovery violation deprived her of due process and that she was prejudiced because if she had timely received the second police report, she might have consulted an expert to determine if the dog could mistake the presence of a prescribed drug for the presence of heroin. She contends that this may have provided additional support to her defense theory that she never possessed any heroin. Defendant's conjecture, however, does not establish that she was prejudiced and entitled to a mistrial.

" 'There is no general constitutional right to discovery in a criminal case . . . .' " *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011), quoting

Weatherford v Bursey, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977). The Michigan Court Rules govern the scope of discovery in a criminal case. MCR 6.201; *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). MCR 6.201(B)(1) provides that the prosecution, upon request, must provide the defendant any exculpatory information or evidence known to the prosecution. MCR 6.201(B)(2) provides that the prosecution, upon request, must provide the defendant with any police report concerning the case except for portions that concern an ongoing investigation. The prosecution bears responsibility for evidence within its control, even evidence unknown to it, "without regard to the prosecution's good or bad faith." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014).

In this case, defense counsel requested the disclosure of police reports under MCR 6.201(B)(2) and was not provided with the second police report. Even though the prosecution lacked knowledge of the existence of the second report until it was first revealed at trial, the prosecution's failure to discover and disclose the report to the defense likely constituted a discovery violation. See *Chenault*, 495 Mich at 150. Assuming it to be so, the trial court had the authority under MCR 6.201(J) to fashion an appropriate remedy. To be entitled to relief under MCR 6.201(J), a defendant must demonstrate that he or she was prejudiced by the discovery violation. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997).

Here, defendant did not seek a continuance or other remedy from the trial court, as permitted under MCR 6.201(J), for the prosecution's discovery violation. Instead, defendant moved for a mistrial. We conclude from our review of the record that the trial court correctly analyzed the discovery issue in light of the

entire record. Defense counsel effectively cross-examined Miller regarding the dog search and obtained testimony favorable to the defense despite not having the second police report in advance of trial. Miller admitted that no drugs were found in either defendant's car or purse, and he admitted that the drug-detecting dog commonly gave false alerts. The record reflects that defense counsel used these admissions in closing argument to support the defense theory that defendant never possessed the heroin and to cast doubt on the prosecution's case.

Contrary to defendant's argument, our review of the record leads us to conclude that even if defendant had obtained the second police report in advance of trial and prepared her defense in the manner she contends that she would have if she had the report, it would have made no difference to the outcome of her trial. Her delivery of the heroin to Cain was captured on video. The jurors saw the video and heard Riley's testimony that he had personally observed defendant commit the charged offenses. Accordingly, we conclude that any discovery violation on the part of the prosecution did not prejudice defendant. The trial court did not abuse its discretion by denying defendant's motion for a mistrial. *Lugo*, 214 Mich App at 704.

V. SENTENCING

Finally, defendant argues that she is entitled to resentencing because the trial court incorrectly scored OV 14 and OV 19, resulting in an incorrect minimum sentencing range under the statutory sentencing guidelines. We disagree.

We review for clear error the trial court's factual determinations used for sentencing under the sentencing guidelines, facts that must be supported by a

preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo the trial court's interpretation and application of the statutory sentencing guidelines. *People v Jackson*, 487 Mich 783, 789; 790 NW2d 340 (2010). We will hold the trial court's factual determinations clearly erroneous only if we are left with a definite and firm conviction that the trial court made a mistake. *People v Armstrong*, 305 Mich App 230, 242; 851 NW2d 856 (2014).

When calculating scores under the sentencing guidelines, a trial court may consider all the evidence in the trial court record. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). "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).[3]

Under MCL 777.22, OV 14 must be scored for all felony offenses. MCL 777.44 describes when and how OV 14 is to be scored:

> (1) Offense variable 14 is the offender's role. Score offense variable 14 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender was a leader in a multiple offender situation .....10 points
>
> (b) The offender was not a leader in a multiple offender situation .....0 points

[3] The Michigan Supreme Court has clarified that sentencing courts must determine the applicable range of a minimum sentence under the sentencing guidelines and must take that calculation into account when imposing a sentence, but that the minimum sentences recommended by the guidelines are advisory only and not mandatory. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015).

(2) All of the following apply to scoring offense variable 14:

(a) The entire criminal transaction should be considered when scoring this variable.

(b) If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader.

In *People v Rhodes (On Remand)*, 305 Mich App 85, 90; 849 NW2d 417 (2014), we noted that the Legislature did not define what constitutes a "leader" for the purposes of OV 14. We therefore reviewed dictionary definitions and noted that "[t]o 'lead' is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting." *Id*. We concluded that for purposes of an OV 14 analysis, a trial court should consider whether the defendant acted first or gave directions "or was otherwise a primary causal or coordinating agent." See *id*. In *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880 (2013), we analyzed, for OV 14 scoring purposes, the undefined term "multiple offender situation" in relation to the undefined term "leader." We held that "the plain meaning of 'multiple offender situation' as used in OV 14 is a situation consisting of more than one person violating the law while part of a group." *Jones*, 299 Mich App at 287. We applied the plain meaning of those terms to the facts of the case and determined that the trial court's assessment of 10 points for the defendant's OV 14 score was correct and supported by several facts in the trial record. *Id*. at 287-288. Notably, we concluded that the defendant was involved in a "multiple offender situation" even though he was accompanied by only one other person and even though the other person was not charged in connection with the crime for which the defendant was convicted. *Id*.

In scoring OV 14 in this case, the trial court considered the "entire criminal transaction" as required under MCL 777.44(2)(a). Our review of the record leads us to conclude that the trial court's findings that defendant procured the heroin, possessed it for a period of time, transported it to the prison, and delivered it to Cain were supported by a preponderance of the evidence and were not clearly erroneous. The trial court did not misinterpret or misapply the sentencing guidelines by determining that defendant acted as a leader. Cain obviously could not leave the prison to procure the heroin himself. It was reasonable to infer, as the trial court did in this case, that defendant exercised independent leadership to procure the heroin from someone else outside the prison, transported it independently to the prison, and smuggled it inside before transferring it to Cain. A trial court may draw inferences regarding a defendant's behavior from objective evidence when sentencing the defendant. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). Consequently, we hold that the trial court correctly scored OV 14 at 10 points for defendant's role in the criminal transaction.

OV 19, the other offense variable challenged by defendant, must be scored for all felony offenses. MCL 777.22. Under MCL 777.49, OV 19 is to be scored at 25 points when a defendant's criminal conduct threatened the security of a penal institution. Bringing a controlled substance like heroin into a prison and delivering it to a prisoner in violation of MCL 800.281(1) inherently puts the security of the penal institution at risk. Our Legislature has specifically criminalized such conduct because of the seriousness of the problem of drugs in our state's penal institutions and the way in which illicit drug use interferes with the administration of justice in those institutions. Defendant's deliv-

ery of an unquestionably dangerous drug like heroin into the confines of the prison threatened the safety and security of both the guards and the prisoners and, therefore, threatened the security of a penal institution.

Defendant does not dispute the trial court's conclusion that smuggling drugs into a penal institution creates serious problems for inmates and prison guards but rather argues that OV 19 applies only to offenders who smuggle weapons into a prison. That argument, however, is unavailing because MCL 777.49 by its language does not limit the assessment of 25 points for OV 19 to offenders who smuggled weapons or other mechanical destructive devices into a prison. Our review of the trial court's application of MCL 777.49 to the facts of this case and the reasonable inferences drawn from those facts establishes that the trial court's assessment of 25 points for defendant's OV 19 score was warranted. Accordingly, defendant is not entitled to resentencing.

Affirmed.

RONAYNE KRAUSE and SWARTZLE, JJ., concurred with BOONSTRA, P.J.

HENDERSON v CIVIL SERVICE COMMISSION

Docket No. 332314. Submitted June 13, 2017, at Lansing. Decided June 29, 2017. Approved for publication August 15, 2017, at 9:05 a.m. Leave to appeal sought.

William R. Henderson and other employees of the Department of Corrections (DOC) brought an action against the Civil Service Commission (CSC) and the DOC in the Ingham Circuit Court, appealing a final decision of the CSC regarding the classification of certain DOC employees after the DOC eliminated approximately 2,415 resident unit officer (RUO) positions and 57 corrections medical unit officer (CMUO) positions and subsequently created new corrections officer (CO) and corrections medical officer (CMO) positions that required the employees to perform the same duties, but for a lower rate of pay. The employees' union, the Michigan Corrections Organization (MCO), filed a grievance on behalf of the employees, alleging that the DOC did not eliminate the RUO and CMUO positions for reasons of administrative efficiency. The parties agreed to hold the grievance in abeyance while the CSC's Office of Classifications, Selections, and Compensation (OCSC) undertook a classification and compensation study to determine whether the new positions were correctly classified. Following completion of the study, the MCO filed a Technical Classification Complaint on behalf of plaintiffs in the CSC's Office of Technical Complaints, requesting the restoration of all abolished RUO and CMUO positions as well as lost pay and other lost benefits resulting from the action. Plaintiffs took issue with the study's finding that the majority of the former RUOs interviewed did not answer affirmatively when asked if they participated in a treatment team, stating that the majority of the former RUOs would have responded that they participated in a treatment team had that term been defined in accordance with the job duty. After reviewing the record, the technical review officer (TRO) found that the newly created positions were properly classified as COs and CMOs. Plaintiffs then applied for leave to appeal to the Employment Relations Board (ERB), arguing that the TRO made numerous erroneous findings and ignored evidence and arguments favorable to their position. The ERB found no error

requiring reversal and recommended that the CSC deny plaintiffs' application. The CSC approved and adopted the ERB's decision as its own. Plaintiffs appealed in the Ingham Circuit Court, and defendants argued that under Const 1963, art 6, § 28, the circuit court's review was limited to whether the decision was "authorized by law" and that the "competent, material, and substantial evidence" standard did not apply because the CSC had not authorized a contested hearing to evaluate technical classification complaints. Plaintiffs responded that Const 1963, art 6, § 28, only set the minimum standard of review and that MCL 24.306 of the Administrative Procedures Act (APA), MCL 24.201 *et seq*., provides that an administrative agency's decision must be set aside if it is not supported by competent, material, and substantial evidence. The court, William E. Collette, J., determined that the applicable standard of review required a determination of whether the CSC's decision was authorized by law, whether it was arbitrary and capricious, and whether it was supported by competent, material, and substantial evidence on the whole record. Applying this standard, the court reversed the CSC's final decision and reversed the TRO's decision. Defendants sought leave to appeal in the Court of Appeals, which the Court of Appeals granted in an unpublished order, entered August 19, 2016.

The Court of Appeals *held*:

1. Article 6, § 28, of the 1963 Constitution provides, in relevant part, that all final decisions of any administrative agency existing under the Constitution or by law that are judicial or quasi-judicial and affect private rights or licenses shall be subject to direct review by the courts as provided by law. Article 6, § 28, further provides that this review shall include, at a minimum, the determination whether such final decisions are authorized by law, and in cases in which a hearing is required, whether the same are supported by competent, material, and substantial evidence on the whole record. This language consists of two standards of review: (1) authorized by law, a minimum standard applicable every time the constitutional provision applies, and (2) competent, material, and substantial evidence on the whole record, applicable only in cases in which a hearing is required. When a hearing is not required, courts review an agency decision only under the authorized-by-law standard; the substantial-evidence test does not apply when no hearing is required. In this case, because no hearing was required, the circuit court was limited to determining whether the CSC's decision was authorized by law;

accordingly, the circuit court adopted incorrect legal principles when it reviewed the CSC's decision for evidentiary support that was competent, material, and substantial.

2. The circuit court incorrectly based its scope-of-review decision on the Supreme Court's holding in *Viculin v Dep't of Civil Serv*, 386 Mich 375 (1971), and, pursuant to MCR 7.117 and MCR 7.119, the applicability of the standard of review provided by MCL 24.306 of the APA. Reliance on *Viculin* for the proposition that both the authorized-by-law and substantial-evidence standards applied to cases in which no hearing was required was misplaced because the issue in *Viculin* was the method of review, not the scope of review; the *Viculin* Court made no determinations about the scope of review when a hearing was not required. Similarly, reliance on application of the APA's competent, material, and substantial evidence standard, MCL 24.306(d), through the mandate of MCR 7.117 and MCR 7.119(H) was also unavailing because the APA provides appellate courts with the procedure for reviewing appeals from CSC decisions, but not the scope of review. Nothing in the plain language of MCR 7.117 or MCR 7.119 suggested that this distinction between the procedure for review and the scope of review had been abandoned or that MCR 7.117 and MCR 7.119 adopted the APA's scope of review.

3. The circuit court incorrectly concluded that the CSC's decision was not authorized by law because it was arbitrary and capricious. The CSC exercised its constitutional authority under Const 1963, art 11, § 5, to classify the newly created positions, and nothing indicated that the CSC's decision violated a statute or resulted from procedures that were unlawful. Regarding whether the decision was arbitrary and capricious, the CSC predicated its decision on an extensive and detailed classification study, the determining principle of which was to identify the extent to which employees in the newly created positions participated in the treatment-related activities envisioned for the RUO and CMUO positions. The conclusions of the OCSC were subject to multiple layers of review that included an opportunity for plaintiffs to submit additional documentation and express their critique of the study and resulting classification. The CSC's decision came at the end of this process and did not reflect an absence of consideration or adjustment with reference to principles, circumstances, or significance. The circuit court erred by applying the competent, material, and substantial evidence scope of review to a case in which a hearing was not required and by exceeding the authorized-by-law scope of review

by reweighing the evidence, making credibility decisions, and substituting its judgment for that of the CSC.

Reversed; CSC's decision reinstated.

ADMINISTRATIVE LAW — CONSTITUTIONAL LAW — REVIEW OF FINAL DECISIONS OF ADMINISTRATIVE AGENCIES — SCOPE OF REVIEW WHEN A HEARING IS NOT REQUIRED.

Article 6, § 28, of the 1963 Constitution provides, in relevant part, that all final decisions of any administrative agency existing under the Constitution or by law that are judicial or quasi-judicial and affect private rights or licenses shall be subject to direct review by the courts as provided by law; Article 6, § 28, further provides that this review shall include, at a minimum, the determination whether such final decisions are authorized by law, and in cases in which a hearing is required, whether the same are supported by competent, material, and substantial evidence on the whole record; when a hearing is not required, courts review an agency decision only under the authorized-by-law standard.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Christopher W. Braverman*, Assistant Attorney General, for the Civil Service Commission and the Department of Corrections.

Sachs Waldman, PC (by *Mary Ellen Gurewitz* and *Marshall J. Widick*) for William Henderson et al.

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

PER CURIAM. Defendants, the Civil Service Commission (CSC) and the Department of Corrections (DOC), appeal by leave granted the circuit court's order of March 14, 2016, which reversed the CSC's final decision affirming position classification decisions made by a technical review officer. The trial court's order also reversed the technical review officer's decisions

and affirmed the positions' former classifications. For the reasons stated in this opinion, we reverse the circuit court's ruling and reinstate the CSC's decision.

I. FACTS AND PROCEEDINGS

On April 1, 2012, the DOC eliminated approximately 2,415 resident unit officer (RUO) positions and 57 corrections medical unit officer (CMUO) positions. The persons in those positions were able to "bump" into newly created corrections officer (CO) and corrections medical officer (CMO) positions, respectively. The employees performed the same duties as they had in their former positions, but for a lower rate of pay. Their union, the Michigan Corrections Organization (MCO), filed a grievance on their behalf, alleging that the DOC did not eliminate the RUO and CMUO positions for reasons of administrative efficiency.[1] The MCO claimed instead that the DOC was facing budget cuts and could not directly reduce employee pay because of collective bargaining agreements that specified the rates of pay for RUOs and CMUOs. However, the DOC could achieve the same savings by abolishing the RUO and CMUO positions and reassigning employees to newly created positions with lower classifications and lower rates of pay.

A. CLASSIFICATION STUDY

The parties agreed to hold the grievance in abeyance while the CSC's Office of Classifications, Selections, and Compensation (OCSC) undertook a classification

[1] Michigan's Constitution requires the CSC to classify positions in the classified service according to their respective duties and responsibilities. Const 1963, art 11, § 5. The appointing authorities—here, the DOC—may create or abolish positions for reasons of administrative efficiency without the approval of the CSC. *Id*.

and compensation study to determine whether the new positions were correctly classified as CO and CMO rather than RUO and CMUO, respectively. The classification study involved desk audits of approximately 120 positions by eight classification experts over several months, encompassing all major DOC facilities. The OCSC compared the job duties for an RUO with those of a CO, eventually focusing on the occurrence and frequency that RUOs performed duties related to participating in a treatment team in a housing facility, preparing reports related to treatment team determinations, and duties involving delivering medications to prisoners. The OCSC then reviewed the Desk Audit Findings, reporting in its classification study that when the employees previously classified as RUOs were "asked whether they had served as a member of a treatment team before April 2012, the majority of employees said that they had not." The OCSC further found that "the supervisors viewed most positions in the housing units as participating in treatment teams," with examples including "providing general input on prisoner behavior, filing paperwork for psychological referrals and running training sessions." The OCSC also reported that the appointing authority (DOC) indicated that the RUOs' increased "involvement . . . in the treatment programs . . . has never developed as was initially envisioned."

The OCSC concluded that

> [w]hile the [RUO and CO] positions . . . do have different duties and those inside the unit may have comparatively more treatment team, reporting, and medication duties, the statements of employees, supervisors, and the appointing authority have not provided evidence that the housing unit positions are performing sufficient duties to make the RUO classification the best fit.

The OCSC then compared the job duties for the CMUO and CMO positions and concluded that the "classifications are essentially differentiable by the level of therapeutic care to be provided. The CMUO is intended to provide more direct and specialized care while the CMO delivers routine care in the course of traditional custody-focused duties." The OCSC found that "[a] review of position descriptions for newly created CMO positions" showed "the primary duties for the CMO positions are security related, which is consistent with the statement by the appointing authority that, as with the RUO, the envisioned duties of care provision never materialized for the abolished CMUO positions." The OCSC concluded that, "[g]iven the lack of specific required medical background for the newly created CMO positions and the lack of focused medical duties, their continued classification as CMOs is determined to be appropriate."

B. TECHNICAL REVIEW DECISION

In October 2013, the MCO filed a "Technical Classification Complaint" on behalf of plaintiffs in the CSC's Office of Technical Complaints, requesting the restoration of all abolished RUO and CMUO positions as well as lost pay and other lost benefits resulting from the action. Plaintiffs took issue with the study's finding that the majority of the former RUOs interviewed did not answer affirmatively when asked if they participated in a treatment team. Plaintiffs noted that the first job duty for the RUO position states as follows:

> Participates as a member of a treatment team in determining the classification, reclassification, parole eligibility, counseling needed, minor disciplinary procedures, and treatment programs for each prisoner in the housing unit.

Plaintiffs asserted that the majority of employees responded that they did perform the specific tasks listed above, and the survey only showed that the former RUOs did not understand the meaning of the term "treatment team" when questioned. Plaintiffs maintained that a majority of the former RUOs would have responded that they participated in a treatment team had that term been defined in accordance with the job duty quoted above. Plaintiffs provided an affidavit from Michael Green, a former RUO, who said he was "very uncertain how to respond" to the treatment team question because he "thought they could be referring to mental health treatment." Green, referring to the job duty quoted above, stated: "If that is the definition of a treatment team then I am certainly a member. These are things that I do all the time. These are the things that other Housing Unit Officers do all the time." Plaintiffs also maintained that the results of the desk audits relating to the abolished CMUO positions showed that the employees previously classified as CMUOs performed and continued to perform the work described in the CMUO position description.

After reviewing the entire record, the technical review officer (TRO) found the newly created positions properly classified as COs and CMOs. The TRO acknowledged that duties within the housing units are different from duties outside those units but concluded that different duties did not necessarily mean different classifications, reasoning as follows:

> The DOC's assignment of duties is most consistent with the CO and CMO classifications. The audit results indicated that the duties of the majority of employees surveyed lacked a focus consistent with classifications as RUOs or CMUOs, since as an aggregate they have a stronger emphasis on custody than on treatment. The

> primary role of the affected officers is to provide custody within a housing unit. Their responsibility included reporting to the health care professionals regarding the behavior of prisoners. The professionals on the treatment team decide what treatment will be provided to each prisoner, and the officers perform their portion of the planned treatment.

C. EMPLOYMENT RELATIONS BOARD AND CSC'S FINAL DECISION

In December 2014, plaintiffs applied for leave to appeal the technical review decision to the Employment Relations Board (ERB), arguing that the TRO made numerous erroneous findings and ignored evidence and arguments favorable to their position. The ERB recommended that the CSC deny plaintiffs' application. The ERB reiterated that most of the former RUOs neither said that they were members of a treatment team nor demonstrated significant participation in preparing reports and delivering medication. With regard to the CMUOs, the ERB found that the record did not demonstrate that they provided the type of direct therapeutic intervention or specialized healthcare to prisoners that was expected of CMUOs. The ERB concluded as follows:

> Because the affected employees did not significantly perform the specialized duties described in the [RUO] or [CMUO] job specifications, they cannot be properly classified as Resident Unit Officers or Corrections Medical Unit Officers. The duties that the new position descriptions and the employees themselves described are most consistent with the [CO] and [CMO] classes. The Board finds no reversible error in the [TRO's] decision.

On June 12, 2015, the CSC approved the ERB's decision and adopted it "as the final decision of the civil service commission in this matter."

D. CIRCUIT COURT

Plaintiffs next appealed the CSC's final decision in the circuit court, arguing as they had before the TRO and the ERB. In response, defendants argued that under Const 1963, art 6, § 28, the circuit court's review was limited to whether the decision was "authorized by law." They argued that the competent, material, and substantial evidence standard, although also found in Const 1963, art 6, § 28, did not apply because the CSC had not authorized a contested hearing to evaluate technical classification complaints. Defendants argued that the CSC's decision adhered to the Constitution and fell within the CSC's authority and, therefore, was authorized by law. Defendants further contended that, in light of the method employed in analyzing the issue and the multiple layers of review, the CSC's final decision could not properly be characterized as arbitrary and capricious. Defendants argued that it would be inappropriate to consider "the evidentiary support" for the CSC's decision and that a "rational basis" supported both of its classification determinations.

Plaintiffs replied that Const 1963, art 6, § 28, only set the minimum standard of review and that MCL 24.306 of the Administrative Procedures Act (APA), MCL 24.201 *et seq*., provides that an administrative agency's decision must be set aside if it is not supported by competent, material, and substantial evidence. Plaintiffs argued that the decision "must be set aside" even under the arbitrary and capricious standard because "there was *no* evidence to support the Commission's decision."

The circuit court heard oral argument on February 17, 2016, and issued a written opinion and order

on March 14, 2016. The court first determined the applicable standard of review, reasoning as follows:

> Defendants argue that because a hearing is not required in this case, this Court's review is limited to a determination of whether the Commission's final decision was authorized by law. However, this Court notes that Article VI, Section [28] requires such a determination as a *minimum* standard of review. *Viculin v Dept of Civil Service*, 386 Mich 375, 392; 192 NW2d 449 (1971) examined the issue of the standard of review and found that the competent, material, and substantial standard of review was to be applied to final decisions of the Commission, without differentiating on the issue of whether a hearing was being held. Furthermore, the Commission itself sent the Appellants in this case a notice stating that the decision is subject to review under MCR 7.117 and MCL 24.301-24.306; the standards of review contained in MCL 24.306 were included in the Commission's notice. Therefore the standard of review requires this Court to ascertain whether the Commission's final decision was authorized by law, whether it was arbitrary and capricious, and whether it was supported by competent, material, and substantial evidence on the whole record.

Next, the court addressed the TRO's determination that the former RUOs were properly classified as COs, finding that the CSC had "reassessed" and "affirmed" the "RUO classification" in 1983, 1996, and 2006. The court noted that "[t]he primary difference that the TRO relied upon between the RUO and the CO positions appears to be whether the position participates as part of a rehabilitative treatment team." The court found "that most of the former RUOs who said they were not part of a treatment team understood the term 'treatment team' to refer to physical or mental health treatment teams, rather than rehabilitative treatment teams," and that "[t]he supervisors of the former RUOs

almost all identified the RUOs as part of a treatment team." The court reasoned as follows:

> The TRO relied on flawed and inconclusive findings supported by [DOC] statements, and while the [DOC's] statements could and should have been taken into account, the contradictions between these statements and the confusing results of the classification study, which appears to have purposefully clouded the issue of what a treatment team is and who was considered part of it, cannot be held to provide competent, supported, or material evidence on the whole record.

The court opined that the TRO's decision was "simply an exercise of will in an attempt to support the [DOC's] effective reclassification of the RUO positions" and concluded that the decision was also arbitrary and capricious.

The court then held that "the decision that the former CMUOs were performing only the work of the CMO was arbitrary and capricious and was not supported by competent, material, and substantial evidence on the record." The court found that the classification study regarding the CMUO position "was even more flawed" because the desk audit interview responses "were apparently not entered, and so the classification study came to its conclusion based solely on job specifications, rather than any reports from former CMUOs or their supervisors." The court found that the interviews "showed that all of the former CMUOs interviewed described themselves . . . as performing the duties set forth in the job specification for the CMUO" and that "there is no evidence to support a conclusion that the former CMUOs were not participating in the work required of the CMUO position." In accordance with its opinion, the circuit court reversed the CSC's final decision, reversed the TRO's decision, and stated that the employees formerly classified as

RUOs and those formerly classified as CMUOs had been properly classified as RUOs and CMUOs.

II. ANALYSIS

A. STANDARD OF REVIEW

"[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Hanlon v Civil Serv Comm*, 253 Mich App 710, 716; 660 NW2d 74 (2002) (quotation marks and citation omitted).

B. SCOPE OF REVIEW

The parties correctly agree that Const 1963, art 6, § 28, provides the scope of the circuit court's review of the CSC's decision. See *Boyd v Civil Serv Comm*, 220 Mich App 226, 232; 559 NW2d 342 (1996) (stating the scope of a circuit court's review of a CSC decision is established in Const 1963, art 6, § 28). The parties disagree, however, regarding the limits of the court's scope of review. Defendants argue that because no hearing was required in this case,[2] the circuit court

[2] Hearings are required when deprivation of a protected property interest is threatened. Civil Service employees have a protected property interest in continued employment but no such interest in reclassification of their position. *York v Civil Serv Comm*, 263 Mich App 694, 703; 689 NW2d 533 (2004). The Michigan Civil Service Rules authorize hearings in cases involving allegations of unfair labor practices, grievances, labor-relations appeals, and certain other appeals (e.g., where a technical review officer determines that a hearing is necessary to resolve material questions of fact). Under the APA, parties to a contested case must be given the opportunity to be heard. MCL 24.271(1). A " '[c]ontested case' means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for

was limited to determining whether the CSC's decision was authorized by law. Defendants also argue that the circuit court exceeded that scope of review by applying the competent, material, and substantial evidence test. Plaintiffs, on the other hand, contend that the circuit court properly ruled that the competent, material, and substantial evidence scope of review articulated in Const 1963, art 6, § 28, also applied. They contend that the circuit court correctly based its scope-of-review decision on the Supreme Court's holding in *Viculin v Dep't of Civil Serv*, 386 Mich 375; 192 NW2d 449 (1971), and, pursuant to MCR 7.117 and MCR 7.119,[3] the applicability of the standard of review provided by MCL 24.306[4] of the APA. Plaintiffs assert that defendants' position is only supported by dicta and that *York v Civil Serv Comm*, 263 Mich App 694; 689 NW2d 533 (2004), establishes that this Court requires application of the substantial-evidence test, even when there has been no hearing.

Upon a careful review of the applicable law, we conclude that defendants' position is correct. Const 1963, art 6, § 28, provides, in relevant part:

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an evidentiary hearing." MCL 24.203(3). The CSC is not considered an "agency" for purposes of the APA. MCL 24.203(2).

[3] As will be discussed later, MCR 7.117 mandates that review of the CSC's decisions must comply with MCR 7.119, which pertains to appeals from agencies governed by the APA.

[4] MCL 24.306(1) provides, in relevant part:

> Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> * * *
>
> (d) Not supported by competent, material and substantial evidence on the whole record.

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

This language consists of two standards of review: "authorized by law," a minimum standard applicable every time the constitutional provision applies, and "competent, material and substantial evidence on the whole record," applicable only in cases in which a hearing is required. See *Attorney General v Pub Serv Comm*, 206 Mich App 290, 295-296; 520 NW2d 636 (1994) (stating that because a settlement agreement did not involve a rate increase that would have triggered the contested-case hearing procedures of the APA, no hearing was required and the substantial-evidence portion of the Article 6 standard of review did not apply); see also LeDuc, Michigan Administrative Law (2015), § 9:2, p 614.

Numerous binding authorities establish that when a hearing is not required, courts review an agency decision only under the "authorized by law" standard; the substantial-evidence test does not apply when no hearing is required.[5] See, e.g., *Ross v Blue Care Network of Mich*, 480 Mich 153, 164; 747 NW2d 828 (2008) ("Decisions of an administrative agency or officer, in cases

[5] This Court has stated that Const 1963, art 6, § 28, establishes a minimum standard of review without forbidding a more stringent review. *Palo Group Foster Care, Inc v Dep't of Social Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998). Plaintiffs argue along the same lines. However, plaintiffs provide no authority that would allow a circuit

in which no hearing is required, are reviewed to determine whether the decisions are authorized by law."); *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991) ("Where no hearing is required, *it is not proper* for the circuit court or this Court to review the evidentiary support of an administrative agency's determination. Judicial review . . . is *limited* in scope to a determination whether the action of the agency was authorized by law.") (emphasis added); *Wescott v Civil Serv Comm*, 298 Mich App 158, 161-162; 825 NW2d 674 (2012) (adopting the assertions in *Ross* and *Brandon*). In light of the foregoing, the circuit court adopted incorrect legal principles when it reviewed the CSC's decision for evidentiary support that was competent, material, and substantial.

Plaintiffs argue that *Viculin* supports the court's application of both the authorized-by-law and the competent, material, and substantial evidence standards to its review of the CSC's decision, but their argument is unpersuasive. The *Viculin* Court held that Const 1963, art 6, § 28, did not guarantee or permit review de novo of a final decision by the CSC affirming an employee's "dismissal from state service" after a "full hearing." *Viculin*, 386 Mich at 381-384. In so holding, the Court stated, "The scope of review is that stated by the constitution, 'whether the same are supported by competent, material and substantial evidence on the whole record.' " *Id*. at 392. Plaintiffs contend that because "[t]he Supreme Court . . . did not rely on the sentence in the constitutional article requiring a substantial evidence test for cases where a

court sua sponte to apply a stricter standard, and this Court indicated in *Palo* that it was the role of the Legislature to provide for stricter review. *Id*.

hearing was held," a circuit court's application of the competent, material, and substantial evidence standard does not rest on "the presence or absence of a hearing." However, the issue in *Viculin* was the method of review, not the scope of review. *Viculin*, 386 Mich at 392. The *Viculin* Court made no determinations about the scope of review when a hearing was not required, which is the issue in the case at bar. As the Supreme Court recently explained, to derive a rule of law from the facts of a case "when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture." *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016). Thus, the reliance of plaintiffs and the circuit court on *Viculin* for the proposition that both the authorized-by-law and substantial-evidence standards applied to cases in which no hearing was required was misplaced.

Plaintiffs' argument that the APA's competent, material, and substantial evidence standard, MCL 24.306(d), applies to this case through the mandate of MCR 7.117 and the provisions of MCR 7.119(H) is also unavailing. MCR 7.117 mandates compliance with MCR 7.119, which applies to appeals governed by the APA, and MCR 7.119(H) provides:

> The court may affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions.
>
> (1) If the agency's decision or order is not supported by competent, material, and substantial evidence on the whole record, the court shall specifically identify the finding or findings that lack support.
>
> (2) If the agency's decision or order violates the Constitution or a statute, is affected by a material error of law, or is affected by an unlawful procedure resulting in material

> prejudice to a party, the court shall specifically identify the agency's conclusions of law that are being reversed.

Plaintiffs contend that MCR 7.119(H) summarizes the APA standard of review set forth in MCL 24.306.

Before the 2012 adoption of MCR 7.117 and MCR 7.119, 490 Mich at clxxxvii, cxcii, MCR 7.104(C) provided that appeals from the CSC were governed by the provisions for appeals from administrative agencies in the APA. Interpretations of MCR 7.104(C) make clear that the APA provides appellate courts with the procedure for reviewing appeals from civil service decisions, but not the scope of review. See, e.g., *Hanlon*, 253 Mich App at 725 n 6 (noting that MCR 7.104(C) "regards the appellate *process*") (emphasis added); *Womack-Scott v Dep't of Corrections*, 246 Mich App 70, 79; 630 NW2d 650 (2001) (noting that "[t]he APA provides the *means* to seek review of a CSC decision") (emphasis added); see also LeDuc, Michigan Administrative Law (2015), § 9:4, p 620.

Nothing in the plain language of MCR 7.117 or MCR 7.119 suggests that this distinction between the procedure for review and the scope of review has been abandoned or that MCR 7.117 and MCR 7.119 adopted the APA's scope of review. See *Haliw v City of Sterling Hts*, 471 Mich 700, 704-705; 691 NW2d 753 (2005) (indicating that interpretation of a court rule begins with the plain language). Rather, MCR 7.119(H) merely instructs the court to clearly identify its reason for reversal of a CSC decision, regardless of whether it employs the competent, material, and substantial evidence scope of review, MCR 7.119(H)(1), or the authorized-by-law scope of review, MCR 7.119(H)(2).[6]

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[6] Furthermore, this Court has continued to expect circuit courts to review CSC decisions in accordance with the standards of review set forth in the constitutional provision after adoption of MCR 7.117 and

Recently, this Court engaged in an extended discussion of the correct scope of review for agency decisions in *Wescott*, indicating that when a case did not require a hearing, agency decisions "are reviewed to determine whether the decisions are authorized by law." *Wescott*, 298 Mich App at 162, quoting *Ross*, 480 Mich at 164, citing Const 1963, art 6, § 28. Plaintiffs contend that this Court's statement in *Wescott* is dicta that had nothing to do with the Court's decision. However, in *Wescott*, the Court necessarily had to determine the scope of review and proceed to examine whether the circuit court misapplied the authorized-by-law standard. *Wescott*, 298 Mich App at 162-163. Further, the Court acknowledged that agency findings are generally reviewed under "the substantial evidence test" but reasoned that this standard of review would be inappropriate because a hearing was not required in that case. *Id*. at 161-162 (quotation marks and citation omitted). Moreover, in a footnote, the Court referred to "the inapplicability of the substantial-evidence test in cases in which no hearing was required . . . ." *Id*. at 163 n 4. Therefore, this Court's statements in *Wescott* were not dicta, and they echoed the law firmly established by the constitutional provision and caselaw interpreting it.

In conclusion, we agree with defendants that the proper scope of review for agency cases in which no hearing is required is the authorized-by-law standard.

MCR 7.119, indicating that the court rules at issue did not adopt the APA's standard of review. See, e.g., *Dine v Grand Civil Serv Comm*, unpublished opinion per curiam of the Court of Appeals, issued August 14, 2014 (Docket No. 315773), pp 1-2; *Hammond v Civil Serv Comm*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2013 (Docket No. 309704), p 3. Unpublished opinions of this Court have no precedential effect but may be considered persuasive. MCR 7.215(C)(1).

Accordingly, the circuit court erred by reviewing the CSC's decision to determine whether competent, material, and substantial evidence supported it. Furthermore, for the reasons stated earlier, we reject plaintiffs' interpretation of MCR 7.117 and MCR 7.119(H) as confirming the applicability of the APA's standards of review to CSC decisions.

C. AUTHORIZED BY LAW

The circuit court also applied the authorized-by-law standard, ruling that the CSC's decision was arbitrary and capricious, and therefore not authorized by law. Defendants contend that in so ruling, the court exceeded its scope of review under the authorized-by-law standard by reweighing the evidence, making credibility decisions, and substituting its judgment for the CSC's. We agree.

An agency decision "in violation of [a] statute, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or [that] is arbitrary and capricious" is not authorized by law. *Brandon Sch Dist*, 191 Mich App at 263. This Court adopted this particular formulation of the authorized-by-law standard, in part, because "it focuses on the agency's power and authority to act rather than on the objective correctness of its decision." *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 489; 586 NW2d 563 (1998). "A ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is freakish or whimsical." *Wescott*, 298 Mich App at 162.

There is no question, and the parties do not dispute, that Michigan's Constitution authorizes the CSC to undertake the classification action at issue here. Const 1963, art 11, § 5, provides, in relevant part:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

Not only does Michigan's Constitution authorize the CSC to classify civil service positions, but the CSC is vested with plenary powers in its sphere of authority. *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 329; 870 NW2d 275 (2015); *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 15; 818 NW2d 337 (2011) ("That is, the Civil Service Commission has absolute power in its field."). Thus, the CSC's decision does not exceed its authority, nor have plaintiffs suggested that it violates a statute. *Brandon Sch Dist*, 191 Mich App at 263. Although plaintiffs contend that the term "treatment plan" should have been defined to eliminate some employees' confusion about what the term meant, plaintiffs have provided no evidence—nor do they argue—that the procedures used in the classification study or in the TRO's analysis of the classifications were unlawful. *Id*.

The circuit court determined that the CSC's decision was not authorized by law because it was arbitrary and capricious. The court based its ruling on its finding that the record evidence did not support the TRO's

decision. In the circuit court's view, the TRO predicated its decision regarding employees formerly classified as RUOs on study results that were flawed and internally inconclusive because they were derived, in part, from responses to intentionally misleading questions. And in the circuit court's view, the TRO predicated its decision regarding employees formerly classified as CMUOs on job specifications rather than on reports from former CMUOs or their supervisors.

Plaintiffs' argument with regard to this issue is little more than a reassertion of their contention that the court's proper scope of review extended to a thorough review of the evidentiary record, even in the absence of a hearing. Plaintiffs stress that MCR 7.101 through MCR 7.115 apply to appeals from the CSC and that appeals to the circuit court are heard on the original record, MCR 7.109, which "includes all documents, files, pleadings, testimony, and opinions and orders," MCR 7.210(A)(2). If the entire record must be transmitted to the circuit court, plaintiffs reason, then it must be that the circuit court is allowed review it, without regard to whether a hearing was required.

Plaintiffs' reasoning runs counter to the scope-of-review provisions in Const 1963, art 6, § 28, as well as to the numerous binding authorities already mentioned that limit a circuit court's review of an agency decision in cases in which no hearing is required to determine whether the decision is authorized by law. The law is clear that in a case in which a hearing was not required, it simply " 'is not proper for the circuit court or this Court to review the evidentiary support of [the] administrative agency's determination.' " *Wescott*, 298 Mich App at 162, quoting *Brandon Sch Dist*, 191 Mich App at 263 (alteration by the *Wescott* Court). In this case, the circuit court reweighed the

evidence, essentially giving less weight to the results of the classification study and the statements by the DOC and more weight to the affidavits of employees who said that the question about participating in a treatment team confused them and that they performed the duties in the RUO and CMUO job specifications. In addition, the circuit court questioned the credibility of the study by suggesting that the highly relevant issue of whether employees participated on a treatment team was "purposefully clouded." Further, the circuit court impermissibly dictated what evidence the TRO should have entertained in making its ruling by noting that it had not taken into account reports from employees formerly classified as CMUOs. See *Wescott*, 298 Mich App at 163 n 4. In addition, the circuit court essentially substituted its judgment for that of the CSC by concluding that the weight of the evidence supporting the CSC's decision was insufficient to overcome the weight of the evidence to the contrary. None of this is permissible in an authorized-by-law scope of review. See *Brandon Sch Dist*, 191 Mich App at 263. Finally, the circuit court also erred by considering the CSC's prior reviews of the RUO and CMUO positions because they were irrelevant to the study performed in this case and simply served as evidence to support plaintiffs' argument for reversal of the CSC's decision.

We cannot agree with the circuit court that the CSC's decision was not authorized by law. The CSC exercised its constitutional authority to classify the newly created positions, Const 1963, art 11, § 5, and nothing indicates that the CSC's decision violated a statute or resulted from procedures that were unlawful. Regarding whether the decision was arbitrary and capricious, the CSC predicated its decision on an extensive and detailed classification study, the determining principle of which was to identify the extent to

which employees in the newly created positions participated in the treatment-related activities envisioned for the RUO and CMUO positions. The conclusions of the OCSC were subject to multiple layers of review that included an opportunity for plaintiffs to submit additional documentation and express their critique of the study and resulting classification. The CSC's decision came at the end of this process. In light of the foregoing and of our limited scope of review, we cannot say that this decision "lacks an adequate determining principle" or that it "reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance," or that it is "freakish or whimsical." *Wescott*, 298 Mich App at 162.

III. CONCLUSION

We conclude that the circuit court erred by applying the competent, material, and substantial evidence scope of review to a case in which a hearing was not required and by exceeding the authorized-by-law scope of review by reweighing the evidence, making credibility decisions, and substituting its judgment for that of the CSC. In light of this conclusion, we need not address defendants' remaining issue.

We reverse the circuit court's ruling and reinstate the CSC's decision.

TALBOT, C.J., and BECKERING and M. J. KELLY, JJ., concurred.

In re DETMER

Docket No. 336348. Submitted August 8, 2017, at Grand Rapids. Decided August 22, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 915.

The Department of Health and Human Services petitioned the Kent Circuit Court, Family Division, to assume jurisdiction over KD and AB—two of respondent-mother's minor children—as well as respondent's other minor children who were not involved in this appeal, alleging that there had been sexual contact between the children; KD and AB were eligible for membership in the Sault Ste. Marie Tribe of Chippewa Indians. At the preliminary hearing, respondent voluntarily placed KD with KD's nonrespondent father, but AB remained in respondent's care. The court, Hillary G. Patrick, J., subsequently assumed jurisdiction over all the minor children, continued KD's placement with her nonrespondent father, and placed AB with AB's nonrespondent father. Before placing AB with his nonrespondent father, the court declined to consider whether, under MCL 712B.15(2) of the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., active efforts had been made to provide remedial services and rehabilitative programs to respondent before removing AB from her care, whether the active efforts had been successful, and whether respondent's continued custody of AB would likely result in serious emotional or physical damage to the child. The court reasoned that the MCL 712B.15(2) findings were not required by the statute because AB was placed in the care of a parent who was not a respondent in the proceedings, that parent had every right to have AB in his home, and the court therefore had no say in AB's placement. Respondent appealed. While respondent's appeal was pending in the Court of Appeals, the circuit court returned KD and AB to respondent's care and closed the case.

The Court of Appeals *held*:

1. Even though an issue is moot, it will still be reviewed if the issue is one of public significance that is likely to recur yet evade judicial review. In this case, the issue of KD and AB's placements was moot because both children were returned to respondent's care before the instant appeal was decided by the Court of

Appeals. Whether a Native American child has been removed from a parent or custodian's care for purposes of MCL 712B.15 had public significance because parents have a fundamental due-process right to make decisions regarding their children and because the federal and state governments have taken action to maintain the integrity of Native American families, culture, and tribes. Similar disputes were likely to recur because it is common in the state that children sometimes have to be removed from their parents' care and custody. The issue was likely to evade judicial review because temporary placements are not a final judgment but rather part of an ongoing review of a parent's progress; given the pace of appellate review, final resolution of similar issues in the Court of Appeals was unlikely before a placement was modified or parental rights terminated.

2. Under MCL 712A.2(b), a trial court may assume jurisdiction over a minor child when a parent fails to provide proper care and custody, the home environment is an unfit place for the minor child to live, or the minor child is in danger of substantial physical or psychological harm. MCL 712B.15(1) provides that a trial court must follow specific procedures when a Native American child is the subject of a child protective proceeding under MCL 712A.2(b). MCL 712B.15(2) provides, in part, that a Native American child may not be removed from a parent or Native American custodian, placed into a foster placement, or remain in protective custody unless there is clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Native American family, that the efforts were unsuccessful, and that the continued custody of the Native American child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the Native American child. In light of dictionary definitions and usage of the word throughout MIFPA and other provisions of the Probate Code, MCL 710.21 *et seq*., involving minors, the undefined term "remove" in MCL 712B.15(2) means the instance when a court orders a child to be physically transferred or moved from the care and residence of a parent or Native American custodian to the care and residence of some other person or institution. Accordingly, a trial court must make the required factual findings under MCL 712B.15(2) before removing a Native American child from the care and custody of a parent or Native American custodian even when the new placement is with the Native American child's other noncustodial parent. However, the required MCL 712B.15(2) factual findings

are not triggered when a parent voluntarily places his or her child with another person or institution.

3. The trial court removed AB from respondent's care and custody for purposes of MCL 712B.15(2) when it physically transferred AB's residence from respondent to his nonrespondent father—with whom he had previously visited only every other weekend—and conditioned respondent's visitation on the discretion of DHHS. While the trial court correctly determined that it could not make a ruling that would infringe the parental rights of AB's nonrespondent father because AB's father had not been adjudicated unfit, reversal was required because the trial court failed to make the requisite factual findings under MCL 712B.15(2)—whether active efforts were made to provide remedial services, whether those services were successful, and whether respondent's continued custody posed a risk of serious emotional or physical damage to the child—before removing AB from respondent's care and custody. The trial court also failed to hear testimony of a qualified expert witness concerning the factors.

4. The trial court correctly concluded that MCL 712B.15(2) did not apply to KD's placement because respondent voluntarily placed KD with KD's nonrespondent father; in other words, the trial court did not remove KD from respondent's care and custody for purposes of the statute. Instead, respondent exercised her fundamental right to make decisions concerning the care, custody, and control of her child.

With respect to AB, adjudication order vacated and case remanded for further proceedings. With respect to KD, voluntary placement by respondent affirmed.

CHILD CUSTODY — MICHIGAN INDIAN FAMILY PRESERVATION ACT — REMOVAL OF INDIAN CHILD — WORDS AND PHRASES — REMOVE.

MCL 712B.15(2) of the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., provides that a Native American child may not be removed from a parent or Native American custodian, placed into a foster placement, or remain in protective custody unless there is clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Native American family, that the efforts were unsuccessful, and that the continued custody of the Native American child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the Native American child; the undefined term "remove" in MCL 712B.15(2) means the instance when a court

> orders a child to be physically transferred or moved from the care and residence of a parent or Native American custodian to the care and residence of some other person or institution; the MCL 712B.15(2) factual findings are required before a trial court may remove a Native American child and place him or her with the child's other noncustodial parent, but those findings are not required when a parent voluntarily places his or her child with another person or institution.

Christopher R. Becker, Prosecuting Attorney, and *Allison L. Freed*, Assistant Prosecuting Attorney, for the Department of Health and Human Services.

Michigan Indian Legal Services, Inc. (*James A. Keedy* and *Cameron Ann Fraser*) for Amanda Detmer.

Elizabeth A. Eggert and the Indian Law Clinic of the Michigan State University College of Law (by *Kathryn E. Fort*) for the Sault Ste. Marie Tribe of Chippewa Indians.

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

SWARTZLE, J. We consider here whether the special protections provided to Native American parents and children under state law apply when a child is taken from her mother's care and residence and placed in her father's care and residence. Concluding that one of respondent-mother's children (AB) was "removed," we hold that the special protections set forth in the Michigan Indian Family Preservation Act do apply to AB's removal. Because the trial court failed to comply with those protections, we vacate and remand for further proceedings. With respect to the other child at issue in this appeal (KD), we hold that the special protections do not apply because KD was not removed from respondent-mother but instead voluntarily placed by respondent-mother with KD's nonrespondent-father.

I. BACKGROUND

AB and KD are minor children, and the two children and respondent-mother are of Native American heritage and are eligible for membership in the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe). In September 2016, the Department of Health and Human Services (DHHS) petitioned the trial court to remove the minor children from respondent-mother's care. The petition noted respondent-mother's extensive history with Children's Protective Services and alleged that inappropriate sexual contact had occurred multiple times among her minor children, including three other children who are not subject to this appeal. At the preliminary hearing, respondent-mother voluntarily placed most of her minor children into the care of the minor children's relatives. KD was voluntarily placed with her nonrespondent-father, but AB remained in respondent-mother's care. The trial court made no findings on whether DHHS made "active efforts" to provide remedial services or whether respondent-mother's continued custody posed a risk-of-harm to the minor children, as the placements at that time were voluntary.

The trial court assumed jurisdiction over the children in November 2016. At adjudication, the trial court ordered that AB be placed with his nonrespondent-father out of concern for AB's safety in respondent-mother's home. KD's prior voluntary placement was continued. The trial court expressly declined to make any findings as to active efforts or risk-of-harm, stating that the findings were unnecessary because AB was placed in the home of his nonrespondent-father and, therefore, he was still in the care of a parent. According to the trial court, because AB's father was a nonrespondent, under *In re Sanders*, 495 Mich 394; 852 NW2d

524 (2014), AB's father had "every right to go take [his] child and . . . take that child home" and the trial court did not "have any say whatsoever over" AB's placement. The trial court therefore concluded that, because AB was not "out of the home of a parent," it did not need to address active efforts or risk-of-harm.

Several days after the November 2016 hearing, respondent-mother's attorney emailed the trial court (copying the other parties), and notified the court that its written order of adjudication incorrectly identified respondent-mother as voluntarily placing AB with his nonrespondent-father. The trial court issued a corrected adjudication order shortly thereafter. The email did not make any specific mention of KD, though it did indicate that the "other children" had been "voluntarily placed." Moreover, the referee and trial court held subsequent hearings in February 2017, and during both hearings, KD's placement with her father was characterized as voluntary, and neither respondent-mother's attorney nor anyone else objected to that characterization.

Respondent-mother appealed as of right, arguing that the placement of AB and KD violated protections set forth in the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. Because no stay had been entered, the case progressed below. After the parties completed appellate briefing, this Court set the date of oral argument for August 8, 2017. Prior to oral argument, the trial court held a progress review hearing on July 27, 2017.

During the hearing, the trial court noted that both AB and KD had been returned to respondent-mother's care and residence in mid-June 2017. The trial court commended respondent-mother on the "fantastic job" that she had done in turning her life around, pursuing

education, engaging in the available programming, and undertaking similar positive acts. The trial court recognized respondent-mother's "excellent responsiveness," but the court did strike a cautionary note that with respect to this family: "we have been back and forth, and back and forth, and back and forth." The trial court closed the case, but before doing so, it stated that the question of removal is an "incredibly important" one and expressed its hope that this Court would address it on appeal.

This Court heard oral argument on August 8, 2017. In response to questions about whether this appeal was moot, counsel for respondent-mother, the Tribe, and petitioner all agreed that the appeal was moot now that the case below had been closed. But, all counsel further asked this Court to reach the merits of the appeal regardless of mootness because the case involved an issue of public significance that is likely to recur, yet evade appellate review. See *In re Midland Publishing Co, Inc*, 420 Mich 148, 151 n 2; 362 NW2d 580 (1984).

II. ANALYSIS

A. THE CASE IS MOOT, BUT THE EXCEPTION AGAINST DECIDING MOOT CASES APPLIES

1. JUDICIAL AUTHORITY AND MOOTNESS

Courts of this state derive their authority from Article VI of the Constitution of the state of Michigan of 1963. An "essential element" of our courts' judicial authority is that the courts do "not reach moot questions or declare rules of law that have no practical legal effect in a case." *City of Warren v City of Detroit*, 471 Mich 941, 941-942 (2004) (MARKMAN, J., concurring). One of "the most critical" aspects of judicial authority,

as opposed to legislative or executive authority, is the requirement that there be a "real" controversy between the parties, as opposed to a "hypothetical" one. *Id*. at 942 (quotation marks and citation omitted). Thus, before we can reach the merits of this appeal, we must first consider whether it has become moot.

Generally speaking, a case becomes moot when an event occurs that makes it impossible for a reviewing court to grant relief. *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987). Stated differently, "a case is moot when it presents nothing but abstract questions of law which do not rest upon existing facts or rights." *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010) (quotation marks and citations omitted). "Where a court's adverse judgment may have collateral legal consequences for a [party], the issue is not necessarily moot." *Mead v Batchlor*, 435 Mich 480, 486; 460 NW2d 493 (1990), abrogated on other grounds by *Turner v Rogers*, 564 US 431; 131 S Ct 2507; 180 L Ed 2d 452 (2011). When no such collateral legal consequences exist, and there is no possible relief that a court could provide, the case is moot and should ordinarily be dismissed without reaching the underlying merits. *Richmond*, 486 Mich at 34-35.

There is, however, a well-recognized exception to the dismissal of a moot case. When a case presents an issue of public significance, and disputes involving the issue are likely to recur, yet evade judicial review, courts have held that it is appropriate to reach the merits of the issue even when the case is otherwise moot. *Id*. at 37; *In re Midland Publishing*, 420 Mich at 151 n 2.

2. THE CASE IS MOOT

We agree with the parties' counsel that this case is now moot. Both AB and KD have been returned to the

care and residence of respondent-mother, and the trial court has ended its jurisdiction and ordered the case to be closed. None of the parties' counsel could identify a collateral legal consequence faced by respondent-mother, AB, or KD as a result of the temporary placement of the two children, and we are likewise not aware of any.

3. PUBLIC SIGNIFICANCE, LIKELY TO RECUR, AND EVADING JUDICIAL REVIEW

Recognizing that the case is moot, we turn to whether the exception applies. The issue on appeal—whether a Native American child has been "removed" from a parent—has paramount public significance. As our Supreme Court explained in *In re Sanders*, 495 Mich at 409, fundamental due process includes "the right of parents to make decisions concerning the care, custody, and control of their children." This right "is an expression of the importance of the familial relationship and stems from the emotional attachments that derive from the intimacy of daily association between child and parent." *Id*. (quotation marks omitted). This significant liberty interest of parents "in the companionship, care, custody, and management of their children," *id*., is further reflected and magnified in efforts by federal and state governments to maintain the integrity of Native American families and tribes, see, e.g., 25 USC 1901; MCL 712B.5(a); see also *In re Morris*, 491 Mich 81, 98; 815 NW2d 62 (2012) (noting that the federal counterpart to Michigan's MIFPA evidenced "a profound recognition of the separate and distinct rights of Indian tribes to their children, the most critical resource necessary to preserve not only tribal culture, but the tribes themselves").

Moreover, disputes involving the issue are likely to recur. One of the problems identified by Congress and our Legislature prior to enactment of the federal Indian Child Welfare Act and Michigan's MIFPA was that Native American children were being removed from their families and tribes at alarmingly high rates. See *In re Morris*, 491 Mich at 97-98; 25 USC 1901(4). More broadly, it is a common occurrence throughout the trial courts of this state that children sometimes have to be removed from their parents, and our Legislature and DHHS have created an extensive legal framework for doing so in a lawful manner. See, e.g., MCL 712A.1 *et seq*.

Finally, on the matter of evading judicial review, the present case illustrates well the quandary faced by a parent who wishes to challenge on appeal the temporary removal of her child. Both AB and KD were placed outside the care and residence of respondent-mother, but this was not part of a final order of judgment, but rather as part of the trial court's ongoing monitoring of respondent-mother's progress with her parental programming, housing, education, etc. The trial court held periodic progress review hearings while this case was on appeal, and during the last of these hearings, the court determined that respondent-mother had made such significant progress that all of her children, including AB and KD, would be returned to her. While it is laudable that the trial court and parties worked so diligently to bring this case to a positive resolution, this diligence does not alter the fact that AB and KD were placed under the care and residence of someone other than respondent-mother. Given the typical pace of appellate review, it is unlikely that claims about temporary placements similar to those of AB and KD will achieve final resolution on appeal before the trial

court either reverses or materially modifies the placement, or terminates the parent's rights altogether.

In sum, we agree with the parties' counsel that this matter is moot, but also that the exception applies—this case involves an issue of public significance, it is likely to recur, and it is likely to evade appellate review. Accordingly, we will consider the merits of this appeal and decide whether AB and KD were "removed" from respondent-mother.

B. STATUTORY PROTECTION OF NATIVE AMERICAN FAMILIES

Respondent-mother, AB, and KD are eligible for membership in the Tribe, and both AB and KD are Native American children. Given this, the procedural and substantive provisions of MIFPA apply to certain proceedings regarding the minor children. MCL 712B.3(k); *In re England*, 314 Mich App 245, 250; 887 NW2d 10 (2016). Relying on language in MCL 712B.15(2), respondent-mother argues that the trial court erred when it purportedly "removed" AB and KD without first making any findings as to active efforts or risk-of-harm. DHHS responds that the trial court did not "remove" either child and, accordingly, the provisions of MCL 712B.15(2) do not apply. Thus, to resolve this matter, we need to construe the meaning of "removed" under MIFPA.

We review de novo issues involving the interpretation and application of MIFPA. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 462-463; 861 NW2d 303 (2014). When interpreting a statute, the overriding goal is to give effect to the intent of the Legislature. *In re Spears*, 309 Mich App 658, 671; 872 NW2d 852 (2015). To determine legislative intent, we look first to the language of the statute itself. *Id*. "When construing statutory language, [we] must read the statute as a whole

and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013) (quotation marks and citation omitted). When the terms of a statute are clear and unambiguous, this Court must enforce the statute as written. *In re Spears*, 309 Mich App at 671.

In 2012, Michigan enacted MIFPA for the purpose of protecting "the best interests of Indian children and promot[ing] the stability and security of Indian tribes and families." MCL 712B.5(a). MIFPA's procedural and substantive measures are "designed to prevent the voluntary or involuntary out-of-home care placement of Indian children" and, when placement does occur, to place Native American children in homes that reflect the values of their tribe. MCL 712B.5(b).

MCL 712B.15 provides specific procedures a trial court must follow when "an Indian child is the subject of a child-protective proceeding under [MCL 712A.2(b)]." MCL 712B.15(1). MCL 712A.2(b) provides the means by which a trial court may assume jurisdiction over a minor child, including when a parent fails to provide proper custody and care to the minor child, the home environment is an unfit place for the minor child to live, or the minor child is in danger of substantial physical or psychological harm.

When a Native American child is the subject of a child-protective proceeding, MIFPA provides, among other things, the following protections:

> An Indian child may be removed from a parent or Indian custodian, placed into a foster care placement, or, for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence that active efforts have been made to provide

> remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that the active efforts were unsuccessful, and that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. [MCL 712B.15(2).]

By the statute's own terms, the trial court is not subject to these requirements when the Native American child is not "removed" from the parental home, "placed into . . . foster care," or otherwise in "protective custody." *Id*. See also *In re England*, 314 Mich App at 264-265.

C. THE TRIAL COURT ERRED WITH RESPECT TO AB

1. *IN RE SANDERS* IS NOT DISPOSITIVE

Before reaching the dispositive issue with respect to AB, we first note that the trial court's reliance on *In re Sanders* was misplaced. The trial court appears to have believed that because AB was placed with his father—who was not a respondent to the proceedings and no efforts had been made to petition his involvement—this placement meant *both* that the trial court could not make a ruling that would infringe AB's nonrespondent-father's parental rights *and also* that the provisions of MIFPA did not apply. As to the first point, the trial court was certainly correct that it did not have authority to infringe AB's nonrespondent-father's parental rights. As our Supreme Court explained in *In re Sanders*, "We accordingly hold that due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *In re Sanders*, 495 Mich at 422.

Yet, as to the second point, the trial court erred. Neither the holding nor the reasoning of *In re Sanders*

negates or otherwise undermines the statutory requirements a trial court must follow before removing a Native American child from an adjudicated parent. Here, DHHS had filed a petition with respect to respondent-mother; respondent-mother and AB were properly within the trial court's jurisdiction; and the two met the qualifying conditions of MIFPA. Given this, the trial court should have considered whether moving AB from respondent-mother's care and residence to his nonrespondent-father's care and residence triggered MIFPA's provisions. *In re Sanders* is a shield to protect the rights of a nonadjudicated parent, not a sword to pierce the rights of an adjudicated parent or child.

2. AB WAS "REMOVED" FROM RESPONDENT-MOTHER

Under MIFPA, a child-protective proceeding involving a Native American family must generally comply with the provisions of MCL 712B.15. MCL 712B.15(1). With that said, the requirements of MCL 712B.15(2) that active efforts and a risk-of-harm assessment be made are triggered only when a Native American child is "removed" from a parent, placed in foster care, or otherwise put in protective custody. Because there is no dispute that AB was not in foster care or protective custody, we focus our inquiry on whether he was "removed" from a parent.

MIFPA does not define "removed." In the absence of a statutory definition, we may turn to dictionaries in common usage for guidance. See *In re Lang*, 236 Mich App 129, 136; 600 NW2d 646 (1999). *Black's Law Dictionary* defines "removal" as the "transfer or moving of a person or thing from one location, position, or residence to another." *Black's Law Dictionary* (10th ed). For its part, *Merriam-Webster* has several defini-

tions of "remove"; ignoring the ones dealing with transferring a legal proceeding from state court to federal court or dismissing an officeholder from office, the remaining definitions involve the physical movement of an object, the most apt definition being the following: "to change the location, position, station, or residence of." *Merriam-Webster's Collegiate Dictionary* (11th ed).

These definitions focusing on physical transfer or movement are consistent with how "removal" and "removed" are used in MIFPA and other child-protection provisions in Michigan law. For example, the Legislature explained that the framework of MIFPA is "designed to prevent the voluntary or involuntary *out-of-home* care placement of Indian children." MCL 712B.5(b) (emphasis added). As another example, in addition to when a child is removed from a parent, the placement of a child in foster-care or protective custody can also trigger the active-efforts and risk-of-harm protections, and each of these placements involves the physical transfer or movement of a child. Under the traditional canon of construction that a term is known by the company it keeps, we should understand "removed" to have a similar physical transfer/movement component. See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421-422; 662 NW2d 710 (2003).

Indeed, this reading is consistent with the Legislature's use of the term "removed" in other sections of the Probate Code involving minors. Compare, for example, the different timelines for a dispositional review in a child-protective proceeding when a child "remains in his or her home" versus when a child is "removed from his or her home." MCL 712A.19(2) and (3). Other provisions of the Probate Code reinforce this understanding of "removed." See, e.g., MCL 712A.19a; MCL 712A.19c. As

MIFPA and the other child-protection provisions of the Probate Code relate to the same or similar subject (protection of children and families), we can read the term "removed" in MCL 712B.15(2) consistent with the term's similar use in the other provisions. *Walters v Leech*, 279 Mich App 707, 709-710; 761 NW2d 143 (2008).

Thus, we understand "removed" in MCL 712B.15(2) to mean the instance when a court orders that a child be physically transferred or moved from the care and residence of a parent or Native American custodian to the care and residence of some other person or institution. Based on this understanding, it becomes clear that the trial court erred with respect to AB. Over respondent-mother's objection, the trial court ordered that AB be physically placed with his nonrespondent-father. AB had previously resided with respondent-mother and spent every other weekend with his nonrespondent father. The trial court's order moved AB's residence to his nonrespondent-father's home and conditioned respondent-mother's visitation on the discretion of DHHS. Under our reading of MCL 712B.15(2), the trial court "removed" AB from respondent-mother.

DHHS responds that this Court's decision in *In re England*, 314 Mich App at 264-265, demonstrates that AB was not "removed" from respondent-mother because AB was not transferred or moved from both of his parents, but instead remained placed with one of his parents. *In re England* is not, however, applicable here. The Native American child in *In re England* did not move residences. See *id*. The child had physically resided with his mother and physically remained with his mother throughout the proceedings. See *id*. In contrast, AB did not remain in respondent-mother's

physical care but was required to move residences. In other words, although AB was placed with a parent, this does not negate application of the statute's provisions, which are triggered when a Native American child is "removed from a parent" and which occurred in this case when AB was physically removed from respondent-mother and placed in his nonrespondent-father's care and residence.[1]

Because AB was removed from a parent, the trial court was required under MIFPA to make findings on whether active efforts were made to provide remedial services, whether those efforts were successful, and whether respondent-mother's continued custody of AB posed a risk of emotional or physical harm to the child. MCL 712B.15(2). The trial court was similarly required to hear testimony of a qualified expert witness concerning these matters. *Id*. The trial court made no such findings and heard no such testimony, and this was reversible error.

D. THE TRIAL COURT DID NOT ERR WITH RESPECT TO KD

Turning to KD, the placement with her nonrespondent-father was not court ordered, nor was it ordered by law enforcement on an emergency basis. Rather, the record shows that respondent-mother voluntarily placed KD with KD's nonrespondent-father. There is nothing in the record to suggest that either the court or the parties understood the voluntary placement to be a permanent relinquishment of any of respondent-mother's parental rights, nor is there anything in the record to suggest that respondent-mother was somehow precluded from revoking the voluntary

[1] We note that the proceedings below did not involve a custody battle between two parents. Other provisions of MIFPA apply to custody battles. See, e.g., MCL 712B.5; MCL 712B.7.

placement and requiring more formal proceedings regarding KD. This is quite different than being "removed"—in fact, this is an example of respondent-mother exercising her fundamental right "to make decisions concerning the care, custody and control" of her children. *In re Sanders*, 495 Mich at 409. See also *Meyer v Nebraska*, 262 US 390, 399-401; 43 S Ct 625; 67 L Ed 1042 (1923).

Our child-protection laws, including MIFPA, constrain the state from interfering in the parent's fundamental right to parent unless and until sufficient proof has been presented that the child's moral, emotional, mental, or physical welfare needs protection by the state. See *In re Sanders*, 495 Mich at 409-410; see also *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Although the Legislature has extended some provisions of MIFPA to certain proceedings in which a Native American parent voluntarily gives up her fundamental rights, see, e.g., MCL 712B.13 (requiring that certain requirements be met when a parent consents to a guardianship or voluntarily relinquishes his or her parental rights), our Legislature has not provided these protections when a Native American parent retains in toto her fundamental right to direct the child's care. And, suffice it to say that it is outside our constitutional authority to extend MIFPA on our own.

III. CONCLUSION

Respondent-mother and her children, AB and KD, are eligible for the protections afforded to Native American families under MIFPA. The trial court removed AB from the care and residence of respondent-mother, and this removal triggered the statutory protections set forth in MCL 712B.15(2). The trial court

erred by not affording respondent-mother and AB these protections and, accordingly, we vacate the trial court's order of adjudication with respect to AB and remand for further proceedings consistent with this opinion.

With respect to KD, the trial court did not remove her from the care and residence of respondent-mother, as explained above. We affirm with respect to KD's voluntary placement with her nonrespondent-father.

We do not retain jurisdiction.

BOONSTRA, P.J., and RONAYNE KRAUSE, JJ., concurred with SWARTZLE, J.

PEOPLE v NORFLEET (AFTER REMAND)

Docket No. 328968. Submitted August 2, 2017, at Grand Rapids. Decided August 22, 2017, at 9:05 a.m. Leave to appeal denied 502 Mich 901.

Ronald K. Norfleet was convicted following a jury trial in the Grand Traverse Circuit Court of three counts of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); one count of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); one count of conspiracy to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*) and MCL 750.157a; one count of maintaining a drug house, MCL 333.7405(d); and one count of maintaining a drug vehicle, MCL 333.7405(d). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to five terms of 134 months to 40 years' imprisonment: one term for each of the three counts of delivery of less than 50 grams of heroin, one term for the count of possession with intent to deliver less than 50 grams of heroin, and one term for conspiracy to deliver less than 50 grams of heroin. He was also sentenced to two terms of 46 months to 15 years' imprisonment: one term for maintaining a drug house and one term for maintaining a drug vehicle. The court, Richard M. Pajtas, J., directed that the sentences for the first five counts were to be served consecutively and that the two remaining sentences were to be served concurrently. Defendant appealed. The Court of Appeals, SHAPIRO, P.J., and HOEKSTRA and SERVITTO, JJ., in a published opinion per curiam, affirmed defendant's convictions but remanded the case to the trial court to articulate its reasons for imposing consecutive sentences. The trial court was also instructed to indicate, pursuant to the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), whether it would have imposed the same minimum sentence had it not scored one offense variable on the basis of judicially found facts. 317 Mich App 649 (2016). On remand, the trial court sentenced defendant to serve the terms for the first two counts consecutively but the remaining terms concurrently, explaining that the consecutive sentences were justified by defendant's violent criminal history and his manipulation of others, among other considerations. The trial court also stated that it would have imposed the same minimum sentence had it been aware that the sentencing guidelines were advisory.

The Court of Appeals *held*:

1. The trial court properly understood the directives of the remanding opinion. The trial court adequately stated its rationale for believing that the strong medicine of a consecutive sentence was appropriate in this case, that being defendant's extensive violent criminal history, multiple failures to rehabilitate, and the manipulation of several less culpable individuals in his ongoing criminal operation. This combination of facts was sufficient to depart from the heavy presumption in favor of concurrent sentences and to order one of the sentences to be served consecutively to another. The trial court properly recognized that it could not impose multiple consecutive sentences as a single act of discretion and correctly issued a judgment of sentence in which the remaining sentences are all to be served concurrently.

2. The minimum sentences that the trial court had imposed on the basis of judicially found facts were valid because the court stated on remand that it would have imposed the same minimum terms had it been aware that the sentencing guidelines were advisory rather than mandatory.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Robert A. Cooney*, Prosecuting Attorney, and *Christopher J. Forsyth*, Assistant Prosecuting Attorney, for the people.

Ronald K. Norfleet *in propria persona*, and *Dana B. Carron* for defendant.

AFTER REMAND

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

PER CURIAM. This case returns to us after we remanded to the trial court for it to properly articulate its rationale for imposing consecutive sentences. Defendant was convicted of seven drug offenses, five of which were under MCL 333.7401, which provides trial courts the discretion to impose consecutive sen-

tences. MCL 333.7401(3). Originally the trial court ordered all five of defendant's convictions under MCL 333.7401 to be served consecutively to each other and concurrently to the remaining two offenses, and it did so without explanation.

In remanding the case, we stated:

> Review of a discretionary decision requires that the trial court set forth the reasons underlying its decision. See *People v Broden*, 428 Mich 343, 350-351; 408 NW2d 789 (1987) (holding that in order to aid the appellate review of whether an abuse of discretion has occurred at sentencing, the trial court is required to articulate on the record reasons for imposing a particular sentence). Further, MCL 333.7401(3) provides discretion to impose "[*a*] *term* of imprisonment . . . to run consecutively . . . ." (Emphasis added.) Therefore, a trial court may not impose multiple consecutive sentences as a single act of discretion nor explain them as such. The decision regarding each consecutive sentence is its own discretionary act and must be separately justified on the record. The statute clearly provides that a discretionary decision must be made as to each sentence and not to them all as a group. Moreover, this is in accordance with the Supreme Court's statements that Michigan has a "clear preference for concurrent sentencing" and that the "[i]mposition of a consecutive sentence is strong medicine." *People v Chambers*, 430 Mich 217, 229, 231; 421 NW2d 903 (1988) (quotation marks and citation omitted). While imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each consecutive sentence so as to allow appellate review. As the *Milbourn* Court aptly stated, "Discretion, however, is a matter of degree, not an all or nothing proposition." *Milbourn*, 435 Mich at 664. Additionally, we believe that requiring trial courts to justify each consecutive sentence imposed will help ensure that the "strong medicine" of consecutive sentences is reserved for those situations in which so drastic a deviation from the norm is justified.

> In the instant case, the trial court spoke only in general terms, stating that it took into account defendant's "background, his history, [and] the nature of the offenses involved." Moreover, it did not speak separately regarding each consecutive sentence, each of which represents a separate exercise of discretion. Therefore, the trial court did not give particularized reasons—with reference to the specific offenses and the defendant—to impose each sentence under MCL 333.7401(2)(a)(*iv*) consecutively to the others. Remand is therefore necessary so that the trial court can fully articulate its rationale for each consecutive sentence imposed. [*People v Norfleet*, 317 Mich App 649, 664-666; 897 NW2d 195 (2016).]

We retained jurisdiction.

On remand, the trial court amended its previous sentencing order by only imposing two of the five convictions under MCL 333.7401 to run consecutively to each other and ordered the other five counts to all run concurrently to each other and concurrently to these first two counts.[1] The trial court articulated its rationale for determining that Counts 1 and 2 should run consecutively. We affirm.

While the facts of this case are more thoroughly detailed in our previous opinion, *Norfleet*, 317 Mich App at 654-657, we briefly reiterate that defendant was convicted after an investigation tied him to several heroin distributions. Specifically, officers had observed a suspected heroin transaction between Alysha Nerg, who was later determined to be one of defendant's associates, and Angela Bembeneck. A subsequent search of Bembeneck's car confirmed the officers' suspicions, and Bembeneck implicated defendant as her heroin supplier. Bembeneck agreed to engage in sev-

[1] The parties stipulated that the trial court could resentence defendant in the context of the hearing on remand, although it was not a formal resentencing.

eral controlled buys that involved her calling defendant to place the order and then meeting Nerg to conduct the actual exchange. A search warrant was executed on defendant's home, where drug paraphernalia and the controlled buy funds were located. Defendant's ex-girlfriend also testified to previously picking up cash and making deliveries for defendant, including deliveries to Nerg and her husband.

On remand, the trial court stated as follows regarding its rationale for imposing consecutive sentences for Counts 1 and 2:

> And, as the prosecutor states in his brief, some of the considerations for consecutive sentencing are the defendant's extensive criminal history which we reviewed, his extremely violent criminal history which we reviewed, his failure to be rehabilitated, his failure to be gainfully employed, . . . his use and manipulation of addicts to sell heroin, his use and manipulation of his 18 year old girlfriend to sell heroin, the length and extensiveness of his heroin dealing, the amount of money he gained from his heroin dealing and the fact that consecutive sentences deter others from committing similar crimes.
>
> For all of those reasons the Court deems that an appropriate exercise of discretion to issue a consecutive sentence as to Count I and Count II, that is Count II shall run consecutive to Count Number I. But, if I understand the Court of Appeals position the Court has to go through all of the other counts that were consecutive at the original sentence and describe why they should be consecutive, and I think that that becomes not only repetitive but it seems to me that there should be some different reasons perhaps that would justify a consecutive sentencing as to all the counts that were consecutive at the original sentencing. So, my conclusion then would be that there is substantial circumstances based on history and the nature of the offenses for consecutive sentence in this major controlled substance case as to Count I and Count II but that there are not other reasons or additional reasons

> why the Court should impose consecutive sentences as to any and all of the remaining counts, so they shall all run concurrently with the Count I and Count II sentences.

These statements show that the trial court properly understood the directives of our previous opinion. The trial court ordered Count 1 to be served consecutively to Count 2 and stated its rationale for believing that the strong medicine of a consecutive sentence was appropriate in this case, that being defendant's extensive violent criminal history, multiple failures to rehabilitate, and the manipulation of several less culpable individuals in his ongoing criminal operation. We agree that this combination of facts was sufficient to depart from the heavy presumption in favor of concurrent sentences and to order *one* of the sentences to be served consecutively to another. The trial court properly recognized that it could not impose multiple consecutive sentences as a single act of discretion and correctly issued a judgment of sentence in which the remaining sentences are all to be served concurrently.

Affirmed.[2]

SHAPIRO, P.J., and HOEKSTRA and SERVITTO, JJ., concurred.

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[2] We also directed the trial court to follow the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), as to the individual minimum terms imposed because the court had scored one offense variable on the basis of judicially found facts. On remand, the trial court stated that it would have imposed the same minimum terms had it been aware that the guidelines were advisory rather than mandatory.

GENESEE COUNTY DRAIN COMMISSIONER v GENESEE COUNTY

Docket No. 331023. Submitted June 14, 2017, at Detroit. Decided August 22, 2017, at 9:10 a.m. Leave to appeal sought.

Genesee County Drain Commissioner Jeffrey Wright and others brought an action against Genesee County and the Genesee County Board of Commissioners in the Genesee Circuit Court, alleging that defendants' improper retention of refunds owed to plaintiffs for overpayments of group health insurance premiums constituted an intentional tort and a breach of contract. The court, Geoffrey L. Neithercut, J., granted defendants' motion for summary disposition with respect to breach-of-contract damages that accrued before October 24, 2005, but ruled that the intentional-tort claims were not barred by the governmental tort liability act (GTLA), MCL 691.1401. The Court of Appeals, SAAD and BOONSTRA, JJ. (STEPHENS, P.J., concurring in the result only), affirmed in part and reversed in part, holding that the intentional-tort claims were barred by the GTLA but remanding for consideration of the breach-of-contract claim to the extent that it involved damages that accrued after October 24, 2005. 309 Mich App 317 (2015). On remand, the trial court allowed the drain commissioner, as the only remaining plaintiff, to amend his complaint against the only remaining defendant, Genesee County, to include a claim of unjust enrichment. Defendant again moved for summary disposition, arguing that plaintiff had failed to state a claim of unjust enrichment and that, in any event, such a claim would have been barred by governmental immunity. The court denied the motion on the ground that governmental immunity did not bar the unjust-enrichment claim, and defendant appealed.

The Court of Appeals *held*:

1. Claims based on a theory of unjust enrichment are not barred by governmental immunity. Under the equitable doctrine of unjust enrichment, the law will imply a contract if a defendant has been unjustly or inequitably enriched at the plaintiff's expense as long as there is no express contract covering the same subject matter. The Michigan Supreme Court specifically has held that an action for breach of implied contract is not

barred by the GTLA. Claims of unjust enrichment involve contract liability, not tort liability, because they merely involve a situation in which the contract was an implied one imposed by the court in the interests of equity rather than an express one entered into by the parties. Accordingly, the trial court did not err by denying defendant's motion for summary disposition on this ground.

2. Because the trial court did not address whether plaintiff failed to state a claim of unjust enrichment, it was not addressed on appeal and defendant was free on remand to renew its motion for summary disposition under MCR 2.116(C)(8).

Affirmed and remanded for further proceedings.

EQUITY — UNJUST ENRICHMENT — CONTRACTS — IMPLIED CONTRACTS — GOVERNMENTAL IMMUNITY.

A claim based on a theory of unjust enrichment involves contractual liability rather than tort liability and therefore is not barred by governmental immunity (MCL 691.1401 *et seq*.).

Henneke, Fraim & Dawes, PC (by *Scott R. Fraim* and *Brandon S. Fraim*) for the Genesee County Drain Commissioner.

Plunkett Cooney (by *Mary Massaron*, *Hilary A. Ballentine*, *Josephine A. DeLorenzo*, and *H. William Reising*) for Genesee County.

Before: SAWYER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM. We are asked in this appeal to determine whether a claim based on a theory of unjust enrichment is barred by the doctrine of governmental immunity. We conclude that it is not.

This is the second time that this case is before us. See *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317; 869 NW2d 635 (2015). That opinion fully sets out the relevant facts of this case. Briefly, plaintiff Jeffrey Wright is the Genesee County Drain Commissioner and, along with other plaintiffs who are no

longer parties in the case, he participated in a county health plan through Blue Cross Blue Shield. Premiums were paid both by the county and the participants. Those premiums were set annually and were based on an estimate of the amount that the claims would be for the upcoming year along with the administrative costs of the plan. Unbeknownst to plaintiffs, at the end of each year, Blue Cross would refund to the county the amount by which the premiums exceeded the amount necessary to pay the claims and costs. The instant suit was instituted to recover the portion of the refunds that represented the participants' share of the premiums paid.

In the original appeal, we held that plaintiffs' claims alleging intentional torts were barred by governmental immunity and that plaintiffs could not recover under a breach-of-contract claim for any damages that accrued before October 24, 2005 (six years before the filing of this action). Thereafter, following remand, in addition to the continuation of the drain commissioner's breach-of-contract claim against Genesee County, the trial court permitted the complaint to be amended to add an unjust-enrichment claim. Defendant again moved for partial summary disposition, arguing that governmental immunity barred the unjust-enrichment claim and that plaintiff failed to state a claim for unjust enrichment. The trial court concluded that governmental immunity did not bar the unjust-enrichment claim. The trial court allowed the matter to continue, though without explicitly ruling on whether plaintiff properly stated a claim for unjust enrichment. Defendant now appeals.

We review de novo both the grant of summary disposition under MCR 2.116(C)(7) and questions of statutory interpretation. *In re Bradley Estate*, 494

Mich 367, 376-377; 835 NW2d 545 (2013). And we look first to *Bradley* for assistance in answering the question whether a claim based on unjust enrichment constitutes one for "tort liability" that comes under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. *Bradley* does not directly answer this question, given that it involved a claim based on civil contempt rather than unjust enrichment. But it does provide guidance in determining whether a particular claim falls under the GTLA.

Plaintiff's claim based on unjust enrichment is barred only if unjust enrichment imposes "tort liability."[1] The Court in *Bradley*, 494 Mich at 384-385, summarized the analysis as follows:

> Given the foregoing, it is clear that our common law has defined "tort" to be a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of compensatory damages. Accordingly, because the word "tort" has "acquired a peculiar and appropriate meaning" in our common law, and because the Legislature is presumed to be aware of the common law when enacting legislation, we conclude that the term "tort" as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.
>
> Our analysis, however, requires more. MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim" nor to a "tort action," but to "tort *liability*." The term "tort," therefore, describes the type of liability from which a governmental agency is immune. As commonly understood, the word "liability," refers to liableness, i.e., "the state or quality of being liable." To be "liable" means to be "legally responsible[.]" Construing the term "liabil-

[1] It is not argued that the claim based on a breach-of-contract theory is barred by the GTLA. Nor does plaintiff argue that any of the exceptions to the GTLA for tort liability apply to the unjust-enrichment claim.

> ity" along with the term "tort," it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages. [Citations omitted; alteration in original.]

Unjust enrichment is an equitable doctrine. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). Under this doctrine, "the law will *imply a contract* to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id*. at 195 (emphasis added). But "a *contract will be implied* only if there is no express contract covering the same subject matter." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993) (emphasis added). In other words, "the law *implies a contract* to prevent unjust enrichment, which occurs when one party receives a benefit from another the retention of which would be inequitable." *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992) (emphasis added). See also *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). Further, our Supreme Court has specifically held that an action for breach of implied contract is not barred by the GTLA. *Bradley*, 494 Mich at 386.

We conclude that a claim based on the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability. It merely involves a situation in which the contract is an implied one imposed by the court in the interests of equity rather than an express contract entered into by the parties. Accordingly, the claim is not barred by the GTLA.

Defendant also argues that plaintiff has failed to state a claim under an unjust-enrichment theory. It does not appear that the trial court addressed this issue. Accordingly, we decline to do so on appeal. Defendant is, however, free on remand to renew its motion for summary disposition under MCR 2.116(C)(8) based on a failure to state a claim for unjust enrichment so that the trial court may address it in the first instance.

Affirmed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

SAWYER, P.J., and SERVITTO and RIORDAN, JJ., concurred.

PEOPLE v SMITH (ON REMAND)

Docket No. 332288. Submitted August 16, 2017, at Lansing. Decided August 22, 2017, at 9:15 a.m. Affirmed in part, reversed in part, vacated in part, and remanded 502 Mich 624.

State Senator Virgil Smith pleaded guilty in the Wayne Circuit Court to malicious destruction of property, MCL 750.377a(1)(a)(*i*). Smith's plea agreement included the dismissal of three charges against him—domestic violence, MCL 750.81(2); felonious assault, MCL 750.82; and carrying a firearm during the commission of a felony, MCL 750.227b. Smith was sentenced to a 10-month jail term and 5 years' probation. As part of the plea agreement, Smith agreed to resign from the Senate and refrain from running for public office during his 5-year probationary period. At sentencing, the court, Lawrence S. Talon, J., sua sponte declared that the parts of the plea agreement requiring Smith to resign from office and refrain from seeking public office during his probationary period were void because they offended Michigan's constitutional separation of powers, infringed the public's right to elect the representatives of their choice, were contrary to public policy, and compromised the integrity of the court. In all other respects, the court approved the plea agreement and sentenced Smith as previously indicated. The prosecution moved to vacate Smith's plea, arguing that because Smith did not resign his Senate seat, he had failed to comply with the terms of the plea agreement[1] and that the prosecution should therefore be permitted to negotiate a new agreement with Smith. The court denied the prosecution's motion, and the prosecution appealed. The Court of Appeals dismissed the appeal as moot in an unpublished opinion per curiam issued April 18, 2017, and denied the prosecution's motion for reconsideration; the Supreme Court, however, remanded the case to the Court of Appeals for consideration as on reconsideration granted. 501 Mich 851 (2017).

On remand, the Court of Appeals *held*:

1. The Michigan Constitution, Const 1963, art 3, § 2, divides the powers of government into three branches: legislative, execu-

[1] Smith ultimately did resign his Senate seat, effective April 12, 2016.

tive, and judicial. This provision further states that no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the Constitution. In requiring Smith to resign from his state Senate seat as part of a plea bargain, the prosecution attempted to punish and expel a member of the state Senate, actions reserved solely for the Legislature under Const 1963, art 4, § 16. Because that authority was assigned to the Legislature alone, the prosecution's offering of resignation as a condition of Smith's plea was an unconstitutional attempt to violate the separation of powers. Further, when the prosecution included in the plea bargain the requirement that Smith not seek public office during his five-year probationary period, the prosecution invaded the right of Smith's constituents to decide upon his moral and other qualifications when Smith's crimes did not specifically disqualify him under Const 1963, art 11, § 8, or Const 1963, art 4, § 7, from being a member of the state Senate. Allowing the prosecution to engage in such negotiations could open the door for the executive branch to use its power of prosecution—and the threat of imprisonment—to remove from elected office those officials who do not align with the political preferences of the executive branch. Affirming the trial court's decision to strike those terms from the plea agreement will ensure that future prosecutors are aware of the unconstitutional nature of such negotiations and that the possibility that prosecutors will abuse the plea process will be diminished. Accordingly, the trial court properly determined that the terms of the plea agreement requiring Smith to resign from his state Senate seat and to not seek public office for five years were unconstitutional, and the trial court properly struck those portions of the plea agreement before entering the judgment of sentence.

2. Pursuant to MCR 6.310(E), on the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement. The prosecutor has an equal right to withdraw from a plea agreement because the people, no less than the defendant, should be able to receive the benefit of the agreed-upon bargain. While analogous to a contract, plea bargains are not governed by the standards of commerce but must comport with the interests of justice in the administration of criminal laws. Contractual theories will not be applied if to do so would subvert the ends of justice. In this case, the action of the prosecution in offering to forgo prosecution of crimes that could ultimately result in imprisonment in exchange for Smith's resigning his state Senate seat and refraining from holding public office was not only unconstitutional, it also carried with it the possibility of abuse by future prosecutors. If a prosecutor is aware that

using the threat of criminal charges against a member of the legislative branch will only be punished by allowing the prosecutor to go back to the negotiating table after the courts discover the wrongdoing, there will be little impetus to stop the practice. Accordingly, the trial court did not abuse its discretion when it determined that permitting the prosecution to withdraw the plea would subvert the ends of justice. Additionally, Smith was in a much worse bargaining position after the plea was accepted by the trial court. The prosecution then knew that Smith was willing to make a plea, Smith had revealed the location of the weapon used during the crime as a condition of the plea, and Smith had voluntarily resigned his state Senate seat. Permitting the prosecution to go back to the negotiating table with such advantages after it had made an unconstitutional plea agreement would undoubtedly subvert the ends of justice. Also, Smith was not left entirely unpunished as a result of the trial court's decision, given that he was still required to serve 10 months in the Wayne County Jail without the possibility of early release and five years of probation, to submit to alcohol and drug treatment, to submit to a mental health evaluation, and to pay full restitution.

Affirmed.

RIORDAN, J., dissenting, agreed that because of the separation of powers, the executive or judicial branch of government could not force Smith to involuntarily resign his Senate seat or forbear running for public office, but Judge RIORDAN would not have struck the provisions of the plea agreement by which Smith agreed to resign his Senate seat and to forgo candidacy for public office during his five years of probation. Neither the Michigan Constitution nor the United States Constitution places any prohibitions on a person's decision to voluntarily resign a current office or to forgo future public office for a specified period. An elected officeholder should be treated no differently than any other citizen when it comes to the freedom to choose available options for the resolution of a criminal matter. In addition to the trial court's error in striking the parts of the plea agreement it determined were unconstitutional, the trial court abused its discretion by refusing to allow the prosecution to withdraw the plea agreement. Moreover, the trial court erred by failing to comply with the plea-taking process outlined in MCR 6.302.

1. CONSTITUTIONAL LAW — SEPARATION OF POWERS — LEGISLATIVE OFFICEHOLDERS — PLEA AGREEMENTS.

The power to expel a member of the Legislature lies exclusively with the Legislature, and the executive branch of government is expressly prohibited from removing a legislator from office; the

prosecution belongs to the executive branch and cannot negotiate a plea agreement with a legislator that requires the legislator to resign his or her office and to refrain from seeking public office for a specified amount of time; a plea agreement that requires a legislator to resign his or her office and forgo candidacy for office is unconstitutional (Const 1963, art 3, § 2; Const 1963, art 4, § 16; Const 1963, art 5, § 10).

2. CRIMINAL LAW — PLEA AGREEMENTS — UNCONSTITUTIONAL PROVISIONS — PROSECUTION'S RIGHT TO WITHDRAW.

Under MCR 6.310(E), the prosecution may move to vacate a defendant's plea if the defendant has failed to comply with a plea agreement, but a court may void the unconstitutional portions of a plea agreement while enforcing the rest of the agreement if doing so serves the administration of criminal justice.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Jason W. Williams*, Chief of Research, Training, and Appeals, for the people.

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

ON REMAND

Before: RIORDAN, P.J., and SERVITTO and M. J. KELLY, JJ.

SERVITTO, J. This case is before us, as on reconsideration granted, *People v Smith*, 501 Mich 851 (2017), to determine whether the trial court's order declaring a portion of defendant's plea agreement void was in error and whether the trial court's subsequent order denying the prosecution's motion to vacate defendant's plea constituted an abuse of discretion. This Court previously dismissed the appeal as moot. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2017 (Docket No. 332288). We now affirm.

We stated the relevant facts in our prior decision:

> In May 2015, defendant was involved in an altercation with his ex-wife. As a result, he was charged with domestic violence, MCL 750.81(2); malicious destruction of personal property, MCL 750.377a(1)(a)(i); felonious assault, MCL 750.82; and [carrying a firearm during the commission of a felony (felony-firearm)], MCL 750.227b. On February 11, 2016, the prosecution and defendant entered into a plea agreement whereby defendant would plead guilty to the charge of malicious destruction of property and agreed both to resign his Senate seat and to refrain from holding public office during his five-year probationary period (which included a ten-month jail term). The remaining charges against the defendant would be dismissed. At the sentencing hearing, the trial court ruled sua sponte that the provisions of the agreement related to defendant's Senate seat violated the constitutional principle of separation of powers and infringed on the people's right to choose their representatives. Accordingly, the trial court declared those portions of the plea agreement void because they "offend[] the Constitution of the State of Michigan, [are] contrary to public policy and compromise[] the integrity of th[e] court." In all other respects, the court sentenced defendant in accordance with the plea agreement.
>
> The prosecution subsequently moved to vacate defendant's plea. The prosecution argued that in failing to resign, defendant had not complied with the plea agreement and that the prosecution should be permitted to negotiate a new plea deal given the trial court's refusal to enforce the entirety of the original agreement. The trial court denied the prosecution's motion. The trial court acknowledged that while plea agreements are akin to contracts, they must serve the interests of justice. The trial court then held that where the parties had initially indicated that the agreement protected the public and provided for punishment and rehabilitation, enforcement of the agreement without the "offending portion" would serve the interests of justice. [*Smith*, unpub op at 1-2 (alterations in original).]

The trial court added that vacating the plea would harm the interests of justice because

> [v]acating the plea would violate the fundamental principle that it is the right of the People to elect whom they chose to elect for office by allowing the prosecutor to pressure a member of the legislative branch to resign or face prosecution and likely imprisonment.
>
> Vacating the plea would violate the separation of powers set forth in the Michigan [C]onstitution, where only the Senate can discipline or remove one of its members convicted of this type of crime by allowing the prosecutor to pressure a member of the legislative branch to resign and face prosecution and likely imprisonment.
>
> Vacating the plea would violate public policy by allowing the prosecutor to dominate the legislative branch of government with the threat of forced resignation.
>
> [And] granting the prosecution's motion to vacate this plea would compromise the Court's integrity by involving it in an act that violates public policy and offends the [C]onstitution.

On remand, we consider the prosecution's appeal of both the trial court's original order voiding a portion of defendant's plea agreement and its order denying the prosecution's motion to vacate defendant's plea.

A trial court's decision whether to set aside an accepted guilty plea is reviewed for an abuse of discretion. *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995). An abuse of discretion "occurs when the trial court chooses an outcome that falls outside the range of principled outcomes." *People v Lee*, 314 Mich App 266, 272; 886 NW2d 185 (2016) (quotation marks and citation omitted). Issues of constitutional law are reviewed de novo. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011).

On appeal, the prosecution argues that the trial court erred by voiding the portion of the plea agree-

ment requiring defendant to resign his state Senate seat and to refrain from seeking elective or appointed public office during the five-year probationary period. The prosecution further argues that the trial court abused its discretion by refusing to allow the prosecution to withdraw the plea agreement and proceed to trial. The prosecution specifically contends that the plea agreement did not, as the trial court held, violate the separation of powers and that both defendant *and* the prosecution were entitled to receive the benefit of their end of the negotiated plea agreement.[2]

The Michigan Constitution provides for the separation of powers: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. "While the Constitution provides for three separate branches of government, Const 1963, art 3, § 2, the boundaries between these branches need not be 'airtight[.]' " *Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014) (citations omitted). Indeed, the Michigan Supreme Court has held that this constitutional provision does not require " ' "that [the separate branches of government] must be kept

[2] We note that despite the trial court's rulings, defendant in fact voluntarily resigned from his seat in the Michigan Senate effective April 12, 2016. Although defendant previously argued that the trial court's vacating the portion of the plea agreement requiring him to not seek elected office during his five-year probationary period was not yet ripe for review, it has come to our attention that defendant is currently running for a public office. Moreover, even if he were not, there is an "actual, existing controversy" because the trial court's act of striking certain terms from the plea agreement as unconstitutional, while approving the rest of the agreement, formed a "real and immediate threat" to the prosecution's interest. See *People v Conat*, 238 Mich App 134, 145; 605 NW2d 49 (1999).

wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree." ' " *Kent Co Prosecutor v Kent Co Sheriff (On Rehearing)*, 428 Mich 314, 321-322; 409 NW2d 202 (1987), quoting *Local 321, State, Co & Muni Workers of America v Dearborn*, 311 Mich 674, 677; 19 NW2d 140 (1945), quoting Story, Constitutional Law (4th ed), p 380. Instead, "[t]he true meaning [of the Separation of Powers Clause] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." *Kent Co Prosecutor*, 428 Mich at 322 (quotation marks and citations omitted).

Relevant to the instant matter, the Michigan Constitution contains a clause regarding the qualifications of an individual to serve as part of the state Legislature, including the state Senate:

> Each senator and representative must be a citizen of the United States, at least 21 years of age, and an elector of the district he represents. The removal of his domicile from the district shall be deemed a vacation of the office. No person who has been convicted of subversion or who has within the preceding 20 years been convicted of a felony involving a breach of public trust shall be eligible for either house of the legislature. [Const 1963, art 4, § 7.]

The Michigan Constitution identifies additional characteristics that disqualify someone from seeking public office:

> A person is ineligible for election or appointment to any state or local elective office of this state and ineligible to hold a position in public employment in this state that is policy-making or that has discretionary authority over public assets if, within the immediately preceding 20 years, the person was convicted of a felony involving

> dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government. This requirement is in addition to any other qualification required under this constitution or by law. [Const 1963, art 11, § 8.]

Further, the Michigan Constitution states how a member of the state Senate can be forcibly removed from that position:

> Each house shall be the sole judge of the qualifications, elections and returns of its members, and may, with the concurrence of two-thirds of all the members elected thereto and serving therein, expel a member. The reasons for such expulsion shall be entered in the journal, with the votes and names of the members voting upon the question. No member shall be expelled a second time for the same cause. [Const 1963, art 4, § 16.]

The Michigan Constitution also expressly bars the executive branch of government, to which the prosecution belongs, *People v Conat*, 238 Mich App 134, 150; 605 NW2d 49 (1999), from expelling members of the other two branches of government: "[The governor] may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature." Const 1963, art 5, § 10.

The language used in the state Constitution is clear: the Constitution specifically describes when an individual is ineligible to run for elective office, including as a state senator, and also reserves to the Legislature the right to determine when its own members should be expelled. The prosecution argues that the voluntary nature of defendant's decision regarding the plea

agreement rendered the agreement constitutional, but such a view would allow the prosecution, a part of the executive branch, to do indirectly an act that the prosecution is specifically prohibited from doing directly.

There are no Michigan cases that have addressed this issue. However, at least one federal court has considered a nearly identical issue. In *United States v Richmond*, 550 F Supp 605, 606 (ED NY, 1982), the defendant, a member of Congress, entered into a plea agreement requiring that he immediately resign from Congress and withdraw as a candidate for re-election. The United States District Court for the Eastern District of New York held that the plea agreement provisions relating to his then current membership in Congress and his then candidacy for re-election were void because the provisions represented an unconstitutional interference by the executive branch of government with the legislative branch of government (a violation of the separation of powers), the provisions interfered with the rights of the defendant's constituents, and the provisions contravened public policy. *Id*.

The imperative that the people are sovereign in a republican form of government "was embodied in the Constitution by prescribing only a limited number of qualifications for congressional office" and by empowering "the houses of Congress to discipline their members and in extreme cases to expel them by a two-thirds vote." *Id*. at 607. "It was the people of the Congressman's district who were to decide upon his moral and other qualifications, not Congress. A fortiori this inhibition applies to other branches of government." *Id*. As the *Richmond* court explained, "Just as Congress and the states are prohibited from interfering with the choice of the people for congressional

office, federal prosecutors may not, directly or indirectly, subvert the people's choice or deny them the opportunity to vote for any candidate." *Id*. at 608.

Similarly, though admittedly not directly on point, the state of Maryland also held that requiring an elected official to refrain from running for public office as a condition of his criminal sentence violated the separation of powers. In *Leopold v State*, 216 Md App 586, 590; 88 A3d 860 (2014), the defendant, who held the elected position of county executive, was convicted after a bench trial of two criminal charges. As part of his sentence, specifically as a special condition of probation, the trial court prohibited the defendant from "be[ing] a candidate for any local, state, or federal elected office." *Id*. (quotation marks omitted; alteration in original). On appeal, the Maryland Court of Special Appeals struck the special condition of probation because "there exists a comprehensive statutory scheme governing the eligibility and removal of public officials in Maryland," *id*. at 613, and "the separation of powers precludes trial courts from interfering in areas where the Legislature left the question of eligibility on who may seek elected office to the County Council and the General Assembly," *id*. at 611 (quotation marks omitted).

While the prosecution asserts that forcing an individual out of office is quite different from the voluntary resignation that was to occur in this case, the *Richmond* court found it of no matter that the defendant had voluntarily consented to the plea agreement, stating that "[t]he constitutional protections of legislators and candidates exist not for their personal benefit but to safeguard the rights of the people. A member of Congress may not barter away constitutional protections which belong not to him but to his constituents." *Richmond*, 550 F Supp at 609 (citations omitted).

Further, public policy considerations are significant when plea negotiations involve elected offices. "Even [arm's-length] negotiated commercial contracts between persons of equal power are void if they offend public policy." *Id*. The *Richmond* court further explained:

> The possibility of the executive utilizing the threat of prosecution to force the resignation of a congressional representative involves potentially dangerous political consequences. It represents an opportunity for an assault on the composition and integrity of a coordinate branch of government. Taken together, investigative techniques such as those used in the Abscam cases, *see United States v. Myers*, 688 F.2d 817 (2d Cir.1982), the enormous spectrum of criminal laws that can be violated, the powerful investigative and prosecutorial machine available to the executive, and forced resignations through plea bargaining would provide an intolerable threat to a free and independent Congress. [*Richmond*, 550 F Supp at 608.]

We find the reasoning in *Richmond* persuasive, despite the dissent's position that the case was "wrongly" decided by the federal bench charged with making the decision. It is particularly compelling in light of the substantial similarities between that case and the instant matter. In both the instant case and *Richmond*, the constitution in question provides a singular manner by which a sitting member can be removed from office. In both cases, the remedy required two-thirds of the members of the body to which the person had been elected to vote for the member's expulsion. *Id*. at 607. Indeed, the Michigan Constitution contains an additional clause not considered by the *Richmond* court that specifically bars the executive branch from removing members of the legislative branch. Const 1963, art 5, § 10.

Likewise, the *Richmond* case and the present case both involve constitutional provisions that set out an exhaustive list of requirements and disqualifiers for a person seeking a position in the legislature. In *Richmond*, there were age, residency, and citizenship requirements, as well as criminal and similar disqualifiers. Similarly, in the present case, the Michigan Constitution contains a list of requirements for a person seeking a state Senate seat, including that the person "be a citizen of the United States, at least 21 years of age, and an elector of the district he represents." Const 1963, art 4, § 7. Additionally, the Michigan Constitution lists the types of felonies that disqualify someone from seeking a state Senate seat. Const 1963, art 11, § 8; Const 1963, art 4, § 7. Notably, that list does not include the crime for which defendant was convicted. And in *Richmond* and in this case, both defendants voluntarily entered into plea agreements with provisions concerning their elected seats.

By requiring defendant to resign from his state Senate seat as part of the plea bargain, the prosecution attempted to punish and expel a member of the state Senate, actions that are reserved solely for the Legislature. Const 1963, art 4, § 16. Because that authority was assigned to the Legislature alone, the prosecution's *offering* of that plea-agreement term was an unconstitutional attempt to violate the separation of powers. Const 1963, art 3, § 2. When the prosecution included in the plea bargain the requirement that defendant not seek public office during his five-year probationary period, the prosecution invaded the right of defendant's constituents to "decide upon his moral and other qualifications" when defendant's crimes did not specifically disqualify him under Const 1963, art 11, § 8, and Const 1963, art 4, § 7. *Richmond*, 550 F Supp at 607. Likewise, if the judiciary were to enter

orders with plea conditions like those at issue here, even upon the agreement of the parties, the judiciary would be providing its tacit approval of the terms of the agreement, which would violate the Michigan Constitution. See *Richmond*, 550 F Supp at 609.

As the *Richmond* court held, allowing the prosecution to engage in such negotiations permits the threat of prosecution and the possibility of imprisonment to be used for nefarious purposes. Tacit permission for prosecutors to engage in such negotiations, even if done innocently at the time, could open the door for the executive branch to use its power of prosecution (and the threat of imprisonment) to remove from elected office those officials who do not align with the political preferences of the executive branch. Indeed, in the present case, the dangers of this practice were specifically observed in defendant's response to the prosecution's motion to vacate the plea.

In response to the prosecution's motion, defendant argued that while he believed the trial court should not vacate the plea, if it intended to do so, he wanted the opportunity to fulfill the terms of the plea agreement to avoid potential prosecution and imprisonment. As can be seen, the mere possibility of prosecution and prison time resulted in defendant's seeking to abandon his state Senate seat to avoid those possibilities. That is just the issue about which the trial court, defendant, and the *Richmond* court expressed concern. "Availability of the technique and the possibilities of its abuse cannot be tolerated." *Id*. Further, "[t]he prosecutorial practice of dealing in legislative office in negotiations with congressional defendants must be arrested before its potential for abuse is realized." *Id*. In affirming the trial court's decision to strike those terms from the plea agreement, this Court will ensure that future prosecu-

tors are aware of the unconditional nature of such negotiations and that the possibility that prosecutors will abuse the plea process will be diminished.[3]

There is no question that public officials can, and do, voluntarily resign from office for a variety of reasons. For the dissent to suggest that our decision and reasoning necessarily indicate that public officials can never voluntarily resign is nonsensical. An individual's voluntary resignation from public office by that individual's own volition, without a threat of criminal charges being used to compel the resignation, is a drastically different situation than the one before us today. When another branch of government, like the executive branch, uses resignation from public office as a bargaining tool, the public office held sheds its cloak of public service and becomes one of service personal to the officeholder and the other branch of government. It diminishes the nature and purpose of the public office and reduces it to a simple tool used solely to better or worsen an officeholder's position in the criminal justice system. In addition, as the dissent points out, "[a]n elected officeholder should be treated no differently than any other citizen" as it relates to plea negotiations. If resignation from public office is used as a potential plea-negotiation tool, that equality is gone and the executive branch is effectively recognizing a

[3] The dissent lightly dismisses the potential of prosecutors misusing the office (e.g., referring to "public policy doomsday hyperbole" and "the imaginary specter of prosecutors running amok"). However, we would be remiss if we did not point out that this Court was made aware that in direct response to this case, the Wayne County Prosecutor's office, at least temporarily, instituted a policy of "no plea offers" to *all* defendants appearing before the trial court judge assigned to the instant matter. This conduct not only raises constitutional implications, it firmly establishes that the executive branch does, in fact, have the ability and potential to use its power in ways that are contrary to public policy.

second class of citizens—an elected class with an additional advantage with which to bargain.

Moreover, in the present case, the fact that defendant was willing to voluntarily relinquish his state Senate seat and to refrain from seeking public office during probation is entirely irrelevant to the issue presented here. Defendant did not have the constitutional right to use his elected office as a bargaining chip because the constitutional rights associated with his office were not for his individual benefit but for the benefit of the people who elected him. Allowing the prosecution to engage in this type of negotiation (using prosecution and possible imprisonment in exchange for a resignation and a promise not to seek elected office) and then call the agreement "voluntary" falls well within the problem of coercion about which the *Richmond* court expressed concern. We have the same concern. Therefore, the prosecution's argument in that vein is without merit.

The trial court properly determined that the terms of the plea agreement requiring defendant to resign from his state Senate seat and to not seek public office for five years were unconstitutional. The trial court properly struck those portions of the plea agreement before entering the judgment of sentence. That being the case, we must next determine whether the trial court abused its discretion when it denied the prosecution's motion to vacate the plea agreement.

Pursuant to MCR 6.310(E), "[o]n the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." This Court has held that "the prosecutor has an equal right to withdraw from a plea agreement" because "the people, no less than the defendant, should be able to receive the benefit of the agreed-upon

bargain[.]" *People v Siebert*, 201 Mich App 402, 413; 507 NW2d 211 (1993). " 'The authority of a prosecutor to make bargains with defendants has long been recognized as an essential component of the efficient administration of justice.' " *People v Martinez*, 307 Mich App 641, 651; 861 NW2d 905 (2014), quoting *People v Jackson*, 192 Mich App 10, 14-15; 480 NW2d 283 (1991). "In light of the prosecutor's expansive powers and the public interest in maintaining the integrity of the judicial system, agreements between defendants and prosecutors affecting the disposition of criminal charges must be reviewed within the context of their function to serve the administration of criminal justice." *Jackson*, 192 Mich App at 15. "[W]hile analogous to a contract, plea bargains are not governed by the standards of commerce but must comport with the interests of justice in the administration of criminal laws." *Martinez*, 307 Mich App at 651. "In other words, contractual theories will not be applied if to do so would subvert the ends of justice." *People v Swirles (After Remand)*, 218 Mich App 133, 135; 553 NW2d 357 (1996).

Consonant with the law just cited, the question this Court must consider is whether the trial court abused its discretion when it determined that permitting the prosecution to withdraw the plea would "subvert the ends of justice." *Id*. at 135. We find that voiding the portions of the plea agreement that were unconstitutional while accepting the rest of the agreement "serve[d] the administration of criminal justice." *Jackson*, 192 Mich App at 15.

As previously discussed, the prosecution's proposition was dangerous. It offered to forgo the prosecution of crimes that could ultimately result in at least two years of imprisonment (given the felony-firearm

charge) in exchange for, among other things, defendant's resigning his state Senate seat and refraining from holding public office. Not only was the offer unconstitutional, it also carried with it the possibility of abuse by future prosecutors. It is not hard to extend the scope of the prosecution's actions in this case to include a situation in which a prosecutor might go on a fishing expedition against a political opponent, threaten to charge the opponent with serious felonies, and then provide a "voluntary" escape from the threat by conditioning the escape on the opponent's agreement to give up his or her position in the Legislature and to not run in the future. Allowing the prosecution in the present case to make that offer, reach an agreement, and then simply have another chance at negotiation after the trial court struck the unconstitutional parts of the agreement would send the wrong message. If a prosecutor is aware that using the threat of criminal charges against a member of the legislative branch will only be punished by allowing the prosecutor to go back to the negotiating table after the courts discover the wrongdoing, there will be little impetus to stop the practice. Losing the benefit of the bargain after making such an agreement, however, would send the message that these actions, which involve unconstitutional coercion, are better to be avoided entirely. Given that analysis, it is logical to conclude that the trial court's order refusing to allow the prosecution to vacate the plea was entered in order to "serve the administration of criminal justice." *Jackson*, 192 Mich App at 15. Deciding otherwise would send a clear message to the prosecution that making such an agreement only carries the risk of having to start over with the negotiations.

Additionally, in the present case (and it is not hard to see similar circumstances in future cases), defendant

was in a much worse bargaining position after the plea was accepted by the trial court. The prosecution then knew that defendant was willing to make a plea, defendant revealed the location of the weapon used during the crime as a condition of the plea, and defendant has since voluntarily resigned his state Senate seat. Permitting the prosecution to go back to the negotiating table with such advantages after it entered an unconstitutional plea agreement would undoubtedly "subvert the ends of justice." *Swirles*, 218 Mich App at 135. Also of importance, defendant was not left entirely unpunished as a result of the trial court's decision. Defendant was still required to serve (and did serve) 10 months in the Wayne County Jail without the possibility of early release and five years of probation; in addition, defendant is required to submit to alcohol and drug treatment with monthly documentation, had to submit to a mental health evaluation and fully comply with treatment, and must pay full restitution.

This Court finds that the trial court did not abuse its discretion by denying the prosecution's motion to vacate the plea.

Affirmed.

M. J. KELLY, J., concurred with SERVITTO, J.

RIORDAN, P.J. (*dissenting*). I respectfully dissent.

A trial court's decision to set aside an accepted guilty plea is reviewed for an abuse of discretion. *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995). An abuse of discretion "occurs when the trial court chooses an outcome that falls outside the range of principled outcomes." *People v Lee*, 314 Mich App 266, 272; 886 NW2d 185 (2016) (quotation marks and

citation omitted). Issues of constitutional law are reviewed de novo. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). In this matter, the trial court abused its discretion.

The majority finds the reasoning of *Leopold v State*, 216 Md App 586; 88 A3d 860 (2014), and *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), to be persuasive in reaching its conclusion that it is improper for a public official to voluntarily resign or voluntarily forbear public office as part of a negotiated criminal plea agreement.

Unlike the facts of our case, the trial court in *Leopold* unilaterally imposed a special condition of probation prohibiting the defendant, who had been convicted of two counts of misconduct in office, from "be[ing] a candidate for any local, state, or federal elected office." *Leopold*, 216 Md App at 590 (quotation marks omitted; alteration in original). Further, unlike former Senator Virgil Smith, defendant Leopold did not enter into a plea agreement prohibiting him from elective office. Thus, the trial court in *Leopold* did not need to consider whether the defendant voluntarily agreed to the provisions that, I believe, are the issue before us in the instant matter. Rather, the Maryland appellate court considered whether a trial court could unilaterally remove a public officeholder in light of certain provisions of the Maryland constitution. Unlike the Maryland court, we must consider whether the trial court abused its discretion by not enforcing plea-agreement provisions and by summarily labeling it a "forced resignation" through "prosecutorial domination," without determining whether the defendant voluntarily agreed to resignation and forbearance in order to resolve the criminal charges pending against him.

Like the district court judge in *Richmond*, the majority reasons that such voluntary provisions violate the constitutionally mandated separation-of-powers doctrine. I believe the majority's reliance on the *Richmond* decision also is flawed, given that the *Richmond* court considered issues that were moot and, in any event, that were decided wrongly.

The *Richmond* case involved former Congressman Frederick W. Richmond of New York who, in 1982, became the subject of a federal criminal investigation. In an effort to dispose of his criminal liability, on August 25, 1982, he pleaded guilty to three charges[1] in the United States District Court for the Eastern District of New York. As part of the plea, he voluntarily resigned from Congress, effective immediately, and also immediately withdrew as a candidate for reelection in the upcoming November election. In exchange, six other criminal charges against him were dismissed.[2] According to the *Richmond* court, the already effectuated resignation and withdrawal conditions of the plea agreement violated the separation-of-powers doctrine and infringed the constitutional right of the public to select representatives of their choosing. *Richmond*, 550 F Supp at 606. The district judge's comments concerning the plea bargain were made after the plea-agreement terms dealing with resignation and withdrawal from candidacy had been fully performed and, apparently, were made without the issue having been otherwise raised by the defendant or, seemingly,

[1] The three charges were income tax evasion, supplementing the salary of a federal employee, and possession of marijuana.

[2] See Babcock, *Pleads Guilty To Three Charges*, Washington Post (August 26, 1982), p A1, available at <https://perma.cc/WV3U-QHDU>. Because of the age of the *Richmond* decision, the procedural history of the case is not available through any court records that can be accessed online.

briefed by the parties. See United States Department of Justice, *Criminal Resource Manual*, § 624. Plea Negotiations with Public Officials—United States v. Richmond, available at <https://perma.cc/8Q59-8A6K>. The plea agreement was, in all other respects, enforced, and the court's illusory refusal to "accept" the defendant's resignation and noncandidacy had no effect on the sentence because those plea terms already had been voluntarily completed. *Id*. Thus, because of the mootness doctrine, with there being no case and controversy, the separation-of-powers issues raised by the judge never were subject to appellate review.[3] *Id*.; see also *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010) (stating that a court need not reach moot questions or declare principles of law that have no practical effect in the case before it).

Like the judge in *Richmond*, the majority refers to a Pandora's box of imaginary issues that it hypothesizes could arise if we allow a defendant who holds public office the freedom to choose to resolve through plea negotiations the very real criminal charges he or she faces. In turn, the majority rejects the notion that a public officeholder should be afforded the same freedom of choice enjoyed by every other person in Michigan who is the subject of a criminal indictment or is faced with criminal charges.

I agree that because of the separation of powers, defendant's resignation, withdrawal, or forbearance

[3] In any event, "[a]lthough state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citation omitted). That is, the decisions of lower federal courts are not binding on state courts. *Id*. at 607. This is especially so when the reasoning relied upon is mere dicta, as it is in *Richmond*, 550 F Supp 605, and when the reasoning is logically and constitutionally flawed.

may not be imposed involuntarily by the executive or judicial branches of government against a member of the Legislature. The Michigan Constitution provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. See also *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 646; 825 NW2d 616 (2012). Conversely, neither the United States Constitution nor the Michigan Constitution places any prohibitions on a person's decision to voluntarily resign a current office or forbear future public office. Further, there is nothing to support the majority's claim that the mere possibility of a negotiated plea in a public-corruption case or in a case in which a publicly elected official is charged with criminal wrongdoing, such as the instant matter, "could open the door" for the executive branch to use its power of prosecution—and the threat of imprisonment—to remove from elected office those officials who do not align with the political preferences of the executive branch.

Such a blanket assertion is troublesome on many levels. First, it seeks to take from publicly elected officials a voluntary mechanism for the efficient resolution of charges of criminal wrongdoing. Then, without any legal justification other than a naked prediction of the impending demise of the democratic electoral process and the imaginary specter of prosecutors running amok, the majority limits the ability of a public officeholder to freely enter into a plea agreement. Further, the majority implies that the judiciary in our state is incapable of recognizing instances of potential prosecutorial misconduct. In short, I do not find the majority's public policy doomsday hyperbole to be persuasive. In fact, anecdotally, over the 35 years since the federal district court's dicta in *Richmond*,

there have been many instances of elected officials voluntarily resigning their offices as a result of plea agreements, and I have found nothing indicating that any of those resignations or forbearances have been the product of an abuse of power by the executive branch.

My review of the transcript and record in this case confirms that the trial court failed to comply with the provisions of MCR 6.302 and abused its discretion when it determined that permitting the prosecution to withdraw the plea agreement would "subvert the ends of justice." The trial court conducted no meaningful voir dire of defendant regarding the negotiation of the plea agreement or his voluntariness in entering the plea, or his now-purported unwillingness to do so. While the trial court transcript is replete with references to the plea agreement, defendant was never questioned, on the record, regarding whether he was voluntarily resigning and forbearing a future run for public office or whether he was being forced to enter into such terms. At sentencing, the trial court read the terms of the plea agreement to defendant and then asked him if he understood that the prosecutor would dismiss three counts—felonious assault, domestic violence, and felony-firearm—in exchange for his plea of guilty and for a sentence set out in the agreement. Defendant responded, "Yes, your Honor." While this colloquy does not reflect a voluntary resignation and forbearance by defendant, it also does not reflect prosecutorial coercion or domination. In short, there is nothing in the trial court record that supports the trial judge's conclusion that there was "prosecutorial domination" over defendant "through forced resignation." There is nothing even remotely indicating that the prosecutor crossed the threshold of the separation of powers and forcibly tried to remove defendant from office.

In short, I disagree with the majority's blanket prophylactic prohibition on negotiated plea agreements between prosecutors and publicly elected officials. An elected officeholder should be treated no differently than any other citizen when it comes to the freedom to choose available options for the resolution of a criminal matter, nor should any officeholder be forced to remain in office simply because the electorate chose him or her for an elected position. There is no absolute constitutional right authorizing the electorate to choose any person of their liking to serve in public office. A person must agree to serve. Even if elected, a citizen of the United States, and a citizen of Michigan, is free to decline to serve, or decline to continue to serve, in office.[4] Here, defendant should have had the option to do just that in the trial court.

Only a defendant can weigh the benefits of assenting to a plea agreement or the potential downsides of rejecting one. If the defendant feels he or she was coerced by the prosecution, implicitly or explicitly, the defendant should have the opportunity to inform the trial court of that coercion. If the trial court vacates or voids any terms of the plea agreement, the prosecutor should be afforded the opportunity to reinstate any appropriate criminal charges that were dropped as a

[4] For example, President Lyndon B. Johnson told a March 31, 1968 national television audience, "I shall not seek, and I will not accept, the nomination of my party for another term as your President."

Here, in our own state, public officials frequently resign office to pursue other things that they perceive to be in their best interests. Following the majority's reasoning, those who seek to resign from office are legally prohibited from doing so "because the constitutional rights associated with [the] office were not for [the officeholder's] individual benefit but for the benefit of the people who elected [the officeholder]." Just as the majority believes former Senator Smith had no right to voluntarily resign his office, it follows that neither do those who resign from public office to pursue other employment or personal opportunities.

result of the agreement. Should the matter eventually go to trial, the trial judge can then consider any evidentiary issues that the defendant wishes to raise relating to the vacated plea agreement. See MRE 104.

I would hold that the trial court abused its discretion when it denied the prosecution's motion to vacate defendant's plea agreement.

PEOPLE v ROBAR

Docket No. 335377. Submitted June 7, 2017, at Grand Rapids. Decided August 24, 2017, at 9:00 a.m. Leave to appeal denied 503 Mich ___.

Jason C. Robar was charged in the 60th District Court with possession with intent to deliver less than 50 grams of a mixture containing acetaminophen and hydrocodone, MCL 333.7401(2)(a)(*iv*), and possession with intent to deliver Methylin, MCL 333.7401(2)(b)(*ii*). The parties stipulated at the preliminary examination that defendant had possessed the controlled substances and that he had admitted to the police that he had intended to sell the substances; defendant asserted in his defense that he had a valid prescription for each substance. Defendant moved to dismiss the charges, arguing that he could not be prosecuted for possession with intent to deliver a controlled substance because simple possession, MCL 333.7403(1), is a lesser included offense of possession with intent to deliver a controlled substance and that he was exempt from prosecution for simple possession under MCL 333.7403(1)—and therefore also exempt from prosecution for possession with intent to deliver a controlled substance—given that he possessed prescriptions for both substances. The prosecution opposed the motion, arguing that simple possession is a cognate lesser offense of possession with intent to deliver a controlled substance and that possession of a valid prescription is not an affirmative defense to the offense of possession with intent to deliver a controlled substance. The court, Andrew Wierengo, J., denied defendant's motion and bound him over on the charged offenses. Defendant then moved in the Muskegon Circuit Court to modify M Crim JI 12.3, arguing that the current instruction mischaracterizes the law in that it requires a defendant to produce evidence that he or she was authorized to deliver a controlled substance to avoid prosecution under MCL 333.7401, contrary to our Supreme Court's conclusion in *People v Wolfe*, 440 Mich 508 (1992), amended 441 Mich 1201 (1992), that the prosecution must prove—as an element of the crime of possession with intent to deliver a controlled substance—that a defendant lacked authority to possess, not deliver, the substance. The prosecution opposed defendant's motion, arguing

that the August 2016 amendment of M Crim JI 12.3 accurately reflects the plain language of MCL 333.7401. The circuit court, William C. Marietti, J., granted defendant's motion, holding that the former jury instruction accurately reflected the possession-with-intent-to-deliver elements set forth in *Wolfe*. The circuit court also concluded that simple possession is a lesser included offense of possession with intent to deliver a controlled substance and that—because possession of a valid prescription is an affirmative defense to simple possession—defendant would be entitled to a directed verdict for the charged offenses if he established that he possessed a valid prescription for each substance. With regard to that affirmative defense, the circuit court concluded that under *People v Pegenau*, 447 Mich 278 (1994), defendant had the burden to produce some competent evidence that he was authorized to possess the controlled substances—in this case, possession of valid prescriptions—after which the burden of persuasion would shift to the prosecution. The Court of Appeals granted the prosecution's application for leave to appeal.

The Court of Appeals *held*:

1. MCL 333.7401(1) provides that, except as authorized by MCL 333.7101 through MCL 333.7545, a person shall not manufacture, create, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. MCL 333.7303 provides certain exceptions under which a person may legally possess or deliver controlled substances. In that regard, a person who forms an intention to deliver a controlled substance may legally deliver the substance if the person is licensed to do so or, if not licensed, the person is (1) the agent or the employee of a licensed person, (2) a common or contract carrier whose possession is in the usual course of business or employment, or (3) the ultimate user or agent whose possession is pursuant to a lawful order or a practitioner; the licensing requirement may be waived for certain manufacturers, distributors, prescribers, or dispensers. In contrast, the simple-possession statute, MCL 333.7403(1)—which must be construed together with MCL 333.7401(1) because the statutes are *in pari materia*—prohibits the knowing or intentional possession of a controlled substance but creates an exception for a person who obtained the substance with a valid prescription. Unlike MCL 333.7403(1), a person's possession of a valid prescription is not a defense under MCL 333.7401(1) because the legality of the person's possession is not relevant to the crime itself; instead, the relevant inquiry is whether the person is legally authorized to deliver the substance.

2. MCR 2.512(D)(1) provides that model jury instructions do not have the full force or effect of a court rule. However, MCR 2.512(D)(2) provides that pertinent portions of the instructions must be given if the instructions are applicable, they accurately state the applicable law, and they are requested by a party. M Crim JI 12.3 applies to prosecutions under MCL 333.7401(1). Under former M Crim JI 12.3, the jury was, in part, instructed that the prosecution had to prove that the defendant was not legally authorized to *possess* the controlled substance. The current version of M Crim JI 12.3, as amended in 2016, however, requires the prosecution to prove that the defendant was not legally authorized to *deliver* the controlled substance. In this case, the circuit court erred by granting defendant's motion to modify the current version of M Crim JI 12.3 to conform with the former instruction's use of the word "possess." The *Wolfe* Court's statement of the elements of the offense of possession with intent to deliver cocaine—that the substance was cocaine, that the cocaine was in a mixture less than 50 grams, that the defendant was authorized to *possess* the substance, and that the defendant knowingly possessed the cocaine with intent to deliver—was not outcome-determinative because (1) *Wolfe* was factually distinguishable in that *Wolfe* involved cocaine, not a controlled substance that could be obtained by a valid prescription, and the Court's analysis did not involve statutory analysis of MCL 333.7401(1); (2) the Court articulated a different formulation of the elements of possession with intent to deliver a controlled substance in *People v Crawford*, 458 Mich 376 (1998), one which did not include as an element that a defendant was not authorized to possess the substance; and (3) under the plain language of MCL 333.7401(1), the relevant inquiry was whether a defendant was authorized to *deliver* the controlled substance, not whether the defendant was legally authorized to *possess* the substance.

3. In *Pegenau*, 447 Mich at 289, 292 (opinion by MALLETT, J.); *id*. at 304 (CAVANAGH, C.J., concurring in part and dissenting in part); *id*. at 309 (BOYLE, J., concurring in the result), the Court explained that simple possession is limited to whether a person knowingly or intentionally possesses a controlled substance and concluded that possession of a valid prescription for the controlled substance acts as a defense to or an exemption from prosecution for the offense; it is not an element of the offense. A lesser included offense is an offense whose elements are completely subsumed in the greater offense, while cognate offenses share several elements with a greater offense and are of the same class or category, but they contain elements not found in the greater

offense. The trial court correctly concluded that simple possession is a lesser included offense of possession with intent to deliver a controlled substance because, absent a difference in the categorized statutory amount of the controlled substance involved, the elements of simple possession, MCL 333.7403)(1), are subsumed within the elements of the greater offense of possession with intent to deliver a controlled substance, MCL 333.7401(1). The possession-with-intent-to-deliver statute does not contain the valid-prescription exemption set forth in the simple-possession statute but instead limits legal possession and delivery of a controlled substance to those situations outlined in MCL 333.7303. Accordingly, the trial court erred by concluding that evidence of a valid prescription was a valid defense to the greater offense of possession with intent to deliver a controlled substance.

4. The burden of proof consists of the burden of production, which requires a party to produce some evidence of that party's proposition of fact, and the burden of persuasion, which requires a party to convince the trier of fact that those propositions of fact are true. While the prosecution has the burden of proving all the elements of a charged crime beyond a reasonable doubt, MCL 333.7531 provides that the burden of proof of an exemption or an exception under the controlled substances act (CSA), MCL 333.7101 *et seq*., is on the person claiming it. In *People v Mezy*, 453 Mich 269, 282-282 (1996) (opinion by WEAVER, J.); *id*. at 286 (BRICKLEY, C.J., concurring in part and dissenting in part), a majority of the Court held that MCL 333.7531 places both the burden of production and the burden of persuasion on a defendant claiming an exemption or an exception under the CSA; the defendant must establish the exemption or the exception by a preponderance of the evidence. MCL 333.7303, which authorizes a person to legally possess and deliver controlled substances under certain circumstances, constitutes an exemption or an exception to prosecution for the offense of possession with intent to deliver the substance; like possession of a prescription is not an element of simple possession, the authorization to possess and deliver controlled substances is not an essential element of possession with intent to deliver. Because the MCL 333.7303 authorization is an exception, a defendant bears the burden of production and the burden of persuasion to establish the exception. Accordingly, although the circuit court was correct that defendant had the burden of producing some competent evidence that he was authorized to possess or deliver the controlled substances, the court erred by concluding that the burden of persuasion would then shift to the prosecution to prove beyond a reasonable doubt that defendant lacked that authority.

5. Current M Crim JI 12.3 sets forth the elements the prosecution must prove to establish that a defendant violated MCL 333.7401. Paragraph 6 of that instruction states that the prosecution must prove beyond a reasonable doubt that the defendant was not legally authorized to deliver the controlled substance. Footnote 3 of that instruction incorrectly states that if a defendant presents some competent evidence that the defendant was authorized to deliver a controlled substance the prosecution must prove lack of authorization beyond a reasonable doubt. Instead, a defendant who claims an exception or an exemption under the CSA bears both the burden of production and the burden of persuasion and must demonstrate by a preponderance of the evidence that he or she is legally authorized to deliver a controlled substance.

Affirmed in part, reversed in part, and the case remanded for further proceedings.

1. CRIMINAL LAW — CONTROLLED SUBSTANCES — POSSESSION WITH INTENT TO DELIVER — AFFIRMATIVE DEFENSES — POSSESSION OF VALID PRESCRIPTION NOT AN AFFIRMATIVE DEFENSE.

Possession of a valid prescription is not a defense to the offense of possession with intent to deliver a controlled substance because the legality of the person's possession is not relevant to the crime itself; instead, the relevant inquiry is whether the person is legally authorized to deliver the substance (MCL 333.7401(1); MCL 333.7303).

2. JURY INSTRUCTIONS — CONTROLLED SUBSTANCES — ELEMENTS OF POSSESSION WITH INTENT TO DELIVER — EXCLUSION FOR AUTHORITY TO DELIVER CONTROLLED SUBSTANCES.

For purposes of prosecutions under MCL 333.7401(1), the applicable Model Criminal Jury Instruction, as amended in 2016, correctly provides that the prosecution must prove, in part, that the defendant was not legally authorized to deliver the controlled substance; the former jury instruction was incorrect in that it required the prosecution to prove that the defendant was not legally authorized to possess the controlled substance (M Crim JI 12.3; MCL 333.7303).

3. CRIMINAL LAW — CONTROLLED SUBSTANCES — POSSESSION WITH INTENT TO DELIVER — EXCEPTION TO PROSECUTION — BURDENS OF PROOF AND PERSUASION.

MCL 333.7303, which authorizes a person to legally possess and deliver controlled substances under certain circumstances, provides an exemption or an exception to prosecution for the offense

of possession with intent to deliver a controlled substance, and a defendant has both the burden of production and the burden of persuasion to establish the exception (MCL 333.7401(1); MCL 333.7531).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Dale J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Muskegon County Office of the Public Defender (by *Thomas G. Oatmen*) for defendant.

Before: GADOLA, P.J., TALBOT, C.J., and GLEICHER, J.

GADOLA, P.J. This case involves the offense of possession with intent to deliver a controlled substance, as set forth by MCL 333.7401 of the controlled substances act (CSA), MCL 333.7101 *et seq.*, Article 7 of the Public Health Code, MCL 333.1101 *et seq.* The prosecution appeals by leave granted[1] an order of the trial court containing three rulings. First, the trial court ruled that, under *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), defendant was entitled to the use of a former version of the applicable model jury instruction, M Crim JI 12.3, rather than the current version, which was amended effective August 2016. Next, the trial court ruled that, under *People v Gridiron*, 185 Mich App 395; 460 NW2d 908 (1990) (*Gridiron I*),[2] the offense of possession of a controlled substance (simple possession), MCL 333.7403, is a lesser included offense of the offense of

[1] *People v Robar*, unpublished order of the Court of Appeals, entered January 27, 2017 (Docket No. 335377).

[2] Vacated by *People v Gridiron (On Rehearing)*, 190 Mich App 366 (1991) (*Gridiron II*), amended with regard to remedy by *People v Gridiron*, 439 Mich 880 (1991) (*Gridiron III*).

possession with intent to deliver a controlled substance. The trial court also determined that defendant would be entitled to a directed verdict if he produced evidence of a valid prescription because having a prescription is a defense to prosecution for simple possession under MCL 333.7403(1). Finally, the trial court ruled that, under *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994), defendant bore the burden to produce some competent evidence of his authority to possess the controlled substances, after which the burden of persuasion would shift to the prosecution to prove that defendant lacked that authority beyond a reasonable doubt. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Defendant is charged with one count of possession with intent to deliver less than 50 grams of a mixture containing acetaminophen and hydrocodone, MCL 333.7401(2)(a)(*iv*), and one count of possession with intent to deliver Methylin, MCL 333.7401(2)(b)(*ii*). At the preliminary examination, the parties stipulated that defendant had possessed the controlled substances at issue and that he had admitted to the police that he had intended to sell the substances. Defense counsel indicated that defendant had a valid prescription for both substances, and the prosecution conceded that defendant "has a prescription."[3]

Defendant moved to dismiss the charges at the preliminary examination, arguing that simple possession, MCL 333.7403(1), is a lesser included offense of

[3] The prosecution later filed briefs in the trial court and before this Court asserting that it does not concede that defendant has a valid prescription for the substances.

possession with intent to deliver a controlled substance under *Gridiron I* and that having a valid prescription exempts a defendant from prosecution for simple possession. The prosecution argued that *Gridiron I* was no longer binding because a more recent case, *People v Lucas*, 188 Mich App 554; 470 NW2d 460 (1991), held that simple possession was merely a cognate lesser offense of possession with intent to deliver a controlled substance and that having a valid prescription was not a defense to prosecution for possession with intent to deliver a controlled substance under MCL 333.7401(1). Following a hearing, the district court agreed with the prosecution and bound defendant over to the circuit court on the charged offenses.

Defendant subsequently moved in the circuit court to modify the current model jury instruction, M Crim JI 12.3, arguing that the instruction mischaracterized the law because it required a defendant to produce evidence that he or she was authorized *to deliver* a controlled substance to avoid prosecution under MCL 333.7401, while *Wolfe* required the prosecution to prove that a defendant lacked authority *to possess* a controlled substance as an element of the crime of possession with intent to deliver a controlled substance. The prosecution responded that the former version of M Crim JI 12.3 included the element that "the defendant was not legally authorized to *possess*" the controlled substance, but the instruction was amended in August 2016 to replace the word "possess" with "deliver," which, the prosecution argued, accurately reflected the law as set forth in MCL 333.7401. The prosecution agreed that having a valid prescription exempts a defendant from prosecution for simple possession under the plain language of MCL 333.7403(1) but argued that the plain language of MCL 333.7401(1) does not provide that exemption. Addition-

ally, citing Justice BOYLE's concurring opinion in *Pegenau*, the prosecution contended that defendant bore the burden of both production and persuasion under MCL 333.7531(1) to prove that he was authorized to possess *and* deliver the controlled substances.

The trial court concluded that it was bound by the *Wolfe* Court's formulation of the elements of the offense of possession with intent to deliver a controlled substance. One of the elements set forth by *Wolfe* requires the prosecution to show that a defendant was not authorized *to possess* the controlled substance. The trial court therefore agreed to use the former, rather than the current, version of M Crim JI 12.3. The trial court also concluded that simple possession is a lesser included offense of possession with intent to deliver a controlled substance under *Gridiron I*. Therefore, defendant would be entitled to a directed verdict under the possession with intent to deliver a controlled substance statute if he could adequately establish the existence of a valid prescription for each substance because having a valid prescription is a defense to prosecution for simple possession. Finally, the trial court rejected the prosecution's position that MCL 333.7531(1) places the burdens of production and persuasion on a defendant to prove authorization, concluding that under *Pegenau*, a defendant need only produce some competent evidence of authorization before the burden of persuasion shifts back to the prosecution to prove lack of authorization beyond a reasonable doubt.

II. JURY INSTRUCTIONS

The prosecution contends that the trial court erred by ruling that defendant was entitled to use the former version of M Crim JI 12.3 because the current version

accurately states the law. We review de novo claims of instructional error involving legal questions and issues of statutory interpretation. *People v Bush*, 315 Mich App 237, 243; 890 NW2d 370 (2016).

A criminal defendant "is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must set forth all the elements of any charged offense and must include any material issues, theories, or defenses supported by the evidence. *Bush*, 315 Mich App at 243. Model jury instructions do not have the force or effect of a court rule, MCR 2.512(D)(1), but pertinent portions of the instructions "must be given in each action in which jury instructions are given if (a) they are applicable, (b) they accurately state the applicable law, and (c) they are requested by a party," MCR 2.512(D)(2).

The current model jury instruction for possession with intent to deliver a controlled substance is M Crim JI 12.3, which states, in pertinent part, the following:

> (1) The defendant is charged with the crime of illegally possessing with intent to deliver [*state weight*] of a [mixture containing a] controlled substance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant possessed [*identify controlled substance*].
>
> (3) Second, that the defendant knew that [he / she] possessed a controlled substance.
>
> (4) Third, that the defendant intended to deliver the controlled substance to someone else.
>
> (5) Fourth, that the controlled substance that the defendant intended to deliver [was in a mixture that] weighed (*state weight*).

> [(6) Fifth, that the defendant was not legally authorized *to deliver* the controlled substance.][3]
>
> ---
>
> [3] This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized *to deliver* the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).
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>
> [Fourth and fifth emphasis added; brackets in original.]

Before the August 2016 amendment of M Crim JI 12.3, Paragraph (6) stated the following:

> [(6) Fifth, that the defendant was not legally authorized *to possess* this substance.][4]
>
> ---
>
> [4] This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized *to possess* the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).
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>
> [Emphasis added; brackets in original.]

The Committee on Model Criminal Jury Instructions explained that it amended M Crim JI 12.3 to "correct the final element" of the instruction. The question before us is whether this amendment accurately reflects Michigan law.

MCL 333.7401 sets forth the offense of possession with intent to deliver a controlled substance and provides, in pertinent part, the following:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to

> manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form.

In *Wolfe*, 440 Mich at 516-517, our Supreme Court set forth the following elements for the offense of possession with intent to deliver cocaine: "(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver."[4] We are bound to follow decisions of the Supreme Court unless those decisions have clearly been overruled or superseded. *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000). The principle of stare decisis requires courts

> to reach the same result as in one case when the same or substantially similar issues are presented in another case with different parties. Stare decisis does not arise from a point addressed in obiter dictum. However, an issue that is intentionally addressed and decided is not dictum if the issue is germane to the controversy in the case, even if the issue was not necessarily decisive of the controversy in the case. This Court is bound by stare decisis to follow the decisions of our Supreme Court. [*Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007) (citations omitted).]

Wolfe has not been overruled, and the language of MCL 333.7401(1) has not changed since the Supreme Court issued the opinion in 1992. However, we conclude that the formulation of the elements set forth by *Wolfe* is not

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[4] *Wolfe* has been cited in multiple opinions for these elements of possession with intent to deliver a controlled substance, including the element "that defendant was not authorized to possess the substance . . . ." See, e.g., *People v McGhee*, 268 Mich App 600, 604, 622; 709 NW2d 595 (2005) (analyzing a challenge to the possession element only and involving the controlled substances cocaine, heroin, and marijuana).

alone dispositive because (1) *Wolfe* is factually distinguishable from the instant case and did not address the issue presented here, (2) our Supreme Court has also recited the elements of possession with intent to deliver a controlled substance in a way that does not include as an element that a "defendant was not authorized to possess the substance," and (3) the plain language of MCL 333.7401(1) does not support a conclusion that possessing a valid prescription is relevant to whether a defendant committed the offense of possession with intent to deliver a controlled substance.

In *Wolfe*, 440 Mich at 511, our Supreme Court analyzed whether sufficient evidence supported the defendant's conviction for possession with intent to deliver cocaine. After articulating the elements of the offense, the *Wolfe* Court explained that the defendant "challenged the sufficiency of the evidence only with respect to the fourth element—that he knowingly possessed cocaine with intent to deliver." *Id*. at 516-517. The Court did not analyze the other articulated elements and did not address the issues we are faced with today, those being whether a prescription authorizing a defendant *to possess* a controlled substance exempts a defendant from prosecution for the offense of possession with intent to deliver a controlled substance or whether a defendant must instead show authorization *to deliver* the substance to avoid prosecution. We conclude that we are not bound by the rule of stare decisis to accept the formulation of the elements set forth in *Wolfe* because the case did not involve "the same or substantially similar issues" as those presented here. *Griswold Props*, 276 Mich App at 563.

Moreover, the *Wolfe* Court did not construe MCL 333.7401 or otherwise analyze how it determined that the earlier mentioned four elements were the elements

of the offense. *Id*. at 516-517. The *Wolfe* Court cited *People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989), for the elements of the offense, and the *Lewis* Court merely adopted the elements of the offense articulated in *People v Acosta*, 153 Mich App 504, 511-512; 396 NW2d 463 (1986). Both *Acosta* and *Lewis* involved cocaine and cited the same jury instruction, CJI 12:2:00, to include as an element of the offense "that the defendant was not authorized by law *to possess* the substance." *Acosta*, 153 Mich App at 511 (emphasis added). Accordingly, the elements of possession with intent to deliver a controlled substance as articulated in *Wolfe* were not derived from statutory analysis. Additionally, *Wolfe* and the line of cases that provided authority for the *Wolfe* Court's formulation of the elements all involved cocaine rather than a controlled substance that could be obtained by a valid prescription, as is the case here.

Next, the formulation of the elements in *Wolfe* is not the only formulation that our Supreme Court has articulated for the offense of possession with intent to deliver a controlled substance. In *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998), our Supreme Court stated that the elements of the offense of possession with intent to deliver cocaine are as follows: "(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and 225 grams." The *Crawford* Court cited CJI2d 12.3 as its authority for these elements and did not independently construe the statutory language of MCL 333.7401. *Id*. Our Supreme Court and a panel of this Court in published opinions have both subsequently cited *Crawford* for this formulation of the

elements of the offense. See *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002) (stating the elements of the offense in the context of analyzing an entrapment defense); *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005) (reviewing the defendant's challenge to the sufficiency of the evidence supporting his conviction of possession with intent to deliver marijuana). The fact that there are two different formulations used by this Court and our Supreme Court supports that we should not only consider *Wolfe*'s formulation of the elements when assessing whether the current version of M Crim JI 12.3 accurately states the applicable law. We therefore also find it necessary to review the language of the statute itself.

When interpreting statutes, courts must assess statutory language in context and must construe the language according to its plain and ordinary meaning. *People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009). If statutory language is unambiguous, courts must apply the language as written and further construction is neither required nor permitted. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). "If a word is defined by statute, the word must be applied in accordance with its statutory definition." *Bush*, 315 Mich App at 246. "It is well settled that criminal statutes are to be strictly construed, absent a legislative statement to the contrary." *People v Boscaglia*, 419 Mich 556, 563; 357 NW2d 648 (1984).

Statutes that relate to the same matter are *in pari materia*. *Bloomfield Twp v Kane*, 302 Mich App 170, 176; 839 NW2d 505 (2013). "This general rule of statutory interpretation requires courts to examine the statute at issue in the context of related statutes," and statutes that involve the same subject matter are *in pari materia* and "must be construed together for

purposes of determining legislative intent." *Id*. Generally, when statutory language is included in one statutory section but omitted from another, we presume that the drafters acted intentionally to include or exclude the language. *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011).

As previously noted, the pertinent part of the possession with intent to deliver a controlled substance statute, MCL 333.7401(1), states the following:

> *Except as authorized by this article, a person shall not* manufacture, create, deliver, or *possess with intent to* manufacture, create, or *deliver a controlled substance*, a prescription form, or a counterfeit prescription form. [Emphasis added.]

Considering this sentence, there are two classes of crimes defined by MCL 333.7401(1). First, and not at issue in this case, it is a crime to "manufacture, create, [or] deliver" the defined substances. Second, it is a crime to "*possess with intent to* manufacture, create, or *deliver*" the defined substances. The phrase "with intent to manufacture, create, or deliver" modifies the word "possess." There are no other words modifying the word "possess." As the prosecution points out, the statute does not include a modifier that refers to *lawful* or *unlawful* possession. Accordingly, the statute is directed at the evil of possessing "a controlled substance, a prescription form, or a counterfeit prescription form" with a particular intent—the intent to "manufacture, create, or deliver" the substance—regardless of whether the possession would otherwise be lawful or unlawful if the person lacked that particular intent.

In contrast, the crime of simple possession, which is defined by MCL 333.7403(1), provides the following:

> *A person shall not knowingly or intentionally possess a controlled substance*, a controlled substance analogue, or a prescription form *unless the controlled substance*, controlled substance analogue, or prescription form *was obtained directly from, or pursuant to, a valid prescription* or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.[5] [Emphasis added.]

This statute makes it a crime to possess a controlled substance "knowingly or intentionally" but creates an exception for a person who has obtained the substance "from, or pursuant to, a valid prescription . . . ." *Id*. The statute also allows a person to possess a controlled substance if the possession is "otherwise authorized by this article." The simple-possession statute is therefore directed at the evil of mere possession of these substances, unless a person is legally authorized to possess them. A person's actual or intended use is irrelevant to the crime of simple possession; unlawful possession is the prohibited conduct. See also *People v Hartuniewicz*, 294 Mich App 237, 246; 816 NW2d 442 (2011) ("MCL 333.7403(1) proscribes the knowing or intentional possession of a controlled substance without authorization.").

There is no such exception in MCL 333.7401 that negates culpability because of a valid prescription. The legality of a person's possession, by itself, is irrelevant to the crime of possession with intent to deliver a controlled substance. Rather the only statutory exception to this offense is created by the opening phrase: "Except as authorized by this article . . . ." MCL 333.7401(1). Under the CSA, a person must meet

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[5] The Legislature recently amended this statute by way of 2016 PA 307, which took effect on January 4, 2017. This amendment did not affect the statutory language at issue in this appeal.

certain requirements before he or she may lawfully deliver or intend to deliver a controlled substance. See MCL 333.7303.

Before considering these requirements, however, we must first examine several pertinent statutory definitions. The CSA defines the terms "deliver" and "delivery" as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1). " 'Dispense' means to deliver or issue a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner . . . ." MCL 333.7105(3). The CSA further defines the term "distribute" as "to deliver other than by administering or dispensing a controlled substance." MCL 333.7105(5). " 'Ultimate user' means an individual who lawfully possesses a controlled substance for personal use or for the use of a member of the individual's household . . . ." MCL 333.7109(8).[6] The CSA defines "person" as "a person as defined in [MCL 333.1106] or a governmental entity." MCL 333.7109(1). And MCL 333.1106(4) defines "person" as "an individual, partnership, cooperative, association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity." MCL 333.7101(1) states that "[e]xcept as otherwise provided in [MCL 333.7341], . . . the words and phrases defined in sections 7103 to 7109 have the meanings ascribed to them in those sections."

MCL 333.7303 provides, in relevant part, the following:

> (1) *A person* who manufactures, distributes, prescribes, or dispenses a controlled substance in this state or *who*

[6] The Legislature did not make any changes to Subsection (8) in the recent amendment of MCL 333.7109. See 2016 PA 383, effective March 27, 2017.

proposes to engage in the manufacture, *distribution*, prescribing, or *dispensing of a controlled substance . . . shall obtain a license issued by the administrator* in accordance with the rules. . . .

(2) A person licensed by the administrator under this article to manufacture, distribute, prescribe, dispense, or conduct research with controlled substances may possess, manufacture, distribute, prescribe, dispense, or conduct research with those substances to the extent authorized by its license and in conformity with the other provisions of this article.

* * *

(4) The following persons need not be licensed and may lawfully possess controlled substances or prescription forms under this article:

(a) An agent or employee of a licensed manufacturer, distributor, prescriber, or dispenser of a controlled substance if acting in the usual course of the agent's or employee's business or employment.

(b) A common or contract carrier or warehouseman, or an employee thereof, whose possession of a controlled substance or prescription form is in the usual course of business or employment.

(c) An ultimate user or agent in possession of a controlled substance or prescription form pursuant to a lawful order of a practitioner or in lawful possession of a schedule 5 substance.

(5) The administrator may waive or include by rule the requirement for licensure of certain manufacturers, distributors, prescribers, or dispensers, if it finds the waiver or inclusion is consistent with the public health and safety. [Emphasis added.]

Therefore, under MCL 333.7303(1), once a person "proposes to engage" in the distribution or dispensing, i.e., the "delivery" of a controlled substance, that person generally must obtain a license to do so

lawfully. See also MCL 333.7105(3) and (5). The CSA does not define the term "proposes," but "when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined," which "assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings." *Kane*, 302 Mich App at 175. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the word "propose" as "to form or put forward a plan or intention." In other words, a person who forms an intention to deliver a controlled substance generally must obtain a license to do so under MCL 333.7303(1).

MCL 333.7303(4) and (5) provide limited exceptions to the general licensure requirement in MCL 333.7303(1). MCL 333.7303(4) identifies three categories of persons who "need not be licensed and may lawfully possess controlled substances or prescription forms under this article[.]" First, an "agent or employee" of a person licensed under MCL 333.7303(1) need not be licensed so long as the agent or employee is "acting in the usual course of the agent's or employee's business or employment." MCL 333.7303(4)(a). Second, a "common or contract carrier or warehouseman, or an employee thereof" need not be licensed so long as such a person's "possession of a controlled substance . . . is in the usual course of business or employment."[7] MCL 333.7303(4)(b). Third, an "ultimate user or agent" need not obtain a license to possess a controlled substance under MCL 333.7303(1) so long as his or her possession

[7] MCL 333.7303(4)(b) rationally allows a "common or contract carrier or warehouseman, or an employee thereof" in possession of a controlled substance to lawfully intend to deliver the substance so long as the delivery "is in the usual course of business or employment" of that person or entity.

is "pursuant to a lawful order of a practitioner . . . ."[8] MCL 333.7303(4)(c). Finally, MCL 333.7303(5) states that the administrator may waive the licensure requirement for "certain manufacturers, distributors, prescribers, or dispensers" if it determines the waiver is "consistent with the public health and safety."

Reading the above statutes *in pari materia*, we conclude that MCL 333.7401(1) makes it a crime to possess a controlled substance—whether lawfully or not—*with the intent to deliver that substance* unless the person possessing the controlled substance either (1) has obtained a valid license to deliver the substance under MCL 333.7303(1) and (2), or (2) falls within one of the limited exceptions provided by MCL 333.7303(4) and (5). The statutory offense is aimed at preventing a person from possessing a controlled substance *with unlawful intent* regardless of whether the possession would otherwise be lawful absent this intent. See MCL 333.7401(1); *Kane*, 302 Mich App at 176. Intent to deliver may be "inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Wolfe*, 440 Mich at 524. Contrary to defendant's argument, a person is not criminally culpable under MCL 333.7401 for merely possessing a prescription medication; culpability arises when a person possessing a controlled substance displays overt actions showing an intent to unlawfully deliver the substance to someone else.

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[8] Like the exception in MCL 333.7303(4)(b), we also conclude that MCL 333.7303(4)(c) only rationally allows an "ultimate user or agent" in possession of a controlled substance to lawfully intend to deliver the substance if the delivery is "pursuant to a lawful order of a practitioner," such as may be the case if a person retrieves a controlled substance from a pharmacy, pursuant to a valid prescription, for an ailing friend or family member.

Therefore, the current version of M Crim JI 12.3, which phrases the relevant inquiry as whether a defendant was legally authorized *to deliver* the controlled substance as opposed to being legally authorized *to possess* the controlled substance, comports with the statutory definition of the offense. M Crim JI 12.3 does not conflict with Michigan caselaw because both this Court and our Supreme Court have recently employed at least two formulations of the elements of possession with intent to deliver a controlled substance. See *Wolfe*, 440 Mich 516-517; *Crawford*, 458 Mich at 389. Only one of those formulations includes as an element that a defendant was not authorized *to possess* the controlled substance, and that formulation was developed in the context of offenses involving cocaine, in which the possible possession of a prescription was not at issue. See *Wolfe*, 440 Mich 516-517. The current version of M Crim JI 12.3 accurately states the law and should be used in this case.[9] MCR 2.512(D)(2). Therefore, the trial court erred by granting defendant's motion to modify the jury instruction.

III. LESSER INCLUDED OFFENSE

The prosecution next argues that the trial court erred by concluding that simple possession is a lesser included offense of possession with intent to deliver a controlled substance. Defendant argues that because having a valid prescription exempts a defendant from prosecution under the simple-possession statute, MCL 333.7403, a prescription should likewise exempt a

[9] Our conclusion on this issue only applies to the main body of the text in M Crim JI 12.3 and not to the footnote accompanying bracketed Paragraph (6). We discuss in Part IV of this opinion the burdens of production and persuasion applicable to a defendant claiming that he or she was authorized to possess or deliver a controlled substance.

defendant from prosecution under MCL 333.7401. We review de novo questions of law, including whether an offense constitutes a lesser included offense. *People v Heft*, 299 Mich App 69, 73; 829 NW2d 266 (2012).

As a preliminary matter, defendant argues that this issue is not ripe for review because neither party has moved for a lesser-included-offense instruction on simple possession. To determine whether an issue is justiciably ripe, "a court must assess whether the harm asserted has matured sufficiently to warrant judicial intervention." *People v Bocsa*, 310 Mich App 1, 56; 871 NW2d 307 (2015) (quotation marks and citation omitted), held in abeyance 872 NW2d 492 (2015). "Inherent in this assessment is the balancing of any uncertainty as to whether [a party] will actually suffer future injury, with the potential hardship of denying anticipatory relief." *Bosca*, 310 Mich App at 56 (quotation marks and citation omitted). Stated another way, the ripeness doctrine precludes adjudication of merely hypothetical claims. *Id*. at 57.

In the order appealed, the trial court concluded that simple possession is a lesser included offense of possession with intent to deliver a controlled substance. The court then concluded that, because having a valid prescription is a defense to the offense of simple possession, the defense was equally applicable to the greater charge of possession with intent to deliver a controlled substance. The trial court explained that it would enter a directed verdict against the prosecution if defendant produced evidence that he had a valid prescription to possess the controlled substances at issue. Given the trial court's ruling, the prosecution will suffer future harm, and its injury is not merely hypothetical because the trial court has indicated precisely what it intends to do. Furthermore, the

parties have thoroughly briefed this issue, and it is well framed for a decision by this Court. We therefore conclude that the harm asserted warrants judicial intervention. *Id*. at 56.

"A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). In contrast, cognate offenses share with a greater offense several elements and are of the same class or category, but they contain elements not found in the greater offense. *Id*. at 543. A determination of whether a lesser offense is necessarily included within a greater offense "requires a comparison of the elements of the offenses . . . ." *People v Jones*, 497 Mich 155, 164; 860 NW2d 112 (2014).

In *Gridiron I*, 185 Mich App at 397, 400,[10] this Court addressed whether a defendant charged with possession with intent to deliver cocaine was entitled to a jury instruction on simple possession and stated, "[I]t is evident that simple possession is a necessarily lesser included offense to possession with intent to deliver since the only distinguishing characteristic is the additional element of the intent to deliver in the greater offense." The Court opined that "one obviously cannot possess a controlled substance with the intent to deliver it without having also committed the offense of possession." *Id*. at 401. Likewise, in *People v Torres (On Remand)*, 222 Mich App 411, 416-417; 564 NW2d 149

[10] The opinion in *Gridiron I* was vacated on rehearing by *Gridiron II*, 190 Mich App at 370, for reasons unrelated to the statements of law set forth in this opinion, namely, on grounds of ineffective assistance of counsel. The *Gridiron II* Court vacated the defendant's conviction and prohibited retrial. *Id*. In *Gridiron III*, 439 Mich at 880, our Supreme Court amended this Court's judgment in *Gridiron II* because it concluded that "[t]he appropriate remedy on a finding of ineffective assistance of counsel is retrial and not the discharge of the defendant."

(1997), citing *People v Gridiron (On Rehearing)*, 190 Mich App 366, 369; 475 NW2d 879 (1991) (*Gridiron II*), this Court stated that "[p]ossession of more than 650 grams of cocaine has been considered to be a necessarily included lesser offense of possession with intent to deliver that amount of cocaine, because the only distinguishing characteristic is the additional element of the intent to deliver."

The prosecution argues that this Court's opinion in *Lucas*, 188 Mich App 554, controls. In *Lucas*, this Court stated that "[p]ossession of a controlled substance is a cognate lesser included offense of possession with intent to deliver involving a differently categorized statutory amount." *Id*. at 581. The *Lucas* Court made this statement without any analysis, but it cited *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989), remanded on other grounds by *People v Thomas*, 439 Mich 896 (1991), and *People v Leighty*, 161 Mich App 565, 578-579; 411 NW2d 778 (1987). In *Marji*, 180 Mich App at 531, this Court explained that delivery of a lesser amount of cocaine was a cognate lesser offense of delivery of over 225 grams of cocaine because the offenses "contain essential elements not present in the greater offense, namely proof of lesser quantities of controlled substances." In *Leighty*, 161 Mich App at 578, this Court treated possession of less than 50 grams of cocaine as a cognate lesser offense of possession with intent to deliver 225 grams or more of cocaine. These cases thus stand for the proposition that simple possession can be a lesser included offense of possession with intent to deliver the same amount of a controlled substance, but if the offenses involve differently categorized statutory amounts, possession will be treated as a cognate lesser offense.

Both *Gridiron I* and *Torres* involved the offense of possession with intent to deliver cocaine, a drug which could not be obtained using a valid prescription. However, comparing the elements of the two offenses, we agree that, absent a difference in the amount of the substance involved, the elements of simple possession are completely subsumed within the elements of possession with intent to deliver a controlled substance. The elements of possession with intent to deliver a controlled substance under MCL 333.7401 are (1) that a defendant possessed a controlled substance, (2) that the defendant knew he or she possessed the controlled substance, (3) that the defendant intended to deliver the controlled substance to someone else, and (4) the amount of the controlled substance, if applicable. See *Crawford*, 458 Mich at 389; M Crim JI 12.3; MCL 333.7401. In comparison, the elements of simple possession are (1) that a defendant possessed a controlled substance, (2) that the defendant knew he or she possessed the controlled substance, and (3) the amount of the controlled substance, if applicable. M Crim JI 12.5; MCL 333.7403. Because the elements of simple possession are completely subsumed within the elements of the greater offense of possession with intent to deliver a controlled substance, the trial court did not err by concluding that simple possession is a lesser included offense of possession with intent to deliver a controlled substance. See *Mendoza*, 468 Mich at 540.

The trial court went astray, however, by then concluding that evidence of a valid prescription, which exempts a defendant from prosecution under the simple-possession statute, MCL 333.7403(1), constitutes an equally applicable defense to the greater offense of possession with intent to deliver a controlled substance. In *Pegenau*, 447 Mich 278, our Supreme Court analyzed the elements of simple possession

under MCL 333.7403(1). In his lead opinion, Justice MALLETT wrote that the elements of this offense were limited to whether a person "knowingly or intentionally possess[es] a controlled substance . . . ." *Id*. at 292 (opinion by MALLETT, J.) (quotation marks omitted). Justice MALLETT explained that the "presence of a prescription is analogous to an affirmative defense," *id*. at 289, so the statutory "language concerning a prescription or other authorization refers to an exemption rather than an element of the crime," *id*. at 292.[11] In *Hartuniewicz*, 294 Mich App at 245-246, this Court further explained:

> Before *Pegenau*, this Court repeatedly considered the burden of proof in relation to exceptions to the CSA. And, having done so, this Court consistently ruled that these exceptions are affirmative defenses, not elements of the underlying offense. See *People v Bates*, 91 Mich App 506, 513-516; 283 NW2d 785 (1979) (the defendant has the burden to prove the exemption now located in MCL 333.7531[2] because the lack of authorization to deliver a controlled substance is not an element of a delivery charge); *People v Bailey*, 85 Mich App 594, 596; 272 NW2d 147 (1978) (same); *People v Beatty*, 78 Mich App 510, 513-515; 259 NW2d 892 (1977) (the CSA creates a general prohibition on the delivery of controlled substances and the defendant has the burden to establish a specific exception); *People v Dean*, 74 Mich App 19, 21-28; 253 NW2d 344 (1977), mod in part on other grounds 401 Mich

[11] Justice MALLETT's opinion was joined in full only by Justices LEVIN and BRICKLEY; however, Chief Justice CAVANAGH and Justice BOYLE each authored opinions concurring with this portion of the lead opinion. See *Pegenau*, 447 Mich at 304 (CAVANAGH, C.J., concurring in part and dissenting in part) (dissenting only with regard to the lead opinion's characterization of the "some competent evidence" standard); *id*. at 309 (BOYLE, J., concurring in the result) (agreeing with the lead opinion's rejection of the defendant's constitutional argument). Justice LEVIN concurred with Chief Justice CAVANAGH's opinion, and Justices GRIFFIN and RILEY concurred with Justice BOYLE's opinion.

> 841 (1977) (the Legislature did not unconstitutionally shift the burden of proof onto defendants under the CSA; defendants merely have the burden of establishing statutory exceptions as an affirmative defense). The common theme of these opinions is that exceptions, exemptions, and exclusions from the legal definition of "controlled substance" are not elements of a controlled substance offense. Rather, they are affirmative defenses that a defendant may present to rebut the state's evidence. [Brackets in original.]

The presence of a valid prescription thus constitutes an exemption from prosecution for simple possession, not an element of the offense. See MCL 333.7403(1) ("A person shall not knowingly . . . possess a controlled substance . . . unless the controlled substance . . . was obtained directly from, or pursuant to, a valid prescription . . . ."). MCL 333.7401(1) likewise contains an exception, but it is not based on the holding of a valid prescription. Rather, MCL 333.7401(1) provides that, "[*e*]*xcept as authorized by this article*, a person shall not . . . possess with intent to . . . deliver a controlled substance . . . ." (Emphasis added.) As described earlier in this opinion, a person may possess a controlled substance with intent to deliver the same if the person either (1) holds a valid license to deliver the substance under MCL 333.7303(1) and (2), or (2) falls within one of the limited exceptions provided by MCL 333.7303(4) and (5).

Therefore, although the trial court did not err by concluding that simple possession is a lesser included offense of possession with intent to deliver a controlled substance, it erroneously concluded that having a valid prescription, which exempts a defendant from prosecution for simple possession under MCL 333.7403(1), also exempts a defendant from prosecution for the offense of possession with intent to deliver a controlled sub-

stance under MCL 333.7401(1). Instead, to establish the exception under MCL 333.7401(1), a defendant must show that he or she was authorized to deliver the controlled substance possessed by either having a valid license to deliver the substance or by falling within one of the exceptions to the general licensure requirement. See MCL 333.7303(1), (4), and (5).

IV. BURDEN OF PROOF

Finally, the prosecution argues that the trial court erred by concluding that, to establish an exemption or exception under the CSA, defendant bore only the burden to produce some competent evidence of his authorization to possess or deliver the controlled substances, after which the burden of persuasion shifted to the prosecution to prove lack of authorization beyond a reasonable doubt. The prosecution contends that the burdens of production and persuasion should be placed on defendant under MCL 333.7531. Issues regarding the allocation of the burden of proof under the CSA involve "the interpretation and coordination of various provisions of the CSA," which presents an issue of statutory interpretation that we review de novo. *Hartuniewicz*, 294 Mich App at 241.

MCL 333.7531 sets forth the presumptions and burdens of proof applicable to a defendant claiming an exemption or exception under the CSA and provides the following:

> (1) It is not necessary for this state to negate any exemption or exception in this article in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under this article. *The burden of proof of an exemption or exception is upon the person claiming it.*

> (2) In the absence of proof that a person is the authorized holder of an appropriate license or order form issued under this article, the person is presumed not to be the holder of the license or order form. The burden of proof is upon the person to rebut that presumption. [Emphasis added.]

In *People v Hartwick*, 498 Mich 192, 216; 870 NW2d 37 (2015), our Supreme Court explained that there are two distinct legal concepts involved in the assignment of the burden of proof:

> The first, the burden of production, requires a party to produce some evidence of that party's propositions of fact. The second, the burden of persuasion, requires a party to convince the trier of fact that those propositions of fact are true. The prosecution has the burden of proving every element of a charged crime beyond a reasonable doubt. This rule of law exists in part to ensure that there is a presumption of innocence in favor of the accused . . . and its enforcement lies at the foundation of the administration of our criminal law. To place the burden on a criminal defendant to negate a specific element of a crime would clearly run afoul of this axiomatic, elementary, and undoubted principle of law. [Quotation marks and citations omitted; ellipsis in original.]

In *Pegenau*, 447 Mich 278, our Supreme Court addressed whether MCL 333.7531 could constitutionally place the burden of proving the existence of a valid prescription on a defendant charged with unlawful possession of Valium and Xanax. The defendant challenged the constitutionality of MCL 333.7531 by "claiming its allocation of the burden of proof regarding an exemption constitutes an impermissible presumption." *Id*. at 288 (opinion by MALLETT, J.). Citing *Patterson v New York*, 432 US 197; 97 S Ct 2319; 53 L Ed 2d 281 (1977), Justice MALLETT explained in his lead opinion that "a statute that places the burden of proof on a defendant is not violative of due process if the fact

the defendant is required to prove is not determinative of an essential element of the crime as defined in the statute." *Pegenau*, 447 Mich at 289 (opinion by MALLETT, J.). Justice MALLETT concluded that the presence of a prescription for purposes of MCL 333.7403(1) was not an essential element of simple possession but was instead "analogous to an affirmative defense." *Id*. Therefore, the lead opinion concluded, the assignment of the burden of proof in MCL 333.7531 did not violate the defendant's constitutional due-process rights. *Id*. at 293.[12]

Relying on *People v Wooster*, 143 Mich App 513, 517; 372 NW2d 353 (1985), *People v Bailey*, 85 Mich App 594, 596; 272 NW2d 147 (1978), and *People v Bates*, 91 Mich App 506, 516; 283 NW2d 785 (1979), Justice MALLETT opined that the burden of proof imposed by MCL 333.7531 first required a defendant to produce "some competent evidence," which required "more than his own mere assertion that he had a prescription." *Pegenau*, 447 Mich at 295 (opinion by MALLETT, J.). Justice MALLETT concluded that the defendant had failed to produce evidence sufficient to meet the burden of production under MCL 333.7531. *Id*. at 300. In doing so, however, he explained that "we have left open the question whether in Michigan [MCL 333.7531] can or should be interpreted to shift to defendant the burden of persuasion in addition to the burden of production." *Id*.

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[12] Again, the opinions authored by Chief Justice CAVANAGH and Justice BOYLE agreed with this portion of Justice MALLETT's lead opinion. See *Pegenau*, 447 Mich at 304 (CAVANAGH, C.J., concurring in part and dissenting in part) (dissenting only with regard to the lead opinion's characterization of the "some competent evidence" standard); *id*. at 309 (BOYLE, J., concurring in the result) (agreeing with the lead opinion's rejection of the defendant's constitutional argument).

Justices LEVIN and BRICKLEY concurred with Justice MALLETT's lead opinion. Chief Justice CAVANAGH, in his partial concurrence and partial dissent, wrote that he concurred "in the holding of the lead opinion" but dissented "from its characterization of 'some competent evidence.' " *Id*. at 304 (CAVANAGH, C.J., concurring in part and dissenting in part). In his discussion of the relevant statute, Chief Justice CAVANAGH stated: "[T]he defendant may show an exception to or exemption from the statutory mandate by offering some competent evidence of a prescription during trial. *At that point, the prosecution is required to establish the contrary beyond a reasonable doubt*." *Id*. at 307 (emphasis added). Chief Justice CAVANAGH's opinion, however, was joined only by Justice LEVIN.

Justice BOYLE argued in a partial dissenting opinion that the statutory phrase "burden of proof" as used in MCL 333.7531 by its plain terms shifted both the burden of production and persuasion to the defendant to prove an exemption or exception under the CSA. *Pegenau*, 447 Mich at 309-310 (BOYLE, J., concurring in the result). Justice BOYLE stated:

> I write separately because the lead opinion's interpretation of MCL 333.7531 ignores the plain meaning of the statute. Contrary to its assurances that only the constitutionality of this particular conviction is being addressed, by refusing to recognize that the statute shifts the burdens of production *and* persuasion onto the defendant, the lead opinion would alter the burden of proof established by the statute. [*Id*. (citation omitted).]

Justices GRIFFIN and RILEY concurred with Justice BOYLE.

Responding to Justice BOYLE's opinion, Justice MALLETT argued that the phrase "burden of proof" is capable of two alternate meanings:

> Burden of proof is a term which describes two different concepts; first, the "burden of persuasion," which under traditional view never shifts from one party to the other at any stage of the proceeding, and second, the "burden of going forward with the evidence," which may shift back and forth between the parties as the trial progresses.
>
> Far from being plain, the Legislature's use of the term "burden of proof" is ambiguous. Our Court of Appeals has consistently interpreted the language in this statute as shifting only the burden of going forward with the evidence, also known as the burden of production, to the defendant. *People v Bates* [91 Mich App 506], *People v Bailey* [85 Mich App 594], and *People v Wooster* [143 Mich App 513]. [*Id*. at 300-301 (opinion by MALLETT, J.) (quotation marks and citation omitted).]

Further, citing *People v Dempster*, 396 Mich 700; 242 NW2d 381 (1976), and *People v Henderson*, 391 Mich 612; 218 NW2d 2 (1974), Justice MALLETT wrote that the Michigan Supreme Court "has interpreted similar statutory provisions as shifting the burden of production, rather than the burden of persuasion," to a defendant. *Pegenau*, 447 Mich at 301 (opinion by MALLETT, J.). Justice MALLETT conceded that *Dempster* and *Henderson* were decided before the United States Supreme Court decided *Patterson*, which held that a statute placing the burden of proof on a defendant does not violate due process if the fact the defendant is required to prove is not an essential element of the crime. *Id*. at 302. However, Justice MALLETT "decline[d] to reinterpret the statute in the guise of 'plain meaning' so that it lines up with the United States Supreme Court's pronouncement, especially without the benefit of argument and briefing by the parties." *Id*.

As an initial matter, we note that a majority of the Supreme Court in *Pegenau* did not decide whether MCL 333.7531 shifts the burden of *persuasion* to a defendant claiming an exemption or exception under

the CSA. See *id*. at 300 ("[W]e have left open the question whether in Michigan [MCL 333.7531] can or should be interpreted to shift to defendant the burden of persuasion in addition to the burden of production.").[13] Although Justice MALLETT relied on this Court's opinions in *Bates*, *Bailey*, and *Wooster* to abstain from ruling that MCL 333.7531 shifted both the burden of production and persuasion to a defendant claiming an exemption or exception under the CSA, these opinions are not binding on this Court. MCR 7.215(J)(1).[14] Further, our Supreme Court's opinions in *Dempster* and *Henderson* did not involve the CSA and MCL 333.7531,[15] and as Justice MALLETT

[13] It is worth pointing out that in Justice MALLETT's lead opinion, there is a statement that "[a]fter a defendant has met his burden of going forward with evidence on an issue, the burden shifts to the prosecution to prove this issue beyond a reasonable doubt." *Id*. at 303. This statement was made, however, in the context of describing the burden allocation under 21 USC 885(a)(1) of the federal Controlled Substances Act, 21 USC 801 *et seq*., and should not be considered a legal ruling by the lead opinion regarding the burden allocation under MCL 333.7531.

[14] In *Bailey*, 85 Mich App at 596, 599, this Court held that "[l]ack of authorization is not an element of the crime of delivery of a controlled substance under the present statute" and that "if the defendant adduces any evidence of authorization, the people must also prove beyond a reasonable doubt that he had no such authorization." See also *Wooster*, 143 Mich App at 517 (citing the same language from *Bailey*); *Bates*, 91 Mich App at 516 ("The prosecution establishes a prima facie case by evidence linking defendant with each element of the crime of delivery of heroin. Upon defendant's presentation of some competent evidence that he is authorized by license . . . the people must then prove to the contrary beyond a reasonable doubt.").

[15] In *Dempster*, 396 Mich at 711-714, our Supreme Court interpreted a provision of the former Uniform Securities Act, MCL 451.501 *et seq*., repealed by 2008 PA 551, stating that, "[i]n any proceeding under this act, the burden of proving an exemption or an exception is upon the person claiming it," and concluded that this provision shifted only the burden of production to a defendant. In *Henderson*, 391 Mich at 616, our Supreme Court concluded that, in the context of a prosecution for carrying a concealed weapon, once the prosecution establishes a prima

noted in his lead opinion, these opinions were decided before the United States Supreme Court decided *Patterson*. Accordingly, *Pegenau* and the line of cases cited by Justice MALLETT in his lead opinion do not require us to conclude that only the burden of production falls on a defendant under MCL 333.7531.[16]

Instead, we conclude that the articulation of the burden of proof adopted by a majority of our Supreme Court in *People v Mezy*, 453 Mich 269; 551 NW2d 389 (1996), applies in this case. In *Mezy*, our Supreme Court addressed whether successive state and federal prosecutions for conspiracy to possess with intent to deliver cocaine were prohibited by the double-jeopardy provisions of the United States and Michigan Constitutions,[17] or by MCL 333.7409 of the CSA. MCL 333.7409 states, "If a violation of this article is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state." In her lead opinion, Justice WEAVER, joined by Justice BOYLE and Justice RILEY, concluded that the "state and federal governments may punish the same offenses" and that the defendants' subsequent state

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facie violation, the defendant has the burden of offering some proof that he or she has some license to carry the weapon, after which the prosecution is obliged to establish the contrary beyond a reasonable doubt.

[16] Furthermore, we agree with Justice BOYLE's opinion that the term "burden of proof" by its plain meaning encompasses both the burdens of production and persuasion. *Pegenau*, 447 Mich at 309-310 (BOYLE, J., concurring in the result). When the Legislature places the "burden of proof" on a defendant, this requires no additional gloss or parsing from the judiciary. Had the Legislature intended to shift only the burden of production to a defendant, it could easily have said so. As the Legislature chose not to subdivide the term "burden of proof," it is logical to conclude that the Legislature intended to shift both burdens to a defendant.

[17] US Const, Am V; Const 1963, art 1, § 15.

prosecution therefore did not violate the double-jeopardy provisions of the state and federal Constitutions. *Mezy*, 453 Mich at 281 (opinion by WEAVER, J.). Addressing the possible application of MCL 333.7409, Justice WEAVER then stated the following:

> We would hold that the defendants bear the burden both of production and persuasion to prevail on their argument that the statute applies to bar a second prosecution. As a general rule, this Court has the power to allocate the burden of proof. *People v D'Angelo*, 401 Mich 167, 182; 257 NW2d 655 (1977). Because the statute does not state who shall bear the burden of proof, we are free to assign it as we see fit, as long as we do not transgress the constitutional requirement that we not place on the defendant the burden of persuasion to negate an element of the crime. *Patterson v New York*, 432 US 197; 97 S Ct 2319; 53 L Ed 2d 281 (1977); *People v Pegenau*, 447 Mich 278, 317; 523 NW2d 325 (1994) (BOYLE, J., concurring in the result). This statutory exclusion does not call into question defendant's guilt or innocence. The defendant is alleging that he should be insulated from prosecution regardless of whether he is guilty. MCL 333.7531 provides:
>
> > It is not necessary for this state to negate any exemption or exception in this article in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under this article. The burden of proof of an exemption or exception is upon the person claiming it.
>
> As in *People v Pegenau*, *supra*, defendant is attempting to establish an exemption or exception to a controlled substances offense. In this situation, the presence of a conviction or acquittal under federal law or the law of another state for the same act is analogous to an affirmative defense. *Id*. at 289. Thus, it is appropriate to place the burden of proof by a preponderance of the evidence on the defendant. See *D'Angelo*, *supra* at 182. [*Mezy*, 453 Mich at 282-283 (opinion by WEAVER, J.) (citation omitted).]

Justice WEAVER concluded that a remand was required to determine whether the defendants could satisfy this newly established burden of proof under MCL 333.7531. *Id*. at 286. Although Justice WEAVER's opinion was joined in full only by Justices RILEY and BOYLE, Chief Justice BRICKLEY wrote an opinion concurring in part and dissenting in part in which he expressly agreed with the lead opinion's conclusion regarding the applicable burden of proof under MCL 333.7531. See *Mezy*, 453 Mich at 286 (BRICKLEY, C.J., concurring in part and dissenting in part) ("I agree with the decision of the lead opinion to remand the case so that the trial courts may determine whether there were multiple conspiracies for purposes of the statute under the newly articulated burden of proof. Accordingly, I concur with part[] . . . IV . . . of the lead opinion."). Therefore, a majority of our Supreme Court agreed that MCL 333.7531 places both the burden of production and persuasion on a defendant claiming an exemption or exception under the CSA and that a defendant must establish such an exemption or exception by a preponderance of the evidence.

As discussed earlier in this opinion, authorization either to possess a controlled substance for purposes of MCL 333.7403(1) or to possess with the intent to deliver a controlled substance for purposes of MCL 333.7401(1) constitutes an exemption or exception to prosecution for those offenses, and the absence of authorization is not an essential element of the crimes. Therefore, under *Mezy*, 453 Mich at 282-283 (opinion by WEAVER, J.); *id*. at 286 (BRICKLEY, C.J., concurring in part and dissenting in part), defendant bears both the burden of production and the burden of persuasion to establish these exceptions or exemptions and must do so by a preponderance of the evidence. The trial court therefore erred by concluding that, under *Pegenau*, 447

Mich 278, defendant bore only the burden to produce some competent evidence of his authority to possess or deliver the controlled substances at issue, after which the burden of persuasion shifted to the prosecution to prove that defendant lacked such authority beyond a reasonable doubt.

For the same reason, we also conclude that the footnote accompanying bracketed Paragraph (6) of M Crim JI 12.3 does not accurately state the law. Citing *Pegenau*, 447 Mich 278, the footnote states that Paragraph (6), which refers to a defendant's authorization to deliver a controlled substance, "should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to deliver the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt." M Crim JI 12.3 n 3. Under *Mezy*, 453 Mich at 282-283 (opinion by WEAVER, J.); *id*. at 286 (BRICKLEY, C.J., concurring in part and dissenting in part), a defendant claiming an exception or exemption under the CSA bears both the burden of production and the burden of persuasion and must demonstrate by a preponderance of the evidence that he or she is legally authorized to deliver a controlled substance.

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

TALBOT, C.J., and GLEICHER, J., concurred with GADOLA, P.J.

MITCHELL v KALAMAZOO ANESTHESIOLOGY, PC

Docket No. 331959. Submitted August 9, 2017, at Grand Rapids. Decided August 24, 2017, at 9:05 a.m.

Rolla Mitchell filed a medical malpractice action in the Kalamazoo Circuit Court against Kalamazoo Anesthesiology, PC, and Dr. Bernard Smith III (collectively, defendants) after he suffered a permanent injury following Smith's performance of a postoperative procedure on him. Mitchell had undergone shoulder surgery, and to control Mitchell's pain after the surgery, Smith performed an interscalene nerve block on Mitchell, which involved inserting a needle and placing a catheter in Mitchell's shoulder. Proper placement of the needle and catheter was critical because the phrenic nerve could be damaged by improper placement. Defendants belatedly produced a scan of an ultrasound image they claimed was taken when Smith was placing the needle and the catheter in Mitchell's shoulder. The scanned ultrasound image showed that the needle and the catheter were properly placed. Defendants moved to prevent Mitchell from presenting evidence to the jury regarding the delay in disclosure of the scan and to preclude Mitchell from arguing that the scan might not be a true image of the ultrasound. In response, Mitchell asserted that the scan should be excluded because labeling appearing in the scan raised questions about its authenticity, but that if it were admitted, he should be able to challenge its legitimacy. The court, Paul Bridenstine, J., ruled that the scan was adequately authenticated by witness testimony about the scan's creation, the identity of the patient in the scan (Mitchell), and the recordkeeping procedures of the hospital in which Mitchell's surgery was performed. Because it concluded that defendants had established that the scan was what defendants purported it to be, the court admitted it at trial. The court further ruled that Mitchell could not argue before the jury that the scan was not genuine or that the jury could not rely on what the scan depicted. The jury ultimately found in favor of defendants, and the court entered a judgment of no cause of action. Mitchell appealed.

The Court of Appeals *held*:

1. As gatekeeper, a trial judge must determine whether evidence proffered by a party is admissible, and to be admissible, evidence must be authenticated. Under MRE 901(a), the authentication of evidence requires first that the proponent of the evidence satisfy its burden of bringing forth evidence sufficient to support a finding that the matter in question is what the proponent claims it is. Evidence supporting authentication may be direct or circumstantial and need not be free of all doubt, and the proponent of the evidence need only make a prima facie showing of the authenticity of the evidence. The opponent of the evidence may oppose authentication by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be, but the party opposed to the evidence may not, at this point, present evidence denying the genuineness or reliability of the evidence being authenticated. In this case, the trial judge did not err in applying MRE 901 to the facts and did not abuse his discretion when he determined that a reasonable jury might conclude that the ultrasound image was an actual depiction of Mitchell's procedure and accordingly admitted the scanned image at trial. The scan of the ultrasound image showed a sticker that attached the ultrasound to the underlying progress note, and the sticker included Mitchell's identifying information, the date of the procedure, and the name of the doctor who performed the surgery. Under MRE 901(b)(4), these facts constituted distinctive characteristics that tended to permit an inference that the digital scan depicted the ultrasound generated on the date at issue. In addition, a knowledgeable witness's testimony—included in MRE 901(b)(1) as a means of authenticating evidence—established that the digital scan was made from the original record and was part of Mitchell's medical record. Even though Mitchell raised several sound arguments in opposition to the authenticity of the image, a proponent's prima facie showing need not be free from all doubt to be authenticated for purposes of admission.

2. Questions concerning the genuineness and reliability of authenticated evidence admitted at trial affect the weight to be given the evidence and are questions for the jury; a trial judge's role in examining the genuineness and reliability of evidence admitted at trial concludes when the evidence is admitted. When a bona fide dispute is presented on the genuineness and reliability of evidence, the jury, as finder of fact, is entitled to hear otherwise-admissible evidence regarding the dispute. Therefore, an opponent of evidence that was authenticated and admitted against him or her at trial is entitled to argue that the admitted evidence is not genuine or reliable. In this case, the trial judge

erred by precluding Mitchell from arguing to the jury that the image was not an accurate digital scan of the original ultrasound image, i.e., that the image was not genuine or reliable, and therefore had little to no probative value. By foreclosing Mitchell from presenting any evidence disputing defendants' contention that the image actually depicted Mitchell's procedure, the trial judge, in effect, determined that the image was indeed genuine and reliable, even though such questions of evidentiary weight are reserved to the jury.

3. An evidentiary error is ordinarily not grounds for appellate relief; under MCR 2.613(A), relief is appropriate only when refusing relief would be inconsistent with substantial justice. In this case, however, the error involved a crucial piece of evidence, arguably *the* crucial piece of evidence. The ultrasound image was the only objective evidence tending to establish whether Smith properly placed the needle and catheter in Mitchell's shoulder, satisfying the standard of care for conducting the procedure. Without any evidence presented to dispute the genuineness and reliability of the ultrasound image, Mitchell's own expert had to concede that the image depicted the proper needle placement and was left to speculate about how Smith might have otherwise acted negligently. Because the ultrasound image was a key piece of evidence, evidence regarding its genuineness and reliability would have been relevant to the weight the jury placed on the image. The trial judge abused his discretion by preventing the jury from hearing Mitchell's attack on the genuineness and reliability of the image, and substantial justice required that the trial court's ruling in that regard be reversed and that the judgment be vacated.

Trial court's ruling precluding Mitchell from presenting evidence and argument to the jury regarding whether the scan was what it was purported to be reversed, judgment vacated, and case remanded for further proceedings.

EVIDENCE — ADMISSIBILITY — AUTHENTICATION — DUTIES OF TRIAL JUDGE AND JURY.

Determining the authenticity of evidence for purposes of admission is a matter reserved solely to the trial judge; evidence is authenticated under MRE 901 for purposes of admission when the proponent of the evidence makes a prima facie showing that a reasonable juror could find that the proffered evidence is what the proponent says it is; questions regarding the genuineness and reliability of the admitted evidence affect the weight given to the evidence, which is a matter reserved solely to the finder of fact.

Sommers Schwartz, PC (by *Charles R. Ash III* and *Ramona C. Howard*) for plaintiff.

Hall Matson, PLC (by *Thomas R. Hall* and *Evelyn Waldman*) for defendants.

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

SWARTZLE, J. In this medical-malpractice suit, plaintiff Rolla Mitchell sued defendant Bernard Mason Smith III, M.D., and the doctor's former employer, defendant Kalamazoo Anesthesiology, PC. Plaintiff claimed that Dr. Smith negligently performed certain post-operative services that permanently injured the phrenic nerve in plaintiff's shoulder. The jury returned a verdict in favor of defendants, and plaintiff appealed.

One key issue at trial was whether an ultrasound image sought to be introduced by the defense was, in fact, an accurate scan of the ultrasound image taken of plaintiff's shoulder on the day of surgery. The image purported to show that Dr. Smith properly placed the needle and catheter while performing the post-operative services on plaintiff. Outside the presence of the jury, the trial judge held that defendants had properly authenticated the image and, as a result, plaintiff's counsel was precluded from presenting evidence or argument to the jury that the proffered image was not, in fact, an accurate image of plaintiff's shoulder.

As explained below, we conclude that the trial court properly served its gatekeeping role by admitting the ultrasound image as authentic under Michigan Rule of Evidence 901. Yet, authentication under MRE 901 is a threshold matter that goes to the admissibility of evidence, not to the ultimate weight to be given that

evidence. By precluding plaintiff's counsel from attacking the genuineness and reliability of the ultrasound image before the jury, the trial judge overstepped his gatekeeping role and, instead, intruded on the jury's role as fact-finder. Given the importance of the ultrasound image to this dispute, we reverse and vacate the judgment and remand for further proceedings.

I. BACKGROUND

A. PLAINTIFF'S SHOULDER SURGERY AND POST-OPERATIVE COMPLICATIONS

In May 2011, plaintiff had surgery on his right shoulder at Borgess Medical Center in Kalamazoo, Michigan. Defendant Kalamazoo Anesthesiology provided anesthesiology services for Borgess under contract. Both Dr. Phyllis Lashley and Dr. Smith worked for Kalamazoo Anesthesiology. Dr. Lashley provided anesthesiology services to plaintiff during his surgery, and defendant Dr. Smith provided post-operative services, including performing an "interscalene nerve block and continuous catheter placement" on plaintiff's shoulder. In October 2013, plaintiff sued defendants for malpractice, alleging, among other things, that Kalamazoo Anesthesiology failed to obtain plaintiff's informed consent and that Dr. Smith negligently conducted the procedure. The case proceeded to trial over several days in February 2016.

At trial, Dr. Lashley testified that she did not "specifically remember" interacting with plaintiff before or during his surgery, but records showed that she signed his anesthesia pre-evaluation form, and a notation on the form indicated that she discussed the use of an interscalene block with him to manage his pain after the surgery. At trial, Dr. Brian Kiessling explained that an interscalene block was a procedure

where the physician uses a needle to administer a local anesthetic around the brachial plexus, which provides anesthesia to the patient for varying periods of time.

Dr. Smith testified that he performed the interscalene block and catheter placement on plaintiff after the shoulder surgery. Dr. Smith then attached a pain pump to the catheter to help plaintiff manage his pain. Dr. Smith stated that part of his training included being careful not to puncture the phrenic nerve during the interscalene block. He noted that plaintiff was talking throughout the procedure and that there was no indication that plaintiff had suffered a phrenic nerve injury at that time.

Later that day, plaintiff had problems breathing, a common symptom of phrenic nerve injury. He returned to the hospital and sought follow-up medical advice and treatment. Physicians who subsequently treated plaintiff testified that his phrenic nerve was dysfunctional, that this was the cause of his shortness of breath, and that his condition was not likely to improve.

B. THE ULTRASOUND IMAGE

One crucial factual dispute at trial was whether Dr. Smith properly performed the interscalene block on plaintiff after the shoulder surgery. Plaintiff argued that Dr. Smith breached the standard of care by placing the needle or catheter in such a way as to directly damage his phrenic nerve. Dr. Smith, by contrast, argued that he properly placed the needle and catheter in the interscalene groove near the brachial plexus and that plaintiff was just one of the unfortunate patients—1 in 1,000 or 2,000, in Dr. Smith's estimation—who develop permanent phrenic nerve injury, even with a properly performed interscalene block.

The medical records indicated that Dr. Smith used an ultrasound to guide his placement of the needle and catheter during the procedure, and Dr. Smith noted on plaintiff's chart that he printed an image from the scan at the time he performed the procedure. During his deposition, Dr. Smith testified that he did not know what happened to the image after he put it with plaintiff's chart on the day of the procedure. Plaintiff repeatedly asked for the ultrasound image during discovery, but it was not until just before case evaluation that defendants produced what they purported to be a scanned version of the original progress note with an ultrasound image attached to it.

Plaintiff's counsel questioned the authenticity of the ultrasound depicted in the image. Among other things, the image showed that the sticker with plaintiff's identifying information on it had been placed over another sticker that attached the ultrasound image to the progress note, and that the sticker was different from others used on the day of plaintiff's procedure. Counsel also noted that the time listed on the ultrasound by a time-stamp (4:16:27) varied from the time of the procedure listed on plaintiff's chart (15:32), suggesting that the ultrasound image was taken 45 minutes *after* the notes indicated that plaintiff had his procedure.

Defendants moved in limine to prevent plaintiff from presenting evidence to the jury about the delay in the disclosure of the digital image and to preclude plaintiff from arguing to the jury that defendants' version might not be a true image of the ultrasound taken during the procedure. On the first day of trial, the trial court held an evidentiary hearing outside the presence of the jury to consider the motion, as well as the predicate question of whether the evidence should be authenticated.

At the hearing, Michelle Ritsema testified that she was the Document Imaging Supervisor for Borgess Medical Center. She stated that the center had discovered a digital scan of what it claimed was the original progress note with the ultrasound printout attached to it. The center produced the digital version because the original had apparently been destroyed along with the rest of the physical record per the center's normal record-retention policy. She testified that the digital version had been found in the center's medical records, and human error caused the delay in its disclosure. Regarding the various stickers appearing on the image, Ritsema agreed that the sticker on the progress note was the only thing that connected the image to plaintiff, and she admitted that she did not know who placed the sticker or when it was placed. Ritsema testified that it was normal for a document to have multiple stickers. She also testified, however, that the center does not place stickers on the records, so the sticker in question must have been placed by an employee in the outpatient short-stay department. According to Ritsema, only the first document in a chart would normally have a barcode on it and, therefore, the progress note and attached ultrasound would normally not have a barcode label originating from the center. Ritsema explained, however, that the outpatient short-stay floors print their own labels with barcodes to place on the medical records. Overall, Ritsema did not see anything unusual with the sticker having a barcode.

Concerning the time-stamp indicating a different time than when plaintiff's procedure took place, Ritsema testified that she did not have any doubt that the time-stamp reflected the actual time the image was printed. Ritsema noted that the difference between the time-stamp and the time of plaintiff's procedure could

have resulted from some kind of incongruence between the system's time and daylight savings time. (It should be noted, however, that the difference is not a whole-number of the hour, but rather approximately 45 minutes, suggesting that confusion created by daylight savings time was not the complete answer.)

After taking Ritsema's testimony, defendants argued that allowing plaintiff to present evidence that the ultrasound image was not produced when first requested would cause "confusion, prejudice and false impressions being made to the jury." Moreover, defendants argued that plaintiff should be prohibited from arguing that the image did not depict or pertain to plaintiff. Because there was no evidence that something "nefarious" or "dishonest" occurred with the ultrasound image, defendants argued that any argument to that effect would be a matter of "innuendo and supposition" and would unfairly prejudice the defense. Plaintiff responded that the image was "tainted" by the offending sticker and apparent time disparity, and the image should be excluded from evidence or, if the image was admitted, he should be allowed to attack the image's genuineness and reliability at trial.

The trial court determined that, although there appeared to be some "irregularities with respect to this photograph," there was no evidence that defendants improperly destroyed the original or had any role in the failure to disclose it. The trial court found the evidence sufficiently authenticated to be admissible. Moving to whether the probative value of the image was substantially outweighed by any undue prejudice under MRE 403, the trial judge stated that any irregularities in its production and the chain-of-custody did not outweigh its probative value. (The trial judge did not, however, explicitly consider the probative value of

plaintiff's evidence calling into question the genuineness and reliability of the image.) The trial court concluded that it would invite a "trial within a trial" involving a nonparty (the center) to allow plaintiff to argue that defendants did something wrong in the handling of the image or that the image was not accurate. Thus, the trial judge precluded plaintiff from offering any evidence tending to show that the image was not an accurate one: "Nor am I going to allow testimony that this particular photograph does not belong or otherwise depict the plaintiff's procedure."

During trial, the ultrasound image was a key piece of defendants' case. A defense expert testified that the image represented a "textbook" example for the proper placement of the needle during an interscalene block. And plaintiff's own expert had to concede that the image depicted a proper needle placement. Plaintiff's expert was left to speculate whether Dr. Smith might have improperly placed the needle and catheter before or after the ultrasound image was printed.

After receiving this and other evidence permitted at trial, the jury found that defendants were not negligent. The trial court entered a judgment of no cause of action in favor of defendants, and plaintiff appealed.

II. ANALYSIS

A. EVIDENTIARY RULINGS REVIEWED FOR AN ABUSE OF DISCRETION

On appeal, plaintiff argues that the trial judge erred in several respects with his evidentiary rulings and that those errors prejudiced the trial. We review a trial judge's evidentiary decisions for an abuse of discretion. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). A trial judge abuses his or her discretion when the

judge selects an outcome that is outside the range of principled outcomes. *Id*. We review de novo whether the trial judge properly interpreted and applied the rules of evidence to the facts. *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007).

B. AUTHENTICATION v EVIDENTIARY WEIGHT OF THE ULTRASOUND IMAGE

1. THE TRIAL JUDGE DID NOT ERR BY AUTHENTICATING THE ULTRASOUND IMAGE

Plaintiff first argues that the trial judge erred by allowing defendants to introduce the digital image. Plaintiff claims that defendants failed to present sufficient evidence to authenticate the image. He also argues that, to the extent that the trial judge did not abuse his discretion by allowing the image into evidence, the trial judge abused his discretion by preventing plaintiff from presenting evidence and arguing to the jury that the image was not what it purported to be.

In Michigan, challenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been *authenticated*—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is *actually authentic* or *genuine*—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability.

The first question is reserved solely for the trial judge. In the role as evidentiary gatekeeper, the trial judge must make the initial determination of whether the evidence is admissible—a question that depends, among other things, on whether the evidence can be

authenticated. See *People v Mitchell*, 37 Mich App 351, 355; 194 NW2d 514 (1971). Under MRE 901(a), to authenticate a piece of evidence, the proponent of that evidence bears the burden of bringing forth "evidence sufficient to support a finding that the matter in question is what its proponent claims." Our evidentiary rules do not require the proponent to sustain this burden in any particular fashion. See MRE 901(b). Indeed, evidence supporting authentication may be direct or circumstantial and need not be free of all doubt. See *Champion v Champion*, 368 Mich 84, 87-88; 117 NW2d 107 (1962); *Livernash v DeLorme*, 208 Mich 295, 301; 175 NW 177 (1919); *People v Burrell*, 21 Mich App 451, 456-457; 175 NW2d 513 (1970).

Michigan courts have interpreted MRE 901(a) as requiring the proponent only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be. See *Mitchell*, 37 Mich App at 355-356. See also Gillespie, Michigan Criminal Law & Procedure, Practice Desk Book (2d ed), § 9.2, p 472 ("[T]he question of admissibility turns on an *initial* decision by the court that a reasonable juror *might* find for the proponent on the question."). Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury. See *Mitchell*, 37 Mich App at 356. At this first stage, the opponent may oppose authentication by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be. Nonetheless, this argument must be made on the basis of the proponent's proffer; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage. See *id*.

Just as the first question—whether the evidence is admissible—is reserved solely to the trial judge, the second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder, here the jury. When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court. See *id*. Accordingly, the parties may submit evidence and argument, pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable. See *id*.

Federal courts have similarly interpreted FRE 901(a), the counterpart to MRE 901(a) in the Federal Rules of Evidence. See, e.g., *United States v Jones*, 107 F3d 1147, 1150 n 1 (CA 6, 1997); *United States v McGlory*, 968 F2d 309, 328-339 (CA 3, 1992); *United States v Sliker*, 751 F2d 477, 488 (CA 2, 1984). These and other federal authorities generally hold that a "bona fide dispute as to authenticity or identity is not to be decided by the judge, but rather is to go to the jury." 31A Wright & Miller, Federal Practice and Procedure, Evidence Rules (2009), Rule 901, p 363. "In other words, conflicting evidence on genuineness goes to weight, not admissibility, so long as some reasonable person could believe that the item is what it is claimed to be." *Id*.

With this evidentiary distinction in mind, we conclude that the trial judge did not abuse his discretion in determining that a reasonable jury might conclude that the ultrasound image was an actual depiction of plaintiff's procedure. The image showed a sticker that attached the ultrasound to the underlying progress note, and the sticker included plaintiff's identifying information, the date of the procedure at issue, and the name of the doctor who performed the surgery. Thus, the digital image had distinctive characteristics that

tended to permit an inference that it depicted the ultrasound generated on the date at issue. See MRE 901(b)(4). Further, Ritsema testified that the digital scan was made from the original record and was part of plaintiff's medical record. See MRE 901(b)(1); MRE 1003. Although plaintiff raised several sound arguments against the image's authenticity, the evidence need not be free from all doubt to be authenticated for purposes of admission, as explained above.

2. THE TRIAL JUDGE DID ERR BY PREVENTING PLAINTIFF FROM ATTACKING THE GENUINENESS AND RELIABILITY OF THE ULTRASOUND IMAGE

As to the second aspect, however, the trial judge erred by precluding plaintiff from arguing to the jury that the purported image was not, in fact, an accurate digital scan of the original, i.e., that the image was not genuine or reliable and therefore had little-to-no probative value. The trial judge's role in examining the genuineness and reliability of the image concluded when he held that the image was admissible. Where a bona fide dispute is presented on the genuineness and reliability of evidence, the jury, as finder of fact, is entitled to hear otherwise admissible evidence regarding that dispute. Furthermore, any potential confusion to the jury related to the chain-of-custody involving a non-defendant could have been cured with an appropriate instruction by the trial judge. By foreclosing plaintiff from presenting any evidence disputing whether the image actually depicted plaintiff's procedure, the trial judge in effect determined that the image was indeed genuine and reliable, even though such questions of evidentiary weight are reserved for the jury. In so ruling, the trial judge erred.

With this said, an evidentiary error is not ordinarily grounds for appellate relief, and such relief is appropri-

ate only when the error results in substantial prejudice that denies a fair trial to the aggrieved party. MCR 2.613(A); see also MRE 103; *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Here, the error involved a (arguably *the*) crucial piece of evidence. The ultrasound image was the only objective evidence tending to establish whether Dr. Smith properly placed the needle and catheter in plaintiff's shoulder. As noted above, a significant portion of the expert testimony centered on whether the image showed that Dr. Smith performed the procedure within the appropriate standard of care. Importantly, plaintiff's own expert had to concede that the image depicted a proper needle placement, and his expert was left to speculate on how Dr. Smith could have otherwise acted negligently. Thus, the ultrasound image was a key piece of evidence, and evidence as to its genuineness and reliability would have been quite relevant as to the weight (if any) the jury should have placed on the image. By restricting plaintiff from attacking its genuineness and reliability before the jury, the trial judge abused his discretion and substantial justice requires that we reverse and vacate the judgment.

Plaintiff raises on appeal several other claims of error. Because we hold that the trial judge abused his discretion with respect to the ultrasound image, we need not address the remaining claims.

III. CONCLUSION

For the reasons explained above, we reverse and vacate the judgment in this case. We remand for further proceedings consistent with this opinion, and we do not retain jurisdiction.

BOONSTRA, P.J., and RONAYNE KRAUSE, J., concurred with SWARTZLE, J.

W A FOOTE MEMORIAL HOSPITAL v MICHIGAN ASSIGNED CLAIMS PLAN

Docket No. 333360. Submitted August 9, 2017, at Grand Rapids. Decided August 31, 2017, at 9:00 a.m. Leave to appeal sought.

Plaintiff, W A Foote Memorial Hospital, brought an action in the Kent Circuit Court against the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility (defendants) as well as an unnamed insurance company, requesting that the court enter a judgment declaring that defendants had a duty to promptly assign plaintiff's claim, which sought no-fault personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., to an insurer and that, upon assignment, the insurer would be responsible for processing and paying the claim. The insurance claim stemmed from medical services that plaintiff provided to a person who had been injured in an automobile accident and from whom no insurance information could be identified. By the time the insurer of the vehicle was identified, the insurer denied the claim as being beyond the one-year deadline contained in MCL 500.3145. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's claim was ineligible for assignment because applicable insurance had been identified and because plaintiff could have recovered PIP benefits from that insurer had it acted in a timely fashion. Plaintiff responded and also moved for summary disposition, arguing that defendants were required to promptly assign plaintiff's claim at the time of the claim application unless the claim was obviously ineligible and that defendants had failed to do so. Plaintiff argued that the subsequent discovery of insurance information did not alter this obligation. After a hearing on the parties' motions, the court, Donald A. Johnston, J., granted defendants' motion for summary disposition, reasoning that plaintiff had failed to demonstrate that it could not have identified applicable insurance at the time it submitted its application for PIP benefits to defendants. Plaintiff appealed, and during the pendency of this appeal, the Supreme Court issued its opinion in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), which reversed prior decisions of the Court of Appeals that had recognized that healthcare providers could maintain

direct causes of action against insurers to recover PIP benefits, instead holding that no statutory cause of action exists. Defendants subsequently filed motions for immediate consideration and for leave to file a nonconforming supplemental authority brief addressing *Covenant* and its effect on this case. The Court of Appeals granted the motions and accepted the supplemental briefs submitted by both plaintiff and defendants.

The Court of Appeals *held*:

1. MCL 500.3112 states, in pertinent part, that PIP benefits are payable to or for the benefit of an injured person or, in case of that person's death, to or for the benefit of his or her dependents. In *Covenant*, the Supreme Court examined the language of MCL 300.3112 and held that neither MCL 300.3112 nor any other provision in the no-fault act created an independent cause of action for healthcare providers to pursue PIP benefits from an insurer. Nothing in the language of MCL 500.3172(1) suggests a different outcome when a healthcare provider seeks benefits from an insurer assigned by defendants as opposed to a known insurer. Accordingly, because the Supreme Court has determined that a healthcare provider cannot maintain a direct action for PIP benefits under the no-fault act and because nothing in MCL 500.3172(1) creates an exception to that rule, *Covenant* barred plaintiff's claim provided that its holding was applicable in this case.

2. The issue whether plaintiff possessed a statutory cause of action against defendants had not been waived and had been adequately preserved because the defense of failure to state a claim on which relief can be granted is not waived even if it was not asserted in a responsive pleading or motion; defendants asserted the defenses that plaintiff lacked standing to sue and that defendants did not owe benefits to plaintiff because plaintiff was not the one who had "incurred" them, which was essentially an assertion that plaintiff did not have a statutory right to sue defendants directly; defense counsel's statements at the summary disposition motion hearing made clear that counsel was aware that then-applicable Court of Appeals precedent likely would have rendered any such argument futile at the time; and this issue concerned a legal issue and all the facts necessary for its resolution were present.

3. The general rule is that judicial decisions are to be given complete retroactive effect. Complete prospective application has generally been limited to decisions that overrule clear and uncontradicted caselaw. If a rule of law announced in an opinion is held to operate retroactively, it applies to all cases still open on direct

review. On the other hand, a rule of law that applies only prospectively does not apply to cases still open on direct review and does not even apply to the parties in the case in which the rule is declared. In *Harper v Virginia Dep't of Taxation*, 509 US 86 (1993), the United States Supreme Court established that judicial decisions regarding federal law must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule. However, state courts remained free to adopt their own approach, and Michigan courts did so, adopting and applying the "threshold question" (the initial determination of whether prospective application is warranted, i.e., whether the decision clearly established a new principle of law) and "three-part test" (the test following satisfaction of the threshold question that weighs three factors in determining when a decision should not have retroactive application: the purpose to be served by the new rule, the extent of reliance on the old rule, and the effect of retroactivity on the administration of justice) set forth in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), in numerous cases over the years. The determination of whether to extend *Harper* to Michigan's state court jurisprudence so as to require that all decisions of the Michigan Supreme Court be given full retroactive effect was deemed a determination best decided by the Supreme Court in the first instance.

4. Because the Supreme Court has not expressly adopted the *Harper* rationale, the Supreme Court's remand in *Covenant* for entry of summary disposition was not necessarily dispositive on the issue whether its decision applied retroactively. However, the Supreme Court has subsequently remanded at least two cases to the Court of Appeals for reconsideration in light of *Covenant*. Thus, the Supreme Court's actions—both applying the rule of law it announced in *Covenant* to the parties before it and directing the Court of Appeals to consider *Covenant*'s application to cases pending on direct appeal—suggested that the Supreme Court did not intend the rule of law announced in *Covenant* to be applied prospectively only.

5. The evolution of caselaw in the Michigan Supreme Court regarding retroactivity has culminated to date in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012), in which the Court held that the general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. Accordingly, notwithstanding the understandable reliance of

plaintiff and others on prior decisions of the Court of Appeals, those decisions did not represent "the law"; rather, "the law" is the pronouncement of the Legislature in the statutory text of MCL 500.3112. Absent legislative revision, the law is immutable and unmalleable; it does not ebb and flow with the waves of judicial preferences. Therefore, the Supreme Court's pronouncement in *Spectrum Health* had to be applied, and it was readily apparent that the underpinnings of *Spectrum Health* and *Harper* were one and the same: the Supreme Court in *Spectrum Health* essentially adopted the rationale of the United States Supreme Court in *Harper* relative to the retroactive applicability of its judicial decisions of statutory interpretation to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule. Accordingly, the Court of Appeals decisions that were overruled by the Supreme Court in *Covenant* were not "the law" and did not afford plaintiff a statutory right to recover PIP benefits directly from an insurer. Because plaintiff had no such right under the pre-*Covenant* caselaw and because, as the Supreme Court in *Covenant* determined, plaintiff had no such right under the no-fault act, summary disposition was properly entered in favor of defendants in this case, albeit for reasons other than the pre-*Covenant* rationale given by the trial court.

6. The Supreme Court's holding in *Spectrum Health* effectively repudiated the application of the "threshold question" and "three-factor test," at least in the context of judicial decisions of statutory interpretation. However, even if they were to be applied, the result would be unchanged. The analysis would not make it past the threshold question because the law did not change; *Covenant* did not clearly establish a new principle of law because MCL 300.3112 at no time provided plaintiff with a right of action against defendants, and the intervening Court of Appeals caselaw was never the law. Moreover, even if the three-factor test were to be considered, the factors, taken together, would not necessarily weigh in favor of the prospective-only application of *Covenant*. Ultimately, even under pre-*Spectrum Health* caselaw, prospective application of a judicial decision is appropriate only as an extreme measure and in exigent circumstances, and considering that healthcare providers have always been able to seek reimbursement from their patients directly or to seek assignment of an injured party's rights to past or presently due benefits, no level of exigency justified contravening the general rule of full retroactivity.

7. The Supreme Court in *Covenant* expressly noted that its decision in that case was not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider. Accordingly, the case at bar was remanded to the trial court with direction that it allow plaintiff to move to amend its complaint so that plaintiff could advance alternative theories of recovery, including the pursuit of benefits under an assignment theory, and so that the trial court could address the attendant issues in the first instance.

Affirmed; case remanded for further proceedings.

RONAYNE KRAUSE, J., concurring, agreed with the majority's conclusion that *Covenant* applies retroactively and that plaintiff had to be afforded an opportunity to amend its pleadings, but was unpersuaded that any sufficient reason was present in this matter for departing from the general rule that decisions from the Supreme Court should be given retroactive effect by default.

1. INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — INJURED PERSON'S BENEFITS — ASSIGNED INSURERS — HEALTHCARE PROVIDER'S ENTITLEMENT TO CLAIM.

MCL 500.3112 states, in pertinent part, that personal protection insurance (PIP) benefits are payable to or for the benefit of an injured person or, in case of that person's death, to or for the benefit of his or her dependents; neither MCL 300.3112 nor any other provision in the no-fault act, MCL 500.3101 *et seq*., creates an independent cause of action for healthcare providers to pursue PIP benefits from an insurer; similarly, nothing in the language of MCL 500.3172(1) suggests a different outcome when a healthcare provider seeks benefits from an assigned insurer through the assigned claims plan as opposed to a known insurer.

2. JUDGMENTS — RETROACTIVE APPLICABILITY OF JUDICIAL DECISIONS OF STATUTORY INTERPRETATION.

The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law; "the law" is the pronouncement of the Legislature in the statutory text, and absent legislative revision, the law is immutable and unmalleable; it does not ebb and flow with the waves of judicial preferences; the Supreme Court in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012), essentially adopted the rationale of the United States Supreme Court in *Harper v Virginia Dep't of Taxation*, 509 US 86 (1993), relative to the retroactive applicability of its judicial decisions of statutory interpretation to all cases

> still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule.

Miller Johnson (by *Joseph J. Gavin*) for W A Foote Memorial Hospital.

Hewson & Van Hellemont, PC (by *Robert D. Steffes* and *Nicholas S. Ayoub*) for the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility.

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

BOONSTRA, P.J. Plaintiff appeals by right the trial court's order denying its motion for summary disposition and granting the cross-motion for summary disposition filed by defendants the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility (collectively, defendants). We affirm and remand for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of an automobile accident that occurred on September 4, 2014. Zoie Bonner was a passenger in a 2003 Ford Taurus driven by her boyfriend, Philip Kerr, when it rear-ended another vehicle. The Taurus was owned by Bonner's aunt or uncle and was insured under an automobile insurance policy issued by Citizens Insurance Company of the Midwest (Citizens). The police report generated by the Jackson Police Department concerning the accident identified the applicable insurance for the Taurus as "Citizens Insurance." It also contained Kerr's name, a description of the vehicle, the vehicle registration number, and

the vehicle identification number. It did not, however, identify Bonner as a passenger in the Taurus or as an injured party. Bonner did not seek immediate medical attention, but she was treated for rib pain by plaintiff's emergency department the following day. Bonner's emergency department chart indicates that she told medical providers that she was involved in a motor vehicle accident the previous day in which she was a passenger in a vehicle that had rear-ended another vehicle. It does not appear that any employees of plaintiff asked Bonner about applicable automobile insurance. Plaintiff provided Bonner with medical services valued at $9,113.

During the year following the accident, plaintiff repeatedly attempted to contact Bonner to obtain information concerning applicable insurance coverage. Plaintiff sent letters, telephoned Bonner, and hired a private investigator eight months after the accident. The private investigator eventually made contact[1] with Bonner in June 2015. Bonner stated that neither she nor her boyfriend had automobile insurance but that her aunt owned the vehicle that Kerr had been driving. Neither plaintiff nor its investigator obtained any contact information for Bonner's aunt or boyfriend, apparently failing even to obtain Bonner's aunt's or Kerr's name. They also did not obtain the police report from the accident.

On September 3, 2015 (one day before the one-year anniversary of the accident), plaintiff filed a claim with defendants, seeking no-fault personal protection insurance benefits (also called personal injury protection benefits or PIP benefits) on Bonner's behalf under

[1] The investigator's report states that an unnamed employee of plaintiff called the investigator with "Zoie on the other line" and relayed information to the investigator from Bonner.

Michigan's no-fault insurance act, MCL 500.3101 *et seq*. Under the no-fault act, an injured person may seek PIP benefits from defendants within one year of the injury when no personal protection insurance applicable to the injury can be identified. MCL 500.3172(1); MCL 500.3145.[2] The following day, and before any response from defendants, plaintiff filed suit requesting that the trial court enter a judgment declaring that defendants had a duty to promptly assign its claim to an insurer and that, upon assignment, the insurer would be responsible to process and pay the claim.

On September 17, 2015, defendants responded to plaintiff's claim with a letter indicating that it was unable to process the claim without additional information. The letter requested that additional information be forwarded to defendants and stated that the claim would be reviewed once complete information was received. In October 2015, defendants answered plaintiff's complaint, asserting, among other defenses, that plaintiff had failed to state a claim for which relief could be granted, that plaintiff had not submitted a completed claim for PIP benefits, that defendants did not owe benefits because they were not "incurred" by Bonner, and that plaintiff was precluded from obtaining relief because plaintiff had "failed to obtain primary coverage within the obligation of the primary carrier(s)" to the detriment of defendants.

Bonner was deposed in December 2015. She testified that her aunt owned the vehicle and maintained insurance on it,[3] although she did not know the name of the

[2] The applicable limitations period may be extended if written notice of injury has been provided to the insurer within 1 year after the accident. MCL 500.3145(1).

[3] Apparently, it was actually Bonner's uncle who owned and purchased insurance on the vehicle.

insurer. Citizens was subsequently identified as the insurer of the vehicle. Plaintiff attempted to submit a claim for PIP benefits to Citizens, but Citizens denied the claim as being beyond the one-year deadline contained in MCL 500.3145.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's claim was ineligible for assignment because applicable insurance had been identified and because plaintiff could have recovered PIP benefits from Citizens if it had acted in a timely fashion. Plaintiff responded and also moved for summary disposition, arguing that defendants were required to promptly assign plaintiff's claim at the time of the claim application unless the claim was obviously ineligible and that defendants had failed to do so. Plaintiff argued that the subsequent discovery of information concerning the Citizens policy did not alter this obligation.

After a hearing on the parties' motions, the trial court denied plaintiff's motion for summary disposition and granted defendants' motion for summary disposition, reasoning that plaintiff had failed to demonstrate that it could not have identified applicable insurance at the time it submitted its application for PIP benefits to defendants. Further, plaintiff could have learned of the Citizens policy if it had filed suit directly against Bonner for the unpaid medical bills, if it had obtained proper information from Bonner at the time of treatment, if it had obtained the police report concerning the automobile accident, or if it had followed up on information that Bonner's aunt owned the vehicle in question.

This appeal followed. During the pendency of this appeal, our Supreme Court issued its opinion in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). *Covenant* reversed

decisions of this Court that had recognized that health-care providers could maintain direct causes of action against insurers to recover PIP benefits, instead holding that no such statutory cause of action exists. *Id*. at 195-196. On August 1, 2017, defendants filed motions with this Court for immediate consideration and for leave to file a nonconforming supplemental authority brief addressing *Covenant* and its effect on this case. This Court granted the motions and accepted the supplemental briefs that had been submitted by both plaintiff and defendants.[4]

II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of motions for summary disposition under MCR 2.116(C)(10). See *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). MCR 2.116(C)(10) provides that a trial court may grant judgment on all or part of a claim when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We also review de novo questions of statutory interpretation, see *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007), as well as whether a judicial decision applies retroactively, *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 94; 795 NW2d 205 (2010).

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[4] *W A Foote Mem Hosp v Mich Assigned Claims Plan*, unpublished order of the Court of Appeals, entered August 4, 2017 (Docket No. 333360).

III. ANALYSIS

Plaintiff argues that the trial court improperly granted defendants' motion for summary disposition and instead should have granted summary disposition in favor of plaintiff because defendants were obligated to assign its claim to an insurer under MCL 500.3172(1). Because we hold that *Covenant* controls this issue and applies to this case, we disagree. We therefore affirm the trial court's grant of summary disposition in favor of defendants, albeit for reasons other than those stated by the trial court. We remand this case to the trial court for further proceedings consistent with this opinion.

A. GENERAL LEGAL PRINCIPLES UNDER THE NO-FAULT ACT

Michigan's no-fault insurance act, MCL 500.3101 *et seq*., requires motor vehicle owners or registrants to carry no-fault insurance coverage that provides for PIP benefits. PIP benefits are payable "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). When a person suffers injury as the result of a motor vehicle accident, the person typically has one year to commence an action to recover PIP benefits. MCL 500.3145(1). The injured person must look first to his or her own no-fault policy or to a no-fault policy issued to a relative with whom he or she is domiciled. MCL 500.3114(1); see also *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 262; 819 NW2d 68 (2012). If neither the injured person nor any relatives with whom the person is domiciled have no-fault coverage, the person may seek to recover benefits from "[t]he insurer of the owner or registrant of the vehicle occupied" and "[t]he insurer of the operator of the

vehicle occupied," in that order. MCL 500.3114(4). If the person is unable to recover under any of these options, the person may seek PIP benefits through Michigan's assigned claims plan[5] under MCL 500.3172(1), which provides:

> A person entitled to [a] claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through the assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. In that case, unpaid benefits due or coming due may be collected under the assigned claims plan and the insurer to which the claim is assigned is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility.

Accordingly, a person may recover PIP benefits from the assigned claims plan when (1) no personal protection insurance is applicable to the injury, (2) no personal protection insurance applicable to the injury can be identified, (3) the applicable insurance cannot be ascertained due to a dispute among insurers, or (4) the only applicable insurance is inadequate due to financial inability. See MCL 500.3172(1); *Spectrum Health v*

[5] The Michigan Assigned Claims Plan is adopted and maintained by the Michigan Automobile Insurance Placement Facility. See MCL 500.3171(2).

Grahl, 270 Mich App 248, 251-252; 715 NW2d 357 (2006).[6]

B. THE *COVENANT* DECISION

MCL 500.3112 states, in pertinent part, that "[p]ersonal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents." Before our Supreme Court's decision in *Covenant*, this Court had held that this language permitted a healthcare provider who had provided services to an insured to seek recovery of those benefits directly from the insurer. See *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 401; 864 NW2d 598 (2014), overruled by *Covenant*, 500 Mich 191. In *Covenant*, our Supreme Court examined the language of MCL 500.3112 and held that the statute did not create an independent cause of action for healthcare providers to pursue PIP benefits from an insurer. *Covenant*, 500 Mich at 195. Our Supreme Court also determined that no other provision of the no-fault act grants a statutory cause of action to a healthcare provider for recovery of PIP benefits from an insurer:

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[6] The parties agree that the statutory section pertinent to this case is that requiring that "no personal protection insurance applicable to the injury can be identified." MCL 500.3172(1). Plaintiff argues that MCL 500.3172(1) does not specify a particular level of diligence that must be exercised in attempting to identify an insurer of the injury. However, it acknowledges that use of the verb phrase "can be" relates to an *ability* to identify a responsible insurer, as opposed merely to whether such an insurer has in fact been identified. And we must give effect to the words the Legislature has chosen. See *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 36-37; 878 NW2d 799 (2016). Assuming (as the trial court found) that some level of diligence is implicit in the statute, plaintiff then suggests that the applicable standard should be that of a "reasonable person" and that it satisfied that standard in this case. We need not decide these issues for the reasons stated later in this opinion.

> And further, no other provision of the no-fault act can reasonably be construed as bestowing on a healthcare provider a statutory right to directly sue no-fault insurers for recovery of no-fault benefits. We therefore hold that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act. The Court of Appeals caselaw concluding to the contrary is overruled to the extent that it is inconsistent with this holding.
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> * * *
>
> In sum, a review of the plain language of the no-fault act reveals no support for plaintiff's argument that a healthcare provider possesses a statutory cause of action against a no-fault insurer. This conclusion does not mean that a healthcare provider is without recourse; a provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's reasonable charges. However, a provider simply has no statutory cause of action of its own to directly sue a no-fault insurer. [*Id*. at 196, 217-218 (citation omitted).]

Although our Supreme Court did not specifically address MCL 500.3172(1) in its analysis, it is clear from the opinion in *Covenant* that healthcare providers such as plaintiff cannot pursue a statutory cause of action for PIP benefits directly from an insurer. Nothing in *Covenant* or the language of MCL 500.3172(1) suggests a different outcome when a healthcare provider seeks benefits from an insurer assigned by defendants as opposed to a known insurer.[7] Indeed, it would seem nonsensical to prohibit direct actions by healthcare providers seeking PIP benefits from known

[7] Indeed, the Supreme Court has remanded one such action to this Court for further consideration in light of *Covenant*. See *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 500 Mich 1024 (2017).

insurers while permitting such direct actions by healthcare providers when there is no known or applicable insurer. See *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995) ("[W]hen courts interpret a particular phrase in a statute, they must, whenever possible, construe the phrase in such a way that the interpretation does not conflict with, or deny effect to, other portions of the statute."). Accordingly, because our Supreme Court has determined that a healthcare provider cannot maintain a direct action for PIP benefits under the no-fault act and because nothing in MCL 500.3172(1) creates an exception to that rule, *Covenant* bars plaintiff's claim if its holding is applicable in this case. The question then becomes whether *Covenant* applies only prospectively or whether it applies to cases pending on appeal when it was issued. This question was the subject of the parties' supplemental briefing.

C. WAIVER AND PRESERVATION

Before reaching that question, we must decide whether it is properly before us. We conclude that it is. We find unpersuasive plaintiff's assertion that defendants waived or failed to preserve the issue whether plaintiff possessed a statutory cause of action against them. First, the defense of "failure to state a claim on which relief can be granted" is not waived even if it was not asserted in a responsive pleading or motion. MCR 2.111(F)(2). Second, defendants asserted such an affirmative defense in this case and also asserted the defenses that plaintiff lacked standing to sue and that defendants did not owe benefits to plaintiff because plaintiff was not the one who had "incurred" them. This, in essence, is an assertion that plaintiff did not have a statutory right to sue defendants directly, in

recognition of our holding that MCL 500.3112 "confers a cause of action on the injured party and does not create an independent cause of action for the party who is legally responsible for the injured party's expenses." *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596, 600; 712 NW2d 744 (2006). Rather, "the right to bring an action for personal protection insurance benefits . . . belongs to the injured party." *Id*.[8] Third, given the state of the caselaw at the time of the proceedings in the trial court and defense counsel's statements at the summary disposition motion hearing, it is clear that counsel was aware that then-applicable Court of Appeals precedent likely would have rendered any such argument futile at the time. Finally, while plaintiff cites *Dell v Citizens Ins Co of America*, 312 Mich App 734, 751 n 40; 880 NW2d 280 (2015), for the proposition that "[g]enerally, an issue must be raised, addressed, and decided in the trial court to be preserved for review," this Court said in its very next breath that "[t]his Court may [nonetheless] address the issue because it concerns a legal question and all of the facts necessary for its resolution are present," *id*. The same is true here. We therefore conclude that the issue has not been waived and has been adequately preserved.[9]

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[8] We appreciate that in *Hatcher* the "party who [was] legally responsible for the injured party's expenses" was the injured party's mother, rather than a healthcare provider. Nonetheless, because Congress has seen fit to declare as a matter of public policy that healthcare providers are obligated in certain circumstances to provide healthcare services without regard to an injured party's ability to pay or insurance status, see 42 USC 1395dd, they to some extent stand in similar shoes as do responsible parents and thus fall within the proscription recognized in *Hatcher* (and *Covenant*).

[9] Without meaning to get ahead of ourselves, our determination that the issue before us is adequately preserved means that we need not decide at this time whether (assuming for the moment that *Covenant*

should apply retroactively) it is full or limited retroactivity that should apply. See *McNeel*, 289 Mich App at 95 n 7 (noting that a judicial decision with full retroactivity would apply to all cases then pending, whereas with limited retroactivity it would apply in pending cases in which the issue had been raised and preserved). Nonetheless, we note that our Supreme Court has, at times, held that a judicial decision should apply according to the "usual" rule of retroactivity, rather than prospectively, and—albeit without discussing full retroactivity versus limited retroactivity—has added language that is consistent with a holding of limited retroactivity. See, e.g., *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004) (citations omitted), wherein the Court stated:

> [T]here is no reason to depart from the usual practice of applying our conclusions of law to the case at hand. Our decision today does not announce a new rule of law, but rather returns our law to that which existed before [*Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981)] and which has been mandated by our Constitution since it took effect in 1963. Our decision simply applies fundamental constitutional principles and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified.
>
> Therefore, our decision to overrule *Poletown* should have retroactive effect, applying to all pending cases in which a challenge to *Poletown* has been raised and preserved.

At other times, the Court has ruled similarly, while noting that "this form of retroactivity is generally classified as 'limited retroactivity,' " see, e.g., *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 & n 57; 702 NW2d 539 (2005) ("[O]ur decision in this case is to be given retroactive effect as usual and is applicable to all pending cases in which a challenge to [*Lewis v Detroit Auto Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986)]'s judicial tolling approach has been raised and preserved."), but without addressing the rationale for when to apply limited rather than full retroactivity. See also *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240-241; 393 NW2d 847 (1986) (noting that "the general rule is that judicial decisions are to be given complete retroactive effect," yet holding that "the rules articulated in [*Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567; 363 NW2d 641 (1984)] should be applied to all cases . . . pending either in trial or appellate courts . . . which properly raised and preserved a governmental immunity issue"). At still other times, the Court has suggested that limited retroactivity may be appropriate when there has been "extensive reliance" on prior caselaw in order to "minimize[] the effect of [a later] decision on the administra-

D. RETROACTIVITY VERSUS PROSPECTIVITY

1. GENERAL PRINCIPLES

" '[T]he general rule is that judicial decisions are to be given complete retroactive effect.' " *McNeel*, 289 Mich App at 94, quoting *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (alteration by the *McNeel* Court).[10] " '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.' " *McNeel*, 289 Mich App at 94, quoting *Hyde*, 426 Mich at 240. If a rule of law announced in an opinion is held to operate retroactively, it applies to all cases still open on direct review. *McNeel*, 289 Mich App at 94, citing *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1993). On the other hand, a rule of law that applies only prospectively does not apply to cases still open on direct review and does "not even apply to the parties in the case[]" in which the rule is declared. *McNeel*, 289 Mich App at 94.

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tion of justice." *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). This Court has, at times, subsequently cited certain of these and other Supreme Court cases for the rather anomalous proposition that "[g]enerally, judicial decisions are given *full* retroactive effect, i.e., they are *applied to all pending cases in which the same challenge has been raised and preserved*." *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006) (emphasis added). See also *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015), quoting *Paul*, 271 Mich App at 620. We therefore invite our Supreme Court to clarify the respective circumstances in which full retroactivity and limited retroactivity should apply.

[10] As noted earlier in this opinion, it is not entirely clear to us whether the general rule of complete retroactivity means full retroactivity or limited retroactivity. Nonetheless, for the reasons noted, it does not matter to our analysis in this case.

2. SUMMARY OF THE PARTIES' POSITIONS

Plaintiff would have us follow a line of cases that employ a "flexible approach" to determining whether a judicial decision has retroactive effect. See, e.g., *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 462; 795 NW2d 797 (2010) (opinion by WEAVER, J.) ("In general, this Court's decisions are given full retroactive effect. However, there are exceptions to this rule. This Court should adopt a more flexible approach if injustice would result from full retroactivity. Prospective application may be appropriate where the holding overrules settled precedent.") (citations omitted); see also *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.) ("Although it has often been stated that the general rule is one of complete retroactivity, this Court has adopted a flexible approach."). Under this line of reasoning, "resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632, 644; 433 NW2d 787 (1988) (opinion by GRIFFIN, J.); see also *Placek v Sterling Hts*, 405 Mich 638, 665; 275 NW2d 511 (1979). Plaintiff argues that it would be unfair to apply *Covenant* retroactively because plaintiff and others have relied on a long line of pre-*Covenant* decisions from this Court that recognized a healthcare provider's statutory right to bring suit against an insurer under MCL 500.3112. Plaintiff further argues that *Covenant* satisfies the initial threshold question for determining whether prospective application is warranted, i.e., "whether the decision clearly established a new principle of law." *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). Having thus satisfied the threshold question, plaintiff argues that the resulting three-

factor test for prospective application is also satisfied. See *id*. ("[T]hree factors [are] to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.").

Defendants concede that a certain level of unfairness exists whenever judicial decisions alter the actual or perceived state of the law, but counter that such a flexible approach would turn every court into a court of equity. Defendants further recognize that the threshold question and three-factor test have been often repeated in Michigan caselaw. But defendants characterize prospective judicial decision-making as "a relatively new and somewhat novel concept that conflicts with the traditional fundamental understanding of the nature of the judicial function." Defendants therefore advance a line of cases that recognize that the general and usual rule is that of retroactivity. Under this line of reasoning, "[p]rospective application is a departure from [the] usual rule and is appropriate only in 'exigent circumstances,' " *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005) (citation omitted) (retroactively overruling a 19-year-old legal precedent determined to be inconsistent with plain statutory language), that warrant "the 'extreme measure' of prospective application," *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004) (retroactively overruling a 23-year-old legal precedent determined to be inconsistent with proper constitutional interpretation), citing *Gladych v New Family Homes, Inc*, 468 Mich 594, 605; 664 NW2d 705 (2003) (retroactively overruling a 32-year-old legal precedent determined to be inconsistent with plain statutory language).

Even more fundamentally, defendants argue that the United States Supreme Court in *Harper* definitively established that judicial decisions regarding federal law "must be given full retroactive effect in 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," *Harper*, 509 US at 97, and that the Michigan courts have essentially adopted (or, alternatively, that we should adopt) that definitive rule in Michigan state court jurisprudence. Indeed, defendants argue that it is difficult to discern any reason why the *Harper* reasoning would not "perfectly harmonize" with Michigan jurisprudence and that it can no more be said of Michigan jurisprudence (than of federal jurisprudence) that we can "permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id*. (citation omitted; alterations by the *Harper* Court).

Defendants further argue that *Covenant* did not establish a new principle of law but instead corrected judicial misinterpretations of statutory law to return the law to what it always had been, such that the threshold question of *Pohutski*, if applicable, is not satisfied. Defendants do not concede that *Pohutski*'s three-factor test, if applicable, favors prospective application of *Covenant* but acknowledge that their stronger arguments lie elsewhere.

3. UNPACKING THE EVOLVING CASELAW

On the basis of our analysis of the shifting sands of the evolving caselaw—both in Michigan and in the United States Supreme Court—on the issue of the retroactivity/prospectivity of judicial decisions, we con-

clude that it would be nigh to impossible to divine a rule of law that lends complete consistency and clarity to the various espousements of the Courts, with their shifting makeups, over the years. Rather, the caselaw has evolved over time and, in at least some respects, is not today where it once was.

The one constant is that the general rule is, and always has been, that judicial decisions apply retroactively. The jurisprudential debate over the years has instead been over whether and under what circumstances deviations should be made from the general rule of retroactivity. The underpinnings of what we have described, for purposes of Michigan state court jurisprudence, as the "threshold question" and "three-part test" of *Pohutski* derive from decisions of the United States Supreme Court in *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965), and *Chevron Oil Co v Huson*, 404 US 97; 92 S Ct 349; 30 L Ed 2d 296 (1971). Subsequently, and without belaboring the path that led to *Harper*, the United States Supreme Court ultimately reversed the direction it had taken in those cases and instead definitively adopted the following rule:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in 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. [*Harper*, 509 US at 97.]

State courts nonetheless appear to remain free to adopt their own approach to retroactivity under state law, so long as it does not extend to an interpretation of federal law. See *id*. at 100 ("Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to

their interpretations of federal law.") (citation omitted). See also *Great N R Co v Sunburst Oil & Refining Co*, 287 US 358, 364-366; 53 S Ct 145; 77 L Ed 350 (1932); *Riley*, 431 Mich at 644 (opinion by GRIFFIN, J.). And indeed, the Michigan courts did so, adopting and applying the "threshold question" and "three-part test" in numerous cases over the years.

Defendants concede that the Michigan Supreme Court has never expressly adopted the reasoning of *Harper* into Michigan jurisprudence and indeed that no Michigan appellate court has actually considered whether the *Harper* rule should be adopted in Michigan. Nonetheless, defendants invite us to read this Court's citation of *Harper* in *McNeel* as effectively extending the *Harper* rule to Michigan's state court jurisprudence so as to require that all decisions of the Michigan Supreme Court (like *Covenant*) must be given full retroactive effect. We decline that invitation, inasmuch as *McNeel* did not cite *Harper* in order to mandate retroactivity but rather merely to explain that when a decision applies retroactively, it applies to all pending cases.[11]

We must therefore consider defendants' alternative invitation to so extend *Harper* ourselves. We are an error-correcting Court, however, and such a determination is therefore one that is best decided by our Supreme Court in the first instance. See *People v*

[11] We are similarly unpersuaded by defendants' citation of *Hall v Novik*, 256 Mich App 387, 392; 663 NW2d 522 (2003). Defendants contend that *Hall* implicitly held that when a judicial decision specifies the order to be entered by the trial court on remand (as occurred in *Covenant*), rather than merely remanding "for further proceedings consistent with this opinion," it necessarily applied the law to the parties before it, which defendant contends is the legal equivalent of expressly stating that the decision applies retroactively. We believe that defendants overread *Hall* in advancing this argument.

Woolfolk, 304 Mich App 450, 475; 848 NW2d 169 (2014). We therefore look to the current state of our Supreme Court's pronouncements on the issue for guidance. In *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), the Court overturned an earlier judicial interpretation of a provision of the no-fault act, just as it later did in *Covenant*.[12] As in *Covenant*, the Court did so on the basis of its conclusion that the earlier judicial decision was inconsistent with the plain meaning of the statute. The Court in *Spectrum Health* held that its decision was "retrospective in its operation," and it did so without undertaking any analysis of the *Pohutski* "threshold question" or "three-factor test." *Spectrum Health*, 492 Mich at 537. Instead, its stated rationale was as follows:

> " 'The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.' " This principle does have an exception: When a
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> > "statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision."
>
> [*Id*. at 536 (citations omitted).]

[12] Specifically, the Court disavowed an earlier opinion of the Supreme Court—and overturned decisions of this Court that applied it—that had recognized a "family joyriding exception" to MCL 500.3113(a) (which prohibited persons who had willingly operated or used a motor vehicle that was taken unlawfully from receiving PIP benefits). We note that the disavowed Supreme Court opinion was a plurality opinion, and the Court in *Spectrum Health* therefore found that the principles of stare decisis did not apply. *Spectrum Health*, 492 Mich at 535.

Given that this is the most recent pronouncement of our Supreme Court on this issue, it is critical to informing our analysis of whether *Covenant* should be applied retroactively or prospectively.

4. AS APPLIED TO *COVENANT*

a. DISCERNING DIRECTION FROM THE SUPREME COURT IN AND AFTER *COVENANT*

Defendants argue that the Supreme Court conclusively determined in *Covenant* itself that its decision applied retroactively. While defendants acknowledge that neither the words "retroactive" nor "prospective" appear in the Court's opinion, defendants glean a conclusive determination of retroactivity from the Court's remand of the case to the trial court for entry of summary disposition in favor of the defendant-insurer. In effect, this is a restatement of defendants' position regarding the applicability of *Harper* to Michigan state court jurisprudence. Plaintiff argues, to the contrary, that the remand for entry of summary disposition is not dispositive, pointing out that this Court has occasionally declared a case to have only prospective effect despite the fact that our Supreme Court had applied its holding to the parties before it. In support of this argument, plaintiff cites our decision in *People v Gomez*, 295 Mich App 411; 820 NW2d 217 (2012), concerning the prospective effect of a United States Supreme Court decision announcing a new rule of criminal procedure. However, we conducted that analysis under federal law regarding changes to criminal procedure, under which "a new rule of criminal procedure generally cannot be applied retroactively to alter a final judgment." *Id*. at 415. And although we did declare that our Supreme Court's decision in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23

(2005), was prospective only, see *West v Farm Bureau Gen Ins Co of Mich (On Remand)*, 272 Mich App 58, 60; 723 NW2d 589 (2006), our Supreme Court applied *Rory* retroactively two years later in *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 205-206; 747 NW2d 811 (2008).

Nonetheless, and particularly because the Supreme Court has not expressly adopted the *Harper* rationale, we accept plaintiff's position that the Supreme Court's remand in *Covenant* (for entry of summary disposition) is not necessarily dispositive, and we therefore will assume for purposes of this opinion that we have the authority to decide the issue of retroactivity. However, the Supreme Court has not only remanded *Covenant* for entry of summary disposition, but it has also subsequently remanded at least two cases to this Court for reconsideration in light of *Covenant* in lieu of granting leave to appeal. See *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 500 Mich 1024 (2017); *Spectrum Health Hosps v Westfield Ins Co*, 500 Mich 1024 (2017). Thus, the Supreme Court both applied the rule of law it announced in *Covenant* to the parties before it and also directed this Court to consider *Covenant*'s application to cases pending on direct appeal. While still not dispositive, we interpret both actions as suggesting that the Court did not intend the rule of law announced in *Covenant* to be applied prospectively only.

b. *SPECTRUM HEALTH* IS DISPOSITIVE

We next must address the question of how to apply the caselaw that we have endeavored to unpack in this opinion. As noted, we find little basis on which to reconcile the various pronouncements of the Courts over time. We are therefore guided by two parallel

considerations: (1) the evolution of the caselaw in the United States Supreme Court and (2) the evolution of the caselaw in the Michigan Supreme Court.

As we have indicated, the latter derived from the former. That is, the principles adopted and applied by the Michigan Supreme Court with respect to retroactivity/prospectivity had their genesis in the jurisprudence of the United States Supreme Court. That does not necessarily mean that Michigan jurisprudence will continue to follow (for state law purposes) the jurisprudence of our nation's highest Court, but we find it instructive nonetheless.

The evolution of the caselaw in the United States Supreme Court culminated in *Harper*, wherein, as we have noted, the Court definitively held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in 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. [*Harper*, 509 US at 97.]

The evolution of the caselaw in the Michigan Supreme Court has culminated to date in *Spectrum Health*, wherein, as we have also noted, the Court held:

> " 'The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.' "[13] [*Spectrum Health*, 492 Mich at 536 (citation omitted).]

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[13] As noted earlier, the Court in *Spectrum Health* recognized an exception to that rule. We will discuss that exception later in this opinion.

At its core, this means that notwithstanding the understandable reliance of plaintiff and others on prior decisions of this Court, those decisions did not represent "the law." Rather, "the law" in this instance is the pronouncement of the Legislature in the statutory text of MCL 500.3112. Absent legislative revision, that law is immutable and unmalleable; its meaning does not ebb and flow with the waves of judicial preferences.[14] See *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004) ("Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature."). We recognize that the application of this principle can sometimes lead to seemingly unfair results. However, any unfairness ultimately derives not from the application of the law itself, but rather from the judiciary's determination to stray from the law. And our first obligation must be to maintain the rule of law.

We therefore must apply the Supreme Court's pronouncement in *Spectrum Health*. In doing so, we note that it hardly breaks new ground. Rather, it returns us to the foundational principles as expressed by Sir William Blackstone:

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[14] *Spectrum Health* effectively repudiated *Pohutski* on this issue; in *Pohutski*, the Court stated, "Although this opinion gives effect to the intent of the Legislature that may . . . reasonably be inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in [intervening judicial decisions]." *Pohutski*, 465 Mich at 696.

> For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*[.] [1 Blackstone, Commentaries on the Laws of England, p *70.]

The jurisprudential footing of *Spectrum Health* is therefore both solid and of long standing. And, importantly for purposes of our analysis, its Blackstonian pronouncement lies at the core of the longstanding judicial debate over the proper role of the judiciary generally and the propriety of prospective decision-making specifically. As Justice Scalia stated in *Harper*:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent. . . .
>
> . . . The true *traditional* view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice. . . .
>
> [The dissent] asserts that " '[w]hen the Court changes its mind, the law changes with it.' " That concept is quite foreign to the American legal and constitutional tradition. It would have struck John Marshall as an extraordinary assertion of raw power. The conception of the judicial role that he possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be "the province and duty of the judicial department to say what the law *is*," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) (emphasis added)—not what the law *shall be*. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power "not delegated to pronounce a new law, but to maintain and expound the old one." 1 W. Blackstone, Commentaries [on

> the Laws of England, p] 69 (1765). Even when a "former determination is most evidently contrary to reason . . . [or] contrary to the divine law," a judge overruling that decision would "not pretend to make a new law, but to vindicate the old one from misrepresentation." *Id*. at 69-70. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." *Id*. at 70 (emphasis in original). Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." T. Cooley, Constitutional Limitations *91. The critics of the traditional rule of full retroactivity were well aware that it was grounded in what one of them contemptuously called "another fiction known as the Separation of powers." Kocourek, Retrospective Decisions and Stare Decisis and a Proposal, 17 A.B.A.J. 180, 181 (1931).
>
> Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism, born out of disregard for *stare decisis*. [*Harper*, 509 US at 105-108 (Scalia, J., concurring) (citation omitted; alterations in original).]

This Court also discussed these competing judicial philosophies in *Lincoln v Gen Motors Corp*, 231 Mich App 262, 307-308, 314; 586 NW2d 241 (1998) (WHITBECK, P.J., concurring), wherein Judge WHITBECK observed:

> As noted by former Justice MOODY[31] "[n]otions of retrospectivity and prospectivity have their roots in two diametrically opposed theories of jurisprudence." The first view, widely attributed to Blackstone, is that courts function to discover and declare the law rather than to make it. Therefore, when judges change legal rules, they

> do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*; but that it was *not law* . . . .[32]

Justice MOODY observed that, under this view, a law-changing decision, because it is merely a statement of what had always been the "true" law, must of necessity be retroactively applied.[33]

A second view asserts that judges not only discover law but *make* law.[34] Under this theory, decisions that change the law should not automatically apply retrospectively. The tension between these two views is evident throughout much of our jurisprudence regarding this subject. . . .

* * *

. . . Applying Blackstone's formulation, the interpretation of the [Worker's Disability Compensation Act, MCL 418.101 *et seq*.,] in [*Wozniak v Gen Motors Corp*, 198 Mich App 172; 497 NW2d 562 (1993),] was always the "true law" and it must therefore be given full retroactive effect.

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[31] See Moody, *Retroactive application of law-changing decisions in Michigan*, 28 Wayne L R 439, 441 (1982).

[32] 1 Blackstone, Commentaries on the Laws of England (3d ed, 1884), p 69 (emphasis in original). See also *Linkletter v Walker*, 381 US 618, 623, n 7; 85 S Ct 1731; 14 L Ed 2d 601 (1965).

[33] Moody, n 31, *supra* at 441.

[34] See Carpenter, *Court decisions and the common law*, 17 Colum L R 593, 594-595 (1917).

With this backdrop, it becomes readily apparent that the underpinnings of *Spectrum Health* and *Harper* are one and the same. That is to say, judicial decisions of statutory interpretation must apply retroactively because retroactivity is the vehicle by which

"the law" remains "the law."[15] As *Spectrum Health* dictates, intervening judicial decisions that may have misinterpreted existing statutory law simply are not, and never were, "the law."[16] The necessary consequence is that those decisions of this Court that were overruled by our Supreme Court in *Covenant* were not "the law" and therefore did not, and do not, afford plaintiff a statutory right to recover PIP benefits directly from an insurer. Because plaintiff has no such right under the pre-*Covenant* caselaw and because, as our Supreme Court in *Covenant* determined, plaintiff has no such right under the no-fault act, summary disposition was properly entered in favor of defendants in this case, albeit for reasons other than the pre-*Covenant* rationale given by the trial court.

In essence, we conclude that our Supreme Court in *Spectrum Health* essentially adopted the rationale of

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[15] We emphasize that our decision is limited to the context of judicial decisions of statutory interpretation. We need not and do not consider whether the same principles apply in the context of judicial decisions affecting the common law.

[16] We fully appreciate the conundrum faced by litigants who follow and endeavor to conform their behavior to what they legitimately understand to be the guidance and directives of our courts, only to be confronted with a subsequent judicial change of direction that seemingly pulls the rug out from under them. But we must be true to the law. The remedy is not to be found in a judiciary that adapts the law as and when it sees fit; such judicial policymaking necessarily creates its own inequities. Rather, the remedy, if any, is twofold: (1) adherence to the proper role of the judiciary (such that retroactive application of a judicial decision need never be employed) and (2) in the Legislature. We offer no opinion on the subject of legislative action insofar as it relates to the issues raised in this case; that determination is best left to the Legislature. We do note, however, that healthcare providers, at least in certain circumstances, stand in a far different position than do most other members of our society because they have been mandated to provide certain services without regard to payment or insurance coverage. See 42 USC 1395dd. We therefore encourage the bringing of those concerns to the Legislature and the Legislature's consideration of them.

the United States Supreme Court in *Harper* relative to the retroactive applicability of its judicial decisions of statutory interpretation to "all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper*, 509 US at 97. Having so concluded, we invite our Supreme Court to expressly state whether or to what extent it adopts the *Harper* rationale into Michigan state court jurisprudence.[17]

c. THE "THRESHOLD QUESTION" AND "THREE-FACTOR TEST"

For the foregoing reasons, we conclude that we need not address the "threshold question" and "three-factor test" that have often been cited in Michigan caselaw. The Court's holding in *Spectrum Health*, which the Court notably reached without so much as a mention of *Pohutski*, effectively repudiated the application of the "threshold question" and "three-factor test," at least in the context of judicial decisions of statutory interpretation. Even if we were to consider them, however, the result would be unchanged.

First, and for the reasons we have already articulated, we would not get past the threshold question. Plainly and simply, and for the reasons already noted, the law did not change. *Covenant* did not "clearly establish[] a new principle of law," *Pohutski*, 465 Mich at 696, because MCL 500.3112 at no time provided

[17] Again, as noted, the Court in *Spectrum Health* recognized an exception to the rule. We conclude that the exception is inapplicable in this case, however, because it is premised on parties having made contracts and acquired rights under and in accordance with statutory construction given by the courts of last resort of this state. *Spectrum Health*, 492 Mich at 536. In this case, by contrast, plaintiff's suit against defendants is premised on the *absence* of any insurance contract, and, in any event, the caselaw on which plaintiff relies in bringing suit was not that of a court of last resort of this state, i.e., the Supreme Court.

plaintiff with a right of action against defendants, and the intervening caselaw from this Court "never was the law." *Spectrum Health*, 492 Mich at 536 (quotation marks and citation omitted). *Covenant* merely recognized that the law as set forth in MCL 500.3112 is and always was the law.

We particularly reach that conclusion under the circumstances of this case because the law at issue concerns the very existence of a right of action. In other words, we are not merely being asked to decide whether a judicial decision of statutory interpretation should be given retroactive effect; we are being asked to decide whether a judicial decision of statutory interpretation *concerning the existence of a right of action* should be given retroactive effect. We conclude that it would be particularly incongruous for us to decide that *Covenant* effected a change in the law such that it should not be applied retroactively, because we would effectively be creating law that does not otherwise exist and thereby affording to plaintiff a right of action that the Legislature saw fit not to provide. In effect, we would not only be changing the law from that which the Legislature enacted, but in doing so we would be creating a cause of action that does not exist; for the reasons noted in this opinion, that is outside the proper role of the judiciary.[18]

Were we to advance past the threshold question and consider the three-factor test, the question certainly would become a closer one. But even under pre-*Spectrum Health* caselaw, we are not prepared to

[18] Counsel for plaintiff acknowledged at oral argument that while he could (and did) identify caselaw in which courts had applied judicial decisions of statutory interpretation prospectively, he was unaware of any such decisions that afforded a right of action when the underlying statute itself did not.

conclude that the factors, taken together, would weigh in favor of the prospective-only application of *Covenant*. Again, the three factors to be weighed under *Pohutski* are: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Pohutski*, 465 Mich at 696.

With regard to the first factor, our Supreme Court stated in *Covenant* that the purpose of its decision was to "conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law." *Covenant*, 500 Mich at 201. While *Pohutski* suggests that such a purpose might favor prospective application, *Pohutski*, 465 Mich at 697, *McNeel* found that a rule of law that is intended to "give meaning to the statutory language" and to "clarif[y]" the state of the law weighs in favor of retroactive application, see *McNeel*, 289 Mich App at 96. This apparent divergence of viewpoint itself highlights what is perhaps the most inherent problem with prospectivity: the law requires consistency, see *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), and prospectivity undermines rather than advances that objective. Instead, the law becomes subject to divergent interpretations depending on the particular tribunal that is then interpreting it.

With regard to the extent of reliance on our prior caselaw, there can be no doubt that plaintiff and others have heavily relied on our prior caselaw over the course of many years. We do not in any way seek to diminish that fact or to minimize the negative effects that might be felt by those who relied on pre-*Covenant* decisions. The reliance is real, as are the consequences that flow from it. Yet, "[c]omplete prospective applica-

tion has generally been limited to decisions which overrule clear and uncontradicted case law." *McNeel*, 289 Mich App at 94 (quotation marks and citation omitted). And while plaintiff argues with some justification that *Covenant* upset "decades of settled expectations" concerning healthcare provider lawsuits, the Supreme Court in *Covenant* noted that the cases repeatedly cited in support of this "well-settled" principle generally had not actually litigated the issue whether a healthcare provider possessed a statutory cause of action for PIP benefits under the no-fault act. *Covenant*, 500 Mich at 200-204. In fact, *Wyoming Chiropractic Health Clinic* derived from earlier cases that had not directly litigated the right of a healthcare provider to seek PIP benefits from an insurer. *Id*. at 203 n 24. And despite allowing healthcare providers to directly claim PIP benefits from insurers, we have also stated that MCL 500.3112 "confers a cause of action on the injured party" and that "the right to bring an action for personal protection insurance benefits . . . belongs to the injured party." *Hatcher*, 269 Mich App at 600.

This raises the question of "how reasonable the reliance . . . was." *McNeel*, 289 Mich App at 96. On close inspection, it is less than clear that the state of the law that was overturned by *Covenant* was so "clear and uncontradicted" as to predominate in favor of only prospective application. *Id*. at 94 (quotation marks and citation omitted). As in *McNeel*, the mere fact that insurers and healthcare providers may have acted in reliance on the caselaw that *Covenant* overturned is not dispositive of the question of retroactivity; every retroactive application of a judicial decision has at least the potential to upset some litigants' expectations concerning their pending suits. *Id*. at 96. And "a return to an earlier rule and a vindication of controlling legal authority" such as the plain language of a statute

further supports the conclusion that the overruled caselaw was not "clear and uncontradicted." See *Devillers*, 473 Mich at 587; *Hathcock*, 471 Mich at 484.

Finally, with regard to the administration of justice, we again conclude that the weighing of this factor is at best inconclusive. Plaintiff cites *Moorhouse v Ambassador Ins Co, Inc*, 147 Mich App 412, 422; 383 NW2d 219 (1985), for the proposition that "[i]t is essential to the administration of our legal system that practitioners be able to rely upon well-established legal principles . . . ."[19] But in our judgment, that objective is not furthered by a system of justice that allows the law to ebb and flow at the whim of the judiciary. It is instead furthered, and its legitimacy in the eyes of our society is advanced, by demanding consistency in the law, which can only be attained in perpetuity if judicial decisions applying statutory law as enacted by our Legislature are applied retroactively.

Ultimately, even under pre-*Spectrum Health* caselaw, prospective application of a judicial decision is appropriate only as an "extreme measure," *Hathcock*, 471 Mich at 484 n 98, and in "exigent circumstances," *Devillers*, 473 Mich at 586. Considering (as *Covenant* recognized) that providers have always been able to seek reimbursement from their patients directly or to seek assignment of an injured party's rights to past or presently due benefits, we do not find a level of exigency that would justify contravening the general rule of full retroactivity.

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[19] *Moorhouse* prospectively applied a judicial decision holding that a legal malpractice cause of action is not assignable in Michigan. *Moorhouse*, 147 Mich App at 421-422. There was therefore no underlying statutory law as there is in this case. Moreover, *Moorhouse* relied on *Tebo*, see *id*. at 421, which we conclude was undermined by our Supreme Court's holding in *Spectrum Health*. In any event, *Moorhouse* is not binding on this Court. See MCR 7.215(J)(1).

d. CONCLUSION REGARDING RETROACTIVITY

We therefore conclude that *Spectrum Health* controls our decision and that the application of *Spectrum Health* requires that we apply *Covenant* retroactively to this case. Further, even if we were to consider pre-*Spectrum Health* caselaw, we would conclude that *Covenant* applies retroactively. We therefore affirm the trial court's grant of summary disposition in favor of defendants.

IV. REMAND TO THE TRIAL COURT

The only remaining question is whether this Court should (as plaintiff requested in the alternative in the event we were to conclude, as we do, that *Covenant* applies to this case) treat the pleadings as amended or remand this case to the trial court to allow the amendment of the complaint so that plaintiff may advance alternative theories of recovery, including the pursuit of benefits under an assignment theory. The Supreme Court in *Covenant* expressly noted that its decision in that case was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Covenant*, 500 Mich at 217 n 40. We conclude that the most prudent and appropriate course for us to take at this time is to remand this case to the trial court with direction that it allow plaintiff to move to amend its complaint so that the trial court may address the attendant issues in the first instance.

Affirmed. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SWARTZLE, J., concurred with BOONSTRA, P.J.

RONAYNE KRAUSE, J. (*concurring*). I respectfully concur with the majority's conclusion that *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), applies retroactively and that plaintiff must be afforded an opportunity to amend its pleadings. I am merely unpersuaded that there is any sufficient reason present in this matter for departing from the general rule that decisions from our Supreme Court should be given retroactive effect by default.

PEOPLE v URBAN

Docket No. 332734. Submitted July 11, 2017, at Lansing. Decided July 18, 2017. Approved for publication August 31, 2017, at 9:05 a.m. Leave to appeal sought.

James D. Urban was convicted after a jury trial in the Eaton Circuit Court of unlawful imprisonment, MCL 750.349b, assault with a dangerous weapon, MCL 750.82, and misdemeanor domestic violence, MCL 750.81(2), for confining the victim, MH, to his house, hitting her with a bottle and a handgun, and threatening to rape and kill her. Urban was acquitted of two additional charges—assault with a dangerous weapon and possession of a firearm during the commission of a felony, MCL 750.227b. The court, Janice K. Cunningham, J., sentenced Urban to concurrent terms of imprisonment of 7 to 15 years for unlawful imprisonment, 2 to 4 years for assault with a dangerous weapon, and 93 days for domestic violence. Urban appealed.

The Court of Appeals *held*:

1. The trial court did not plainly err by admitting DNA evidence collected from the scene. Admission of a potential DNA match between a person's DNA profile and DNA found on evidence must be accompanied by some qualitative or quantitative interpretation regarding the likelihood of the potential match. The interpretive analysis should assist the jury in understanding the evidence, as indicated by MRE 702. Evidence of a potential DNA match has minimal probative value absent an accompanying interpretive statistical analysis and should be excluded in accordance with MRE 403 when weighed against the danger of unfair prejudice that would result if the jury were to give the DNA evidence undue weight. Evidence collected from the scene included a white t-shirt with blood on it, a pillowcase with blood on it, and some blood on a door inside Urban's home. The blood on the shirt, the pillowcase, and the door was tested for DNA and compared to MH's and Urban's DNA profiles. The barrel of the handgun was also tested for DNA. Contributors to the DNA on the gun could not be determined, Urban's DNA matched the blood on the pillowcase, and MH's DNA matched the blood on the shirt and on the door. Although the forensic scientist who testified

concerning the DNA matches was not asked at trial to provide any empirical data to define the statistical parameters of a DNA match, the forensic scientist's report was admitted into evidence. The report contained the testing methodology used, the forensic scientist's conclusions and interpretations of the data, and language indicating that the forensic scientist's conclusions that DNA on the evidence matched either Urban or MH were conclusions made to a reasonable degree of scientific certainty in the absence of identical twins or close relatives. The forensic scientist's report constituted sufficient analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match. Even if the DNA evidence was admitted in error, it did not affect Urban's substantial rights because the evidence against Urban was substantial without the DNA evidence.

2. Under US Const, Am VI, and Const 1963, art 1, § 20, a defendant is guaranteed the effective assistance of counsel in any criminal prosecution. Counsel is ineffective when his or her performance falls below an objective standard of professional reasonableness and when it is reasonably probable that but for counsel's deficient performance, the result of the proceeding would have been different. Urban's trial counsel was not ineffective for failing to object to the admission of the DNA evidence because Urban had admitted that he and MH had a "brawl" in which both were injured. Nor was Urban's trial counsel ineffective for eliciting testimony concerning the illegality of possessing a sawed-off shotgun. A common defense tactic is to acknowledge incriminating evidence that is strongly supported while denying other elements of the crime. Urban's counsel was not ineffective when he failed to object to the prosecution's questions about Urban's religious beliefs. The evidence of Urban's religious beliefs was relevant because it demonstrated Urban's state of mind during the incident. The testimony did not go beyond the merits of the case, did not inject issues broader than Urban's guilt or innocence, and was unlikely to inflame the jury to the extent that it could not evaluate the case on the basis of evidence presented. Urban's counsel was not ineffective for failing to request that the trial court include a statement in its instruction to the jury that during a demonstration of MH's ability to load the handgun, MH required assistance because she first tried to load the magazine in backwards. Notably, defense counsel requested the demonstration expressly for the purpose of determining whether MH had the strength to load the magazine, and MH demonstrated that she did. Finally, Urban argued that his counsel was ineffective for failing to object to testimony that Urban's house was a mess and had a "really bad odor," some broken doors, some holes in the wall,

and some obscene words painted on the wall in the master bedroom. Objection to this testimony would have been futile because it was relevant to demonstrate the theory that Urban had been losing control of his emotional state and to show Urban's activities immediately preceding the confinement. Counsel was not ineffective for failing to make a futile objection.

3. A trial court must consult the advisory sentencing guidelines and assess the highest number of possible points for each applicable offense variable, and the trial court's determinations must be supported by a preponderance of the evidence. Urban argued that under MCL 777.34(1)(a), Offense Variable (OV) 4 was incorrectly scored because there was no evidence that MH had suffered serious psychological injury that could require professional treatment. Urban argued that the trial court scored OV 4 on the basis of the nature of the crime, rather than on evidence of serious psychological injury. But the trial court's score was based on all the testimony the trial court heard firsthand during the trial and on MH's victim impact statement, which indicated that MH had been seeing a therapist through a domestic violence shelter, that she had nightmares and flashbacks, and that she struggled daily with emotional stability as a result of the trauma. The trial court also properly scored OV 7, which assesses points for aggravated physical abuse. Under MCL 777.37, 50 points are assessed when a victim is treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. To assess points for OV 7, a trial court should determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime and whether it is more probable than not that such conduct was intended to considerably increase the victim's fear or anxiety. The record contains substantial evidence that Urban's prolonged behavior went beyond the elements of the crimes he committed. Urban confined MH for more than three hours; assaulted her with his hands and feet, a liquor bottle, and a handgun; choked and kicked her; threatened to kill himself and her; threatened to rape her; and forced her to repeatedly load the handgun because he wanted her fingerprints on the bullet that killed him.

Affirmed.

EVIDENCE — DNA — INTERPRETATION OF DNA DATA — QUALIFYING OR QUANTIFYING THE LIKELIHOOD OF A MATCH.

Admission of a potential DNA match between DNA found on evidence and a particular person's DNA profile must be accom-

> panied by some quantitative or qualitative interpretative analysis regarding the likelihood of the potential match; as indicated in MRE 702, the interpretive analysis should assist the jury in understanding the evidence; evidence of a DNA match should be excluded if not accompanied by an interpretive analysis because the DNA match has minimal probative value when weighed against the danger of unfair prejudice that would result from the jury's giving the DNA evidence undue weight.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Senior Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

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

BOONSTRA, J. Defendant appeals by right his convictions, following a jury trial, of unlawful imprisonment, MCL 750.349b, assault with a dangerous weapon, MCL 750.82, and domestic violence, MCL 750.81(2), as a lesser included offense of aggravated domestic violence, MCL 750.81a(2). Defendant was acquitted of an additional charge of assault with a dangerous weapon and a charge of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 7 to 15 years for the unlawful-imprisonment conviction, 2 to 4 years for the conviction of assault with a dangerous weapon, and 93 days for the domestic-violence conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions relate to the extended confinement and assault of his girlfriend, MH, in his

home. During the period of confinement, defendant choked and kicked MH, attempted to force her to drink alcohol, threatened to rape and kill her, hit her with a handgun and a liquor bottle, held the handgun to her face and chest, and put the handgun in her mouth. MH testified that defendant was armed with both a handgun and a sawed-off shotgun during the incident. She further testified that defendant forced her to unload and reload the magazine of the handgun several times. At some point, defendant tripped while taking off his pants and underwear, and MH was able to grab the handgun and escape to a neighbor's house. Eaton County Sheriff's deputies arrested defendant and recovered a loaded handgun but could not locate a shotgun.

At trial, a forensic scientist testified that DNA taken from saliva found on the handgun contained a mix of donors and could not be conclusively matched. However, DNA taken from blood on a tank top and from blood on a door in defendant's home matched that of MH, and DNA taken from blood on a pillowcase matched that of defendant. MH testified that at times during the incident, defendant spoke in Arabic and made statements related to the Islamic religion. Defendant argued that MH was exaggerating; he described the incident as a "brawl" between defendant and MH that had resulted in injuries to both parties. Outside the view of the jury, defense counsel had MH load the magazine of the handgun that had been found in defendant's home. MH first put the magazine in backwards but eventually succeeded in loading the gun. The trial court instructed the jury that MH had demonstrated that she had the physical strength to load the magazine of the handgun.

The jury convicted defendant as described. At sentencing, the trial court scored Offense Variables (OVs)

4 (psychological injury to a victim) and 7 (aggravated physical abuse) at 10 and 50 points respectively. This appeal followed.

II. ADMISSION OF DNA EVIDENCE

Defendant argues on appeal that the trial court improperly admitted DNA evidence because the prosecution failed to present the required statistical analysis. We disagree. Defendant did not object to the admission of this evidence at trial; we therefore review defendant's challenge to its admission for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks, citation, and alteration omitted).

In *People v Coy*, 243 Mich App 283, 294; 620 NW2d 888 (2000), this Court concluded that evidence of a potential match between a subject's DNA sample and DNA found on evidence was "inadmissible absent some accompanying interpretive evidence regarding the likelihood of the potential match." That is, "some qualitative or quantitative interpretation must accompany evidence of [a] potential [DNA] match." *Id*. at 302. The *Coy* Court reasoned that scientific evidence of a possible match between a defendant's DNA and DNA found on evidence would not assist the jury, as MRE 702 generally requires, without "some analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match . . . ." *Id*. at 301.[1] Alter-

[1] MRE 702 states, "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

natively, the Court held that evidence of a potential DNA match had "minimal probative value absent accompanying interpretive statistical analysis evidence," *id*. at 302, and should be excluded in accordance with MRE 403 when weighed against the danger of unfair prejudice, which would result if the jury were to give the DNA evidence undue weight, *id*. at 303.[2]

In this case, a forensic scientist testified that the DNA profiles on the tank top and the bedroom door matched MH's DNA profile and excluded defendant as the donor. The forensic scientist further testified that the DNA profile on a pillowcase matched defendant's DNA and excluded MH as a donor. The forensic scientist was not asked at trial to provide any empirical data to define the statistical parameters of a DNA "match." However, her report was admitted into evidence, and it contained the testing methodology used, as well as her conclusions and interpretations of the data. Following each conclusion, and for each item indicating a match with the DNA of either defendant or MH, the report contained language indicating in some fashion that "[i]n the absence of identical twins or close relatives, it can be concluded to a reasonable degree of scientific certainty that the DNA profile of the major donor to item [number and description of item tested] and the DNA from [number and description corresponding to either defendant or MH] is from the same individual."

We conclude that the forensic scientist's report constitutes "some analytic or interpretive evidence con-

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expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise . . . ."

[2] "[Relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403.

cerning the likelihood or significance of a DNA profile match . . . ." *Id*. at 301. We are satisfied that there was no plain error in the admission of this evidence. See *Carines*, 460 Mich at 763.

Further, even if the evidence was admitted in error, the admission did not affect defendant's substantial rights. MH described an episode lasting 3½ to 4 hours during which defendant confined her to his house with a handgun and a sawed off shotgun while assaulting her with his hands and feet, a liquor bottle, and the handgun. She told a doctor that she had been struck in the head by a firearm and had been hit on other parts of her body, and she had injuries consistent with her description of the incident. An officer photographed MH's injuries. The same officer photographed defendant, who had a bruise on his arm and scratches on his neck, left elbow, and right wrist. Officers searched defendant's home and found a handgun, which MH identified, as well as an empty liquor bottle, a tank top and a pillowcase with some blood on them, blood on the door, pictures of MH's children, and MH's phone, purse, and car keys.

The evidence against defendant was therefore substantial, even apart from the DNA evidence. The DNA evidence merely established that MH's blood was found on items recovered from the bedroom and served as some corroboration of her testimony. However, the evidence also supported defendant's theory of the case—that there was a "brawl" that resulted in injuries to both parties. And the fact that DNA from saliva on the barrel of the handgun was inconclusive arguably supported defendant's claim that the handgun was not involved in the incident. For all of these reasons, defendant has not established that admission of the

DNA evidence, even if erroneous, affected his substantial rights and requires reversal. See *Carines*, 460 Mich at 763.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that his trial counsel provided ineffective assistance in several ways. We disagree. Because defendant did not move the trial court for a new trial or an evidentiary hearing regarding his counsel's effectiveness, his claims are unpreserved and our review is limited to errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *Id*. at 242. We review the trial court's factual findings for clear error, but we review de novo the constitutional question of whether an attorney's ineffective assistance deprived a defendant of his or her right to counsel. *Id*.

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This "right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). In order to demonstrate ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient" and (2) "that counsel's deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007) (quotation marks and citation omitted). Counsel's performance was deficient if "it fell below an objective standard of professional reasonableness." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of

proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Deficient performance prejudices the defense if "it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *Jordan*, 275 Mich App at 667.

Defendant argues that his trial counsel provided ineffective assistance by failing to object to admission of the DNA evidence. Defense counsel's decisions are presumed to be sound trial strategy, *Taylor*, 275 Mich App at 186, and we will not substitute our judgment for the judgment of trial counsel with the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In this case, it is likely that defendant's trial counsel did not think it necessary to dispel the notion that his or MH's DNA was found on the items in defendant's home. Defendant did not deny that an altercation with MH had occurred, and he conceded that she (as well as he) had sustained injuries. The presence of their respective DNA on items found in the home would therefore be unsurprising, and challenging the DNA evidence would seem to be of questionable purpose. Instead, defense counsel argued that defendant did not hold the victim captive, did not assault her with a firearm or liquor bottle, and was consequently overcharged. Further, defendant was able to argue from the DNA evidence that the DNA testing on saliva found on the barrel of the handgun was inconclusive, supporting his defense. Therefore, it may well have been a strategic decision for counsel not to challenge admission of the DNA evidence. We conclude that counsel's actions were within an objective standard of professional reasonableness. See *Jordan*, 275 Mich App at 667. Further, admission of the DNA evidence did not prejudice

defendant because it established that both MH and defendant were injured in the home, which was consistent with defendant's "brawl" theory. Accordingly, even if defense counsel had objected to admission of the DNA evidence and successfully argued for its exclusion, there is no reasonable probability that the result of the trial would have been different. See *id*.

Defendant further argues that his trial counsel provided ineffective assistance when he elicited testimony from MH about defendant's possession of an illegal sawed-off shotgun. However, MH had already testified during direct examination that defendant was holding a handgun and a shotgun when he entered her room and told her that she could not leave. MH testified that she was familiar with the shotgun because defendant had previously sent her a text message, to which he had attached a picture, indicating that he was going to shoot himself. The picture was admitted into evidence and showed defendant holding the shotgun to his chin. MH was asked during direct examination to describe the shotgun, and she recalled that it had been altered by being sawed off and painted with markings and glow-in-the-dark paint. She also stated that defendant had displayed the shotgun during one of their romantic encounters a couple of weeks before the incident and that she had taken a video of that encounter with her phone. The video was played for the jury.

Nonetheless, defense counsel did elicit that defendant's possession of the shotgun was "illegal" and that defendant had told her that possessing it was illegal. This elicitation may well have been strategic. Counsel sought to show that MH was familiar with a unique shotgun and that she knew it had been in the house. Defense counsel argued that the shotgun was not in

the home at the time of the assault and that MH had reported that it was there because she had previously seen the shotgun in the home. Establishing that the shotgun was illegal may have supported defendant's theory that MH wanted to get defendant in as much legal trouble as possible by fabricating a story involving an illegal weapon. And defense counsel repeatedly emphasized that the shotgun was not found in the house. This strategy may have been partially successful, inasmuch as the jury acquitted defendant of a second count of assault with a dangerous weapon (handgun or shotgun) and of one count of felony-firearm, which suggests that the jury did not believe beyond a reasonable doubt that defendant possessed the shotgun at the time of the incident. Further, because the video showing defendant with the shotgun had already been played, defense counsel may have simply tried to "get ahead" of the issue whether defendant's possession of such a weapon was illegal, rather than leaving the jury to speculate in ways that may have prejudiced his client. A common defense tactic is to acknowledge incriminating evidence that is strongly supported while denying other elements of the crime. *People v Wise*, 134 Mich App 82, 97-99; 351 NW2d 255 (1984). We conclude that defendant has not demonstrated that his trial counsel's elicitation of testimony regarding the shotgun fell below an objective standard of professional reasonableness or that defendant was prejudiced by the questions posed. *Jordan*, 275 Mich App at 667.

Next, defendant argues that his trial counsel was ineffective when he failed to object to the prosecution's questions concerning his religious beliefs. We disagree. MH testified that during the incident defendant said Islamic prayers and "Muslim things" in Arabic; she also stated that she "hated the fact that he felt he was

a bad person" and "the fact that [Muslims had] made him this way." Defendant argues that this testimony was irrelevant and prejudicial.

"Generally, all relevant evidence is admissible at trial." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001); see also MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Under this "broad definition," evidence that is useful in shedding light on any material point is admissible. *Aldrich*, 246 Mich App at 114. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008) (quotation marks and citation omitted).

Much of the testimony regarding defendant's religion was relevant to demonstrate his state of mind as observed by MH during the time that he unlawfully confined her. MH testified that defendant had become more emotional and upset as they spoke about personal matters. The prosecution's theory of the case was that defendant committed the crimes because he had become upset at recent losses in his life, and MH's testimony reflected defendant's emotional turmoil. MH also testified that she was afraid that defendant's mental state was worsening and that she was in danger of being more severely hurt or killed if she did not attempt to flee.

The testimony regarding religion was not unfairly prejudicial. "[Relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403; see also *Aldrich*, 246 Mich App at 114. "All relevant evidence is preju-

dicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Gipson*, 287 Mich App 261, 263; 787 NW2d 126 (2010) (quotation marks and citation omitted). Evidence that is unfairly prejudicial goes beyond the merits of the case to inject issues broader than the defendant's guilt or innocence, like the "jury's bias, sympathy, anger, or shock." *McGhee*, 268 Mich App at 614 (quotation marks and citation omitted).

Defendant argues that the jury could have been inflamed by references to the Islamic religion. However, evidence that defendant engaged in prayer and religious practices and was severely emotionally distressed during the commission of the crime was unlikely to inflame the jury to the extent that it could not evaluate the case based on the evidence presented. See *McGhee*, 268 Mich App at 614. Relatedly, defendant argues that defense counsel was ineffective for failing to object to the prosecution's questions concerning defendant's religious statements on the grounds that the questions were intended to inflame the jury. We disagree. "[T]he test for prosecutorial misconduct[3] is

[3] We have discussed the difference between "prosecutorial error" and "prosecutorial misconduct." *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015). In this case, defendant's argument that the prosecution deliberately and repeatedly sought to inflame the jury with religious prejudice would appear to be fairly characterized as a claim for prosecutorial misconduct, rather than as a claim based on "technical or inadvertent" errors that are "more fairly presented as claims of prosecutorial error." *Id*. at 88; see also MRPC 8.4. Nonetheless, regardless of "what operative phrase is used, we must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial." *Cooper*, 309 Mich App at 88.

whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A fair trial for a defendant "can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *Id*. at 63-64. Prosecutorial comments must be read as a whole and evaluated in context and in light of the arguments of the defense. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Here, the prosecution asked MH questions regarding the actions and statements defendant made as he kept MH confined. Most of the statements referring to defendant's religion were relevant and reflected factual descriptions of MH's continued confinement. It does not appear from the record that the prosecution sought to insert religion into the case in order to arouse possible prejudice in the jury, but rather as a factual description of the events. Therefore, an objection by defendant's trial counsel on the grounds of prosecutorial misconduct would have been futile. Counsel was not ineffective for failing to make a futile objection. *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007).

Next, defendant argues that his trial counsel should have objected to the trial court's instructions to the jury after MH demonstrated that she could load ammunition into the magazine of the handgun. The trial court instructed the jury that defense counsel had requested that MH demonstrate outside the presence of the jury her ability to load the handgun's ammunition magazine with eight bullets. The trial court instructed the jury that MH had demonstrated "the physical strength to load the ammunition into the magazine" and that "she was able to put the rounds into the magazine."

During the demonstration, MH initially appeared to struggle to load the magazine and only had success after defense counsel informed her that she had been loading the ammunition backwards. Defendant therefore argues that defense counsel should have objected to the court's instruction and should have requested that the trial court include a statement that MH had required assistance to load the magazine. We disagree. Defense counsel's theory was that MH lacked the strength to load the magazine of the handgun found in defendant's home despite MH's testimony that defendant made her load the magazine during her confinement. Because defense counsel requested the demonstration expressly for the purpose of demonstrating whether MH had the strength to load the magazine, the trial court's instruction to the jury regarding the demonstration was accurate. Even if MH did require a brief verbal prompt while attempting to load the magazine in front of a trial judge and multiple officers of the court, she demonstrated that she had the strength to load the magazine. And the fact that she required such a prompt was not dispositive of whether she had previously loaded the magazine. Given these circumstances, it is doubtful that an objection to the trial court's instruction regarding the demonstration would have been successful. Trial counsel is not required to make futile objections. *Archer*, 277 Mich App at 84. And even if an objection would have been successful, it is doubtful that the exclusion of this evidence would have resulted in a different outcome. *Jordan*, 275 Mich App at 667. Defendant has thus not demonstrated that he was prejudiced by his counsel's lack of objection.

Defendant also argues that his trial counsel was ineffective for failing to object to testimony characterizing the state of defendant's home. Defendant's mother testified that she had previously observed that

defendant's home was "a mess," with dog hair on everything, and a detective described the home on the day of the incident as having "a really bad odor," some broken doors, holes in some walls, and some things painted on a wall. A photograph of two obscene words painted on the master bedroom's wall was admitted.

Defendant argues that this evidence was irrelevant. However, defense counsel had objected previously to the relevance of similar testimony from MH. The trial court had allowed the testimony after the prosecution argued that it was relevant to demonstrate the theory that defendant had been losing control of his emotional state and to show his activities immediately preceding the crimes. Any objection to similar testimony from defendant's mother and the detective likely would have been similarly unsuccessful because the testimony was also relevant to the prosecution's theory that defendant's deteriorating emotional state, as evidenced by the neglect and defacement of his home, contributed to his commission of the charged crimes. Counsel was not ineffective for failing to make a futile objection. *Archer*, 277 Mich App at 84.

IV. SENTENCING

Finally, defendant argues that the trial court erroneously scored OVs 4 and 7. We disagree. "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017) (quotation marks and citation omitted). We review for clear error the trial court's factual determinations at sentencing. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The trial court must

consult the advisory sentencing guidelines and assess the highest number of possible points for each offense variable. *People v Lockridge*, 498 Mich 358, 392 n 28; 870 NW2d 502 (2015). The trial court's determinations must be supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant argues that OV 4 was erroneously scored at 10 points because no serious psychological injury to MH was demonstrated. OV 4 provides for a "[s]core [of] 10 points if the serious psychological injury may require professional treatment," and "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). OV 4 is scored at zero points when "[n]o serious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(b). Defendant argues that the trial court improperly scored OV 4 at 10 points because of the nature of the crime rather than evidence of serious psychological injury. See *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012) ("The trial court may not simply assume that someone in the victim's position would have suffered psychological harm . . . ."). In this case, however, the trial court scored OV 4 at 10 points on the basis of MH's fear that she was going to die, the fact that she wanted to look at pictures of her children as she died, and "all of the things that happened that [the court] heard firsthand from [MH] and observed firsthand in the courtroom[.]" The trial court also concluded that MH's victim impact statement confirmed the psychological injury. The victim impact statement indicated that MH had been seeing a therapist through a domestic violence shelter because she was feeling unlovable and disgusting because of the abuse she had endured. She also mentioned nightmares and flashbacks to the day "he decided to take my life" and a

daily struggle with emotional stability as a result of the trauma. At trial, MH testified that she cried for the 3½ hours she spent confined in the room at gunpoint and that she thought she was going to die. Further, a neighbor described MH as shaking and crying after she escaped from defendant, a detective stated that MH was upset to the extent that she had difficulty communicating, the emergency room physician said that MH was upset, and another officer stated that he tried to calm MH down while she was crying. Ample evidence supported the trial court's scoring of OV 4.

OV 7, MCL 777.37, aggravated physical abuse, is scored at 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."[4] It is scored at zero points when there was no victim treated in the manner described. The trial court found that defendant had engaged in sadism[5] or conduct designed to cause additional pain, grief, and anxiety. To support the scoring, the trial court referred to defendant's use of the handgun and his continuous threats to rape and kill MH, causing fear and anxiety that exceeded the conduct necessary to commit the crimes. In determining how many points to assess under OV 7, a trial court should "determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such

[4] MCL 777.37, as amended by 2002 PA 137, effective April 22, 2002. MCL 777.37 was amended after defendant's offense by 2015 PA 137, effective January 5, 2016, to add "similarly egregious conduct" to the list of factors meriting points under OV 7.

[5] "Sadism" means conduct that "subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).

conduct was intended to make the victim's fear or anxiety increase by a considerable amount." *Hardy*, 494 Mich at 443. Defendant argues that his conduct was not sufficiently egregious to justify a score of 50 points because MH's conduct demonstrated that she did not find his threats to be credible. While MH initially may not have believed defendant's threats, the record is clear that by the time she made her escape she was convinced that defendant was serious and that her life was at risk. More importantly, OV 7 is scored on the basis of defendant's conduct and his intent, not whether the victim felt sufficiently threatened. See MCL 777.37.

Defendant was convicted of assaulting MH, unlawfully imprisoning her, and misdemeanor domestic violence. A conviction for unlawful imprisonment requires that "(1) a defendant must knowingly restrain a person, and (2) the restrained person must be secretly confined." *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010) (quotation marks omitted). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (quotation marks and citation omitted).

The record contains substantial evidence supporting the conclusion that defendant's prolonged behavior was egregious and sadistic. Defendant's behavior appeared to be designed to keep MH captive emotionally as well as physically and went beyond the elements of his crimes. MH stated that defendant confined her for 3½ to 4 hours, threatened her with guns, and assaulted her with his hands and feet, a liquor bottle, and a handgun. She said that defendant choked and

kicked her and then left the room to retrieve his two guns. She stated that defendant told her she could not leave and that he was going to drink liquor and smoke cigarettes before he killed them both. She reported that defendant threatened to rape her, told her that she should have believed the stories he had told her of bad things he had done to other women, and struck her while she was in the fetal position and not responsive to him. Defendant would not allow MH to stand, pointed the handgun at her head when she resisted, and made her repeatedly load the handgun, telling her that he wanted the bullet that killed him to have her fingerprints. Defendant also forced MH to put the handgun in her mouth. Ample evidence supported the trial court's scoring of OV 7.

Affirmed.

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

SAFDAR v AZIZ

Docket No. 337985. Submitted September 6, 2017, at Detroit. Decided September 7, 2017, at 9:00 a.m. Affirmed in part, vacated in part, and remanded 501 Mich 213.

Zaid Safdar filed an action in the Oakland Circuit Court, Family Division, seeking a divorce from Donya Aziz. The judgment of divorce was final in December 2016; the parties agreed to joint legal custody of their minor child with defendant maintaining sole physical custody of the child. In relation to the judgment, defendant appealed the trial court's denial of her motion for attorney fees (Docket No. 336590). While that appeal was pending in the Court of Appeals, defendant moved in the trial court for a change of domicile to allow her and the minor child to relocate from Michigan to Pakistan where both parties were citizens. The court, Lisa Langton, J., denied defendant's motion, reasoning that, under MCR 7.208(A), it lacked authority to modify the custody order while defendant's appeal of the attorney-fee award was pending in the Court of Appeals. The trial court rejected defendant's reliance on the Court's decision in *Lemmen v Lemmen*, 481 Mich 164 (2008)—which held that under MCL 552.17(1) and MCR 7.208(A)(4), a trial court may modify an order or judgment concerning child support or spousal support after a claim of appeal is filed or leave to appeal is granted—reasoning that *Lemmen* was limited to when a party sought to alter child and spousal support awards while an appeal was pending and did not apply to changes in domicile. The court also denied defendant's motion for reconsideration. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

MCR 7.208(A) generally provides that a trial court may not amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted. MCR 7.208(A)(4), however, allows exceptions to this rule "as otherwise provided by law." MCL 552.17(1) authorizes a trial court to modify divorce judgments concerning the care, custody, maintenance, and support of children if the circumstances of the parents or the needs of the children have changed. MCL 722.27(1)(c) of the Child Custody Act, MCL 722.21 *et seq*., similarly authorizes a trial court to

modify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances until the child reaches 18 years of age. The Court's holding in *Lemmen*—that MCL 552.17(1) constitutes an exception under MCR 7.208(A)(4) with regard to a trial court's authority to modify judgments related to child and spousal support—applies equally to the other judgments the statute authorizes a trial court to modify while an appeal is pending, including judgments concerning the care and custody of children. A change of domicile is an issue involving custody because it may affect a child's established custodial environment. Accordingly, MCL 552.17(1) and MCL 722.27(1)(c) satisfy the exception set forth in MCR 7.208(A)(4), allowing the trial court to amend an order or judgment concerning a child's domicile during an appeal. In this case, the trial court erred when it concluded that it lacked authority to consider defendant's motion for change of domicile during the pendency of her appeal in the Court of Appeals.

Reversed.

DIVORCE — APPEAL — MODIFICATION OF JUDGMENT AFTER APPEAL — CARE AND CUSTODY — CHANGE OF DOMICILE.

A trial court may modify an order or judgment concerning the care and custody of a minor child after a claim of appeal is filed or leave to appeal is granted if the circumstances of the parents or the needs of the children have changed (MCL 552.17(1); MCL 722.27(1); MCR 7.208(A)(4)).

Williams, Williams, Rattner & Plunkett, PC (by *James P. Cunningham*) for plaintiff.

Clark Hill PLC (by *Randi P. Glanz* and *Cynthia M. Filipovich*) for defendant.

Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM. Defendant appeals by leave granted[1] a March 24, 2017 order denying without prejudice defendant's motion to change domicile and relocate with the

[1] *Safdar v Aziz*, unpublished order of the Court of Appeals, entered May 26, 2017 (Docket No. 337985).

parties' daughter to Pakistan. The underlying facts are not in dispute.

Plaintiff and defendant, both Pakistani citizens, were married in Pakistan on June 24, 2011, and relocated to the United States, where plaintiff resided with an employment visa. In 2015, defendant moved to Michigan to live with her aunt, while plaintiff continued to reside in Maryland. The couple's only daughter was born in Oakland County on January 1, 2016, and the parties divorced on December 21, 2016. Pursuant to the judgment of divorce, the parties agreed to share joint legal custody of the minor child, while defendant would maintain sole physical custody. The divorce judgment contained a provision prohibiting the exercise of parenting time in any country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. At that time, the prohibition applied to Pakistan. Challenging only the trial court's denial of her motion for attorney fees, defendant filed a claim of appeal from the divorce judgment. That appeal is pending before this Court in Docket No. 336590.

In March 2017, defendant filed the motion to change domicile that is the subject of this appeal, expressing her desire to relocate with the minor child to Pakistan as soon as possible and claiming that Pakistan had completed steps to become a party to the Hague Convention since entry of the judgment of divorce. Plaintiff objected, arguing that the trial court lacked authority to set aside or amend the judgment of divorce while defendant's appeal from that judgment was pending before this Court. Defendant responded that her first appeal was limited to the issue of attorney fees and that the appeal did not preclude the trial court's consideration of custody matters. The trial court ad-

opted plaintiff's position and entered an order dismissing defendant's motion for change of domicile without prejudice, reasoning that pursuant to MCR 7.208(A), it lacked jurisdiction to modify any component of the judgment of divorce.

Defendant filed a motion for reconsideration in the trial court, arguing that under MCR 7.208(A)(4), the trial court was not limited by the pending appeal from considering modification of the divorce judgment "as otherwise provided by law." Defendant argued that because MCL 722.27(1)(c) and MCL 552.17(1) permit a trial court to consider issues related to custody as they arise, the trial court did not need to wait for resolution of the pending appeal before it considered defendant's motion for change of domicile on the merits. In support of her position, defendant cited our Supreme Court's holding in *Lemmen v Lemmen*, 481 Mich 164, 167; 749 NW2d 255 (2008), in which the Court specifically held that MCL 552.17(1) satisfied the exception of MCR 7.208(A)(4). The trial court denied defendant's motion, concluding that *Lemmen*'s holding was limited to judgments concerning child or spousal support and did not extend to changes relating to custody or changes of domicile.

On appeal, defendant argues that the trial court erred when it concluded that it lacked jurisdiction to consider the merits of her motion for change of domicile because the trial court was authorized to consider the issue of domicile under MCR 7.208(A)(4), MCL 722.27(1)(c), and MCL 552.17(1). We agree.

"The proper interpretation and application of a statute presents a question of law that we review de novo." *Petersen v Magna Corp*, 484 Mich 300, 306; 773 NW2d 564 (2009) (opinion by KELLY, C.J.). "We interpret court rules using the same principles that govern

the interpretation of statutes." *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). "Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation." *Id*. We also review de novo the question of a trial court's subject-matter jurisdiction. *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 559; 840 NW2d 375 (2013).

In pertinent part, MCR 7.208(A) provides:

> After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except
>
> (1) by order of the Court of Appeals,
>
> (2) by stipulation of the parties,
>
> (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
>
> (4) as otherwise provided by law.

There is no dispute that the first three exceptions to the broad prohibition of MCR 7.208(A) do not apply in this case. Defendant argues that MCL 552.17(1) and MCL 722.27(1)(c) give the trial court the authority to invoke the MCR 7.208(A)(4) "as otherwise provided by law" exception, thus allowing the court to consider defendant's motion for a change of domicile while the appeal in Docket No. 336590 is pending. MCL 552.17(1) provides:

> After entry of a judgment concerning annulment, divorce, or separate maintenance and on the petition of either parent, the court may revise and alter a judgment concerning the care, custody, maintenance, and support of some or all of the children, as the circumstances of the parents and the benefit of the children require.

Similarly, MCL 722.27(1)(c) of the Child Custody Act (CCA), MCL 722.21 *et seq*., permits a trial court to "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . ."

In *Lemmen*, our Supreme Court held that MCL 552.17(1) and a related statute, MCL 552.28, "satisfy the exception in MCR 7.208(A)(4) allowing a trial court to amend an order or judgment during an appeal 'as otherwise provided by law.' " *Lemmen*, 481 Mich at 167. The *Lemmen* Court reasoned that because MCL 552.17(1) permits modification of a final judgment as necessary "to ensure the welfare of the children when the circumstances of the parents or the needs of the children have changed," its application should not be limited while the parties wait for resolution on appeal. *Id*. According to the *Lemmen* Court,

> to require the trial court to wait to make modifications until after an appeal is completed is contrary to the plain language of the statute[] and would defeat [its] purpose, which is to enable the trial court to make modifications to child and spousal support orders when such modifications are necessary. The appeals process might take several years to complete. If there is a change in circumstances that would affect the needs of one of the parties or their children, or the ability of one of the parties to pay, the trial court should not, and does not, have to wait until that time has passed to modify a support order. [*Id*.]

Plaintiff correctly notes that there is no caselaw applying MCL 552.17(1) as an exception to MCR 7.208(A)(4) in a case involving a change of domicile. Plaintiff argues that because the *Lemmen* Court's consideration was limited to issues involving spousal and child support, it should not be expanded to all custody determinations. But plaintiff's reading of *Lemmen* is myopic. Although the *Lemmen* Court considered

the interplay of MCL 552.17(1) and MCR 7.208(A) in the context of child support, the Court framed the issue before it in general and comprehensive terms: "At issue here is whether MCL 552.17(1) and MCL 552.28 fall within an exception to the rule of MCR 7.208(A) that a trial court may not amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted." *Lemmen*, 481 Mich at 165. While the *Lemmen* Court's consideration was specific to modifications related to support, its reasoning is equally applicable to situations involving custody.

Under the plain language of MCL 552.17(1), a trial court is vested with authority to "alter a judgment concerning the care, custody, maintenance, *and* support of some or all of the children . . . ." (Emphasis added.) We are not persuaded by plaintiff's suggestion that after *Lemmen*, only one of these four coequal categories constitutes an exception under MCR 7.208(A). See *Robinson v City of Lansing*, 486 Mich 1, 16; 782 NW2d 171 (2010) (recognizing that "any attempt to segregate any portion or exclude any portion of a statute from consideration is almost certain to distort the legislative intent") (quotation marks and brackets omitted); *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (explaining that "words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole") (quotation marks and alteration omitted). Under MCL 552.17(1), the trial court has the authority to modify support while an appeal is pending, and it has equal authority to modify "care" and "custody." Further, under MCL 722.27(1)(c), the trial court maintains the authority to modify or amend previous judgments involving the custody of a minor child at any time until the child is 18 years old, as long as the requesting

party can show proper cause and a change in circumstances necessitating the modification.

The parties also dispute whether a change in domicile is an issue concerning the care and custody of a child. In *Rains v Rains*, 301 Mich App 313, 319-324; 836 NW2d 709 (2013), this Court considered whether a change in domicile is an order affecting the custody of a child that is appealable by right as a final order. The Court reasoned that because a change in domicile may affect a child's established custodial environment, it must be treated as an issue involving custody. *Id*. at 323-324. That the MCR 7.208(A)(4) exception applies when a trial court is presented with a motion to change domicile after a claim of appeal has been filed in this Court is consistent with the purpose of the CCA, the statutory scheme related to child custody matters. " 'It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other.' " *Apsey v Mem Hosp*, 477 Mich 120, 129 n 4; 730 NW2d 695 (2007), quoting *Detroit v Mich Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965).

Although MCL 552.17(1) is not part of the CCA, they " 'relate to the same person or thing, or the same class of persons or things' " and should be read together harmoniously if possible. *Apsey*, 477 Mich at 129 n 4, quoting *Detroit*, 374 Mich at 558. Indeed, a motion for change of domicile is brought pursuant to MCL 722.31(4) of the CCA, *Yachcik v Yachcik*, 319 Mich App 24, 34-35; 900 NW2d 113 (2017), and, as in any dispute over custody, a court is required to consider the best-interest factors found in MCL 722.23 in considering whether to grant a

motion for change of domicile, *Rains*, 301 Mich App at 325; *Rivette v Rose-Molina*, 278 Mich App 327, 330 n 1; 750 NW2d 603 (2008). The purpose of the CCA is "to promote the best interests of children." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). The issues of where a child will be domiciled and how the child's domicile will affect the established custodial environment are important. Neither the child nor the parties should be required to wait for resolution of a pending appeal when the trial court can decide whether an appropriate change of circumstances has already occurred and a change in domicile is in the child's best interests.

The trial court erred when it determined that it lacked the authority to consider defendant's motion for change of domicile and to modify the parties' divorce judgment during the pendency of defendant's appeal.

Reversed. We do not retain jurisdiction.

O'BRIEN, P.J., and JANSEN and MURRAY, JJ., concurred.

PEOPLE v BAHAM

Docket No. 331787. Submitted August 1, 2017, at Grand Rapids. Decided September 12, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 1057.

Richard A. Baham pleaded guilty in the Cass Circuit Court of manufacturing methamphetamine, MCL 333.7401(2)(b)(*i*); operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f); and possession of methamphetamine, MCL 333.7403(2)(b)(*i*). During the plea hearing, defendant admitted that he had the components to make methamphetamine in his car, that he had knowingly made methamphetamine in that car, and that he had knowingly possessed methamphetamine after he manufactured the substance. The court, Michael E. Dodge, J., accepted defendant's guilty plea, finding that there was a factual basis to support the plea. The Court of Appeals denied defendant's delayed application for leave to appeal. Defendant sought leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 500 Mich 945 (2017).

The Court of Appeals *held*:

1. MCR 6.310(D) precluded direct substantive review of defendant's challenge to the factual basis and accuracy of his plea because defendant failed to move to withdraw the plea in the trial court, raising as a basis for withdrawal the claims he raised in this appeal.

2. The elements of manufacturing a controlled substance, MCL 333.7401(1), are (1) the defendant manufactured a substance, (2) the substance manufactured was the controlled substance at issue, and (3) the defendant knowingly manufactured it. MCL 333.7106(3)(a) defines the term "manufacture" as the production, preparation, propagation, compounding, conversion, or processing of a controlled substance; while the term includes the packaging or repackaging of the substance or labeling or relabeling of its container, it does not include the preparation or compounding of a controlled substance by an individual for his or her own personal use. Accordingly, a person who engages in the preparation or compounding of a controlled substance for his or her own personal

use cannot be guilty of manufacturing a controlled substance as defined by MCL 333.7106(3). For that reason, the personal-use exception is an affirmative defense to the charge of manufacturing a controlled substance; it is not an element of the offense itself. Given that the Legislature included only two of the six activities defining the term "manufacture" in the MCL 333.7106(3)(a) personal-use exception—preparation and compounding—it is clear that there is no similar exception for the four other activities that define the term. In light of the dictionary definitions of "preparation" and "compounding" and consistently with the decisions of other states' courts, the personal-use exception only applies when a person who already possesses a controlled substance makes it ready for his or her own use or combines it with other ingredients for personal use. The personal-use exception was not relevant in this case because defendant's admissions established that he manufactured methamphetamine; defendant's level of activity in creating the substance was not consistent with that of someone who was preparing or compounding existing methamphetamine for his own personal use.

3. The trial court correctly accepted defendant's guilty plea of manufacturing methamphetamine because defendant's admissions established the grounds for a finding that he had committed the charged crime. In that regard, defendant admitted that he had the components to make methamphetamine and that he had knowingly created the controlled substance. Defendant's admissions supported the conclusion that he produced, propagated, converted, or processed methamphetamine; his level of activity was not consistent with the preparation of or compounding of existing methamphetamine to make it ready for his own use, which is necessary to establish grounds for the personal-use exception. The factual basis of the plea was not undermined when the trial court did not exclude the possibility of personal use as a defense because the inapplicability of the exception is not an element of manufacturing a controlled substance. Instead, under MCL 333.7531(1), it was defendant's burden to raise the personal-use exception and to present some competent evidence of preparation or compounding of the substance for personal use. Regardless, defendant waived the opportunity to assert a factual defense—like the personal-use exception—to the manufacturing offense because he pleaded guilty and provided a factual basis for his plea. Accordingly, because defendant's factual-basis challenge was without merit and because he was not entitled to the personal-use exception, defendant was not denied effective assistance when trial counsel failed to raise that meritless issue in the trial court.

4. The constitutional prohibition against double jeopardy protects, in part, against the imposition of multiple punishments for the same offense. The protection against multiple punishments is not violated if the Legislature has specifically authorized the permissibility of multiple punishments under two statutes; however, if the Legislature has expressed a clear intention to prohibit multiple punishments, it is a violation of double jeopardy to convict a defendant for both offenses in a single trial. If the Legislature's intent is not clear, courts apply the abstract-legal-elements test articulated in *People v Ream*, 481 Mich 223 (2008). Under the test, it does not violate double-jeopardy protections to convict a defendant of multiple offenses if each of the offenses has an element that the other does not.

5. The Legislature did not express a clear legislative intent with regard to multiple punishments under MCL 333.7401(2)(b)(*i*) and MCL 333.7403(2)(b)(*i*). Applying the abstract-legal-elements test, the offenses differ in that MCL 333.7401(2)(b)(*i*) requires proof that the defendant manufactured a controlled substance but not that he or she possessed the substance, while MCL 333.7403(2)(b)(*i*) requires proof that the defendant possessed a controlled substance but not that he or she manufactured the substance. While manufacturing may often involve possession, it is not invariably the case that one who manufactures a controlled substance will also have possession of the substance manufactured. Accordingly, the two offenses are not the same offense for purposes of double-jeopardy analysis because each offense contains an element not required of the other. Defendant admitted that he both manufactured and possessed methamphetamine. Although defendant's possession conviction stems from his possession of the same methamphetamine for which he was convicted of manufacturing, MCL 333.7401(2)(b)(*i*) and MCL 333.7403(2)(b)(*i*) are distinct offenses and his conviction for both offenses did not violate the prohibition against double jeopardy. Defendant was not denied effective assistance when trial counsel failed to raise the meritless double-jeopardy argument in the trial court.

Affirmed.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — MANUFACTURING OF AND POSSESSION OF CONTROLLED SUBSTANCES.

Convicting a defendant of manufacturing a controlled substance under MCL 333.7401(1) and of possession of the same controlled substance under MCL 333.7403(1) does not violate the constitu-

tional protection against double jeopardy (US Const, Am V; Const 1963, art 1, § 15).

2. CONTROLLED SUBSTANCES — MANUFACTURING — PERSONAL-USE EXCEPTION — PREPARATION OR COMPOUNDING.

Under MCL 333.7106(3)(a), a person who engages in the preparation or compounding of a controlled substance for his or her own personal use cannot be guilty of manufacturing a controlled substance as defined in MCL 333.7106(3); the personal-use exception applies only when a person who already possesses a controlled substance makes it ready for his or her own use or combines it with other ingredients for personal use; the exception does not apply when a person knowingly manufactures a controlled substance through production, propagation, conversion, or processing of the substance.

3. CONTROLLED SUBSTANCES — MANUFACTURING — PERSONAL-USE EXCEPTION — AFFIRMATIVE DEFENSE.

The MCL 333.7106(3)(a) personal-use exception to the offense of manufacturing a controlled substance is an affirmative defense to the charge; it is not an element of the offense (MCL 333.7401(1)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Victor A. Fitz*, Prosecuting Attorney, and *Thomas Hubbert*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for defendant.

Before: HOEKSTRA, P.J., and MURPHY and K. F. KELLY, JJ.

PER CURIAM. Defendant pleaded guilty of manufacturing methamphetamine, MCL 333.7401(2)(b)(*i*); operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f); and possession of methamphetamine, MCL 333.7403(2)(b)(*i*). Defendant filed a delayed application for leave to appeal, which this Court denied. Defendant then sought leave to appeal in the Michigan Supreme Court. In lieu of

granting leave to appeal, the Supreme Court remanded "this case to the Court of Appeals for consideration as on leave granted." *People v Baham*, 500 Mich 945 (2017). On remand, because the factual basis for defendant's plea supported his convictions, defendant's convictions did not violate double jeopardy, and defendant was not denied the effective assistance of counsel, we affirm.

In May 2015, the police arrested defendant after discovering that he was operating a mobile methamphetamine laboratory in his vehicle. Defendant was charged with five criminal offenses and given notice that he could be sentenced as a fourth-offense habitual offender, MCL 769.12. The prosecutor offered defendant a plea deal, pursuant to which defendant would plead guilty of manufacturing methamphetamine, operating or maintaining a methamphetamine laboratory, and possession of methamphetamine. In exchange, the prosecutor agreed to dismiss the charges of maintaining a drug house, MCL 333.7405(1)(d), and operating a vehicle while his license was suspended, second offense, MCL 257.904(3)(b). The prosecutor also agreed that defendant could be sentenced as a second-offense habitual offender, MCL 769.10, as opposed to a fourth-offense habitual offender. At the plea hearing, the trial court engaged in the following colloquy with defendant to ascertain the factual basis for defendant's plea:

> *The Court*: The Count I offense charges you with manufacture of [sic] making some methamphetamine.
>
> Is that true, did you make some methamphetamine?
>
> *The Defendant*: Yes.
>
> *The Court*: Did you know the substance that you were manufacturing or making was, in fact, methamphetamine?

The Defendant: Yes, sir.

The Court: And the Count II charge says that you were operating or maintaining a laboratory to make methamphetamine.

Does that mean that you had chemicals or the necessary components to make it?

The *Defendant*: Yes.

The Court: And did you make it in a building or a residence that was under you control?

The Defendant: Um, a vehicle, yes, sir.

The Court: In a vehicle?

The Defendant: Yes. Yes, I did.

The Court: All right, and was that a vehicle of yours or one you controlled?

The Defendant: Yes.

The Court: Did you know that the stuff was there, the components in the vehicle, that you could use to make meth?

The Defendant: Yes, sir.

The Court: Were you successful, did you end up possessing some methamphetamine as a result of your manufacturing?

The Defendant: One more time, please?

The Court: Were you successful? Did you end up possessing some meth that you made?

The Defendant: Yes.

The Court: Because that's the Count III charge; that's why I'm asking you about that. It says you possessed some methamphetamine.

Is that true, did you possess some methamphetamine that you had cooked or made?

The Defendant: Yes.

The Court: And you knew that substance was, in fact, methamphetamine; is that right?

The Defendant: Yes.

On the basis of these admissions by defendant, the trial court accepted defendant's guilty plea, finding that it was factually supported. In keeping with the plea bargain, the trial court sentenced defendant as a second-offense habitual offender to concurrent terms of 51 months' to 30 years' imprisonment for manufacturing methamphetamine and operating or maintaining a methamphetamine laboratory as well as a concurrent sentence of 117 days for the possession of methamphetamine. The case is now before us on remand from the Michigan Supreme Court for consideration as on leave granted.

I. PERSONAL-USE EXCEPTION

On appeal, defendant first argues that his guilty plea for manufacturing methamphetamine should be set aside because, as set forth in MCL 333.7106(3)(a), there is a personal-use exception to prohibitions on manufacturing a controlled substance and, absent evidence that defendant did not intend to use the methamphetamine for personal use, the factual basis for his manufacturing conviction was lacking and trial counsel was ineffective for not raising this issue. We disagree.

Initially, we note that defendant never moved to withdraw his guilty plea in the trial court. Under MCR 6.310(D), defendant's failure to file a motion to withdraw his guilty plea bars him from raising on appeal the argument that his plea was not an accurate one. In particular, MCR 6.310(D) states:

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other

> claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

Defendant's challenge to the factual basis for his plea implicates the accuracy of his plea, and thus his claim falls squarely within the ambit of MCR 6.310(D). Because a motion to withdraw a plea constitutes a prerequisite for challenging the accuracy of a plea and defendant has not filed such a motion, our direct substantive review of this appellate argument is precluded under MCR 6.310(D). *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011).

However, defendant has also raised his argument as an ineffective-assistance claim, asserting that counsel provided ineffective assistance by not raising the personal-use issue in the trial court. While our direct substantive analysis of the personal-use issue is precluded by MCR 6.310(D), this rule does not prevent us from considering the personal-use exception in the context of an ineffective-assistance argument. As demonstrated by the Supreme Court order in *People v Broyles*, 498 Mich 927 (2015), a claim of ineffective assistance of counsel can serve as a basis for relief relative to a plea despite a failure to comply with MCR 6.310. Specifically, the Court observed and ruled:

> Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Kent Circuit Court's order denying the defendant's motion for plea withdrawal and/or to correct an invalid sentence and we remand this case to the Kent Circuit Court. That court shall treat the defendant's January 26, 2015 supplemental brief and February 20, 2015 supplemental motion as timely filed and evaluate the defendant's issues on the merits. The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing a proper motion and admits her sole

> responsibility for the error. Because a motion to withdraw a plea or correct an invalid sentence is a prerequisite to substantive review on direct appeal under MCR 6.310 and MCR 6.429, the defendant was effectively deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. [*Broyles*, 498 Mich at 927-928.]

Following the reasoning in *Broyles*, while we may not directly address the personal-use exception on appeal, we may consider it to determine whether counsel's failure to properly raise this issue in the trial court, and to file a motion to withdraw a plea on this basis, constituted ineffective assistance of counsel.

"To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

To determine whether counsel provided ineffective assistance of counsel in this case, it is necessary to consider the factual basis for defendant's plea and the applicability of the personal-use exception. Under MCR 6.302(D)(1), if a defendant pleads guilty, "the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." "When reviewing whether the factual basis

for a plea was adequate, this Court considers whether the fact-finder could have found the defendant guilty on the basis of the facts elicited from the defendant at the plea proceeding." *People v Fonville*, 291 Mich App 363, 377; 804 NW2d 878 (2011). "Where the statements by a defendant at the plea procedure do not establish grounds for a finding that the defendant committed the crime charged, the factual basis for the plea-based conviction is lacking." *People v Mitchell*, 431 Mich 744, 748; 432 NW2d 715 (1988).

Whether the conduct admitted by a defendant falls within the scope of the criminal statute at issue is a question of statutory interpretation. *People v Adkins*, 272 Mich App 37, 39; 724 NW2d 710 (2006). The goal of statutory interpretation is to ascertain the legislature's intent. *People v Perry*, 317 Mich App 589, 604; 895 NW2d 216 (2016). We begin with the plain language of the statute, interpreting words according to their ordinary meaning and within the context of the statute in order to give effect to the statute as a whole. *Id*. "[W]here that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Barrera*, 278 Mich App 730, 736; 752 NW2d 485 (2008) (quotation marks and citation omitted).

Under the Public Health Code, MCL 333.1101 *et seq*., methamphetamine is a Schedule 2 controlled substance. MCL 333.7214(c)(*ii*). The manufacture of controlled substances is prohibited by MCL 333.7401(1), which states, in relevant part, that "a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . ." "The elements of manufac-

turing a controlled substance are (1) the defendant manufactured a substance, (2) the substance manufactured was the controlled substance at issue, and (3) the defendant knowingly manufactured it." *People v Bosca*, 310 Mich App 1, 23; 871 NW2d 307 (2015).

In this case, defendant admitted that he made methamphetamine and that he did so knowingly. The question is whether his cooking or making of methamphetamine constitutes the illegal "manufacture" of methamphetamine in light of the personal-use exception set forth in MCL 333.7106(3)(a) as part of the definition of "manufacture." In particular, the term "manufacture" is defined in the Public Health Code as follows:

> "Manufacture" means *the production, preparation, propagation, compounding, conversion, or processing of a controlled substance*, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, *except that it does not include either of the following*:
>
> (a) *The preparation or compounding of a controlled substance by an individual for his or her own use*.
>
> (b) The preparation, compounding, packaging, or labeling of a controlled substance by either of the following:
>
> (*i*) A practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.
>
> (*ii*) A practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis, and not for sale. [MCL 333.7106(3) (emphasis added).]

Given the plain language of § 7106(3)(a), it is clear that an individual who engages in the "preparation or

compounding of a controlled substance . . . for his or her own use" cannot be found guilty of manufacturing a controlled substance within the meaning of § 7106(3). See *People v Pearson*, 157 Mich App 68, 72; 403 NW2d 498 (1987). However, contrary to defendant's argument, it does not follow that the factual basis for his plea was invalid simply because the trial court did not elicit information to exclude the possibility that defendant intended to use the resulting methamphetamine for his own personal use.

First of all, defendant mischaracterizes § 7106(3)(a) by suggesting that it provides a broad exemption for *any* manufacturing done for personal use. In actuality, as set forth in § 7106(3), in relevant part, the definition of "manufacture" provides a list of six activities that constitute manufacturing: production, preparation, propagation, compounding, conversion, and processing.[1] From this list of six activities, the § 7106(3)(a) personal-use exception includes only two of these activities: preparation and compounding. "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v McFall*, 309 Mich App 377, 385; 873 NW2d 112 (2015) (quotation marks and citation omitted). By defining "manufacture" to include six activities and then including only two of those six activities under the personal-use exception, the Legislature made clear that a personal-use exception applies for "preparation or compounding," but there is no similar personal-use exception for production, propa-

[1] Manufacturing also includes the "packing or repackaging" of a controlled substance as well as the "labeling or relabeling of its container." MCL 333.7106(3). However, it is undisputed that these activities are not at issue in this case and that defendant is not entitled to the exception for practitioners set forth in § 7106(3)(b).

gation, conversion, or processing. *Pearson*, 157 Mich App at 72. See also Mich Crim JI 12.1, Use Note 4. The Legislature has thus drawn a clear distinction between "preparation or compounding" as compared to the other methods of manufacturing identified in § 7106(3).

Given this distinction, in considering the meaning of "preparation" and "compounding" in comparison to the other methods of manufacturing, it is also readily apparent that the personal-use exception applies only to a controlled substance already in existence, and it does not encompass the creation of a controlled substance. *Pearson*, 157 Mich App at 71-72. Specifically, as most relevantly defined, the term "preparation" means "the action or process of making something ready for use . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). Likewise, in pertinent part, "compounding" denotes the action or process of putting "together (parts) so as to form a whole," such as by combining ingredients. *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "compound" and "-ing"). Adhering to these ordinary definitions, as we recognized in *Pearson*, "the plain intent of the statutory personal use exception is to avoid imposing felony liability on individuals who, already in possession of a controlled substance, make it ready for their own use or combine it with other ingredients for use."[2] *Pearson*, 157 Mich

[2] We are not alone in this understanding of the personal-use exception as set forth in *Pearson*. Consistently with *Pearson*, numerous state courts interpreting the terms "preparation" and "compounding" have concluded that the personal-use exception applies "when [an] individual is already in possession of the controlled substance and is simply making it ready for use . . . or combining it with other ingredients for use." See, e.g., *State v Wilson*, 421 NJ Super 301, 308; 23 A3d 489 (App Div, 2011); *State v Bossow*, 274 Neb 836, 845-846; 744 NW2d 43 (2008); *Owens v State*, 325 Ark 110, 124; 926 SW2d 650 (1996); *State v Underwood*, 168 W Va 52, 57-58; 281 SE2d 491 (1981); *State v Boothe*,

App at 71. Typical examples of preparation or compounding often involve marijuana, specifically making marijuana ready for use by "rolling marijuana into cigarettes for smoking" or combining marijuana with other ingredients to make it ready for use by "making the so-called 'Alice B. Toklas' brownies containing marijuana." *Stone v State*, 348 Ark 661, 667; 74 SW3d 591 (2002) (quotation marks and citations omitted). In both instances, the controlled substance already exists in finished form, and any further action is undertaken merely to enable use of the substance.

In contrast to preparation and compounding, the other four methods of manufacturing controlled substances—i.e., production, propagation, conversion, and processing—"contemplate a significantly higher degree of activity involving the controlled substance," and thus these manufacturing activities are felonies regardless of "whether the controlled substance so 'manufactured' was for personal use or for distribution." *Pearson*, 157 Mich App at 71 (quotation marks and citation omitted). While we do not attempt to provide an exhaustive account of the activities that constitute production, propagation, conversion, and processing, we note that "production" has been statutorily defined as "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." MCL 333.7109(6). In turn, "manufacture" means "to make" from materials. *Merriam-Webster's Dictionary* (11th ed). In comparison, as commonly understood, (1) "propagation" involves "the act or action of propagating," such as to "increase (as of a kind of organism) in

285 NW2d 760, 762 (Iowa App, 1979). Although decisions from other states are not precedentially binding, they may be considered persuasive. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011). See also MCL 333.1111(1); MCL 333.7121(2); *People v Thompson*, 477 Mich 146, 155 n 9; 730 NW2d 708 (2007).

numbers," (2) "conversion" is "the act of converting," and (3) "processing" refers to "a series of actions or operations conducing to an end" or "a continuous operation or treatment esp. in manufacture." *Merriam-Webster's Dictionary* (11th ed) (defining "process" and adding "-ing"). From these various definitions, courts have recognized that production, propagation, conversion, and processing encompass "planting, growing, cultivating or harvesting a controlled substance," *creating* a controlled substance "by any synthetic process or mixture of processes," as well as the alteration or extraction of a controlled substance, such as "taking a controlled substance and, by any process or conversion, changing the form of the controlled substance or concentrating it." *State v Childers*, 41 NC App 729, 732; 255 SE2d 654 (1979). See also *People v Hunter*, 201 Mich App 671, 676-677; 506 NW2d 611 (1993).

In view of these different methods of manufacturing, following the reasoning set forth in *Pearson*, we hold that one may not claim the personal-use exception for making or cooking methamphetamine.[3] Making or cooking methamphetamine clearly involves the creation of methamphetamine, meaning that it constitutes production, propagation, conversion, or processing of methamphetamine as opposed to the mere "preparation or compounding" of existing methamphetamine for personal use. Accordingly, the personal-use exception does not apply, and one who knowingly

[3] Our decision today rests in large part on the reasoning and analysis performed by this Court in *Pearson*, wherein we similarly determined that growing marijuana is not protected by the personal-use exception. *Pearson*, 157 Mich App at 71-72. As a published decision of this Court decided before November 1, 1990, *Pearson* is not precedentially binding. MCR 7.215(J)(1). Nevertheless, we consider *Pearson* persuasive and we use it as a guide. See *People v Barbarich*, 291 Mich App 468, 476 n 2; 807 NW2d 56 (2011).

makes or cooks methamphetamine is guilty of manufacturing methamphetamine without regard to whether the methamphetamine will be distributed or used personally.[4]

Turning to the present facts, at the plea hearing, when describing his activities, defendant admitted that he had chemicals and components to make methamphetamine, that he was "manufacturing or making" methamphetamine, and that he had "cooked or made" methamphetamine. Clearly, defendant admitted to the creation of methamphetamine, and his factual admissions were sufficient to support the conclusion that defendant produced, propagated, converted, or processed methamphetamine in contravention of MCL 333.7401(1) and MCL 333.7106(3). In contrast, this level of activity is not consistent with the assertion that defendant engaged in the "preparation or compounding" of existing methamphetamine merely to make it ready for use. Defendant is, therefore, ineligible for the personal-use exception, and it is immaterial whether or not defendant cooked methamphetamine for his own use or for distribution purposes. In sum, the personal-use exception simply had no bearing on this case, and the trial court's failure to exclude the possibility of personal use does not undermine the factual basis of defendant's plea.

In concluding that the trial court obtained a sufficient factual basis for defendant's plea, we also note that the personal-use exception is an affirmative de-

[4] Other courts interpreting comparable personal-use provisions have likewise determined that making or cooking methamphetamine is not protected by the personal-use exception. See, e.g., *Stallard v State*, 225 Md App 400, 412; 124 A3d 1165 (2015); *Owens*, 325 Ark at 124. Though these cases are not binding, we find them persuasive and consistent with Michigan's statutory provisions. *Jackson*, 292 Mich App at 595 n 3. See also *Thompson*, 477 Mich at 155 n 9.

fense to a charge of manufacturing a controlled substance, meaning that it was not an element of the crime on which the trial court had to elicit factual support for defendant's plea. MCL 333.7401(1) creates a general prohibition on the manufacturing of controlled substances. While there are potential exceptions to this general prohibition, MCL 333.7531(1)[5] provides that, when offering proof of the elements of the offense, the prosecution has no obligation to negate any exemption or exception in Article 7 of the Public Health Code, which includes the personal-use exception in MCL 333.7106(3). Instead, "[t]he burden of proof of an exemption or exception is upon the person claiming it." MCL 333.7531(1). Once the prosecution has presented a prima facie case of manufacturing a controlled substance, the burden shifts to the defendant to present some competent evidence regarding the applicability of the personal-use exception. See MCL 333.7531(1); *People v Pegenau*, 447 Mich 278, 293; 523 NW2d 325 (1994) (opinion by MALLETT, J.); *People v Hartuniewicz*, 294 Mich App 237, 245-246; 816 NW2d 442 (2011). In other words, the personal-use exception functions as an affirmative defense, and the prosecutor is not required to disprove personal use as an element of the offense. Cf. *Pegenau*, 447 Mich at 293 (opinion by MALLETT, J.); *Hartuniewicz*, 294 Mich App at 245. Accordingly, if defendant believed he was entitled to a personal-use defense, the burden was on defendant to raise the issue as an affirmative defense and to

[5] MCL 333.7531(1), which is contained in Article 7 of the Public Health Code, states as follows: "It is not necessary for this state to negate any exemption or exception in this article in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under this article. The burden of proof of an exemption or exception is upon the person claiming it."

present some competent evidence of preparation or compounding for personal use.

Rather than pursue this defense, defendant pleaded guilty; and, as we have discussed, his admissions provided an adequate factual basis for his plea. Further, because the inapplicability of the personal-use exception is not an element of manufacturing a controlled substance, when accepting defendant's plea, the trial court did not have to exclude the possibility of preparation or compounding for personal use to find a factual basis to support the conclusion that defendant's admitted conduct fell within the scope of the criminal statute. See *Fonville*, 291 Mich App at 377; *Adkins*, 272 Mich App at 38. In other words, in accepting defendant's plea, the trial court was not obligated to examine defendant regarding potential defenses or to advise defendant of possible defenses. MCR 6.302(B)(1); *People v Burton*, 396 Mich 238, 242; 240 NW2d 239 (1976). At this juncture, having pleaded guilty and provided an adequate factual basis for his plea, defendant has waived the opportunity to assert a factual defense to the crime charged. *People v Jex*, 489 Mich 983 (2011). Given that defendant's challenges to the factual basis for his plea and his reliance on the personal-use exception are without merit, it is also apparent that counsel did not provide ineffective assistance by failing to raise this meritless issue in the trial court. *Ericksen*, 288 Mich App at 201.

II. DOUBLE JEOPARDY

Next, defendant argues that his convictions for manufacturing methamphetamine and possession of methamphetamine violate double jeopardy and that trial counsel provided ineffective assistance by failing

to raise this issue below.[6] Specifically, defendant contends that it is impossible to manufacture methamphetamine without also possessing methamphetamine, given that the offense of possession does not contain any element different from the elements required for the offense of manufacturing. Consequently, defendant maintains that he may not be convicted for both manufacturing and possessing the same unit of methamphetamine. We disagree.

The United States and Michigan Constitutions protect a defendant from being placed in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. Defendant maintains that conviction and sentencing for both manufacturing methamphetamine and possession of methamphetamine violates double jeopardy by imposing multiple punishments for "the same offense." See *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003).

> [W]hen considering whether two offenses are the "same offense" in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent. If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in *Ream*[7] to discern legislative intent. [*People v Miller*, 498 Mich 13, 19; 869 NW2d 204 (2015) (citation omitted).]

Under the abstract-legal-elements test, "two offenses will only be considered the 'same offense' where it is

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[6] It is not apparent that a double-jeopardy challenge would be precluded on direct appeal by MCR 6.310(D). However, even assuming that defendant's double-jeopardy argument is also problematic under MCR 6.310(D), as we have discussed, it would be properly considered in the ineffective-assistance context.

[7] *People v Ream*, 481 Mich 223, 238; 750 NW2d 536 (2008).

impossible to commit the greater offense without also committing the lesser offense." *Id*. In other words, "it is not a violation of double jeopardy to convict a defendant of multiple offenses if each of the offenses for which defendant was convicted has an element that the other does not." *Id*. (quotation marks, citation, and ellipsis omitted). "Because the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements." *People v Ream*, 481 Mich 223, 238; 750 NW2d 536 (2008).

In this case, defendant was convicted under MCL 333.7401(2)(b)(*i*) and MCL 333.7403(2)(b)(*i*), neither of which expresses a clear legislative intent with regard to the permissibility of multiple punishments. See *Miller*, 498 Mich at 19. Consequently, whether the Legislature intended multiple punishments for manufacturing and possession of a controlled substance is determined by applying the abstract-legal-elements test.

"With respect to manufacturing methamphetamine, the elements are (1) the defendant manufactured a controlled substance, (2) the substance manufactured was methamphetamine, and (3) the defendant knew he was manufacturing methamphetamine." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). In comparison, to obtain a conviction under MCL 333.7403(2)(b), the prosecution must prove that the defendant "knowingly or intentionally possess[ed]" methamphetamine. "The element of possession . . . requires a showing of dominion or right of control over the drug with knowledge of its presence and character." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (quotation marks and citations omitted). Possession may be actual or constructive, joint or exclusive. *Id*. at 166. "The essential issue is whether

the defendant exercised dominion or control over the substance." *Id*.

Considering these elements, the offenses differ in that one requires the "manufacture" of a controlled substance and the other requires "possession" of a controlled substance. In particular, manufacturing methamphetamine requires proof that the defendant manufactured methamphetamine, while a conviction for possession of methamphetamine does not require proof of manufacturing. Conversely, possession of methamphetamine requires proof that the defendant possessed methamphetamine, while the manufacture of methamphetamine does not require proof of possession. Because each contains an element not required for the other, the two offenses are not the same offense for double-jeopardy purposes. See *Miller*, 498 Mich at 19; *People v Welshans*, unpublished per curiam opinion of the Court of Appeals, issued December 9, 2014 (Docket No. 318040), pp 7-8.[8]

In concluding that manufacturing and possession are not the "same offense," we do not ignore the practical reality that in many, if not most, cases, proof of manufacturing a controlled substance will also establish possession of that controlled substance. See, e.g., *Meshell*, 265 Mich App at 622-623 (considering manufacturing activities as evidence of possession). But we are simply not prepared to state that possession is necessarily inherent in manufacturing or that it would be *impossible* to manufacture a controlled substance without also possessing it. See *Miller*, 498 Mich at 19. Previously, in concluding that possession is not a lesser included offense of delivering a controlled sub-

[8] While unpublished opinions are not precedentially binding, MCR 7.215(C)(1), they may be considered for their persuasive value. *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004).

stance, we rejected a similar argument and we cautioned against injecting a possession requirement into the manufacturing and delivery statute, stating:

> One might argue that it is impossible for a party to manufacture, deliver or intend to manufacture or deliver a controlled substance without at least constructive possession of it. However, in our estimation, such an analysis unnecessarily adds the element of constructive possession to the crime. Requiring proof of constructive possession inappropriately creates a doorway through which drug traffickers, particularly those high in the distribution chain, can escape. [*People v Binder (On Remand)*, 215 Mich App 30, 35-36; 544 NW2d 714 (1996), vacated in part on other grounds 453 Mich 915 (1996).]

The same is true of manufacturing insofar as individuals responsible for some aspect of manufacturing could attempt to escape responsibility by claiming a lack of dominion or right of control over the controlled substance despite the fact that the plain language of the manufacturing statute includes no element of "possession" with respect to the controlled substance. In actuality, manufacturing a controlled substance may be a process with various steps, and the Legislature broadly defined the term "manufacture" to encompass myriad activities in this process, including tasks that may potentially be carried out without a right of control over the substance, such as labeling containers or mixing the brownie batter to which a controlled substance is added. See *People v Eggers*, unpublished per curiam opinion of the Court of Appeals, issued February 14, 2006 (Docket No. 256618), p 5. Depending on the drug and the method of manufacturing, it is also possible that there will be no controlled substance to possess until the manufacturing process is complete, and the fact that one undertakes the manufacture of a controlled substance is no guarantee that there will be a right of control or dominion over the finished product.

Ultimately, while manufacturing may often involve possession, it is not invariably the case that one who manufactures a controlled substance will also have possession of the substance manufactured.[9] Because it is not impossible to manufacture a controlled substance without also possessing that controlled substance, there is no double-jeopardy violation arising from convictions for manufacture and possession of the same substance. See *Miller*, 498 Mich at 19.

In this case, defendant admitted both manufacturing methamphetamine and possessing methamphetamine. Although his conviction for possession stems from the possession of the same methamphetamine that he manufactured, possession and manufacturing are distinct offenses. Consequently, defendant's conviction and sentencing for both offenses does not violate double jeopardy. Having concluded that defendant's convictions do not violate double jeopardy, we also reject defendant's argument that counsel provided ineffective assistance by failing to raise this meritless argument in the trial court. See *Ericksen*, 288 Mich App at 201.

Affirmed.

HOEKSTRA, P.J., and MURPHY and K. F. KELLY, JJ., concurred.

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[9] See *id*. Courts in other jurisdictions have also reached this conclusion. See, e.g., *State v Davis*, 117 Wash App 702, 709; 72 P3d 1134 (2003) ("Although possession is usually inherent in manufacture, that is not invariably the case . . . ."); *Galbreath v State*, 213 Ga App 80, 81; 443 SE2d 664 (1994) ("Possession of marijuana is not a necessary element of the crime of knowingly manufacturing marijuana by cultivating or planting . . . ."); *State v Brown*, 106 Or App 291, 297; 807 P2d 316 (1991) ("Each of the statutory provisions defining possession and manufacture of a controlled substance requires proof of an element that the other does not . . . ."); *State v Peck*, 143 Wis 2d 624, 645-646; 422 NW2d 160 (App, 1988) ("Possession, however, is not an element of the offense of manufacturing a controlled substance . . . .").

WAGNER v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN

Docket No. 332400. Submitted September 6, 2017, at Grand Rapids. Decided September 12, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 1096.

Plaintiffs, Michelle and James Wagner, brought an action in the Kalamazoo Circuit Court against Farm Bureau Mutual Insurance Company of Michigan and Conor and Greg Lewis, seeking uninsured motorist (UM) benefits following a collision that occurred on May 17, 2010. Conor, who was delivering a pizza for Pizza Hut, rear-ended Michelle, and Michelle sustained injuries. On May 2, 2013, plaintiffs filed a third-party automobile liability claim against Conor, Greg, and Pizza Hut of Kalamazoo, and Farm Bureau sought a declaration that it had no duty to defend or indemnify Conor or Greg from plaintiffs' third-party claim because Farm Bureau's policy did not provide coverage for liability arising out of the operation of a vehicle while it was being used to carry property for a fee. On June 23, 2014, the court, Pamela L. Lightvoet, J., granted summary disposition in favor of Farm Bureau, and the Court of Appeals, MARKEY, P.J., and OWENS and RONAYNE KRAUSE, JJ., affirmed in an unpublished per curiam opinion, issued November 17, 2015 (Docket No. 322738). On May 12, 2014, plaintiffs notified Farm Bureau of its potential UM or underinsured motorist claim, and Farm Bureau sent plaintiffs a letter asserting that the notice was not timely pursuant to the parties' policy because the claimant had three years after the date of the accident to notify Farm Bureau of its UM claim and file suit. However, the policy also stated that failure to perform a duty or give notice would not invalidate a claim if it was not "reasonably possible" to do so and the claimant performed "as soon as reasonably possible." Plaintiffs filed the instant suit on August 20, 2014, seeking a declaration that plaintiffs' UM claim did not accrue until the trial court's June 23, 2014 order declaring that Farm Bureau had no duty to indemnify Conor or Greg, that plaintiffs' third-party action tolled the running of the UM notice and filing provisions, and that plaintiffs' appeal of the June 23, 2014 order further tolled the statutory period of limitations. All claims against Conor and Greg were dismissed, and Farm Bureau moved for summary

disposition, arguing that plaintiffs' UM claims were time-barred pursuant to the policy's unambiguous and enforceable notice and filing time limitations. The court, Gary C. Giguere, Jr., J., denied Farm Bureau's motion, holding that Farm Bureau's policy was inconsistent on its face and therefore ambiguous. Farm Bureau appealed.

The Court of Appeals *held*:

1. UM insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. The UM policy language governs the coverage. A contract is ambiguous if its words can be reasonably understood in different ways or when its provisions irreconcilably conflict. In this case, the parties' UM policy was ambiguous because its provisions irreconcilably conflicted. The policy contained a three-year time limit for notifying Farm Bureau of a UM claim and filing suit. The accident occurred on May 17, 2010, and therefore the three-year time limit expired on May 17, 2013; however, plaintiffs did not have a UM claim within three years of the accident because the automobile Conor drove did not become uninsured until June 23, 2014. The trial court's June 23, 2014 order made the vehicle Conor drove uninsured after the time to notify Farm Bureau of a UM claim and file a UM claim had expired. Because plaintiffs could not notify Farm Bureau of—or file—a UM claim that did not exist, the policy's definition of an uninsured automobile, its requirement that plaintiffs provide proof that the automobile met this definition, and its UM notice and filing time limitations irreconcilably conflicted. Therefore, the policy was ambiguous, a question of fact existed, and the trial court correctly denied Farm Bureau's motion for summary disposition under MCR 2.116(C)(10).

2. Another policy provision stating that failure to perform a duty or give notice would not invalidate a claim if it was not "reasonably possible" to do so and the claimant performed "as soon as reasonably possible" further highlighted the ambiguity of Farm Bureau's policy. This language suggested that it was possible to interpret the policy in a manner that would allow a fact-finder to conclude that plaintiffs submitted notice and timely filed a UM claim as soon as reasonably possible because plaintiffs notified Farm Bureau of their potential UM claim while Farm Bureau's declaratory action was pending. Therefore, the trial court correctly denied Farm Bureau's MCR 2.116(C)(8) motion for summary disposition.

3. A policy sets the date of accrual for a UM claim. The policy stated that the claim accrued on the date of the accident but also

required plaintiffs to provide proof that the automobile was uninsured, suggesting that the claim could accrue once an automobile is determined to be uninsured. Therefore, the trial court incorrectly determined an accrual date for plaintiffs' UM claim at the summary-disposition stage.

4. Farm Bureau's policy was ambiguous with regard to whether the UM filing limitations could be tolled. The policy required plaintiffs to provide proof that an automobile was uninsured, allowed for an automobile to become insured after the UM notice and filing deadlines, and stated that the failure to perform a duty would not invalidate a claim if it was not reasonably possible to do so and performance occurred as soon as reasonably possible. Therefore, the policy may toll the UM filing limitation until an automobile's insured status is determined. The trial court correctly denied Farm Bureau's MCR 2.116(C)(7) motion because the policy did not unambiguously state that plaintiffs' UM action was time-barred.

Affirmed.

Biringer, Hutchinson, Lillis, Bappert, Angell & Horton, PC (by *Charles R. Bappert*) for Michelle and James Wagner.

Willingham & Coté, PC (by *Kimberlee A. Hillock* and *John A. Yeager*) for Farm Bureau Mutual Insurance Company of Michigan.

Before: TALBOT, C.J., and O'CONNELL and CAMERON, JJ.

PER CURIAM. Defendant Conor Lewis rear-ended plaintiff Michelle Wagner. Conor's father (defendant Greg Lewis), Michelle, and Michelle's husband (plaintiff James Wagner) had automobile insurance policies with defendant Farm Bureau Mutual Insurance Company of Michigan. The accident spurred multiple lawsuits. The instant suit involves plaintiffs' first-party claim for uninsured motorist (UM) benefits.[1] Farm Bureau

[1] The trial court entered an order dismissing all claims against Conor and Greg. All parties to this litigation are insured by Farm Bureau.

moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), arguing that plaintiffs' UM claims were time-barred because plaintiffs failed to comply with the policy's notice and filing provisions. The trial court denied Farm Bureau's motion, concluding that Farm Bureau's policy was ambiguous. Farm Bureau appeals as on leave granted.[2] We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 17, 2010, Michelle was driving, and a car rear-ended her. Michelle sustained injuries. Michelle and Conor spoke at the scene. Michelle said that Conor stated that he was delivering a pizza for his job at Pizza Hut and indicated that he was insured through Farm Bureau. Greg reported the accident to Farm Bureau.

On May 2, 2013, plaintiffs filed a third-party automobile liability claim against Conor, Greg, and Pizza Hut of Kalamazoo. Farm Bureau provided a defense under a reservation of rights, citing language in Greg's policy that Farm Bureau does not provide coverage " 'for liability arising out of the . . . operation of a vehicle while it is being used to carry . . . property for a fee.' " Farm Bureau later filed a declaratory action, seeking a declaration that it had no duty to defend or indemnify Conor or Greg from plaintiffs' third-party claim. Farm Bureau then moved for summary disposition. On June 23, 2014, the trial court granted Farm Bureau's motion. This Court affirmed.[3]

On May 12, 2014, plaintiffs notified Farm Bureau of its potential UM or underinsured motorist claim. Farm

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[2] *Wagner v Farm Bureau Mut Ins Co of Mich*, 500 Mich 945 (2017).

[3] *Farm Bureau Mut Ins v Wagner*, unpublished per curiam opinion of the Court of Appeals, issued November 17, 2015 (Docket No. 322738).

Bureau sent plaintiffs a letter asserting that the notice was not timely pursuant to the parties' policy and therefore concluded that plaintiffs would not be eligible for UM coverage.

The policy states that Farm Bureau will "pay compensatory damages which [plaintiffs are] legally entitled to recover from the owner or operator of an **uninsured automobile**," defines an uninsured automobile, and requires an injured person making a claim to provide proof that the automobile meets this definition. The policy contained a time limit for initiating a UM action, specifically stating that the claimant had three years after the date of the accident to notify Farm Bureau of its UM claim and file suit. However, the policy also stated that failure to perform a duty or give notice would not invalidate a claim if it was not "reasonably possible" to do so and the claimant performed "as soon as reasonably possible."

On August 20, 2014, plaintiffs filed the instant suit. Plaintiffs sought a declaratory judgment, seeking a declaration that plaintiffs' UM claim did not accrue until the trial court's June 23, 2014 order declaring that Farm Bureau had no duty to defend or indemnify Conor or Greg, that plaintiffs' third-party action tolled the running of the UM notice and filing provisions, and that plaintiffs' appeal of the June 23, 2014 order further tolled the statutory period of limitations. Additionally, plaintiffs brought a breach-of-contract claim, alleging that Farm Bureau's letter stating that plaintiffs would not be eligible for UM coverage constituted an anticipatory breach of the policy.

Farm Bureau moved for summary disposition, arguing that plaintiffs' UM claims were time-barred pursuant to the policy's unambiguous and enforceable notice and filing time limitations. Farm Bureau argued that

under these provisions, the UM claim accrued on the date of the accident, May 17, 2010, and plaintiffs needed to notify Farm Bureau of their UM claim and file their UM claim within three years, by May 17, 2013; however, plaintiffs did not notify Farm Bureau of their UM claim until May 12, 2014, and did not file their UM claim until August 20, 2014. Further, Farm Bureau argued that it was reasonably possible for plaintiffs to comply with the notice and filing provisions and that the limitations period could not be tolled.

Plaintiffs asked the trial court to deny Farm Bureau's motion. Plaintiffs argued that the determination of a vehicle's uninsured status affected the accrual date of a UM claim, that they did not learn that Conor's vehicle was uninsured until more than three years after the accident, and that they complied with the policy as soon as reasonably possible.

The trial court denied Farm Bureau's motion. The trial court found the policy to be "inconsistent on its face," and therefore ambiguous, because it "clearly states that a suit against [Farm Bureau] may not be commenced later than three years after the accident" and "also clearly states that the uninsured automobile here did not become an uninsured automobile until Farm Bureau's written denial of coverage had been sustained by final court action." Farm Bureau drafted the policy, and the trial court, therefore, construed the ambiguity against Farm Bureau. Further, the trial court reasoned that the claim accrued and Conor's vehicle became an uninsured automobile on June 23, 2014.

II. STANDARDS OF REVIEW

A court must grant a motion for summary disposition pursuant to MCR 2.116(C)(7) if "dismissal of the

action" "is appropriate because of" a "statute of limitations." A trial court must grant a party's motion for summary disposition pursuant to MCR 2.116(C)(8) if the "opposing party has failed to state a claim on which relief can be granted." This occurs "when the claims are so unenforceable as a matter of law that no factual development could possibly justify recovery." *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 324; 869 NW2d 635 (2015) (quotation marks and citation omitted). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A "trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id*. A trial court must grant the motion if it finds "no genuine issue as to any material fact" and determines that "the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

We review de novo a trial court's resolution of a motion for summary disposition, conclusion whether an insurance contract is ambiguous, and interpretation of a contract. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

III. ANALYSIS

Farm Bureau argues that the trial court erred by determining that the parties' UM policy was ambiguous and by denying its motion for summary disposition. We disagree.

UM "insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver." *Rory v*

Continental Ins Co, 473 Mich 457, 465; 703 NW2d 23 (2005). The UM "policy language governs the coverage . . . ." *Scott v Farmers Ins Exch*, 266 Mich App 557, 561; 702 NW2d 681 (2005).[4] We read the policy as a whole, giving meaning to each term and giving each term its plain and ordinary meaning. *Id*. We enforce an unambiguous contract "as written unless the provision would violate law or public policy." *Rory*, 473 Mich at 470. A contract is ambiguous if its words can be reasonably understood in different ways or when its provisions irreconcilably conflict. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). Any "ambiguous language presents a question of fact . . . ." *Id*. If the parties' intent cannot be determined after considering extrinsic evidence, the court should construe the contract against the drafter. *Id*.

In this case, the parties' UM policy is ambiguous because its provisions irreconcilably conflict. The policy contains a time limit for notifying Farm Bureau of a UM claim and filing suit. It states:

> Any person seeking Uninsured Motorist Coverage must:
>
> * * *
>
> b. present to [Farm Bureau] a written notice of the claim for Uninsured Motorist Coverage within three years after the **accident** occurs.
>
> * * *
>
> A **suit** against us for Uninsured Motorist Coverage may not be commenced later than three years after the **accident** that caused the injuries being claimed.

[4] Therefore, plaintiffs' argument that the six-year period of limitations in MCL 600.5807(8) applies to their UM claim is incorrect.

The accident occurred on May 17, 2010. Therefore, the three-year time limit expired on May 17, 2013.

However, plaintiffs did not have a UM claim within three years of the accident. The policy states that Farm Bureau will "pay compensatory damages which the **insured** is legally entitled to recover from the owner or operator of an **uninsured automobile**." The policy defines an uninsured automobile as

> an **auto** operated on a public highway:
>
> (1) to which no **bodily injury** liability policy or bond applies:
>
> (a) at the time of the **accident**; and
>
> (b) in at least the minimum amounts required by the Financial Responsibility Laws in the State of Michigan; [or]
>
> * * *
>
> (3) insured by a company that has issued a written denial of coverage that has been sustained by final court action, or to which we agree in writing[.]

The policy required plaintiffs, when making a claim, to either "provide proof(s) affirming that the **auto** and operator were not covered by a liability policy or bond at the time of the **accident**" or "provide a final declaratory judgment against the owner and operator of the **uninsured automobile** establishing that the **auto** and operator were not covered by a liability policy or bond at the time of the **accident**[.]"

The automobile Conor drove did not become uninsured until June 23, 2014. Plaintiffs filed a third-party claim against Conor and Greg.[5] Farm Bureau made a

[5] Farm Bureau faults plaintiffs for waiting to file their third-party claim until May 2, 2013, 15 days before the UM notice and filing time

reservation of rights, sought a declaration that it had no duty to defend or indemnify Conor or Greg, and moved for summary disposition. The trial court granted Farm Bureau's motion on June 23, 2014. This order made the vehicle Conor drove uninsured after the time to notify Farm Bureau of a UM claim and file a UM claim had expired. Because plaintiffs could not notify Farm Bureau of—or file—a UM claim that did not exist, the policy's definition of an uninsured automobile, requirement that plaintiffs provide proof that the automobile meets this definition, and UM notice and filing time limitations irreconcilably conflict. Therefore, the policy is ambiguous, a question of fact existed, and the trial court correctly denied Farm Bureau's motion for summary disposition pursuant to MCR 2.116(C)(10).

An additional policy provision highlights this ambiguity and suggests that it is possible to interpret the policy in a manner that would allow a fact-finder to conclude that plaintiffs timely provided notice and timely filed a UM claim. The policy states that

> [f]ailure to perform any duty or to give any notice required does not invalidate [plaintiffs'] claim if [plaintiffs] show that it was not reasonably possible to perform such duty or give such notice promptly or within such time otherwise specified in this policy, and that [plaintiffs] performed the duty or submitted the notice as soon as reasonably possible.

This provision applies "to all parts of this policy." Plaintiffs notified Farm Bureau of their potential UM

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limit expired. Appellants "may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Farm Bureau cited no authority requiring plaintiffs to file their third-party claim at an earlier date. Further, Farm Bureau admits in reply that plaintiffs timely filed their third-party suit.

claim while Farm Bureau's declaratory action was pending. Further factual development and consideration of extrinsic evidence could allow a fact-finder to conclude that plaintiffs submitted notice of their UM claim and filed their UM claim as soon as reasonably possible. Therefore, the trial court correctly denied Farm Bureau's MCR 2.116(C)(8) motion for summary disposition.

Additionally, the trial court correctly denied Farm Bureau's MCR 2.116(C)(7) motion because the policy does not unambiguously state that plaintiffs' UM action is time-barred.

These provisions create an ambiguous accrual date. A policy sets the date of accrual for a UM claim. See *Sallee v Auto Club Ins Ass'n*, 190 Mich App 305, 307-308; 475 NW2d 828 (1991). The policy's time limit for notifying Farm Bureau of a UM claim and filing suit states that the claim accrues on the date of the accident but also requires plaintiffs to provide proof that the automobile was uninsured, suggesting that the claim could accrue once an automobile is determined to be uninsured. Therefore, the trial court incorrectly determined an accrual date for plaintiffs' UM claim at the summary-disposition stage.

Additionally, the policy creates ambiguity as to whether the UM filing limitations can be tolled. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 564, 582; 702 NW2d 539 (2005); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 200-201; 747 NW2d 811 (2008). The policy requires plaintiffs to provide proof that an automobile is uninsured, allows for an automobile to become insured after the UM notice and filing deadlines, and states that the failure to perform a duty will not invalidate a claim if it is not reasonably possible to do so and performance occurs as soon as reasonably

possible. Therefore, the policy may toll the UM filing limitation until an automobile's insured status is determined.

Farm Bureau did not cite caselaw to support its argument that courts have declared all UM time limits to be unambiguous. Rather, some cited caselaw is inapplicable. The Court in *Rory*, 473 Mich at 465-490, analyzed whether a court could disregard a contract provision as unreasonable and whether a policy constituted an unenforceable adhesion contract. The Court in *Devillers*, 473 Mich at 586-593, analyzed whether a statute could be judicially tolled. Neither Court analyzed whether a UM policy was unambiguous. Other caselaw Farm Bureau cited is distinguishable. The Court in *McDonald*, 480 Mich at 203, only analyzed whether the term "legal action" as used in a UM claim was ambiguous. The Court in *Morley v Auto Club of Mich*, 458 Mich 459, 464, 468-469; 581 NW2d 237 (1998), analyzed whether a UM contract was ambiguous when the trial court found an arbitration clause to be ambiguous. The Michigan Supreme Court rejected the ambiguity argument "under these facts" because plaintiffs could have preserved their UM claim by filing a timely demand for arbitration and plaintiffs submitted a letter demonstrating an understanding of the policy, suggesting it was not ambiguous. *Id*. at 469.

Because we agree with the trial court that Farm Bureau's motion for summary disposition should be denied because the policy is ambiguous, we do not consider plaintiffs' alternative arguments for denying summary disposition.

We affirm.

TALBOT, C.J., and O'CONNELL and CAMERON, JJ., concurred.

MLIVE MEDIA GROUP v CITY OF GRAND RAPIDS

Docket No. 338332. Submitted September 6, 2017, at Grand Rapids. Decided September 12, 2017, at 9:10 a.m.

MLive Media Group, an unincorporated division of The Herald Publishing Company, LLC, doing business as the Grand Rapids Press, filed an action in the Kent Circuit Court against the city of Grand Rapids, seeking the production of certain public records under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. A Grand Rapids assistant prosecutor, who had allegedly been drinking, hit a parked car while driving his car the wrong way down a one-way street. One of the police officers who responded to the accident contacted Grand Rapids Police Lieutenant Matthew Janiskee on a recorded police department telephone line, informing Janiskee of the identity of the driver. Janiskee told the officer to hang up and call him back on Line 3407, a telephone line that the officers believed was not recorded. The original police officer and another officer at the accident collectively called Janiskee five times on Line 3407, after which the assistant prosecutor was cited for driving the wrong way down a one-way street and driven home. During the police department's internal investigation regarding the handling of the accident, the department discovered that the conversations between Janiskee and the police officers on Line 3407 had been recorded. The city, which sought to use the recordings in disciplinary actions against the officers and in other legal proceedings, filed a declaratory action in the United States District Court for the Western District of Michigan, seeking a determination of the city's rights and obligations to use and disclose the Line 3407 recordings. The officers asserted that the city's disclosure and use of the Line 3407 recordings would violate the federal wiretapping act, 18 USC 2510 *et seq*., and Michigan's eavesdropping statutes, MCL 750.539a *et seq*. Before the federal action was filed, MLive had submitted two FOIA requests to the city, seeking copies and transcripts of the Line 3407 recordings. The city ultimately denied both requests, asserting that it could not release the requested items because the federal district court had not ruled on whether that release would violate the particular federal and state statutes. MLive moved for summary disposition in the circuit court, arguing that the city

had failed to cite a FOIA exemption for its denial and asserting that no FOIA exemption was applicable. Relying on the doctrine of comity to defer to the federal district court's rulings regarding the recordings, the court, Joseph J. Rossi, J., denied MLive's motion and dismissed the action without prejudice. MLive appealed.

The Court of Appeals *held*:

1. The Court of Appeals had jurisdiction to review the appeal because the circuit court's order denying MLive's motion and dismissing its action without prejudice was a final judgment appealable by right.

2. MCL 15.233(1) provides that, upon written request, persons have the right to inspect, copy, or receive copies of requested public records of a public body except as expressly provided in MCL 15.243. Under MCL 15.243(1)(d), a public body may exempt from disclosure records or information specifically described and exempted from disclosure by statute. The public body is required under MCL 15.235(2) to determine whether the exemption applies. Under MCL 15.235(5)(a), if a public body denies a person's FOIA request on the basis that the public records sought are exempt from disclosure by statute, the public body must explain in writing the basis for its determination that the information is exempt under FOIA or the other statute. Under MCL 15.240, when a person files a civil action in circuit court to compel a public body to disclose public records, the burden is on the public body to sustain the denial. In this case, the city failed to explain in its denial letter that disclosure of the requested recordings would violate either the federal wiretapping act or Michigan's eavesdropping statutes; instead, the city only claimed that the recordings were accidental and that denial was appropriate because the legality of disclosure would be determined in the previously filed federal district court action. The city therefore failed to meet its burden to prove that a FOIA exemption prevented the city from disclosing the requested items. In addition, the city failed to cite supporting authority that would allow it as a public body to pass the FOIA-exemption determination to the federal district court when MCL 15.235(2) in fact granted that authority to the public body. The circuit court accordingly erred by denying MLive's motion for summary disposition and by dismissing its claim.

3. The principle of judicial comity allows a court to respect and recognize a judicial decision of a foreign court. In that regard, the Court of Appeals will defer to a federal court ruling when a federal district court is the equivalent of a state circuit court. The issue in this case was whether the city had met its burden to

prove that the MCL 15.243(1)(d) FOIA exemption prevented the city from disclosing the requested items—an issue the circuit court could have resolved given that the city asserted the recordings were inadvertent—not whether the recordings were intentional as prohibited under the federal wiretapping act and Michigan's eavesdropping statutes. For that reason, the trial court abused its discretion when it relied on the principle of judicial comity to avoid resolving MLive's claim on the merits.

Reversed and remanded.

1. PUBLIC RECORDS — FREEDOM OF INFORMATION ACT — EXEMPTIONS FROM DISCLOSURE — IDENTIFICATION OF STATUTE IN DENIAL OF REQUEST.

MCL 15.233(1) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., provides that, upon written request, a person has the right to inspect, copy, or receive copies of requested public records of a public body except as provided in MCL 15.243; MCL 15.243(1)(d) allows a public body to exempt from disclosure those public records specifically described and exempted from disclosure by statute; a public body must specifically identify the statute on which it relies when it denies a FOIA request under MCL 15.243(1)(d).

2. PUBLIC RECORDS — FREEDOM OF INFORMATION ACT — EXEMPTIONS FROM DISCLOSURE — DETERMINATION BY PUBLIC BODY — REVIEW BY CIRCUIT COURT.

MCL 15.235(5)(a) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., requires the public body, not a court, to determine whether public records are exempt from disclosure under MCL 15.243; if a person files an action to compel a public body to disclose public records, the circuit court must determine whether the public body's denial was supported by the evidence.

Dykema Gossett PLLC (by *James S. Brady*, *Mark J. Magyar*, and *Jill M. Wheaton*) for plaintiff.

Mika Meyers, PLC (by *John H. Gretzinger* and *Scott E. Dwyer*) for defendant.

Before: TALBOT, C.J., and O'CONNELL and CAMERON, JJ.

O'CONNELL, J. Plaintiff, MLive Media Group, doing business as Grand Rapids Press, sent defendant, the

city of Grand Rapids (the City), two requests under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., seeking recordings, copies of recordings, and transcripts of phone calls made by Grand Rapids police officers to a Grand Rapids police lieutenant regarding the citation of a former Kent County Assistant Prosecutor. The City denied MLive's FOIA requests. MLive filed suit, seeking production of the records, and moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied MLive's motion and dismissed the case without prejudice. MLive appeals. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

A man drove the wrong way down a one-way street and hit a parked car. Grand Rapids Police Officer Adam Ickes and Grand Rapids Police Sergeant Thomas Warwick responded to the accident. Officer Ickes called Grand Rapids Police Lieutenant Matthew Janiskee at a recorded police department telephone line and informed Lieutenant Janiskee that the driver of the vehicle was a "hammered" Kent County assistant prosecutor. Lieutenant Janiskee told Officer Ickes to hang up and call back on a different department line, (616) 456-3407, labeled "Non-Recorded Line 3407." Officer Ickes then placed three calls to Lieutenant Janiskee on Line 3407. Sergeant Warwick placed two calls to Lieutenant Janiskee on Line 3407. Ultimately, Officer Ickes cited the assistant prosecutor for driving the wrong way down a one-way street, and Sergeant Warwick drove the assistant prosecutor home.

The police department then conducted an internal investigation. The City states that during the investigation it discovered that the phone calls to Line 3407 had been recorded.

The City filed a declaratory action in the United States District Court for the Western District of Michigan on February 17, 2017, seeking a determination of its rights and obligations to use and disclose the Line 3407 recordings. The City sought to use the recordings as evidence in officer disciplinary actions and legal proceedings. In the federal action, the officers asserted that use of the recordings would violate the federal wiretapping act, 18 USC 2510 *et seq*., and Michigan's eavesdropping statutes, MCL 750.539a *et seq*. The City denied violating the statutes. The City explained that it had received FOIA requests for the Line 3407 recordings. The City alleged that *if* the recordings were obtained in violation of the statutes, disclosure of the recordings would also violate the statutes.

The two FOIA requests received by the City from MLive sought recordings, copies of recordings, and transcripts of the Line 3407 calls. The City denied both requests, asserting that its "ability to release these records is the subject matter of the pending [federal] litigation . . . ."

MLive filed a complaint in the trial court, seeking an order to compel disclosure of the requested items and a declaration that the City had violated FOIA in that the City had failed to cite a FOIA exemption in support of its denial and that no such exemption exists. MLive also moved for summary disposition. In response, the City reiterated its argument that it did not believe that complying with MLive's FOIA request would violate the federal wiretapping act or Michigan's eavesdropping statutes. Nonetheless, it argued that it could invoke the MCL 15.243(1)(d) FOIA exemption because the federal court had not yet determined whether complying with the FOIA request would violate the federal wiretapping act or Michigan's eavesdropping

statutes. The trial court denied MLive's motion for summary disposition and dismissed the case without prejudice, citing the doctrine of comity.

II. JURISDICTION

The City argues that MLive could not appeal by right because it is not appealing a final order. We disagree.

MCR 7.202(6)(a)(i) defines a final order in a civil case as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." Parties cannot create a final order by stipulating the dismissal of remaining claims without prejudice after a trial court enters an order denying a motion for summary disposition addressing only some of the parties' claims. See *Detroit v Michigan*, 262 Mich App 542, 545; 686 NW2d 514 (2004).

In this case, the trial court entered an order denying MLive's motion for summary disposition and dismissing MLive's only claim without prejudice after reviewing both parties' opposing arguments. Therefore, the order is final, MCR 7.202(6)(a)(i), and *Detroit* is distinguishable on the facts.

III. STANDARDS OF REVIEW

We review de novo whether the trial court properly interpreted and applied FOIA, including "whether a public record is exempt under FOIA" "when the facts are undisputed and reasonable minds could not differ . . . ." *Rataj v Romulus*, 306 Mich App 735, 747-748; 858 NW2d 116 (2014). When interpreting a statute, we aim to determine the Legislature's intent by first examining the statute's plain language. *Fellows v Mich Comm for the Blind*, 305 Mich App 289, 297; 854 NW2d 482 (2014). If a statute is unambiguous, we enforce it as written. *Id*.

We review for an abuse of discretion a trial court's decision to abstain from a ruling "in favor of an alternative, foreign forum." *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 214-215; 813 NW2d 752 (2011). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *ESPN, Inc v Mich State Univ*, 311 Mich App 662, 664; 876 NW2d 593 (2015).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must specify issues for which there are no genuine issues of material fact and support the motion. MCR 2.116(G)(4). The nonmoving party then has the burden to provide evidence of a genuine issue. *Id*. The trial court reviews the record in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120. A trial court must grant the motion if it finds "no genuine issue as to any material fact" and determines that "the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). We review de novo a trial court's denial of a motion for summary disposition. See *Maiden*, 461 Mich at 118.

IV. ANALYSIS

MLive argues that the trial court erred by denying its motion for summary disposition. We agree.

A. FOIA EXEMPTION

The trial court erred to the extent that it found that the City met its burden to prove that a FOIA exemption applied.

FOIA proclaims that "[i]t is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees . . . ." MCL 15.231(2). Further, "[t]he people shall be informed so that they may fully participate in the democratic process." *Id*. In keeping with this policy, FOIA provides persons a right to inspect, copy, or receive copies of a requested public record of a public body upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, except as expressly provided in MCL 15.243. MCL 15.233(1).

MCL 15.243(1) states:

> A public body may exempt from disclosure as a public record under this act . . .
>
> * * *
>
> (d) Records or information specifically described and exempted from disclosure by statute.[1]

When a public body invokes this exception, it is necessary to examine the statute under which the public body claims disclosure is prohibited. See *Detroit News, Inc v Policemen & Firemen Retirement Sys of the City of Detroit*, 252 Mich App 59, 72-75; 651 NW2d 127 (2002). For example, the federal wiretapping act prohibits the intentional interception and disclosure of an oral or wire communication. 18 USC 2511(1)(a) and (c).

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[1] Both parties referred to another exemption, MCL 15.243(1)(a). However, we do not consider whether the exemption applies because neither party identified portions of the recordings covered by this exemption or cited authority to support an argument that the exemption applied, contrary to the requirement to do so. See MCR 7.212(C)(7) and (D)(1).

Therefore, if the federal act prohibits disclosure of a communication, the communication would be exempt from disclosure under MCL 15.243(1)(d).

FOIA requires the public body receiving a FOIA request to interpret FOIA and decide whether to honor the request. See MCL 15.235. A FOIA request must be sent directly to the public body, specifically its FOIA coordinator. MCL 15.235(1). FOIA requires the public body to decide whether to grant or deny the request in whole or in part within five business days of receipt. MCL 15.235(2). Alternatively, the public body can seek a 10-business-day extension to make a decision. MCL 15.235(2)(d). If the public body denies any portion of the request because it determined that the content is exempt from disclosure, it must explain in writing the basis for its denial under FOIA or another statute. MCL 15.235(5)(a).

A court only becomes involved in a FOIA request if a public body denies the request and the requester appeals. MCL 15.240(1)(b). Specifically, the person requesting the public record may "[c]ommence a civil action in the circuit court . . . to compel the public body's disclosure of the public records . . . ." MCL 15.240(1)(b). The public body has the burden to "sustain its denial." MCL 15.240(4). The trial court reviews the denial de novo, *id*., and construes FOIA exemptions narrowly, see *Detroit News, Inc*, 252 Mich App at 72.

The City failed to meet its burden to prove that a FOIA exemption applied. The City argues that it properly invoked the MCL 15.243(1)(d) exemption to deny MLive's FOIA requests because 18 USC 2511(1)(a) and (c) of the federal wiretapping act prohibit the intentional interception and disclosure of an oral or wire communication and "the jurisdiction of a federal district court has already been invoked to make

th[e] factual determination[] . . . of whether" the federal wiretapping act applies. But the City never argued when denying MLive's FOIA request, during the trial court proceedings, or on appeal, that it actually violated the federal wiretapping act. Rather, it made the opposite argument: it accidentally or inadvertently recorded the Line 3407 phone calls and then refused to disclose the recordings to MLive. The federal wiretapping act does not prohibit the inadvertent interception or disclosure of communications. See 18 USC 2511(1); *Thompson v Dulaney*, 970 F2d 744, 748 (CA 10, 1992).[2] Stated differently, the City needed to argue that disclosure would violate the federal wiretapping act in order to invoke the MCL 15.243(1)(d) FOIA exemption and to deny MLive's FOIA requests. The City never made this argument.

Any argument by the City that it properly invoked the MCL 15.243(1)(d) exemption because Michigan's eavesdropping statutes prohibit disclosure of the recordings similarly fails. Michigan's eavesdropping statutes prohibit the "willful[]" use of a device to eavesdrop on a private conversation without all parties' consent, MCL 750.539c, and "us[ing]" or "divulg[ing]" information that a person "knows or reasonably should know was obtained" through eavesdropping, MCL 750.539e. Accordingly, the City needed to argue that disclosure would violate an eavesdropping statute to invoke the MCL 15.243(1)(d) FOIA exemption. But the City never made this argument. Instead, it argued that it accidentally recorded the phone calls.

Further, FOIA requires the City to determine whether a FOIA exemption exists. See MCL 15.235(2). The City cited no FOIA provision that allows it to pass

[2] We find this nonbinding caselaw persuasive. See *Holman v Rasak*, 281 Mich App 507, 509; 761 NW2d 391 (2008), aff'd 486 Mich 429 (2010).

this decision to a federal court. Therefore, the City failed to meet its burden to prove that a FOIA exemption applied.

B. COMITY

The trial court abused its discretion by determining that comity prevented it from ruling on MLive's FOIA complaint.

The principle of judicial comity generally states that foreign courts can afford each other's judgments mutual respect and recognition. See *Gaudreau v Kelly*, 298 Mich App 148, 152; 826 NW2d 164 (2012). Accordingly, "principles of comity require" us "to defer to [a] federal court ruling" when "a federal district court [is] the equivalent of a state circuit court." *Bouwman v Dep't of Social Servs*, 144 Mich App 744, 748-749; 375 NW2d 806 (1985).[3] When a court relies on the principle of comity to abstain from ruling on an issue in favor of a foreign ruling, it is also "invoking a doctrine akin to forum non conveniens," which gives a court discretion "to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum." *Hare*, 291 Mich App at 223-224 (quotation marks and citations omitted).[4]

The trial court in this case improperly reframed the issue before it to invoke the doctrine of comity. As explained earlier, the issue before the trial court was whether the City met its burden to show that the narrowly construed MCL 15.243(1)(d) FOIA exemption

[3] We find this nonbinding opinion, see MCR 7.215(J)(1), persuasive.

[4] We do not consider the City's argument that federalism required the trial court to defer to the federal court because the City cited no authority to support its argument, contrary to its requirement to do so. See MCR 7.212(C)(7) and (D)(1).

supported its denial of MLive's FOIA requests. See MCL 15.235(2) and (5)(a); MCL 15.240(4); *Detroit News, Inc*, 252 Mich App at 72. As already explained in this opinion, the City failed to meet the burden. The trial court did not need to consider "whether or not the recordings in this case were intentional" and did not need to defer to the federal court's "factual determination" regarding this separate issue. The City did not argue in this case or in the federal case that it had intentionally recorded Line 3407, which could amount to violations of the federal wiretapping act and Michigan's eavesdropping statutes. Because the City never raised the argument, the MCL 15.243(1)(d) exemption does not apply and the City necessarily failed to meet its burden to show that a narrowly construed FOIA exemption supported its denial of MLive's FOIA requests.[5] Therefore, the trial court's decision to invoke the doctrine of comity was outside the range of principled outcomes, and the trial court erred by denying MLive's motion for summary disposition.

V. CONCLUSION AND RELIEF

Because the trial court erred by denying MLive's motion for summary disposition, we remand for entry of judgment in MLive's favor. On remand, the trial court must order the City "to cease withholding or to

[5] We reiterate that the public policy articulated by the Legislature in FOIA is that "all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees," MCL 15.231(2), "[e]xcept as expressly provided in [MCL 15.243]," MCL 15.233(1). MCL 15.243 contains no exemption to allow a federal court to determine a public body's compliance with a separate statute before the public body must answer a FOIA request. We leave any alteration of this public policy to the Legislature. See *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524, 531, 537; 606 NW2d 38 (1999).

produce" the Line 3407 recordings. MCL 15.240(4). Accordingly, MLive prevailed because the suit "had a substantial causative effect on" and "was necessary to" "the delivery of or access to" the recordings. See *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992). Without the suit, the City would not grant MLive's FOIA request at this time. Because MLive prevailed, the trial court must award MLive reasonable attorney fees, costs, and disbursements. MCL 15.240(6). See also *Rataj*, 306 Mich App at 757. Additionally, the trial court must "determine whether [MLive] is entitled to punitive damages under MCL 15.240(7)." *Rataj*, 306 Mich App at 757.

We reverse and remand. We do not retain jurisdiction. We give our judgment immediate effect. MCR 7.215(F)(2).

TALBOT, C.J., and CAMERON, J., concurred with O'CONNELL, J.

PEOPLE v WASHINGTON

Docket No. 336050. Submitted July 7, 2017, at Detroit. Decided July 13, 2017. Approved for publication September 12, 2017, at 9:15 a.m. Leave to appeal sought.

Gregory C. Washington was convicted in November 2004 of the following offenses after a jury trial in the Wayne Circuit Court: second-degree murder, MCL 750.317; two counts of assault with intent to commit murder (AWIM), MCL 750.83; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and being a felon in possession of a firearm (felon-in-possession), MCL 750.224f. In December 2004, Patricia P. Fresard, J., sentenced Washington as a second-offense habitual offender, MCL 769.10, to 40 to 60 years of imprisonment for second-degree murder, life imprisonment for each conviction of AWIM, 2 to 7½ years of imprisonment for felon-in-possession, and 2 years of imprisonment for felony-firearm. A lengthy procedural history followed Washington's conviction. First, Washington appealed by right his convictions and sentences. The Court of Appeals affirmed Washington's convictions in an unpublished per curiam opinion but remanded the case for resentencing because the trial court had failed to articulate substantial and compelling reasons for its departure from the sentencing guidelines. Before Washington was resentenced, he filed his first application for leave to appeal in the Michigan Supreme Court. The trial court resentenced Washington while his application in the Supreme Court was pending. Before the Supreme Court issued its decision on Washington's application, Washington filed an application in the Court of Appeals for leave to appeal his resentencing. The Supreme Court ultimately denied Washington's first application for leave to appeal. 477 Mich 973 (2006). The Court of Appeals denied Washington's application for leave to appeal, and Washington filed his second application for leave to appeal in the Supreme Court, which was also denied. 480 Mich 891 (2007). Washington then filed a motion in the trial court for relief from judgment, and the trial court denied the motion. Washington applied in the Court of Appeals for leave to appeal the trial court's denial of his motion for relief from judgment, and the Court of Appeals denied the application. The Supreme Court denied

Washington's application for leave to appeal the Court of Appeals' denial. 486 Mich 1042 (2010). Finally, in June 2016, after exhausting all available postconviction relief, Washington filed in the trial court his second motion for relief from judgment, challenging his sentences on jurisdictional grounds. Washington argued that the trial court lacked jurisdiction to resentence him because his application for leave to appeal in the Supreme Court was pending at the time. The prosecution argued that Washington's second motion for relief from judgment was barred by MCR 6.502(G), and the trial court agreed. However, the trial court noted that the prosecution had failed to address the jurisdictional issue, which may be raised at any time. The trial court concluded that relevant caselaw and the applicable court rules, MCR 7.215(F)(1)(a) and MCR 7.305(C)(6)(a), had precluded it from resentencing Washington. Because Washington's application in the Supreme Court was still pending at the time, the trial court had been without jurisdiction to resentence Washington. The trial court granted Washington's motion for relief from judgment, vacated his sentences, and ordered resentencing. The prosecution appealed.

The Court of Appeals *held*:

1. MCR 6.502(G)(1) prohibits successive motions for relief from judgment with the exception of two specific circumstances set forth in MCR 6.502(G)(2)—a retroactive change in law after the first motion was filed or a claim of new evidence not discovered before the first motion was filed. A successive motion for relief from judgment filed without asserting one of these exceptions must be returned to the defendant and not filed in the court. Neither exception was present in this case. Therefore, Washington's motion for relief from judgment was barred by MCR 6.502(G)(1).

2. MCR 7.305(C)(6)(a) provides that an application for leave to appeal a Court of Appeals judgment stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise. And MCR 7.215(F)(1)(a) provides that a Court of Appeals judgment is effective after the time to file an application for leave to appeal in the Supreme Court expires or, if such an application is filed, after the Supreme Court disposes of the case. The Court of Appeals' opinion and remand could not have become effective until after the Supreme Court disposed of Washington's application for leave to appeal. Despite this, the trial court resentenced Washington while the application for leave to appeal in the Supreme Court was still pending and while, pursuant to MCR 7.305(C)(6)(a), the trial court proceedings were stayed.

Accordingly, the trial court was without jurisdiction to enter the judgment of sentence. Because the trial court lacked jurisdiction, the resentencing hearing and the resultant judgment of sentence lacked force and authority and should have been considered void.

3. The trial court had the power to consider the jurisdictional issue, even though the issue was raised in an improperly supported motion. The trial court's ruling did not improperly carve out a third exception to the prohibition of successive motions for relief from judgment in MCR 6.502(G)(1)—the trial court correctly exercised its inherent power to recognize its lack of jurisdiction. The trial court properly recognized that its subsequent judgment of sentence was a nullity and that its compliance with the Court of Appeals' remand for resentencing was consequently incomplete. Because MCL 600.611 gives a circuit court the jurisdiction and power to fully effectuate the circuit court's jurisdiction and judgments, the trial court did not err when it vacated its second judgment of sentence and ordered another resentencing hearing. And even though the trial court erred when it granted Washington's successive motion for relief from judgment, its ruling was upheld because it reached the right result, albeit for the wrong reason.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Jason W. Williams*, Chief of Research, Training, and Appeals, for the people.

John F. Royal for defendant.

Before: O'BRIEN, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM. The prosecution appeals by leave granted[1] a November 22, 2016 order granting defendant's second motion for relief from judgment. For the reasons that follow, we affirm.

On November 10, 2004, defendant was convicted after a jury trial of second-degree murder, MCL 750.317,

[1] *People v Washington*, unpublished order of the Court of Appeals, entered January 24, 2017 (Docket No. 336050).

two counts of assault with intent to commit murder (AWIM), MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm (felon-in-possession), MCL 750.224f. On December 13, 2004, the trial court sentenced defendant, a second-offense habitual offender, MCL 769.10, to 40 to 60 years' imprisonment for the second-degree murder conviction, life imprisonment for each AWIM conviction, 2 years' imprisonment for the felony-firearm conviction, and 2 to 7½ years' imprisonment for the felon-in-possession conviction. The trial court's sentence for second-degree murder represented a 12-month upward departure from the applicable guidelines range.

On January 7, 2005, defendant appealed as of right his convictions and sentences on a number of grounds.[2] Relevant here, defendant challenged the propriety of the trial court's upward departure from the sentencing guidelines range for second-degree murder without stating on the record "substantial and compelling reasons" for the departure as required under MCL 769.34(3).[3] In a June 13, 2006 unpublished opinion, this Court affirmed defendant's convictions

[2] Defendant's issues on appeal included ineffective assistance of trial counsel for failure to raise an insanity defense and failure to file a motion for a new trial based on the assertion that defendant's convictions were against the great weight of the evidence, violation of a sequestration order by the prosecution's witnesses, and prosecutorial misconduct.

[3] On the date of defendant's sentencing, MCL 769.34(3) provided that "[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3) was later struck down in *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015), and the substantial and compelling reason requirement was replaced with a requirement that a departure be reasonable.

but agreed that "the trial court did not satisfy MCL 769.34(3) when imposing a sentence outside the prescribed sentencing guidelines range." *People v Washington*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 2006 (Docket No. 260155), p 8. This Court remanded for resentencing, directing the trial court to reconsider the propriety of its sentence and articulate substantial and compelling reasons for any departure as required by MCL 769.34(3). *Id*. at 8-9.

On August 8, 2006, defendant filed an application for leave to appeal in the Michigan Supreme Court. On October 4, 2006, while the application was still pending, the trial court resentenced defendant pursuant to this Court's June 13, 2006 opinion and remand, imposing identical sentences and offering a number of justifications for the departure. The Supreme Court denied defendant's application for leave to appeal on December 28, 2006. *People v Washington*, 477 Mich 973 (2006).

On December 4, 2006, about three weeks before the Supreme Court denied defendant's initial application, defendant filed in this Court a delayed application for leave to appeal the resentencing order, again arguing that the trial court failed to articulate on the record the required "substantial and compelling reasons" for the upward departure from defendant's sentencing guidelines for second-degree murder. This Court denied defendant's application "for lack of merit." *People v Washington*, unpublished order of the Court of Appeals, entered May 4, 2007 (Docket No. 274768). Defendant filed an application for leave to appeal in the Michigan Supreme Court on June 28, 2007, which that Court denied. *People v Washington*, 480 Mich 891 (2007).

Several months later, on March 25, 2008, defendant filed a motion for relief from judgment in the trial court pursuant to MCR 6.502, raising claims of (1) insufficient evidence, (2) denial of his right to present an insanity defense, (3) ineffective assistance of trial counsel, and (4) ineffective assistance of appellate counsel. On July 9, 2008, the trial court denied defendant's motion under MCR 6.508(D)(3) for failure to demonstrate good cause for not raising the issues in a prior appeal and failure to show actual prejudice. This Court denied defendant's July 8, 2009 delayed application for leave to appeal the trial court's decision, *People v Washington*, unpublished order of the Court of Appeals, entered October 19, 2009 (Docket No. 292891), and the Michigan Supreme Court denied defendant leave to appeal this Court's denial, *People v Washington*, 486 Mich 1042 (2010).

On June 22, 2016, after exhausting all available postconviction relief, defendant filed his second motion for relief from judgment—the motion giving rise to the instant appeal. Defendant challenged his sentences on jurisdictional grounds, arguing that the trial court's October 4, 2006 order after resentencing was invalid because the court lacked jurisdiction to resentence defendant while his application remained pending before the Michigan Supreme Court. In response, the prosecution argued that defendant's successive motion for relief from judgment was clearly barred by MCR 6.502(G), which prohibits successive motions for relief from judgment unless there has been a retroactive change in the law or new evidence has been discovered. In a November 22, 2016 written order and opinion, the trial court indicated its agreement with the prosecution's argument but noted that the prosecution had failed to address the jurisdictional issue, which "may be raised at any time." The trial court concluded that

under MCR 7.215(F)(1)(a), MCR 7.305(C)(6)(a), and relevant caselaw, it had lacked jurisdiction to enter the October 4, 2006 judgment of sentence. The trial court granted defendant's motion, vacated defendant's sentences, and ordered resentencing.[4] The instant appeal followed.

The prosecution argues that the trial court erred when it granted defendant's motion for relief from judgment because MCR 6.502(G)(1) unequivocally bars successive motions for relief from judgment absent application of an explicit exception. We agree in part.

"We review a trial court's decision on a motion for relief from judgment for an abuse of discretion . . . ." *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes, or when the trial court makes an error of law. *Id*. at 628-629. The proper interpretation and application of court rules are questions of law reviewed de novo. *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009).

Motions for relief from judgment are governed by MCR 6.500 *et seq*. *Swain*, 288 Mich App at 629. MCR 6.502(G)(1) provides, in pertinent part:

> Except as provided in subrule (G)(2) . . . one and only one motion for relief from judgment may be filed with

[4] Defendant also requested that, on resentencing, the trial court determine the applicable guidelines range for both defendant's second-degree murder conviction and his AWIM convictions and take them into account pursuant to *Lockridge*, 498 Mich 358. The trial court concluded that defendant was not entitled to any relief under *Lockridge* because the rule articulated in that case does not retroactively apply to sentences on collateral review. Defendant does not challenge this decision on appeal.

> regard to a conviction. The court shall return without filing any successive motions for relief from judgment.

MCR 6.502(G)(2) provides two exceptions to the general rule against successive motions for relief from judgment, allowing a "second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion." Any successive motion that does not assert one of these two exceptions must be returned to the defendant and not filed in the court. *Swain*, 288 Mich App at 631, citing MCR 6.502(G)(1). This Court in *Swain*, 288 Mich App at 632, explicitly held that "MCR 6.502(G)(2) provides the only two exceptions to the prohibition of successive motions." *Swain* is binding on this Court, as it is on the trial court, MCR 7.215(C)(2), and we discern no ambiguity in the language of MCR 6.502(G) to warrant reconsideration of the issue.

Defendant's successive motion for relief from judgment was predicated on a claimed "jurisdictional defect" that invalidated the October 4, 2006 judgment of sentence. Defendant's successive motion for relief from judgment did not involve a retroactive change in the law or newly discovered evidence. Regardless of the merits of defendant's claim of error, the trial court lacked authority to grant defendant's motion under MCR 6.502. However, a motion for relief from judgment under MCR 6.502 is merely a procedural vehicle, and our determination that relief under MCR 6.502 was unavailable to defendant does not end our inquiry. We agree that the prosecution has failed to address the substantive issue in defendant's motion for relief from judgment, which, while brought pursuant to an inapplicable court rule, nevertheless constitutes an important and reviewable claim of error.

It is indisputable that the trial court lacked jurisdiction[5] to resentence defendant when it entered the October 4, 2006 judgment of sentence. MCR 7.305(C) states, in pertinent part:

> (6) Effect of Appeal on Decision Remanding Case. If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply:
>
> (a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1),[6] *an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise*. [Emphasis added.]

Similarly, MCR 7.215(F)(1)(a) provides that a "Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court[.]" Neither this Court nor our Supreme Court ordered otherwise, and under the court rules, this Court's June 13, 2006 resentencing order was not effective until after the Supreme Court entered its December 28, 2006 order denying leave to appeal. However, the trial court conducted the resentencing hearing on October 4, 2006, while the application for leave to appeal was still pending and while, pursuant to MCR 7.305(C)(6)(a), the lower court proceedings were stayed.

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[5] "Whether a court has subject-matter jurisdiction is a question of law reviewed de novo." *Hillsdale Co Sr Servs, Inc v Hillsdale Co*, 494 Mich 46, 51; 832 NW2d 728 (2013).

[6] There is no dispute that this Court's June 13, 2006 unpublished opinion remanding the case for resentencing in the trial court was a "judgment" under MCR 7.215(E)(1), which states: "When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment."

Our Supreme Court considered a similar set of circumstances in *People v Swafford*, 483 Mich 1, 6 n 5; 762 NW2d 902 (2009). The *Swafford* Court noted that, consistent with the aforementioned court rules, the defendant's timely application for leave to appeal in the Supreme Court a judgment of the Court of Appeals stayed the proceedings on remand and divested the trial court of jurisdiction during the pendency of the application. *Id*. at 7 n 5. Thus, in *Swafford*, the Court held that the trial court lacked jurisdiction to conduct a new trial while leave was pending in the Supreme Court, the proceedings were stayed, and this Court's judgment was not yet effective. *Id*.

Although the prosecution argues otherwise, the trial court's entry of the judgment of sentence without jurisdiction was not merely procedural error. "The term jurisdiction refers to the power of a court to act and the authority a court has to hear and determine a case." *People v Clement*, 254 Mich App 387, 394; 657 NW2d 172 (2002) (quotation marks and citation omitted). "Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement." *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001) (quotation marks and citation omitted). "When a court is without jurisdiction of the subject matter, its acts and proceedings are of no force and validity; they are a mere nullity and are void." *Clement*, 254 Mich App at 394 (quotation marks and citation omitted). Thus, because the trial court lacked jurisdiction to hold a resentencing hearing and to enter the October 4, 2006 judgment of sentence, the resentencing hearing and the resultant judgment of sentence lack force and authority and are considered void.

"Jurisdictional defects may be raised at any time." *People v Martinez*, 211 Mich App 147, 149; 535 NW2d

236 (1995); see also *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996) ("[A] challenge to subject-matter jurisdiction may be raised at any time, even if raised for the first time on appeal."). "Subject-matter jurisdiction is so critical to a court's authority that a court has an independent obligation to take notice when it lacks such jurisdiction, even when the parties do not raise the issue." *AMB*, 248 Mich App at 166-167; see also *Clement*, 254 Mich App at 394 (explaining that a court is bound to notice the limits of its authority and to recognize sua sponte its lack of jurisdiction). Even though the issue in this case was raised in an improperly supported motion, the trial court clearly had the power to consider the jurisdictional issue brought to its attention.

The prosecution suggests that the prohibition of successive motions for relief from judgment and the principle that subject-matter jurisdiction may be raised at any time create a conflict in the law. However, at least in the case before us, any such conflict is illusory. Despite the prosecution's argument to the contrary, the trial court's ruling did not improperly carve out a third exception to MCR 6.502(G)(1). Instead, the trial court exercised its inherent power to "recognize its lack of jurisdiction or any pertinent boundaries on its proper exercise." *Clement*, 254 Mich App at 394 (quotation marks and citation omitted). The trial court properly recognized that its October 4, 2006 judgment of sentence was a nullity, and its compliance with this Court's June 13, 2006 remand for resentencing was incomplete. Under MCL 600.611, "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Therefore, the trial court did not err when it vacated the October 4, 2006 judgment of sentence and ordered a resentencing hearing. And

while, as previously discussed, the trial court erred when it granted defendant's motion for relief from judgment in contravention of MCR 6.502, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Affirmed.

O'BRIEN, P.J., and JANSEN and STEPHENS, JJ., concurred.

PEOPLE v PIERSON

Docket No. 332500. Submitted July 12, 2017, at Lansing. Decided September 12, 2017, at 9:20 a.m. Leave to appeal sought.

Raymond C. Pierson was convicted after a jury trial in the Washtenaw Circuit Court, Carol A. Kuhnke, J., of first-degree home invasion, MCL 750.110a(2); being a felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony, second offense, MCL 750.227b; and resisting and obstructing a police officer, MCL 750.81d(1). Police officers had discovered defendant engaged in an altercation with another person, both of whom had their hands on a semiautomatic rifle. Officers testified that defendant told them, unprompted, that he "broke into [the] house but the guy had the gun." Before trial, defendant moved to suppress the statement. The court held a *Walker*[1] hearing and determined that the statement was admissible. At trial, the court cut off redirect questioning of the circumstances surrounding the statement, stating, in the presence of the jury, that it had already ruled that the statement in question was admissible. At the conclusion of trial, the court instructed the jury, and the jury convicted defendant. Defendant appealed, and the Court of Appeals, SAWYER, P.J., and METER and DONOFRIO, JJ., affirmed in an unpublished per curiam opinion, issued December 10, 2013 (Docket No. 309315). Defendant moved for relief from judgment pursuant to MCR 6.502, contending that the trial court deprived him of a fair trial by commenting on the admissibility of the statement and by precluding further questioning of the circumstances surrounding the statement. The trial court denied the motion. The Court of Appeals granted leave to appeal.

The Court of Appeals *held*:

It is error for a trial court to inform a jury that it already determined a defendant's confession to be voluntary, although such an error may or may not warrant reversal. Analogously, informing the jury that the trial court already determined a police officer's conduct to have been proper and lawful in the context of an allegedly coerced confession is, as a practical matter, the same

[1] *People v Walker (On Rehearing)*, 374 Mich 331 (1965).

error, albeit also not necessarily one mandating reversal. Such an error must be reviewed for harmlessness. In this case, the trial court's remark that it had already ruled that the statement in question was admissible, although clearly intemperate and unwise, had little to no effect on the outcome of the case: the police officer's remark that he did not "appreciate" the trial court's statement blunted the latter's effect on the jury; the trial court cut off the prosecution's questioning, and therefore the jury would not have unambiguously understood it to favor the prosecution or the defense; the trial court properly instructed the jury that its rulings and comments were not evidence, that the jury must disregard any opinion it believed the judge might have, and that the jury was the sole judge of the facts; ample other evidence was properly admitted establishing both the content of defendant's statement and the fact that he had not been advised of his *Miranda*[2] rights when he allegedly made it; and defendant's theory of the case, as reflected by closing argument to the jury, was that the other people ostensibly involved in the alleged crimes were unreliable or absent, and possibly that the police officers were incompetent. The conclusion that defendant was not deprived of a fair trial on the basis of erroneous commentary was limited to the facts and circumstances of this case. The trial court properly declined to grant defendant relief from judgment on that basis.

Affirmed.

MARKEY, J., concurring, concurred in result only in respect to the evidentiary issue, but joined the lead opinion in respect to all the other issues.

BOONSTRA, J., concurring in part and dissenting in part, concurred with the lead opinion that the trial court's denial of defendant's postconviction motion for relief from judgment should be affirmed, but would have held that the trial court's comments regarding the admissibility of defendant's statement did not constitute even harmless error. In this case, the trial court merely said that the statement was admissible; the trial court neither informed the jury that it had determined that defendant's statement was voluntary nor spoke at length about the circumstances surrounding defendant's statement so as to potentially influence the jury's determination of whether the statement had, in fact, been made and whether it was true. The trial court's statement and its limiting of the questioning regarding defendant's *Miranda* rights imparted no assessment of whether the officer's

[2] *Miranda v Arizona*, 384 US 436 (1966).

testimony regarding defendant's statement was credible or whether the statement was made at all. Additionally, the trial court repeatedly instructed the jury that it was the ultimate determiner of credibility and of the facts of the case.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Brenda L. Taylor*, Assistant Prosecuting Attorney, for the people.

Raymond C. Pierson *in propria persona*.

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

RONAYNE KRAUSE, J. Defendant appeals by delayed leave granted the trial court's order denying his post-conviction motion for relief from judgment pursuant to MCR 6.502. Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2); being a felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony, second offense, MCL 750.227b; and resisting and obstructing a police officer, MCL 750.81d(1). On appeal, this Court affirmed.[1] Defendant thereafter moved for relief from judgment pursuant to MCR 6.502, contending that the trial court deprived him of a fair trial by commenting on the admissibility of a statement he made to an arresting police officer and precluding further questioning of the circumstances surrounding the statement. This Court granted leave to appeal limited to that issue. We affirm.

Defendant's convictions arose out of police officers discovering defendant engaged in an altercation with another person, both of whom had their hands on a

[1] *People v Pierson*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2013 (Docket No. 309315).

semiautomatic rifle. Relevant to the instant appeal, officers on the scene testified that defendant told them, unprompted, that "I broke into [the] house but the guy had the gun." The trial court held a hearing and found the statement admissible. At trial, the trial court cut off redirect questioning of one of the officers by the prosecutor into, apparently, the circumstances of that statement and when the officer read *Miranda*[2] rights, stating, "The Court already held a hearing on this matter and I have ruled that the defendant was properly advised of his rights and that the statements that have been introduced are admissible." Defense counsel objected, to which the trial court replied: "Fine. Go ahead. It's true. Have a seat." On recross-examination, defense counsel asked the officer about the statement and mentioned the court's remark about its admissibility, to which the officer replied: "The Judge said it. I don't know if I appreciate it." The trial court then stated: "You know what, that doesn't matter either. So go ahead." The officer then confirmed that defendant had made statements to him and to other officers. Defendant contends that the trial court's remarks deprived him of a fair trial, especially because he denied having made the statement at all.

Although trial judges enjoy great discretion and wide latitude in conducting trials, they must not intentionally or unintentionally deprive a criminal defendant of a fair trial. *Wheeler v Wallace*, 53 Mich 355, 357-358; 19 NW 33 (1884). Usually, although not always, objections are required to preserve issues for appeal. See *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994). Where objection would "[have] to be made to the trial judge himself concerning his own conduct," review without the benefit of an objection may be particularly

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

appropriate. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). Trial counsel did object to the trial court's commentary to some extent, although no explication was given; the trial court's conduct, insofar as it is discernable from the transcript, suggests that any further efforts by counsel would have been futile or counterproductive. This Court reviews the issue to determine whether the appellant received a fair trial. *Wheeler*, 53 Mich at 357-358.

It has long been established that it is error for a trial court to inform a jury that it already determined a defendant's confession to be voluntary, although such an error may or may not warrant reversal. See *People v Gilbert*, 55 Mich App 168, 171-173; 222 NW2d 305 (1974), and *People v Williams*, 46 Mich App 165, 169-170; 207 NW2d 480 (1973), which both relied on *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Analogously, informing the jury that the trial court already determined a police officer's conduct to have been proper and lawful in the context of an allegedly coerced confession is, as a practical matter, the same error, albeit also not necessarily one mandating reversal. *People v Kincaid*, 136 Mich App 209, 215-216; 356 NW2d 4 (1984).

It is no particular stretch to further extrapolate that there is little substantive difference between advising the jury that a confession had previously been ruled voluntary after a hearing and advising the jury that the confession had previously been ruled admissible after a hearing. I decline to presume that lay jurors would appreciate the distinction. The practical effect of such a line of commentary is simply to impress upon the jury that the trial court had already engaged in some manner of extraordinary analysis of the propriety of the confession and arrived at a conclusion

unfavorable to the defendant. It would be splitting semantic hairs for us to find otherwise. However, by the same extrapolation from established caselaw, such an error must be subject to review for harmlessness. Under the circumstances of this case, I find the statements erroneous but harmless.

First, I think it likely that the officer's remark that he did not "appreciate" the trial court's statement blunted the latter's effect on the jury. Given that the trial court cut off the prosecutor's questioning, I doubt the jury would have unambiguously understood it to favor the prosecution or the defense. More importantly, the trial court properly instructed the jury that its rulings and comments were not evidence, that the jury must disregard any opinion it believed the judge might have, and that the jury was the sole judge of the facts. Juries are presumed to follow their instructions "unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant." *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001) (quotation marks and citation omitted). As noted, I think the effect the trial court's statement might have had on the jury to be fairly mild. Significantly, ample other evidence was properly admitted establishing both the content of defendant's statement and the fact that he had not been advised of his *Miranda* rights when he allegedly made it. Finally, defendant's theory of the case, as reflected by closing argument to the jury, was that the other people ostensibly involved in the alleged crimes were unreliable or absent, and possibly that the police officers were incompetent.

The overwhelming likelihood is that the trial court's erroneous remark, although clearly intemperate and

unwise, had little to no effect on the outcome of the case. My conclusion in this regard is limited to the facts and circumstances before us, and I would expressly decline to craft a bright-line rule regarding reversal, or whether a similar error would be harmless or outcome-determinative in any other case. I hold only that in *this* case, defendant was not deprived of a fair trial on the basis of the erroneous commentary, and the trial court properly declined to grant him relief from judgment on that basis. I therefore do not consider any argument pertaining to the absence of this or any other issue from defendant's prior appeal.

Affirmed.

MARKEY, P.J. (*concurring*). I concur in result only in respect to the evidentiary issue. I join the lead opinion in respect to all the other issues.

BOONSTRA, J. (*concurring in part and dissenting in part*). Throughout any juror's courtroom experience, a trial judge makes innumerable rulings on the admissibility of evidence. Sometimes those rulings are made in the presence of the jury; sometimes they are made outside the presence of the jury. But either way, they are rulings that are necessary to the conduct of a trial, and jurors are properly made to understand that. Both at the outset of a trial and at its conclusion, juries are therefore generally instructed regarding what constitutes evidence, the judge's role in determining admissibility of evidence, and the jury's role as fact-finder and weigher of credibility.

It is in this context that we must evaluate the issue presented in this case. Before trial, defendant moved to suppress his alleged (and allegedly unprompted) statement to police officers that "I broke into [the] house but

the guy had the gun." The trial court held a *Walker*[1] hearing and determined that the statement was admissible.

At the outset of the trial, the trial court delivered its preliminary instructions to the jury, including that statements of attorneys are not evidence, that the jury must decide the case based only on the admitted evidence, that the jury was ultimately responsible for determining which witnesses or portions of witness testimony to believe, and that the trial court's rulings on objections to statements made by witnesses were based on the law and were not meant to reflect the opinion of the court on the facts of the case. The jury affirmed that it would follow the trial court's instructions.

Among the witnesses who testified at trial was one of the officers in question, and among the subjects on which he was questioned was the statement that the trial court had determined at the *Walker* hearing to be admissible. During the prosecution's redirect examination of the officer, the following colloquy occurred:

> [*Prosecutor*]: Okay. Now, in terms of the statement that the defendant made to you, let me back up. I believe on cross-examination you said you didn't question [defendant].
>
> [*Officer*]: That's correct.
>
> * * *
>
> [*Prosecutor*]: And I believe in terms of your testimony, you said he told you he was breaking into the apartment but that the guy pulled a gun on him; is that correct?
>
> [*Officer*]: Yeah, that the guy had a gun.

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[*Prosecutor*]: The guy had a gun. Now, can you explain when you give Miranda[2] rights?

[*Officer*]: Anytime someone's not free to leave.

[*Defense counsel*]: Foundation.

[*The Court*]: You know what, I'm going to cut that part of it off here. The Court already held a hearing on this matter and I have ruled that the defendant was properly advised of his rights and that the statements that have been introduced are admissible. Go ahead.

[*Defense counsel*]: I'll object to that.

[*The Court*]: Fine. Go ahead. It's true. Have a seat. Go ahead.

Shortly after this exchange, and during defense counsel's recross-examination of the officer, there was the following exchange:

[*Defense counsel*]: You appreciate the Court has ruled that statements by my client are admissible, correct?

[*Officer*]: I don't—

[*Defense counsel*]: He just said it. The Judge just said that.

[*Officer*]: The Judge said it. I don't know if I appreciate it.

[*Defense counsel*]: Okay. So my client gave a statement to you—

[*The Court*]: You know what, that doesn't matter either. So go ahead.

Defense counsel further elicited testimony from the officer that defendant's statement was not written down or recorded at the scene, but instead was written in the officer's report hours later. Defense counsel also pointed out inconsistencies between another witness's testimony regarding her statements to the officer that night

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

and the statements that the officer had recorded in his report. During closing arguments, defense counsel reminded the jury that it could choose to disbelieve the officer's testimony regarding defendant's statement.

At the conclusion of the trial, before the jury began its deliberations, the court further instructed the jury, and again instructed them, *inter alia*, that it is the judge's role to determine what evidence is admissible, that it is the jury's exclusive role to determine the facts and to weigh the credibility of witnesses, that it was for the jury to decide which witnesses to believe (either in whole or in part), and that in doing so it should assess the testimony of police officers using the same standards by which it evaluated the testimony of other witnesses. Finally, the jury was instructed that the trial court's comments and rulings were not evidence. Among the instructions given were the following:

> It's your job and no one else's . . . to decide what the facts of the case are, and to do that you have to decide which witnesses you believe and how important you think their testimony is. You don't have to accept or reject everything a witness told you. You are free to believe all, none, or a part of any person's testimony.
>
> * * *
>
> When you discuss the case and decide on your verdict, you may only consider the evidence that has been properly admitted. Therefore, it's important for you to understand what is evidence and what's not. Evidence in this case includes only the sworn testimony of the . . . [parties'] witnesses, and the exhibits which were admitted into evidence.
>
> * * *
>
> My comments, my rulings, indeed these instructions are also not evidence. It's been my duty to see to it that the

> trial was conducted according to the law and to tell you the law that applies to this case. But when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. Indeed, if you believe I have an opinion about how you should decide this case, pay no attention to it. You are the judges of the facts in this case, not me.
>
> At times during the trial, I excluded evidence or sustained objections. Don't consider those things in deciding the case. Make your decision only on the evidence that I let in and nothing else. As I said, your decision should be based on all the evidence regardless of which party presented it.
>
> * * *
>
> Now, as I said, it's your job to decide what the facts of the case are, and to do that you have to decide which witnesses you believe and how important you think their testimony is. You don't have to accept or reject everything a witness told you. You are free to believe all, none, or a part of any person's testimony.
>
> * * *
>
> You've heard testimony from witnesses who are police officers. That testimony is to be judged by the same standards you used to evaluate the testimony of any other witness.

The lead opinion holds, notwithstanding the trial court's instructions to the jury and the inherent role of a trial court in determining the admissibility of evidence, that it was error (albeit harmless error) for the trial court to state in the presence of the jury that it had already ruled that the statement in question was admissible. I respectfully disagree and therefore dissent from the lead opinion's analysis and finding of error.

The trial court in this case held a *Walker* hearing to determine whether defendant's statement was voluntary. The purpose of a *Walker* hearing is to protect "the defendant's constitutional [due-process] right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." *Jackson v Denno*, 378 US 368, 376-377; 84 S Ct 1774; 12 L Ed 2d 908 (1964).[3] This right remains protected at trial if the jury is limited to considering the "weight and credibility" of the statement, i.e., if defendant is free to argue, and the jury is free to conclude, that the statement was not made or was not true. *Walker*, 374 Mich at 337. A *Walker* hearing thus is an evidentiary hearing held outside the presence of the jury on the issue of the voluntariness of a confession or incriminating statement. If the trial court determines a statement to have been voluntarily made, then the statement is admitted into evidence at trial. However, "[t]he issue of voluntariness is not submitted to the jury. Jury consideration is limited to its weight and credibility." *Id*. at 337; see also *People v Britt*, 37 Mich App 175, 177; 194 NW2d 528 (1971).

The lead opinion correctly states that we have held that it is error for a trial court to inform a jury that it has determined that a defendant's confession is voluntary. In *Walker*, our Supreme Court stated that once a trial court has ruled a defendant's statement to be admissible, the jury's "determination should be limited to truthfulness, *i.e*., weight and credibility"; in other

[3] Put another way, the trial court in a *Walker* hearing does not consider whether a challenged confession or incriminating statement is credible (such as by considering corroborating evidence), but only whether a defendant's right not to be convicted on the basis of a coerced confession has been protected. See *Jackson*, 378 US at 376-377.

words, "the jury may still consider its evidentiary weight." *Walker*, 374 Mich at 337-338. And in *People v Gilbert*, 55 Mich App 168, 172; 222 NW2d 305 (1974), this Court noted that a trial court's ruling that a defendant's statement was admissible "merely placed the confession on an equal footing with all other properly admitted evidence," leaving the defendant "as free as he was before the *Walker* hearing to familiarize the jury with the circumstances that attended the taking of his confession, including facts bearing on voluntariness, to impeach its credibility or to challenge the fact that it was ever given at all." Further, this Court in *Gilbert* stated:

> After such evidence has been admitted, the trial judge may instruct the jury that they should determine, on the basis of all the relevant evidence, 1) if the confession was made, and 2) if they so find, they should decide if the statement is true.
>
> The trial court should not, as happened in this case, go on to discuss anything more. For, to inform the jury of the existence, nature, and results of a *Walker* hearing not only makes it unlikely that the jury will thereafter decide the confession was never made, but it also tends to unfairly discount the credibility of defendant's impeaching evidence, especially that properly admitted evidence that relates to voluntariness. [*Id*. at 172-173 (citation omitted).][4]

In my judgment, the trial court did not err by merely noting that defendant's statement was found to be admissible. After all, a jury is surely aware that the evidence that is submitted to it has either been found to be admissible or is so clearly admissible that no

[4] As noted, the jury is therefore entitled to assess the admissible evidence surrounding the making of the statement but is not asked to determine whether it was made voluntarily. *Walker*, 374 Mich at 337-338.

party has argued against its admission. Unlike in *Gilbert*, the trial court in this case neither informed the jury that it had determined that defendant's statement was voluntary nor spoke at length about the circumstances surrounding defendant's statement so as to potentially influence the jury's determination of whether the statement had, in fact, been made and whether it was true. Indeed, the trial court in *Gilbert* stated that it had evaluated "the duration and conditions of detention, the attitude of the police officers, the physical, mental state of the accused, the diverse pressures that might sap the accused's strength and so forth" in a separate evidentiary hearing. *Gilbert*, 55 Mich App at 172 (quotation marks omitted). The trial court in *Gilbert* thus invaded the province of the jury by imparting to the jurors its own assessment of the credibility of the witnesses and "crippled the defendant's ability to challenge a confession . . . ." *Id*. at 173.

By contrast, the trial court here did no such thing. It instead merely stated that it had ruled that defendant's statement was admissible, and it thereby cut off both the prosecution's and defense counsel's attempts to further explore the circumstances under which defendant was advised of his *Miranda* rights. Those circumstances relate to a subject matter that is within the province of the court, rather than the jury. They relate to whether defendant was properly advised of his rights and whether he knowingly and intelligently waived those rights and otherwise voluntarily made the statement, such that evidence of his statement was properly admitted for the jury's consideration. See *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986); see also *People v Akins*, 259 Mich App 545, 564-565; 675 NW2d 863 (2003). The trial court's statement and its limiting of the questioning regarding defendant's *Miranda* rights did not, however, in any

way render defense counsel unable to challenge the credibility of his statement, or even its existence. See *Gilbert*, 55 Mich App at 172. Indeed, the trial court's statement and ruling imparted no assessment of whether the officer's testimony regarding defendant's statement was credible or whether the statement was made at all. Defense counsel in this case thus remained free to impeach the credibility of the officer or challenge whether the statement was even made, *id*. at 172, and he, in fact, did so at trial by challenging the officer's testimony, pointing out inconsistencies in the officer's report and the testimony of another witness, and eliciting testimony regarding defendant's mental state at the time he gave the statement, including testimony from the officer that shortly before the statement he had pointed his service weapon at defendant. And, again, the trial court repeatedly instructed the jury that it was the ultimate determiner of credibility and of the facts of the case.

Unlike the lead opinion, I do not find the distinction between "admissibility" and "voluntariness" to be merely one of "splitting hairs." Nor is the distinction one, in my judgment, that lay jurors are unable to appreciate. I give them more credit than that. Indeed, in our common parlance, the distinction between "admissibility" and "voluntariness" is clear.[5]

But the jurors were not confronted with that distinction in this case. The trial court merely said that the statement was admissible. It said nothing about voluntariness, about the basis for its finding of admissibility, or about the credibility the witnesses or the

[5] For example, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "admissible," in relevant part, as "capable of being allowed or conceded" and defines "voluntary," in relevant part, as "proceeding from the will or from one's own choice or consent."

weight to be given to the statement or any other piece of evidence. It hardly imparted to the jury, as the lead opinion posits, that it had "already engaged in some manner of extraordinary analysis of the propriety of the confession and arrived at a conclusion unfavorable to the defendant." No, it properly ruled on the admissibility of the evidence and left to the jury the evaluation of the evidence. And in the context of the trial court's instructions to the jurors, they surely were made to understand that, irrespective of the court's determination that the statement was admissible, it was solely within the purview of the jurors themselves to assess the credibility of the witnesses and the weight to be given to the statement and the other evidence admitted at trial.

I concur with the lead opinion that the trial court's denial of defendant's postconviction motion for relief from judgment should be affirmed. However, I would hold that the trial court's comments regarding the admissibility of defendant's statement did not constitute even harmless error.

In re BRODY LIVING TRUST

Docket No. 330871. Submitted September 6, 2017, at Detroit. Decided September 12, 2017, at 9:25 a.m. Part II vacated and case remanded 501 Mich 1094.

Cathy B. Deutchman filed a petition in the Oakland County Probate Court, seeking, under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., the removal of her father, Robert Brody, from his position as trustee of the Rhea Brody Living Trust (the Rhea Trust) and reversal of the damage Robert had allegedly caused to the interests of the trust through certain transactions. Robert and his wife, Rhea Brody, owned numerous companies, including Brody Realty No. I, LLC (Brody Realty) and Macomb Corporation; Rhea established the Rhea Trust as part of her and Robert's estate plan. The Rhea Trust held a 98% interest in Brody Realty; Robert managed Brody Realty, which had an interest in Brittany Park Apartments, LLC. Robert and two of his and Rhea's children—Jay Brody and Cathy—were named beneficiaries of the Rhea Trust. Robert became successor trustee of the Rhea Trust in 2013 after Rhea resigned from the position. While acting in his capacity as trustee, Robert sold Brody Realty's membership interest in the Brittany Park property (the Brittany Park agreement) to the Jay Howard Brody Trust (the Jay Trust) and Jay's two children, Stuart Brody and Rachel Brody. Robert also sold Jay an option to purchase the Rhea Trust's interest in both Brody Realty and Macomb Corporation (the option-to-purchase agreement), granted Jay an irrevocable proxy to vote Robert's interest in Brody Realty, and reduced the purchase price by $2,000,000 if Cathy or her husband interfered with the terms of the option-to-purchase agreement. Cathy moved for partial summary disposition, which the court, Daniel A. O'Brien, J., granted. The court's order removed Robert as successor trustee immediately, declared Rhea disabled under the terms of the Rhea Trust, reformed the Brittany Park agreement by increasing both the purchase price and the interest rate on any unpaid balance, and set aside the option-to-purchase agreement. Robert appealed, and Jay cross-appealed.

The Court of Appeals *held*:

1. Under MCL 700.1302(b), probate courts have exclusive legal and equitable jurisdiction over matters concerning the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary. MCL 700.1303(h) also provides a probate court with concurrent legal and equitable jurisdiction over claims by or against a fiduciary or trustee. In contrast, under MCL 600.8035, a business court has jurisdiction over those cases in which all or part of the action includes a business or commercial dispute, defined by MCL 600.8031(1)(c)(*iv*) as an action involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise. However, MCL 600.8031(3)(e) provides that a business court specifically does not have jurisdiction over proceedings brought under EPIC.

2. In this case, Cathy correctly filed her petition in the probate court, not in a business court. Her claims involving the Rhea Trust were brought under EPIC, and such claims are expressly excluded from the MCL 600.8031(1)(c)(*iv*) definition of "business or commercial dispute." To the extent the petition involved Brody family businesses, the matters were only tangentially related to the central issue of Robert's alleged breach of fiduciary duty as trustee of the Rhea Trust. Robert and Jay's reliance on MCL 600.8035(3)—which provides that an action that involves a business or commercial dispute that is filed in a court with a business docket must be maintained in a business court although it also involves claims that are not business or commercial disputes, including excluded claims under MCL 600.8031(3)—was misplaced. The statutory language indicates a legislative intent for business courts to retain cases originally filed in those courts for the entirety of the proceedings, regardless of whether the business dispute involves excluded subject matter; the statute does not require every action affecting a business to be originally filed in a business court or transferred to the business court. To hold otherwise would create a conflict between the mandatory jurisdiction of business courts over all matters affecting or involving a business and the exclusive jurisdiction of probate courts to consider probate and trust matters; moreover, EPIC's more specific grant of jurisdiction regarding trust-related matters to probate courts under MCL 700.1302 and MCL 700.1303 controls over the more general statutory grants of jurisdiction to business courts. Accordingly, the probate court had jurisdiction over Cathy's petition that was brought under EPIC.

3. An action must be prosecuted in the name of the real party in interest, which is the party who is vested with a right of action in a given claim, and standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy. MCL 700.7201 allows a probate court to intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person, which, under MCL 700.1105(c), includes the incumbent fiduciary, an heir, devisee, child, spouse, creditor, beneficiary, and any other person that has a property right in or claim against a trust estate. The probate court correctly concluded that Cathy had standing to request Robert's removal as trustee of the Rhea Trust and the reversal of certain actions taken by Robert as trustee. Cathy was an interested person for purposes of MCL 700.1105(c) because she was Rhea's child and because, as a trust beneficiary, she had a future interest in the Rhea Trust that was contingent on Rhea's death.

4. The Rhea Trust required its trustee to act in the best interests of the trust beneficiaries, which included Robert, Jay, and Cathy. The Rhea Trust prohibited Robert, as a beneficiary of the trust, from possessing powers that would allow him to enlarge or shift the beneficial interests under the trust, and the trust required Robert to appoint an independent cotrustee if he possessed such powers. Robert had the power to sell interests belonging to or affecting the Rhea Trust because he was the manager of Brody Realty, and the Rhea Trust had a 98% ownership interest in that company. Robert breached his fiduciary duty to the trust when he executed the Brittany Park agreement and the option-to-purchase agreement without first appointing a cotrustee to protect the beneficial interests of the trust beneficiaries while he acted in the conflicting role of manager of Brody Realty. The option-to-purchase agreement clearly shifted the interests of the trust's beneficiaries in favor of Jay because, if Jay exercised the option, Cathy's interest would shift from a 50% share of Brody Realty to a 50% share of any proceeds from its sale, with no guarantee that those two interests would be equivalent. Moreover, while the Rhea Trust granted Robert authority to make unequal distributions or to delay distributions to Jay and Cathy, the intent of the Rhea Trust was to distribute the trust's proceeds equally between Jay and Cathy, and any inequity created by the Brittany Park sale or the option-to-purchase agreement was not consistent with that intent. Accordingly, the probate court correctly concluded that there was no genuine issue of material fact that Robert breached his fiduciary duty.

5. Reformation of a contract is an appropriate equitable remedy if the writing fails to express the intentions of the parties as the result of accident, inadvertence, mistake, fraud, or inequitable conduct. MCL 700.7901—which grants a probate court authority to void a sale, impose a lien or constructive trust on property, recover property and its proceeds, or order any other appropriate relief—does not grant a probate court authority to reform a contract entered into by a trustee if the contract expresses the intent of the parties. In this case, the probate court erred when it reformed the Brittany Park agreement because the contract did not fail to express the intentions of the parties with regard to the purchase price and interest rate. On remand, the probate court was to consider any factual questions related to the Brittany Park agreement, including whether the agreement should be rescinded for mutual mistake.

6. The probate court correctly concluded that the option-to-purchase agreement affected Jay and Cathy unequally, contrary to the intent of the Rhea Trust, and that the agreement favored Jay's interests over Cathy's, Robert's, and the Rhea Trust's. Accordingly, the probate court correctly rescinded the option-to-purchase agreement.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. COURTS — JURISDICTION — PROBATE COURTS — CLAIMS BROUGHT UNDER THE ESTATES AND PROTECTED INDIVIDUALS CODE.

Under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., probate courts have exclusive legal and equitable jurisdiction over probate and trust matters; probate courts, not business courts, have jurisdiction over claims brought under EPIC even when the claims are tangentially related to a business enterprise (MCL 700.1302(b); MCL 700.1303(h); MCL 600.8031(1)(c)(*iv*) and (3)(e); MCL 600.8035).

2. COURTS — PROBATE COURTS — AUTHORITY TO REFORM CONTRACTS INVOLVING TRUSTS — NO AUTHORITY TO REFORM CONTRACTS WHEN INTENT OF PARTIES CLEAR.

MCL 700.7901 grants probate courts authority to void a sale, impose a lien or constructive trust on property, recover property and its proceeds, or order any other appropriate relief; the statute does not grant probate courts authority to reform a contract entered into by a trustee if the contract expresses the intent of the parties.

Hertz Schram PC (by *Kenneth F. Silver* and *Daniel W. Rucker*) for Cathy B. Deutchman.

Giarmarco, Mullins & Horton, PC (by *William H. Horton* and *Christopher J. Ryan*) for Robert Brody.

Kemp Klein Law Firm (by *Alan A. May*, *Joseph P. Buttiglieri*, and *Richard Bisio*) for Jay Brody.

Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM. In this case involving the Rhea Brody Living Trust (the Rhea Trust), Rhea's husband, Robert Brody, appeals as of right the probate court's order granting partial summary disposition to Rhea and Robert's daughter, Cathy B. Deutchman. In relevant part, the order resolved claims relating to two family businesses, Brody Realty No. I, LLC, and Macomb Corporation, declared Rhea Brody disabled pursuant to the terms of the trust, and removed Robert as successor trustee of the trust. Jay Brody, Rhea and Robert's son and the brother of Cathy, cross-appeals.[1] We affirm in part, reverse in part, and remand for further proceedings.

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[1] Cathy argues that because Jay had no pecuniary interest in Robert's removal as trustee, he is not an aggrieved party pursuant to MCR 7.203(A) and therefore he lacks standing to file a claim of cross-appeal. We disagree. The order removing Robert as trustee is a final order. "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006) (quotation marks and citation omitted). The probate court's prior orders included remedies for breaches by Robert, including reformation of the terms of a sale of the Brittany Park property to Jay and canceling an option agreement to which Jay was a party. "Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Because the

I. PROBATE COURT JURISDICTION

On appeal, Robert and Jay ask this Court to vacate the probate court's orders for lack of subject-matter jurisdiction. According to Robert and Jay, the trust action included a "business or commercial dispute" as defined in MCL 600.8031(1)(c) and was therefore within the mandatory jurisdiction of the business court under MCL 600.8035. We disagree.

Neither Robert nor Jay raised the jurisdictional issue in the lower court. However, "[s]ubject-matter jurisdiction cannot be waived and can be raised at any time by any party or the court." *In re Contempt of Dorsey*, 306 Mich App 571, 581; 858 NW2d 84 (2014), vacated in part on other grounds 500 Mich 920 (2016). " 'Whether the trial court had subject-matter jurisdiction is a question of law that this Court reviews de novo.' " *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016), quoting *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999). "We review de novo questions of statutory interpretation, with the fundamental goal of giving effect to the intent of the Legislature." *Bank*, 315 Mich App at 499.

"Subject-matter jurisdiction is conferred on the court by the authority that created the court." *Reed v Yackell*, 473 Mich 520, 547; 703 NW2d 1 (2005) (CORRIGAN, J., dissenting), citing *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973). The probate court is a court of limited jurisdiction and derives its power from statutes. *Manning v Amerman*, 229 Mich App 608, 611;

probate court's remedies for Robert's breaches affected Jay, Jay has standing to file a cross-appeal challenging the probate court's rulings related to Robert's conduct, which served as the basis for the court's decision to remove Robert as trustee.

582 NW2d 539 (1998). Specifically, MCL 700.1302 grants the probate court "exclusive legal and equitable jurisdiction" over matters concerning "the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary." Additionally, MCL 700.1303(h) provides for concurrent legal and equitable jurisdiction over claims by or against a fiduciary or trustee.

A business court's jurisdiction is established by MCL 600.8035, which provides that "[a]n action shall be assigned to a business court if all or part of the action includes a business or commercial dispute." MCL 600.8035(3). Under MCL 600.8031(1)(c), a "business or commercial dispute" means, among other things, "[a]n action involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise." Notwithstanding the broad definition of "business or commercial dispute" found in MCL 600.8031(1)(c), the Legislature specifically excluded proceedings under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., in MCL 600.8031(3)(e).

Robert and Jay first argue that this action fell within the mandatory jurisdiction of the business court because it involved "the rights or obligations of . . . members . . . or managers" of a company, MCL 600.8031(2)(b), an action "arising out of contractual agreements or other business dealings," MCL 600.8031(2)(c), and an action "involving the sale, . . . purchase, . . . or finances of a business enterprise," MCL 600.8031(1)(c)(*iv*). Accordingly, they contend, Cathy was required to bring the action in the circuit court for business court assignment. This argument

lacks merit. Matters brought under EPIC are specifically excluded from the definition of "business or commercial dispute" by MCL 600.8031(3)(e). Cathy sought Robert's removal as trustee of the Rhea Trust, and reversal of the damage she alleged that Robert had already caused to the interests of the trust. Cathy's petition seeking Robert's removal as trustee, delivery of all accountings of trust property to an appointed trustee, temporary court supervision of the trust, an order rescinding transactions Robert had entered into as trustee, and damages for the Rhea Trust, was brought under various provisions of EPIC. To the extent the petition involved transactions of the Brody family businesses or existing contracts, these matters arose only tangentially to the central issue of Robert's breach of fiduciary duty as trustee of the Rhea Trust. Cathy's petition clearly fell within the range of matters specifically excluded from the definition of "business or commercial dispute" under the business court statute.

Next, Robert and Jay argue that, regardless of the nature of Cathy's petition, her claims fell within the mandatory jurisdiction of the business court under MCL 600.8035(3), which states, in part, that "[a]n action that involves a business or commercial dispute that is filed in a court with a business docket shall be maintained in a business court although it also involves claims that are not business or commercial disputes, *including excluded claims under section 8031(3)*." (Emphasis added.) Robert and Jay ask this Court to interpret this language as requiring every case affecting or affected by a business matter, including a trust case, to be brought before the business court. We decline to do so.

When this Court interprets a statute, our goal is to give effect to the Legislature's intent as determined by

the statutory language. *Bukowski v Detroit*, 478 Mich 268, 273; 732 NW2d 75 (2007). "In order to accomplish this goal, this Court interprets every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage." *Id*. at 273-274. Here, we find Robert and Jay's proposed construction of the second sentence of MCL 600.8035(3) inconsistent with the plain language of the statute. Specifically, we note that the Legislature employed in its jurisdictional mandate the phrases "an action . . . *filed in* a court with a business docket" and "shall be *maintained* in a business court." *Id*. (emphasis added). These phrases indicate a legislative intent to retain cases originally filed in the business court for the entirety of the proceedings, regardless of whether the business dispute also involves, or comes to involve, excluded subject matter. This simple reading of the statutory language is consistent with the Legislature's stated purpose in establishing the business court, which is to "[a]llow business or commercial disputes to be resolved with expertise, technology, and efficiency," MCL 600.8033(3)(b), and "[e]nhance the accuracy, consistency, and predictability of decisions in business and commercial cases," MCL 600.8033(3)(c). To read this section as requiring every action affecting a business to be originally filed in the business court or transferred to the business court upon the inclusion of matters affecting a business would be to read language into the statute that simply does not exist and to brush aside the Legislative goal of accuracy and efficiency by imposing on the business courts mandatory jurisdiction over a seemingly endless variety of nonbusiness-related matters.[2]

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[2] Notably, by amendment effective October 11, 2017, the Legislature has amended MCL 600.8031 to remove the language "action involving

Further, Robert and Jay's proposed construction of the business court statute would create a direct conflict between the mandatory jurisdiction of the business court over all matters affecting or involving a business with the exclusive jurisdiction of the probate court to consider probate and trust matters. "If two statutes lend themselves to a construction that avoids conflict, that construction should control." *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 27; 811 NW2d 98 (2011) (quotation marks and citation omitted). The construction of MCL 600.8035(3) proposed by Robert and Jay would render the probate court without jurisdiction to consider any trust matter that also involved or affected, however tangentially, a business transaction. We cannot reconcile this construction with the Legislature's grant of exclusive jurisdiction to the probate court over trust matters. Nor can we reconcile the proposed construction of MCL 600.8035(3) with the Legislature's stated purpose for its broad grant of exclusive jurisdiction on the probate court, which is "to simplify the disposition of an action or proceeding involving a decedent's, a protected individual's, a ward's, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court." MCL 700.1303(3).

Finally, to the extent the probate court's grant of exclusive jurisdiction over trust matters in MCL 700.1302 and MCL 700.1303 conflicts with the broad

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the sale, . . . purchase, . . . or finances of a business enterprise" from its broad definition of "business or commercial dispute." 2017 PA 101. Once the statute takes effect, a "business or commercial dispute" will include only actions in which at least one party is a business enterprise or nonprofit organization. MCL 600.8031(1)(c) (as amended by 2017 PA 101). We find the Legislature's recent amendment persuasive evidence of a legislative intent to limit the business court's jurisdiction to matters substantially involving the affairs of a business.

inclusion of trust-related matters within the exclusive jurisdiction of the business court under MCL 600.8035(3), we conclude that the more specific grant of jurisdiction in MCL 700.1302 and MCL 700.1303 controls. Both statutes confer jurisdiction on a court, and "[w]hen two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007).

"While it is true that a judgment entered by a court that lacks subject-matter jurisdiction is void, subject-matter jurisdiction is established by the *pleadings* and exists when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 561; 840 NW2d 375 (2013) (quotation marks and citations omitted). Cathy's petition was brought under EPIC, and the probate court had exclusive jurisdiction over Cathy's claims under MCL 700.1302 and MCL 700.1303. Robert and Jay's jurisdictional challenge therefore fails.

II. STANDING

Robert and Jay both argue that Cathy did not have standing (i.e., she was not a proper party) to request adjudication of the issues in her petition, including Robert's removal as trustee of the Rhea Trust and reversal of actions taken by Robert as trustee. We disagree.

The parties dispute whether, at the time Cathy filed her petition, the trust was revocable or irrevocable. Robert and Jay argue that Cathy has no beneficial interest in the trust because she is a contingent beneficiary and that the trust is revocable. Robert and

Jay's argument is premised on three assumptions: (1) that Rhea has not been declared disabled pursuant to the trust and that her trust is revocable by its plain terms, or (2) that the trust's terms render it revocable by Robert, the trustee and holder of a durable power of attorney (DPOA), indefinitely, and (3) that Cathy, as a contingent beneficiary, does not have standing to bring an action regarding the administration of a revocable trust. We need not consider the validity of Robert and Jay's first two assumptions, however, because we conclude that their argument fails on its third assumption.

Whether a party has standing is a question of law that this Court reviews de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 527; 695 NW2d 508 (2004). "[S]tanding refers to the right of a party plaintiff *initially* to invoke the power of the court to adjudicate a claimed injury in fact." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). In *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 621-622; 873 NW2d 783 (2015), this Court explained the relationship between standing and a real party in interest:

> MCR 2.201(B) provides that "[a]n action must be prosecuted in the name of the real party in interest . . . ." The real party in interest is a party who is vested with a right of action in a given claim, although the beneficial interest may be with another. In general, standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and "in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." Both the doctrine of standing and the included real-party-in-interest rule are

> prudential limitations on a litigant's ability to raise the legal rights of another. Further, "a litigant has standing whenever there is a legal cause of action." But plaintiffs must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties. The real party in interest is one who is vested with the right of action as to a particular claim, or, stated otherwise, is the party who under the substantive law in question owns the claim asserted. [Citations omitted.]

The probate court concluded that Cathy had standing pursuant to MCL 700.7201, which provides, in pertinent part, that "[a] court of this state may intervene in the administration of a trust to the extent its jurisdiction is invoked by an *interested person* or as provided by law." MCL 700.7201(1) (emphasis added). MCL 700.7201(3) provides:

> A proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and a determination regarding the validity, internal affairs, or settlement of a trust; *the administration*, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do any of the following:
>
> (a) *Appoint or remove a trustee*.
>
> (b) Review the fees of a trustee.
>
> (c) Require, hear, and settle interim or final accounts.
>
> (d) Ascertain beneficiaries.
>
> (e) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a trust.
>
> (f) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.
>
> (g) Release registration of a trust.

> (h) Determine an action or proceeding that involves settlement of an irrevocable trust. [Emphasis added.]

The definition of "interested person" is provided in MCL 700.1105(c), which states:

> "Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, and by the supreme court rules.

The probate court correctly determined that Cathy is an interested person under MCL 700.1105(c). There is no dispute that Cathy is Rhea's child. In addition, Cathy is a "beneficiary." Under MCL 700.1103(d)(*i*), a beneficiary includes a "trust beneficiary," defined in MCL 700.7103(*l*)(*i*) as a person with "a present or future beneficial interest in a trust, vested or contingent." The term "beneficial interest" is defined as follows: "A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property." *Black's Law Dictionary* (10th ed), p 934. The plain language of the trust indicates that Cathy has a future (upon Rhea's death), contingent (assuming no revocation or amendment) interest in the trust property. See Restatement Trusts, 1st, § 56, illustration 7, p 172 (an *inter vivos* trust in which the death of a settlor is a condition precedent establishes a "contingent equitable interest

in remainder"). Specifically, Cathy will receive Rhea's clothing and jewelry. In addition, if Robert predeceases Rhea, then a subtrust composed of 50% of the Rhea Trust's remaining assets is created for Cathy. If Rhea predeceases Robert, then a marital trust and a family trust are created, and under the marital trust, Rhea's descendants are each entitled to net income distributions and any principal necessary for education, health, support, and maintenance.

Robert and Jay ask this Court to adopt the approach of other jurisdictions in holding that a contingent beneficiary lacks standing to challenge the administration of a revocable trust. Robert and Jay's reliance on the Uniform Trust Code and cases from other jurisdictions is misplaced. Cases from other jurisdictions are inapposite because they involve statutory language that does not control here. Although we may look to decisions from other jurisdictions for guidance, *In re Lampart*, 306 Mich App 226, 235 n 6; 865 NW2d 192 (2014), we need not look outside our jurisdiction when our own law is clear, see *Dewey v Tabor*, 226 Mich App 189, 193-194; 572 NW2d 715 (1997). Because Cathy is an interested person under MCL 700.1105(c) and could invoke the court's jurisdiction to remove a trustee under MCL 700.7201(3)(a), she had standing to file her petition. Given our conclusion, we find it unnecessary to address the parties' dispute over whether Rhea was "disabled" under the trust terms during the relevant periods or whether the trust is revocable or irrevocable.

III. BREACH OF FIDUCIARY DUTIES BY ROBERT

In his cross-appeal, Jay argues that the probate court erred when it found no genuine issue of material fact regarding Robert's breach of fiduciary duty to the

trust and granted partial summary disposition in favor of Cathy. Robert makes a similar claim in his reply brief on appeal.[3] We disagree.

Because the probate court necessarily relied on facts outside the pleadings, we treat the court's award of summary disposition as though it was granted under MCR 2.116(C)(10). See *Sharp v City of Lansing*, 238 Mich App 515, 518; 606 NW2d 424 (1999). A motion is properly granted under this subrule if no genuine issue of material facts exists and the moving party is entitled to judgment as a matter of law. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 713; 706 NW2d 426 (2005). In reviewing a lower court's decision, this Court must view all the submitted admissible evidence in a light most favorable to the nonmoving party. *In re Smith Estate*, 252 Mich App 120, 123; 651 NW2d 153 (2002). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

This Court generally reviews the probate court's decision to remove a trustee for an abuse of discretion. *In re Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007). An abuse of discretion occurs only when the probate court's decision falls outside the range of principled outcomes considering the facts and circum-

[3] Robert did not raise this argument in his statement of questions presented in his opening brief on appeal. Therefore, the claim would be waived except that it was properly raised by Jay. See *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011).

stances of the case. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). This Court reviews the language in a will or trust de novo, and the objective of a court in construing a trust is to "give effect to the intent of the settlor." *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2013) (quotation marks and citation omitted).

According to the terms of the Rhea Trust, Robert, as trustee, was required to act in the best interests of the trust beneficiaries. Robert was also a trust beneficiary, and under the plain language of the trust, Robert was prohibited from possessing powers that would permit him to enlarge or shift the beneficial interests under the trust. According to the trust's terms, if Robert came to possess such power, he was required to appoint an independent cotrustee. The Rhea Trust held a 98% interest in Brody Realty, one of the companies owned and operated by the Brody family. As manager of Brody Realty, Robert possessed the power to sell interests belonging to or affecting the Rhea Trust, and he acted pursuant to that power. First, Robert sold Brody Realty's membership interest in the Brittany Park property to the Jay Howard Brody Trust (the Jay Trust) and Jay's two children, Stuart Brody and Rachel Brody. Second, Robert sold Jay an option to purchase the Rhea Trust's interest in both Brody Realty and Macomb Corporation. In arguing that Robert did not breach his fiduciary duty by entering into these transactions, Robert and Jay call attention to provisions in the Rhea Trust the DPOA executed by Rhea appointing Robert as her attorney-in-fact, which grant Robert broad authority over the trust property. But Rhea limited those powers with the trust provision requiring appointment of a cotrustee. Robert failed to appoint a cotrustee to ensure that the beneficiaries' best interests were served while he served in a potentially

conflicting role, and there is no dispute that his failure constituted a breach of his duties under the trust.

Jay argues that the Brittany Park property was not an asset of the Rhea Trust, and any provisions limiting a shift in beneficial interests under the trust did not apply to the Brittany Park sale. Jay also claims that an option agreement between Robert and Jay, which gave Jay an option to purchase the Rhea Trust's interests in Brody Realty and Macomb Corporation, did not enlarge or shift any interests because even if he exercised his option under the agreement, Jay and Cathy would still each receive 50% of the Rhea Trust's assets. These arguments fail. Brittany Park was owned by Brody Realty. The Rhea Trust owned 98% of Brody Realty, and the Rhea Trust was therefore interested in the Brittany Park sale. Under the option agreement, Jay's acceptance would shift Cathy's interest from 50% of Brody Realty to 50% of any proceeds from its sale. There is no guarantee that these separate interests would be equivalent, especially given the potential of income from Brody Realty. Under the Rhea Trust, Jay and Cathy would have each shared 50% of the remaining trust property following the deaths of their parents, including Brody Realty. The probate court did not clearly err by concluding that the option contract shifted beneficial interests under the trust to favor Jay.

Robert and Jay further argue that there was no breach of fiduciary duty with respect to the option agreement because Robert was not required to treat his children equally and the Rhea Trust allowed him to make unequal distributions or to delay distributions. They are correct that, under Articles 8 and 9 of the Rhea Trust, if Rhea predeceases Robert, the trust provisions will benefit Robert and he will have the power to appoint and distribute assets in "equal or

unequal proportions." But Rhea has not predeceased Robert, and the probate court did not clearly err by determining that the Rhea Trust was created with the general intent to treat Cathy and Jay equally. Article 10 of the Rhea Trust provides that upon the death of the survivor of Rhea and Robert, the trust property not previously distributed will be divided into separate trusts, with 50% to Jay and 50% to Cathy. Both Robert and Cathy testified that Rhea intended an equal distribution between the two siblings. It is uncertain who will live longer—Rhea or Robert—or which article of the Rhea Trust will control. While any inequities in the option agreement may be permissible under Articles 8 and 9, any inequity created by the Brittany Park sale or the option agreement would be inconsistent with the 50/50 split under Article 10. The probate court did not err by concluding that there was no genuine issue of material fact regarding Robert's breach of fiduciary duty.

IV. APPROPRIATE REMEDIES

Robert and Jay also take issue with the remedies imposed by the probate court with respect to both the Brittany Park sale and the option agreement, arguing that the probate court lacked the power to reform or rescind a contract. We agree, in part, as to the Brittany Park sale.

"This Court reviews equitable decisions of the probate court de novo, but overturns any underlying factual findings only upon a finding of clear error." *In re Filibeck Estate*, 305 Mich App 550, 553; 853 NW2d 448 (2014). "A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made." *Loutts v Loutts*, 298 Mich App 21, 26; 826 NW2d 152 (2012)

(quotation marks and citations omitted). "The granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case." *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010) (quotation marks, citation, and brackets omitted).

A. REFORMATION OF THE BRITTANY PARK AGREEMENT

Pursuant to a 2013 purchase agreement, Brody Realty sold its 63.5% interest in Brittany Park to the Jay Trust, Jay's daughter Rachel, and Jay's son Stuart. One purchase agreement documented the sale of the interest in two separate transactions, occurring on December 17, 2013 (13.6%) and December 31, 2013 (49.9%). Due to a purported lack of marketability and control, as well as the extensive capital improvements required, Robert reduced the first sale price with a 15% discount and the second sale price with a 40% discount. The total amount of the sale price was $3,348,857.18, which included a down payment of $1,050,000. Pursuant to the agreement, the Jay Trust was required to repay the entire amount of the outstanding debt at an interest rate of 1.65% over 9½ years. Robert personally loaned Jay $850,000 to help him make the repayments. Ultimately, the Jay Trust attained a 62% interest in the Brittany Park Apartments, while Rachel and Stuart each received a 10% interest.

The probate court determined that Jay was complicit in Robert's breaches of fiduciary duty and identified a "whole pattern of favoring Jay Brody at the expense of Cathy . . . ." After the probate court removed Robert, it reformed the Brittany Park purchase

agreement to increase the purchase price to $4,293,406.64 and to increase the interest rate on the balance to 3.99%.

Reformation was not appropriate in this case. Reformation is an equitable remedy that is available for contracts if the writing "fails to express the intentions of the parties . . . as the result of accident, inadvertence, mistake, fraud, or inequitable conduct . . . ." *Najor v Wayne Int'l Life Ins Co*, 23 Mich App 260, 272; 178 NW2d 504 (1970) (quotation marks and citation omitted). See also *Holda v Glick*, 312 Mich 394, 403-404; 20 NW2d 248 (1945). Courts of equity have the power to reform contracts so that they may "conform to the agreement actually made." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006) (quotation marks and citation omitted). If the basis for a proposed reformation is mistake, the mistake must be mutual. *Holda*, 312 Mich at 403-404. "A mistake in law—a mistake by one side or the other regarding the legal effect of an agreement—is not a basis for reformation." *Casey*, 273 Mich App at 398 (citation omitted).

The probate court erred when it reformed the purchase agreement for the Brittany Park sale because the parties to the Brittany Park sale intended the purchase price and interest rate to be the amounts delineated in the plain language of the purchase agreement. There is no evidence that they intended anything different.

Cathy argues that, regardless of the rules of contract, the probate court was permitted to reform the purchase agreement for the Brittany Park sale pursuant to its broad power under MCL 700.7901 to remedy a breach of trust. Specifically, Cathy argues that the probate court could "trace trust property wrongfully

disposed of and recover the property or its proceeds" under MCL 700.7901(2)(i). We disagree. MCL 700.7901 provides:

> (1) A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust.
>
> (2) To remedy a breach of trust that has occurred or may occur, the court may do any of the following:
>
> (a) Compel the trustee to perform the trustee's duties.
>
> (b) Enjoin the trustee from committing a breach of trust.
>
> (c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means.
>
> (d) Order a trustee to account.
>
> (e) Appoint a special fiduciary to take possession of the trust property and administer the trust.
>
> (f) Suspend the trustee.
>
> (g) Remove the trustee as provided in section 7706.
>
> (h) Reduce or deny compensation to the trustee.
>
> (i) Subject to section 7912, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.
>
> (j) Order any other appropriate relief.

The language of MCL 700.7901 does not expressly refer to reformation. Rather, through MCL 700.7901, the Legislature only empowered the probate court with authority to void a sale, impose a lien or constructive trust on property, or recover property and its proceeds.

Cathy also argues that reformation was permissible under the probate court's authority to "[o]rder any other appropriate relief" under MCL 700.7901(2)(j). This Court has defined "appropriate" as " 'particularly suitable; fitting; compatible,' " or " '[s]uitable for a

particular person, condition, occasion, or place; proper; fitting.' " *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000) (alteration in original), quoting *Random House Webster's College Dictionary* (2d ed, 1997) and *The American Heritage Dictionary: Second College Edition* (1985). In this case, reformation of the purchase agreement was not fitting because, as discussed earlier, the Brittany Park sale did not fail to express the intent of the parties. An order to recover proceeds from a sale could have been tailored to remedy the specific breach of fiduciary duty—here, Robert and Jay's complicity in managing the trust contrary to Rhea's intent and without appointing a cotrustee to protect the beneficiaries' best interests—by ordering the responsible parties to pay for any inequity. Moreover, the probate court's chosen remedy was not particular to the circumstances because the reformation affected the interests of Jay's trust, Stuart, and Rachel. There is no evidence in the record that Stuart and Rachel played a role in any improper conduct. Reformation was not appropriate under the plain language of MCL 700.7901(2)(j).

Cathy argues that the probate court's contract reformation was appropriate given its broad equitable powers. Cathy cites *Evans v Grossi*, 324 Mich 297, 305; 37 NW2d 111 (1949), for the proposition that a court of equity "may do whatever is necessary, not only for the preservation of trust property but, also, whatever is necessary for the protection of the rights of beneficiaries and the promotion of their interests." But a court's equity powers are not unlimited. Our Supreme Court has explained, "Although courts undoubtedly possess equitable power, . . . [a] court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking . . . ." *Devillers v Auto Club Ins*

Ass'n, 473 Mich 562, 590-591; 702 NW2d 539 (2005). "Equity jurisprudence mold[s] its decrees to do justice amid all the vicissitudes and intricacies of life." *Tkachik*, 487 Mich at 45-46 (quotation marks and citation omitted; alteration in original). The probate court's order did not weigh the intricacies of the sale against the parties responsible for the misconduct, and it erred when it chose the remedy of reformation of the Brittany Park purchase agreement.[4]

In his brief on cross-appeal, Jay claims that he should now have the option to rescind the Brittany Park agreement because of mistake or material change to the subject of the contract. But a party who bears the risk of a mistake is not entitled to rescind the contract. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 30; 331 NW2d 203 (1982). In this case, the probate court found that Jay was complicit in Robert's breaches of his fiduciary duties. Therefore, it would not be unreasonable to allocate the risk of mistake to Jay. However, the probate court did not consider this issue, and we will not decide it on appeal. The probate court should consider whether rescinding the contract for mutual mistake is appropriate on remand.

Jay also argues that the probate court could have treated the Brittany Park sale as a gift or advance on future distributions. Indeed, under the terms of the Rhea Trust, the trustee was permitted to make gifts to Rhea's descendants for the best interests of Rhea, her family, and the estate. Any gift was required to be "deemed a satisfaction of such legacy or distribution, pro tanto, and that the gift or transfer made by the

[4] In light of this outcome, we decline to address Jay's argument that no claim regarding the Brittany Park sale was properly before the probate court given that Robert was acting as a manager of Brody Realty when he executed the sale, not as a trustee of the Rhea Trust.

Trustee is not considered to be in addition to such legacy or distribution." Although MCL 700.7901(2)(j) authorizes the court to "[o]rder any other appropriate relief," it is for the probate court on remand, not this Court on review, to determine whether treating the sale as a gift is particularly suited to the circumstances.

Finally, Jay argues that the probate court incorrectly eliminated the discounts for lack of marketability and control in the Brittany Park sale when it increased the purchase price. Because we have concluded that the probate court's reformation of the Brittany Park purchase agreement was in error, we find it unnecessary to address the propriety of the marketability discounts at this time.[5] Any remaining factual questions must be resolved on remand.

B. SETTING ASIDE THE OPTION AGREEMENT

Robert and Jay also argue that the probate court improperly set aside an option agreement between Robert and Jay that grants Jay the option to purchase substantial amounts of the Rhea Trust interest upon Rhea's death. We disagree.

In exchange for approximately $103,322 and $33,325.24, Robert sold Jay an option to purchase "everything," including the Rhea Trust's interest in Brody Realty and the Macomb Corporation, as well as

[5] Robert and Jay also argue that the probate court violated Stuart's and Rachel's right to due process by reforming the purchase agreement for the Brittany Park sale without giving Stuart and Rachel notice and an opportunity to be heard regarding the matter. In light of our decision, it is unnecessary to address this constitutional issue. Moreover, Stuart and Rachel have not complained of any violation, and Robert and Jay do not have standing to assert Stuart's and Rachel's due-process claims on their behalf. *Barrows v Jackson*, 346 US 249, 255; 73 S Ct 1031; 97 L Ed 1586 (1953).

the interest in Brody Realty and the Macomb Corporation held by Robert's trust. The period to exercise the option would begin on the nine-month anniversary of Rhea's death and end on the 15-year anniversary of her death. Due to the option's existence, the Rhea Trust's assets would remain frozen until the option was exercised or the 15-year option period had expired. The purchase price would be determined by the "fair market value of the membership interests or capital stock . . . considering all applicable valuation discounts." If Jay exercised the option related to the Rhea Trust interest in Brody Realty, Jay would repay the purchase price to the Rhea Trust in monthly payments over nine years at the midterm applicable federal rate of interest. Pursuant to the option agreement, Jay also received an irrevocable proxy to vote Robert's interest in Brody Realty, which prevented Robert from exercising his rights to vote and directly conflicted with his responsibilities under the Rhea Trust:

> From the date of Rhea's death until all the options provided under this agreement have expired, Rhea's trust shall use all means at its disposal to ensure that Jay (and not Cathy Deutchman or Jim Deutchman) manages Brody Realty . . . and Macomb Management includes [sic] voting control of Brody Realty and Macomb, amending articles, by-laws, operating agreements and entering into all contracts including agreements to sell and property management agreements. To ensure the foregoing, Rhea's Trust will provide Jay with irrevocable proxies to represent Rhea's Trust at any meeting of the members or managers of Brody Realty and any meeting of the Macomb Shareholders.

The option agreement further provided:

> In the event Cathy Deutchman or James Deutchman, directly or indirectly, interfere with or attempt to interfere with Jay Brody's rights under this agreement then the

> purchase price shall be reduced by $2 million, and Jay shall determine how this reduction in the purchase price shall be allocated.

The option agreement did not contain any provisions pertaining to Cathy's interests in the Rhea Trust or the family's businesses. Cathy was not given the option to purchase the assets of the trust.

"Rescission of a contract is an equitable remedy to be exercised in the sound discretion of the trial court." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 587; 458 NW2d 659 (1990). In this case, the probate court concluded that the option agreement was part of a pattern of favoring Jay over Cathy. The probate court reasoned that the option's delay of distribution to Cathy and the fact that the option was offered only to Jay, along with the proxy to vote Robert's interest in Brody Realty and the $2,000,000 penalty,[6] supported this conclusion.

On appeal, Robert and Jay argue that there is a question of fact regarding whether the option favored Jay over Cathy. Robert argues that any discounts to the purchase price would only be applied by an independent appraiser after determining the fair market value and that Cathy would not necessarily be disadvantaged by the repayment period if Jay exercised the option. However, the probate court did not solely rely on either the discounts or the repayment period in setting aside the option agreement. Rather, the probate court appropriately considered the overall delay in distribution to Cathy, which ran contrary to the

[6] Peripherally, the parties dispute whether the proxy and the $2,000,000 penalty in the option agreement were permissible under Michigan law. We need not decide these questions because we conclude that the probate court did not err when it set aside the option agreement containing those provisions.

terms of the Rhea Trust. Pursuant to the option agreement, Jay would be able to purchase the entire interest in Brody Realty immediately upon exercising the option, while Cathy would not be paid for her interest for 15 years.

Jay suggests that the 15-year option period was not more beneficial to Jay than to Cathy and that distribution delays are allowed under the terms of the Rhea Trust. Jay is correct that, under the trust, the trustee may "delay making the distributions and divisions . . . for a reasonable period of time if the Trustee, in its sole discretion, determines that such delay will accomplish one or more of the trust's purposes." Even if a 15-year delay is deemed a "reasonable period of time" under the language of the trust, the delay itself affected Cathy and Jay unequally. Neither Cathy's nor Jay's interests in Brody Realty would be distributed until the option was exercised or expired. But Jay would enjoy full control over the entity through the voting proxy during that period. The inequity in that arrangement is clear. Additionally, the language of the option agreement evidences a clear intent to favor Jay's interests over Cathy's, Robert's, and the Rhea Trust's. Robert and Jay have failed to establish any error requiring reversal of the portion of the order setting aside the option agreement.

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

O'BRIEN, P.J., and JANSEN and MURRAY, JJ., concurred.

In re BRODY CONSERVATORSHIP

Docket No. 332994. Submitted September 6, 2017, at Detroit. Decided September 19, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 1074.

Cathy B. Deutchman filed a petition in the Oakland County Probate Court, seeking under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., the appointment of a conservator for the estate and affairs of her mother, Rhea Brody. In 2009, Rhea executed a durable power of attorney (DPOA), designating her husband, Robert Brody (Cathy's father), as her attorney-in-fact. At the time Cathy filed the petition, it was undisputed that Rhea was unable to manage her property or business affairs. Jay Brody—Rhea and Robert's son—and Robert opposed the petition. The probate court, Daniel A. O'Brien, J., appointed Mary Lyneis to temporarily serve as special conservator for Rhea during the pendency of the conservatorship proceeding; in a separate proceeding, the probate court had earlier appointed Lyneis to serve as trustee of the Rhea Brody Living Trust. The probate court later granted the petition in this case and appointed Lyneis as conservator of Rhea's estate under MCL 700.5401(3), reasoning that Rhea was unable to manage her property and business affairs because of mental deficiency and that Rhea's property would be wasted or dissipated unless proper management was provided. Robert appealed.

The Court of Appeals *held*:

1. MCL 700.5401(3) provides, in part, that a court may appoint a conservator or make another protective order regarding an individual's estate and affairs if (1) the individual is unable to manage property and business affairs effectively for certain reasons, including mental deficiency, and (2) the individual has property that will be wasted or dissipated unless proper management is provided; the prerequisites for the appointment of a conservator must be established by clear and convincing evidence. Given the language of MCL 700.5401(3), the probate court must consider the likelihood that the protected assets will be prospectively wasted or dissipated if a conservator is not appointed, not whether those actions had occurred before the conservatorship petition was filed. When considering the MCL 700.5401(3) prereq-

uisites to appointing a conservator, a probate court may consider individually owned assets as well as jointly held assets in its determination whether those assets will be wasted or dissipated unless proper management is provided. In addition, although a conservator may not change the nature of joint accounts after the conservator's appointment, the conservator has the power to manage those joint accounts. In this case, testimony established that in order to avoid waste or dissipation of Rhea's assets, a conservator was needed to deal with the tax liabilities and refunds associated with Rhea's assets, manage the mandatory yearly distribution required by Rhea's individual retirement account, and handle the Florida home's mortgage payments in addition to the maintenance associated with the couple's two homes; the probate court correctly focused on the potential for waste or dissipation in the future when it concluded that a conservator was necessary to protect the estate. In light of the testimony, the probate court did not clearly err when it found that Rhea had property that would be wasted or dissipated without protection and oversight, and it did not abuse its discretion by appointing a conservator to oversee Rhea's estate. In addition, the probate court correctly considered the assets Rhea jointly held with Robert when making the waste-or-dissipation determination under MCL 700.5401(3). Finally, the probate court did not shift the burden of proof from Cathy to Robert.

2. The existence of a DPOA does not prohibit a probate court from appointing a conservator for the estate of the protected individual who executed the DPOA. The selection and appointment of a conservator is largely within the discretion of the probate court. MCL 700.5409(1) guides the court's discretion in that it prioritizes who is entitled to consideration for appointment as conservator. In that regard, a protected individual's spouse has priority over all other individuals except a conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides, MCL 700.5409(1)(a), and an individual or corporation nominated by the protected individual, including a nomination made in a DPOA, MCL 700.5409(1)(b). In this case, the probate court did not abuse its discretion by appointing Lyneis as conservator instead of Robert. Even though Robert was Rhea's husband, the court did not abuse its discretion when it determined that Robert was not suitable for the conservatorship because Robert had abdicated his DPOA responsibilities and had failed to act on Rhea's behalf to protect her estate assets.

3. Robert did not properly present for appellate review his argument that Rhea's court-appointed guardian ad litem (GAL) failed to fulfill his statutory duties under MCL 700.5406(4). Regardless, there was no evidence that the GAL failed to perform his duties.

4. Assuming Robert had standing to raise the issue, Robert abandoned his argument that Rhea's court-appointed attorney failed to represent Rhea's interests at the conservatorship hearing because he failed to support the argument on appeal.

5. Robert waived any error related to the admission of evidence regarding the Rhea Trust when he intentionally contributed to any error during the conservatorship hearing by referring to the trust proceedings during the cross-examination of witnesses and in closing argument. Regardless, Robert's arguments failed on the merits because the probate court appropriately limited testimony regarding the separate trust case.

6. Robert waived review of his judicial bias claim because he failed to state the claim in the statement of questions presented in his appeal brief. Regardless, the record did not support his claim.

7. Under MCL 700.5408(1), a court may impose limited protective arrangements for a protected individual instead of a full conservatorship. The need for assistance in managing financial affairs does not necessarily demonstrate an inability to manage finances or a mishandling of finances, and a need for some assistance does not support the imposition of a full conservatorship when an individual remains capable of making responsible decisions. Given the probate court's finding that Jay was manipulative and abusive toward Robert, the court did not clearly err when it found that Robert's DPOA was insufficient to protect Rhea's assets. The probate court did not clearly err by finding that a conservatorship, as opposed to a limited conservatorship or protective arrangement, was more appropriate for Rhea in light of testimony that a DPOA or patient advocate form was insufficient to manage responsibilities related to her estate.

Affirmed.

1. STATUTES — ESTATES AND PROTECTED INDIVIDUALS CODE — CONSERVATORSHIPS — CONSIDERATION OF PROSPECTIVE WASTE OR DISSIPATION OF PROPERTY.

Under MCL 700.5401(3) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., a court may appoint a conservator or make another protective order regarding an individual's estate and affairs if (1) the individual is unable to manage property and

business affairs effectively for certain reasons, including mental deficiency, and (2) the individual has property that will be wasted or dissipated unless proper management is provided; the probate court must consider the likelihood that the protected assets will be prospectively wasted or dissipated if a conservator is not appointed, not whether those actions had occurred before the conservatorship petition was filed.

2. STATUTES — ESTATES AND PROTECTED INDIVIDUALS CODE — CONSERVATORSHIPS — APPOINTMENT OF A CONSERVATOR — CONSIDERATION OF PROPERTY HELD JOINTLY BY PROTECTED INDIVIDUAL.

When considering the MCL 700.5401(3) prerequisites for appointing a conservator for a protected individual under the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., a probate court may consider individually owned assets as well as jointly held assets in its determination whether those assets will be wasted or dissipated unless proper management is provided; a conservator has the power to manage assets jointly held by the protected individual.

3. STATUTES — ESTATES AND PROTECTED INDIVIDUALS CODE — CONSERVATORSHIPS — APPOINTMENT OF CONSERVATOR WITH EXISTING DURABLE POWER OF ATTORNEY ALLOWED.

For purposes of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., the existence of a durable power of attorney (DPOA) does not prohibit a probate court from appointing a conservator for the estate of a protected individual who executed the DPOA (MCL 700.5401(3)).

Hertz Schram PC (by *Kenneth F. Silver* and *Daniel W. Rucker*) for Mary Lyneis and Cathy B. Deutchman.

Giarmarco, Mullins & Horton, PC (by *William H. Horton* and *Christopher J. Ryan*) for Robert Brody.

Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM. In this estate case involving Rhea Brody's personal assets, Rhea's husband—appellant, Robert Brody—appeals as of right the probate court's order appointing Mary Lyneis as Rhea's conservator. Rhea and Robert's daughter, Cathy B. Deutchman,

filed the petition for conservatorship, which was opposed by Robert and Jay Brody, the son of Robert and Rhea. We affirm.

I. APPOINTMENT OF A CONSERVATOR

Robert argues on appeal that the probate court abused its discretion by appointing a conservator to manage Rhea's estate and affairs under MCL 700.5401. We disagree.

This Court reviews for an abuse of discretion a probate court's appointment of a conservator. *In re Bittner Conservatorship*, 312 Mich App 227, 235; 879 NW2d 269 (2015). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id*. This Court reviews for clear error the probate court's factual findings and reviews de novo its legal conclusions. *Id*. at 235-236. "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011) (quotation marks and citation omitted). "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

Article V of the Estates and Protected Individuals Code (EPIC), MCL 700.5101 *et seq*., provides protection for individuals under disability. The standards governing conservatorship appointments are described in MCL 700.5401, which, in relevant part, provides:

> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

These prerequisites must be established by clear and convincing evidence. MCL 700.5406(7). "The clear-and-convincing-evidence standard is 'the most demanding standard applied in civil cases . . . .' " *Bittner*, 312 Mich App at 237, quoting *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Clear and convincing proof

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Martin*, 450 Mich at 227 (quotation marks and citations omitted; alterations in original).]

Robert does not dispute that MCL 700.5401(3)(a) is satisfied given that Rhea's frontotemporal dementia renders her unable to manage her property or business affairs effectively. On appeal, Robert argues only that the probate court clearly erred by concluding that Rhea "has property that will be wasted or dissipated unless proper management is provided . . . ." We hold that the probate court did not clearly err when it found that

Rhea had property that would be wasted or dissipated without proper protection and oversight, and it did not abuse its discretion when it appointed a conservator to oversee Rhea's estate.

The probate court thoughtfully considered Rhea's circumstances and the nature of each of the assets in Rhea's personal estate—composed of a Fifth Third bank account for tax refunds, an individual retirement account (IRA), a jointly held Chase Bank account, and jointly owned homes in Michigan and Florida—before concluding that the requirements of MCL 700.5401(3) had been established by clear and convincing evidence. The Fifth Third bank account, containing only $580.60 at the time of the hearing, existed for depositing tax refunds. Lyneis testified that, as the special conservator temporarily appointed during the pendency of the conservatorship proceedings, she was responsible for reviewing Rhea's personal tax return and paying any tax liabilities, which included taxes associated with Rhea's potentially substantial income from the Rhea Brody Living Trust (the Rhea Trust). Rhea risked negative tax consequences if she failed to file her signed return and pay any liabilities. While the probate proceedings were ongoing, Jay completed Rhea's tax return but refused to provide it to Lyneis for review. Without the ability to review Rhea's tax return, Lyneis was unable to verify whether any refund was properly deposited into the Fifth Third account. Accordingly, assets involving tax liabilities and refunds, including the Fifth Third account dealing with refunds, risked waste or dissipation without proper management.

The probate court noted that Rhea's IRA required an election of annual distributions. The probate court also noted that with no one in place to authorize mandatory

distributions, Rhea's IRA would be subject to tax penalties, which created a risk of waste and dissipation of the IRA funds. Robert argues that the probate court could not have found the IRA subject to waste or dissipation as a result of tax penalties because distributions from the IRA had been occurring automatically for years, and Rhea's IRA requires "minimal involvement." Respondent fails to explain how the fact that an asset requires only minimal oversight renders the asset less likely to fall victim to waste or dissipation. Further, Robert's argument is not supported by the record. Although Lyneis testified that Rhea's annual IRA distribution was deposited into the Rhea Trust for 2015, there was no evidence regarding annual distributions, automatic or otherwise, before 2015. Further, there is no evidence that appropriate distributions are guaranteed to occur absent intervention.

Rhea shares an interest in two homes, one in Michigan and one in Florida, with her husband Robert. The two also share a Chase Bank account, which is used to fund payments on the Florida home. The Brody family bookkeeper, Bonnie Dellinger, testified that she had actively requested that funds be transferred from the Rhea Trust account to the Chase Bank account in order to satisfy mortgage payments on the Florida home. Because the Florida home is not regularly used, it is particularly susceptible to waste. Rhea herself is incapable of traveling to the Florida home. The probate court reasoned that without management of the Florida home's mortgage payments or oversight of each home's maintenance, both the Michigan home and the Florida home risked waste or dissipation.

Robert suggests that it was improper for the probate court to consider joint assets when evaluating the risk of waste or dissipation because a conservator would be

unable to change the nature of jointly owned property. Robert cites for authority our Supreme Court's 1988 opinion in *In re Wright Estate*, 430 Mich 463, 469-470; 424 NW2d 268 (1988), wherein the Court held that while "a conservator has the power to collect, hold, and retain assets of the estate, he may not change the nature of joint accounts created by the disabled adult before the adult was declared incompetent." (Quotation marks, citations, and brackets omitted.) Robert misinterprets the Court's holding in that case. Although *Wright* precludes a conservator from changing the *nature* of joint accounts after the conservator's appointment, the case does not limit a conservator's power to manage the accounts. Similarly, the *Wright* case does not preclude a probate court from considering the joint assets at the conservatorship hearing. See *id*. Under MCL 700.5419, "[a]ppointment of a conservator vests in the conservator title as trustee to *all* of the protected individual's property . . . held at the time of or acquired after the order . . . ." (Emphasis added.) The probate court did not err when it considered whether the jointly held assets would be subject to waste or dissipation for purposes of MCL 700.5401(3)(b).[1]

Dellinger testified that she stopped managing payments for Rhea's expenses in January 2016 when Lyneis was appointed special conservator. Dellinger was concerned that without a conservator, Rhea's expenditures would not receive continued oversight. The probate court agreed, stating, "If no one is making decisions, it is a certainty, frankly, that property will be

[1] The parties dispute whether the Fifth Third bank account was held by Rhea individually or held jointly by Rhea and Robert. In light of our determination that the probate court properly considered both Rhea's individually held assets and her jointly held assets, we conclude that the distinction is irrelevant.

wasted or dissipated." Given these facts, the probate court did not clearly err by concluding that, because Rhea is unable to manage her property and business affairs, Rhea's property would be wasted without proper management.

Robert also argues that the probate court erred by appointing a conservator to act on behalf of Rhea because Robert—who had a durable power of attorney (DPOA), executed by Rhea in 2009, naming him as Rhea's attorney-in-fact—was already in a position to prevent waste and dissipation of Rhea's estate. At the very least, according to Robert, he should have been given priority over Lyneis as a potential conservator.

The existence of a DPOA does not prohibit the appointment of a conservator, see MCL 700.5503(1) (stating the powers of a conservator appointed after execution of a DPOA, including the same power as the principal to revoke the power of attorney), and selection of an individual to be appointed as an incapacitated person's conservator is a matter committed largely to the discretion of the probate court, *In re Williams Estate*, 133 Mich App 1, 11; 349 NW2d 247 (1984). The statute governing appointment of a conservator, MCL 700.5409(1), allows a court to determine if the individuals who fall within the statutory priority guidelines are "suitable." Additionally, MCL 700.5409(2) grants the probate court authority to pass over "a person having priority and appoint a person having less priority or no priority" for the role of conservator if good cause exists. The statute's priority classifications are merely a guide for the probate court's exercise of discretion.

Under MCL 700.5409(1)(c), a protected individual's spouse is entitled to consideration for appointment as conservator, and the spouse is granted priority over all

other individuals except "[a] conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides," MCL 700.5409(1)(a), and "[a]n individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney," MCL 700.5409(1)(b). But under MCL 700.5409(1)(h), if the individuals having priority under MCL 700.5409(1) are unsuitable, the probate court may consider anyone it determines is suitable and willing to serve.

Considering the evidence before it, the probate court found Robert unsuitable for the conservatorship. The probate court found that Robert had abdicated his responsibilities under the DPOA and failed to act on Rhea's behalf to protect her estate assets. The record supports the probate court's finding. Robert is over 91 years old and requires a caregiver. Testimony established that Robert, who relied on others to help with his own financial decisions, did not handle Rhea's estate matters using the DPOA. Instead, according to Dellinger, Jay acted on Robert's behalf to make decisions for the Rhea Trust. Witnesses also testified that Jay exhibited controlling behavior over Robert. Given these facts regarding the relationship between Jay and Robert, it was not unreasonable for the probate court to infer that Jay would attempt to influence Robert's decision-making with respect to Rhea's estate in the future. The probate court did not abuse its discretion when it selected Lyneis, an independent fiduciary, over Robert as conservator.

Robert also argues that the probate court's appointment of a conservator was an abuse of discretion

because there was no evidence that any asset of the estate had already been wasted or dissipated. However, the Legislature's use of the word "will" to modify the phrase "be wasted or dissipated unless proper management is provided" in MCL 700.5401(3)(b) supports the probate court's decision to focus on the likelihood that assets would be prospectively wasted or dissipated if a conservator was not appointed. See *In re DeCoste Estate*, 317 Mich App 339, 346; 894 NW2d 685 (2016) (explaining that the drafters of a statute are "assumed to have intended the effect of the language plainly expressed" and that this Court must give every word of the statute its plain and ordinary meaning) (quotation marks and citation omitted). The probate court properly concluded that it was unnecessary to find that any waste or dissipation had already occurred. Rhea's disability made her unable to manage her property and business affairs effectively. Although she had appointed Robert as her attorney-in-fact under the DPOA, he had abdicated his duties under the DPOA to Jay. Moreover, in addition to protecting against waste or dissipation of the assets currently in the estate, Lyneis testified that a conservator could protect the estate by interacting with the health insurance company, serving as the Social Security payee, and managing credit card bills and car lease payments. We are not left with a definite and firm conviction that the probate court erred by finding that a conservator was appropriate to fulfill these responsibilities.

We also reject Robert's argument that the probate court improperly shifted the burden of proof from Cathy to Robert when it asked Robert's attorney: "[W]hy do you care" and "[Y]ou're the one objecting to it. I'm, I'm asking you for your reasons for opposing having Ms. Lyneis be [a] conservator . . . ." Robert takes the probate court's remarks out of context. The

probate court's inquiry was in direct response to Robert's argument before the probate court. Robert claimed to oppose the appointment of a conservator because, when compared to the Rhea Trust, Rhea's personal estate was insignificant. The probate court merely asked Robert why he had bothered to oppose the petition if the assets were that insignificant. Later, the probate court judge stated, "[T]hese assets regardless of how small people seem to view this estate, require, uh, decisions being made and there's a question, therefore, as to who has the legal authority to make decisions." Finally, the probate court demonstrated that it understood the proper burden of proof when it stated on the record that Robert and Jay had no obligation to testify or present a defense.

In sum, the probate court did not clearly err by finding that Rhea's property would be wasted or dissipated without proper management. Because there was clear and convincing evidence to support this conclusion, the probate court acted within its discretion in appointing a conservator under MCL 700.5401.

II. COURT-APPOINTED GUARDIAN AD LITEM

Next, Robert argues that the court-appointed guardian ad litem (GAL), William J. Petersmark, failed to fulfill his statutory duties under MCL 700.5406(4).

Robert failed to challenge the GAL's performance in the probate court, and this issue is unpreserved. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007). Although this Court may address an unpreserved issue if it involves a question of law and the necessary facts have been presented, *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006), we decline to fully address this issue because the record is simply undeveloped. Robert ar-

gues that the GAL failed to consider whether an alternative to conservatorship may be appropriate, but cites only the lack of explicit written consideration of the matter in Petersmark's report. Petersmark's failure to specifically note the full extent of consideration is not evidence that Petersmark failed to carry out his statutory obligation. Petersmark's report indicated that he complied with the duties of a GAL as required by statute and court rule, which would have included consideration of whether there was an alternative to conservatorship, MCL 700.5406(4)(a), and whether limiting the scope or duration of the conservator's authority was appropriate before ultimately recommending a conservatorship without limitation, MCL 700.5406(4)(b). Petersmark was discharged before the conservatorship hearing and did not testify regarding his thought processes or conclusions. On this record, we cannot conclude that Petersmark failed to perform his statutory duties.

III. COURT-APPOINTED ATTORNEY

Robert also raises two complaints regarding the probate court's appointment of an attorney for Rhea, arguing that the probate court denied Rhea her right to retain an attorney of her choosing and that appointed counsel failed to vigorously represent Rhea's interests at the conservatorship hearing. Even assuming that Robert has standing to challenge an alleged deprivation of Rhea's constitutional rights, Robert's claims fail because he has not demonstrated that Rhea possessed these rights in the probate court. Robert asserts that there is a constitutional right to retained counsel under Const 1963, art 1, § 13, which states that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper

person or by an attorney." However, Robert fails to explain how this constitutional provision guarantees any individual, especially a nonsuitor, the right to an attorney, or how the probate court's decision to appoint an attorney for Rhea violates this constitutional provision. Indeed, Robert concedes that the appointment was an exercise of the probate court's discretion. Further, although the right to the effective assistance of counsel applies in criminal prosecutions, Const 1963, art 1, § 20, child protective proceedings, MCR 3.915(B)(1), and paternity proceedings, *Haller v Haller*, 168 Mich App 198, 199; 423 NW2d 617 (1988), Robert makes no claim that there is a constitutional right to the effective assistance of counsel in probate proceedings.

Robert's argument is also inconsistent with the record. The probate court appointed an attorney out of concern that Rhea, who was mentally incapacitated, was unable to hire an attorney on her own behalf. The probate court stated that if Rhea hired counsel after the appointment, he would revisit his decision to appoint an attorney on her behalf. Robert argues that he could have hired an attorney for Rhea as her attorney-in-fact under the DPOA, but he never attempted to do so. Robert did not object to the performance of appointed counsel during the conservatorship hearing, and we note that appointed counsel actively engaged in the proceedings. Robert has not indicated what appointed counsel should have done differently. Because Robert has failed to support his arguments, his claim is abandoned. See *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (explaining that "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of

supporting authority") (citations omitted); see also *id*. at 339-340 ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

IV. TRUST EVIDENCE

Next, Robert argues that the probate court improperly admitted and relied on evidence from a concurrent proceeding[2] in the probate court—one involving matters related to the Rhea Trust's assets—to conclude that Rhea's estate assets were at risk of waste or dissipation. However, " '[a] party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.' " *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352 (2014) (citation omitted). Not only did Robert fail to object to the inclusion of information about the trust proceedings at the conservatorship hearing, Robert incorporated trust evidence into his own strategy, repeatedly referring to the trust proceedings during cross-examination of witnesses and in closing argument. Robert's attorney specifically questioned Lyneis about the trust and her role as trustee, stating: "I want to segregate these. . . . I've got questions for you as the conservator, I've got questions for you as trustee." Robert waived any error related to the admission of evidence regarding the Rhea Trust when he intentionally contributed to the error at the hearing below. See *Genna v Jackson*, 286 Mich App 413, 422; 781 NW2d 124 (2009). Regardless, we conclude that Robert's argument also fails on its merits.

[2] The probate court's order in the concurrent proceeding was also appealed in this Court. See *In re Brody Living Trust*, 321 Mich App 304; 910 NW2d 348 (2017).

Generally, all relevant evidence is admissible. MRE 402; *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003), citing MRE 401. "[R]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Tobin v Providence Hosp*, 244 Mich App 626, 637-638; 624 NW2d 548 (2001), citing MRE 403. When a trial court serves as the trier of fact in a case, it is presumed to consider evidence for its proper purpose. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

In the related trust case, the probate court found on the record that Jay was complicit in Robert's breaches of fiduciary duty and identified a "whole pattern of favoring Jay Brody at the expense of Cathy . . . ." However, at the conservatorship hearing, the probate court expressly refused to consider that complicity. The probate court stated that the evidence presented by the parties regarding Jay's manipulation of Robert was consistent with "what's been going on in the trust case. Uh, Jay Brody has a, has a history of this behavior in the other case *but that's not evidence here*. Uh, but this is, this is quintessential Jay Brody, frankly." (Emphasis added.) Moreover, as Robert acknowledges, when Cathy's questioning focused on the trustee's monthly expense payments for the Rhea Trust, the probate court instructed her attorney, "Arguably, if you go far enough, it does have to do with the trust, but I would like to bring it back closer to, uh, you know, the handling of her personal estate." The probate court

limited the testimony just as Robert argues on appeal it should have done, and Robert's arguments are therefore unsupported by the record.

To the extent that the trust matter and the handling of Rhea's estate were inextricably linked, the probate court properly allowed the introduction of evidence related to the trust matter. Robert complains about the introduction of a letter Dellinger sent to the guardian ad litem for the trust that detailed Jay's order for Dellinger to pay Robert's past expenses from the Rhea Trust. Robert claims that the letter was irrelevant on a number of grounds. First, Robert claims that the letter was not material because it only involved funds in the Rhea Trust. But the record demonstrated that income from the Rhea Trust flows directly to Rhea's personal estate. The probate court could infer that if Jay planned to invade the investment portfolio in the Rhea Trust to pay Robert's expenses, the personal income from that portfolio could be reduced and proper management was necessary under MCL 700.5401(3)(b). Second, Robert claims the letter was irrelevant because it involved Jay's statements to Dellinger, and Robert did not intend to act on those plans. But the record demonstrated throughout the proceedings that Jay attempted to exert control over Robert's decisions. For that reason, the court could infer that Jay may have exerted control with respect to the repayment of Robert's expenses as well.

Robert also complains that Cathy's attorney improperly injected considerations of the Rhea Trust in arguments to the probate court. But it is well settled that an attorney's statements and arguments are not evidence. See *Guerrero v Smith*, 280 Mich App 647, 658; 761 NW2d 723 (2008); *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v*

Dorsey (On Remand), 273 Mich App 26, 45; 730 NW2d 17 (2006). The probate court appointed Lyneis to her separate roles as trustee and conservator, and the court was aware of the role she served in each capacity. Robert has not offered any argument to overcome the presumption that the court considered the evidence for its proper purpose.

V. JUDICIAL BIAS

Robert also suggests that the probate judge harbored bias against Robert and Jay as a result of his knowledge of the trust case. Robert challenges the probate court's reliance on Dellinger's letter regarding Jay's plan to repay Robert for past expenses as well as the court's reference to Jay's and Robert's decisions not to attend parts of the proceedings, and Jay's decision to withhold certain financial information from Lyneis.

Robert failed to state a claim for judicial bias in his statement of questions presented, and this argument may be considered waived. See *River Investment Group, LLC v Casab*, 289 Mich App 353, 360; 797 NW2d 1 (2010) ("This issue is waived because plaintiff failed to state it in the statement of questions presented in its brief on appeal."). Regardless, it is well established that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996) (quotation marks and citation omitted). In this case, the probate court was tasked with determining whether Rhea's estate risked waste or dissipation. The probate court's reference to Dellinger's letter, which

evidenced an intent to invade trust property and might affect the income to Rhea's estate, did not demonstrate bias or antagonism. Further, the probate court did not demonstrate favoritism when it acknowledged the absence and lack of involvement by interested parties at various portions of the proceedings, especially when the probate court was required to consider those particular parties as candidates for the conservatorship appointment. The record simply does not support Robert's claim.

VI. LIMITED CONSERVATORSHIP OR PROTECTIVE ORDER

Finally, Robert argues that the probate court should not have ordered a full conservatorship, but instead should have entered a less restrictive order, such as a limited conservatorship or a protective arrangement. Again, we disagree.

The need for assistance in managing financial affairs does not necessarily demonstrate an inability to manage finances or a mishandling of finances, and a need for some assistance will not support the imposition of a full conservatorship when an individual remains capable of making responsible decisions. *Bittner*, 312 Mich App at 240-241. Therefore, when determining whether there is cause for a conservatorship, the probate court must endeavor to maintain an individual's autonomy by ordering the least restrictive means of protecting assets. *Id*. at 241-242. See also MCL 700.5407(1) ("The court shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure.").

Under MCL 700.5408(1), courts may impose limited protective arrangements in lieu of a full conservatorship. When considering whether a full conservatorship is appropriate,

> a probate court should approach the task from a perspective of respect for the individual's right to acquire, enjoy, and dispose of his or her property as the individual sees fit. Any restrictions on this fundamental right must be narrowly tailored to the individual's specific capabilities and incapacities, bearing in mind the heightened evidentiary threshold for judicial interference. [*Bittner*, 312 Mich App at 242.]

In *Bittner*, this Court ruled that the probate court erred by appointing a conservator because Shirley Bittner understood her sources of income and economic responsibilities; in addition, her financial affairs were well managed because she had arranged for assistance from her daughter. *Id*. at 240-243. This Court explained that Shirley Bittner's "grant of a durable power of attorney to [her daughter] confirms rather than negatives her ability to effectively manage her property and business affairs." *Id*. at 243.

Although Robert equates Rhea's situation to Shirley Bittner's, we believe the two cases are distinguishable. Unlike Rhea, Shirley Bittner suffered only math and memory difficulties that "plague many elderly (and not so elderly) individuals," and Shirley Bittner did not have a mental disability that made her unable to manage property or business affairs. *Id*. at 239. Moreover, because Shirley Bittner had never mismanaged or mishandled her affairs in the past and she had appointed an agent under a DPOA, there was no clear and convincing evidence that the property would be wasted or dissipated without proper management. *Id*. at 240-241. In contrast, Rhea was not aware of the

assets in her estate, let alone able to manage them. There is no evidence that Rhea continues to possess any ability to acquire, enjoy, and dispose of her property as she sees fit. Before she was struck with disability, Rhea appointed Robert as her attorney-in-fact via the DPOA. Although her act demonstrated some self-reliance and independence, her chosen method of oversight was rendered ineffective when Robert abdicated his duties.

The probate court specifically acknowledged that the least restrictive means of protecting Rhea's assets, aside from a conservatorship, would be the DPOA. However, facts in the record called into question Robert's ability to make decisions on Rhea's behalf, including Robert's abdication of such decisions in the past and the control Jay has exerted over Robert. On the basis of the testimony presented, the probate court opined that Jay was "overbearing, manipulative, abusive toward his father . . . and he was attempting to be the one in control . . . ." We defer to the probate court on matters of credibility and give broad deference to its factual findings. *Erickson*, 202 Mich App at 331. We are not definitely and firmly convinced that the probate court made a mistake when it concluded that the DPOA was insufficient to protect Rhea's assets.

Robert does not adequately explain how Rhea would be able to maintain oversight of some, but not all, of her property under a limited conservatorship. Moreover, although Robert argues that a protective order may have been less invasive, Lyneis testified that she was not sure whether some of the tasks needed by Rhea would be satisfactorily achieved with such an order. The probate court cited evidence that a DPOA or patient advocate form would be insufficient to manage responsibilities, such as dealing with Rhea's insurance

companies. Given these facts, the probate court did not clearly err by finding that a conservatorship, as opposed to a limited conservatorship or a protective arrangement, was most appropriate for Rhea.

Affirmed.

O'BRIEN, P.J., and JANSEN and MURRAY, JJ., concurred.

PEOPLE v MURPHY

Docket No. 331620. Submitted July 12, 2017, at Detroit. Decided September 19, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 985.

Kimberly A. Murphy was convicted of second-degree child abuse, MCL 750.136b(3), after a jury trial in the Macomb Circuit Court. James M. Biernat, Jr., J., sentenced Murphy to 36 to 120 months of imprisonment. Murphy's 11-month-old daughter, Trinity, died after she ingested a toxic quantity of morphine. Trinity apparently found and ingested a morphine pill prescribed to her grandmother who, before dying of cancer, had been living in Murphy's house with Murphy, Trinity, and Trinity's father.[1] The prosecution argued that Trinity died as a result of her parents' reckless acts. According to the prosecution, the inaction of Trinity's parents, and their inability to protect Trinity and provide her with a safe home environment, caused Trinity's death. The prosecution presented evidence that the home where Trinity lived was in a filthy and deplorable condition, and it asserted that Trinity's parents' failure to clean the room where Trinity's grandmother had been staying constituted reckless conduct that caused Trinity serious physical harm. Murphy appealed her conviction.

The Court of Appeals *held*:

A person may be convicted of second-degree child abuse under MCL 750.136b(3)(a) if his or her omission causes serious physical or mental harm to a child or if his or her reckless act causes serious physical or mental harm to a child. The prosecution's theory of the case was that Murphy's reckless act caused Trinity serious physical harm. To convict Murphy on that theory the prosecution had to prove (1) that Murphy was Trinity's parent or guardian, or was a person who cared for Trinity, or who had custody of or authority over Trinity, (2) that Murphy committed a reckless act, (3) that Trinity suffered serious physical harm as a result of the reckless act, and (4) that Trinity was under the age of 18 at the time. The question in this case was not whether

[1] Trinity's father was also charged in connection with Trinity's death; he was tried jointly with Murphy, and he was convicted of and sentenced for second-degree child abuse. He has not appealed.

Murphy was reckless; the question was whether Murphy committed a reckless *act*. *Black's Law Dictionary* (10th ed) defines the term "act" as follows: "1. Something done or performed, esp. voluntarily; a deed" or "2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world[.]" Consequently, in order to commit a reckless act, a person must do something and do it recklessly. Simply failing to take an action—that is, *inaction*—does not constitute an act for purposes of MCL 750.136b(3)(a). The prosecution presented no evidence to support that some reckless *action* on Murphy's part caused Trinity's death. Murphy's failure to clean and vacuum the bedroom where Trinity played did not constitute an affirmative reckless act on which her second-degree child abuse conviction could be based.

Conviction and sentence vacated.

GLEICHER, J., concurring, fully agreed with the majority's determination that Murphy did not engage in an affirmative act that caused serious physical harm to Trinity. But even if Murphy's failure to clean her home could be regarded as an "act," it did not meet the applicable *mens rea* standard—that is, recklessness. *People v Gregg*, 206 Mich App 208 (1994), conflated recklessness and garden-variety carelessness. *Gregg* was wrongly decided and showcased the need for a definition of "reckless" consistent with fundamental criminal law principles. Recklessness and negligence are not interchangeable legal concepts. The recklessness standard incorporated in MCL 750.136b(3)(a) requires proof that a defendant consciously disregarded a known, substantial, unjustifiable, and foreseeable risk of serious harm. Anything less than a conscious disregard of the risk, such as a mere indifference to the risk, is more consistent with negligence, which is not the standard by which a conviction of second-degree child abuse under MCL 750.136b(3)(a) is measured. It stretches credulity that Murphy or any objective, reasonable person would have perceived that allowing Trinity to play in her grandmother's former room would expose Trinity to a substantial and unjustifiable risk of serious harm. No evidence supports that Murphy consciously disregarded a foreseeable risk that Trinity would find something fatally toxic on the carpet and die. Nor can such an awareness be inferred. In short, no facts *or* inferences existed showing that Murphy knew or should have known that a morphine pill had fallen on the carpet, or likely had fallen. The evidence presented in this case did not come close to establishing a foreseeable danger or to establishing that Murphy consciously disregarded a known, substantial, and unjustifiable risk.

CRIMINAL LAW — SECOND-DEGREE CHILD ABUSE — RECKLESS ACT — INACTION IS NOT AN ACT.

A conviction of second-degree child abuse under MCL 750.136b(3)(a) requires that the serious physical harm caused to a child under the age of 18 be the result of a reckless and affirmative act on the part of the child's parent or guardian or other person who cares for, has custody of, or has authority over the child; failing to take action—or reckless *inaction*—does not constitute an affirmative and reckless act for purposes of the offense described in MCL 750.136b(3)(a).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Joshua Van Laan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Kristin LaVoy*) for defendant.

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

M. J. KELLY, J. Defendant, Kimberly Murphy, was convicted following a jury trial of second-degree child abuse, MCL 750.136b(3). Murphy was sentenced to 36 to 120 months' imprisonment, with 76 days of credit for jail time served. Because the jury verdict is not supported by sufficient evidence, we vacate Murphy's conviction and sentence.

I. BASIC FACTS

This case arises from the death of Murphy's 11-month-old daughter, Trinity Murphy.[1] The prosecutor

[1] Trinity's father, Harold Murphy, was also charged in connection with her death. He was tried jointly with Murphy, convicted of second-degree child abuse, and sentenced. He has not appealed.

presented evidence showing that Trinity died after ingesting a toxic quantity of morphine.[2] The prosecutor's theory was that Trinity died because of her parents' "reckless acts," which she contended consisted of "their inaction" and their inability to protect their child and provide a safe home environment. In support of her theory, the prosecutor presented substantial evidence showing that the home was in a deplorable and filthy condition, that there were prescription morphine pills in the home, and that Trinity's parents had failed to clean the home to ensure that the morphine pills were removed after Trinity's grandmother (who was prescribed the medication and had been living in the home) passed away. The defense theory was that no reckless act taken by Murphy caused Trinity's death.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Murphy argues that there was insufficient evidence to convict her of second-degree child abuse. We review de novo challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). When reviewing a challenge to the sufficiency of the evidence, "[a]ll conflicts in the evidence

[2] It is not clear where Trinity found the morphine pill. However, there was testimony that her grandmother, who had been living in the home, had been prescribed morphine for pain management. The grandmother had colon cancer and had passed away about a month before Trinity's death. Murphy admitted to a police detective that a pill could have possibly fallen on the floor in the grandmother's bedroom. The police also located a prescription pill bottle containing morphine pills in a closet in the grandmother's former bedroom, but it appeared to be out of the reach of an 11-month-old child. Thus, although speculative, the prosecutor argued that a pill had likely fallen to the floor and that because Trinity's parents had failed to clean the bedroom, Trinity found the pill and consumed it.

must be resolved in favor of the prosecution, and circumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime." *People v Solloway*, 316 Mich App 174, 180-181; 891 NW2d 255 (2016) (citations omitted). " 'It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.' " *People v Henry*, 315 Mich App 130, 135; 889 NW2d 1 (2016), quoting *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

B. ANALYSIS

Under MCL 750.136b(3), a person is guilty of second-degree child abuse under any one of three circumstances:

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

Only Subdivision (a) is applicable in this case. Under Subdivision (a), a person can be convicted of second-degree child abuse if his or her "omission causes serious physical harm or serious mental harm to a child" or if his or her "reckless act causes serious physical harm or serious mental harm to a child." MCL 750.136b(3)(a).[3]

[3] "Person" is defined as "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child

The prosecutor proceeded under the theory that Murphy had committed a reckless act causing serious physical harm to Trinity, not that her omission caused serious physical harm to Trinity, and that was the only theory on which the jury was instructed.[4] To establish second-degree child abuse based on a reckless act, the prosecution must prove (1) that the defendant was a parent or a guardian of the child or had care or custody of or authority over the child, (2) that the defendant committed a reckless act, (3) that, as a result, the child suffered serious physical harm, and (4) that the child was under 18 years old at the time. See M Crim JI 17.20. Generally, determining whether an act was reckless is a jury question. See *People v Edwards*, 206 Mich App 694, 696-697; 522 NW2d 727 (1994).

The question in this case, however, is not whether Murphy was "reckless."[5] Instead, it is whether she committed a "reckless *act*." The statute does not define what constitutes an "act" for purposes of MCL 750.136b(3)(a). *Black's Law Dictionary* (10th ed)

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regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person." MCL 750.136b(1)(d). There is no dispute in this case that Murphy qualifies as a "person" under the statute, nor is there any dispute that Trinity suffered serious physical harm.

[4] We note that under the facts presented to the jury, Murphy could not have been convicted of second-degree child abuse under an omission theory because the statute defines "omission" as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c). Here, there is no evidence that Murphy willfully failed to provide food, clothing, or shelter to Trinity or that she willfully abandoned her.

[5] The concurrence takes issue with the definition of "reckless" set forth in *People v Gregg*, 206 Mich App 208; 520 NW2d 690 (1994), and the definition of "reckless" adopted by the trial court in this case. We also have serious concerns about the loose definition in *Gregg* and the definition adopted by the trial court. However, given that the issue is not outcome-determinative, we decline to address it now, especially in the absence of briefing on the issue.

defines "act" as "1. Something done or performed, esp. voluntarily; a deed" or "2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world[.]" Thus, in order to constitute a "reckless act" under the statute, the defendant must do something and do it recklessly. Simply failing to take an action does not constitute an act. In this case, the prosecutor presented no evidence that any affirmative act taken by Murphy led to Trinity's death. Instead, she only directed the jury to Murphy's reckless *inaction*, i.e., her failure to clean her house to ensure that morphine pills were not in Trinity's reach.

Because there is no evidence in the record of a reckless act taken by Murphy that caused Trinity to suffer serious physical harm, we vacate her conviction and sentence for second-degree child abuse.[6]

SHAPIRO, J., concurred with M. J. KELLY, J.

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[6] Given our resolution of this issue we need not address Murphy's argument that she was completely deprived of the assistance of a lawyer during a portion of the trial or that her jail credit was improperly calculated. Nevertheless, we are compelled to briefly discuss the ineffective-assistance claim. Here, it is undisputed that for approximately 27 minutes during the trial, Murphy's lawyer was completely absent while her codefendant's lawyer cross-examined a police detective and while the prosecutor conducted a redirect-examination of the detective. The questions asked during Murphy's lawyer's absence included questions pertaining to Murphy that were arguably inculpatory. Although the lawyer's absence likely did not amount to a complete denial of counsel under *United States v Cronic*, 466 US 648, 659-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984), we find the court's willingness to proceed without Murphy's lawyer disturbing. A criminal defendant should not be punished for his or her lawyer's failure to timely appear for court proceedings. Although the absence was undoubtedly inconvenient for the court, the jury, the opposing lawyers, and the witnesses, the proposition that the presence of a lawyer in the courtroom is necessary for a party's proper defense is so fundamental that it hardly requires a citation of authority, and it should not have been so lightly ignored by the trial court.

GLEICHER, P.J. (*concurring*). I fully concur with the majority's determination that Kimberly Murphy did not engage in an affirmative act that caused harm to Trinity. I write separately to express my view that even if Murphy's failure to clean her home could be regarded as an "act," it did not meet the applicable *mens rea* standard: recklessness. This alternative ground also supports vacating Murphy's conviction.

I. FACTUAL BACKGROUND

No one knows how or where Trinity found the morphine pill that the prosecution theorizes took the child's life. The investigators' best guess is that the pill landed on the floor of Murphy's mother's bedroom at some unknown point in time, and that Trinity found it when she crawled around on the room's unvacuumed carpet. But this is truly a guess, as the investigators noted that the pills were otherwise contained in a child-proof vial kept in a closet on a shelf above Trinity's reach.

The trial evidence focused relentlessly on the conditions of the home—the filthy kitchen and bathroom, the smelly garbage bags in the laundry room, and the unpleasant, dirty, and, as characterized by an investigator, altogether "deplorable" state of the home. No evidence was presented, however, about any specific circumstances that led to Trinity's ingestion of the pill. After Murphy's mother, Muriel Cheeks, died of cancer, one of Murphy's adult children moved into Cheeks's bedroom. Trinity watched television in that room during the evening before the child died. The lead investigator speculated that Cheeks or one of her caregivers may have accidentally dropped one of Cheeks's brownish-colored morphine pills on the brown carpet and that two weeks later, Trinity ate it.

During her closing argument, the prosecutor strenuously maintained that Murphy's tolerance of the filthy living conditions equated with a reckless act consistent with second-degree child abuse: "Their recklessness was their inability to care. Their indifference to consequence. Their inability to go in and make sure that medication was taken out of the house. Make sure that room was kept in an environment fit for children." The prosecutor emphasized the filthy conditions in the home and that Child Protective Services had previously intervened for that reason:

> There was evidence in the case that talked about the defendants' prior Child Protective Service history. And that's really important because we know that this isn't a onetime thing. This is how they've always been. Their whole entire lives.
>
> Services were provided to this family. Is there anything we can do to help you make your home conditions more fit? More fit for your children. We will do anything we need to do. We will help you pay your rent. We will help you with your heating bill. We will provide you beds. But every [sic] their hands out to get any of these services, they don't turn around and do anything to better their children. In fact, their children were consistently sent to school in unkempt conditions.
>
> And why is that important? It leads directly back to their lifestyle. The lifestyle they've always had. One in which that was reckless and one that is just indifferent to the consequences of their actions.[1]

In her rebuttal argument, the prosecutor persisted in hammering this theme:

> Their recklessness was their inability to care. Their indifference to consequence. Their inability to go in and

[1] The trial court sustained an objection to this argument but did not instruct the jury to disregard it.

> make sure that medication was taken out of the house. Make sure that room was kept in an environment fit for children. An environment that they were taught about. Child Protective Services comes in their house. Let's help fix this. Let's do what we need to do. Here's an intensive program. Here's another program. Here's another program. This isn't an accident. This isn't some oh well we didn't know. It's not cleaning day. It's not laundry day. We just didn't vacuum. They didn't even find a vacuum in the house. There's a brand new broom.
>
> * * *
>
> There were no cleaning supplies in the house. Police said that and found nothing in the (inaudible).
>
> That's the defendant's [sic] recklessness. That's what they did. They're [sic] unkempt house. They're [sic] inability to clean. They're [sic] inaction caused Trinity to die. It was not Trinity's time to go. That baby is not here today because of what they failed to do. Give her living conditions that were safe.

The trial court instructed the jury that it could find Murphy guilty if it determined that Murphy had committed "some reckless act" as a result of which "Trinity Murphy suffered a serious physical harm." The court defined "reckless" as "[u]tterly unconcerned about the consequences of some action. Indifferent to the consequences."

II. RECKLESSNESS, NEGLIGENCE, AND THE CRIMINAL LAW

According to the prosecution's brief on appeal, "[a]t trial, the People argued that Defendant's 'reckless act' was her failure to protect Trinity by maintaining a safe living environment, and that such recklessness ultimately allowed Trinity to find and ingest the morphine[.]" The majority correctly rejects this argument, summarizing that "[s]imply failing to take an action

does not constitute an act." I would add that even if Murphy "acted" by permitting Trinity access to Cheeks's bedroom, that act was not reckless as a matter of law.

Unfortunately, the Legislature did not provide a definition of the term "reckless" used in the second-degree child abuse statute, MCL 750.136b(3)(a). In *People v Gregg*, 206 Mich App 208; 520 NW2d 690 (1994), this Court considered whether the fourth-degree child abuse statute, MCL 750.136b(5),[2] was unconstitutionally vague because it too lacked a definition of "reckless." We concluded that a dictionary definition sufficed to explain the term, and we cited two dictionaries for guidance:

> Black's Law Dictionary (6th ed) defines "reckless" as:
>
> > Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.
>
> *The Random House College Dictionary, Revised Edition*, defines "reckless" as:
>
> > 1. utterly unconcerned about the consequences of some action; without caution; careless . . . . 2. characterized by or proceeding from such carelessness.
>
> [*Gregg*, 206 Mich App at 212.]

"Given these dictionary definitions of the word 'reckless' and applying its plain and ordinary meaning to the language of the statute," this Court upheld the statute's constitutionality. *Id*.

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[2] Fourth-degree child abuse is now defined in MCL 750.136b(7).

In the years since *Gregg* was decided, a number of unpublished decisions have cited it for the proposition that garden-variety carelessness is included in the definition of "recklessness" under the second- or fourth-degree child abuse statutes. Here, the trial court used the first *Random House College Dictionary* definition to instruct the jury as to the term's meaning ("utterly unconcerned about the consequences of some action").

I respectfully suggest that *Gregg* was wrongly decided and that this case showcases the need for a definition of "reckless" consistent with fundamental criminal law principles rather than dictionary definitions.[3]

The Legislature is free to make certain acts criminal regardless of intent, see *People v Quinn*, 440 Mich 178, 189; 487 NW2d 194 (1992), just as it may decide to "impose a criminal responsibility for a tort that theretofore carried with it only civil liability." *People v McMurchy*, 249 Mich 147, 162; 228 NW 723 (1930). This Court has similarly expounded that "[t]he [L]egislature has the power to define a crime without regard to the presence or absence of criminal intent or culpability in its commission." *People v McKee*, 15 Mich App

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[3] *Gregg* relied in part on *Black's Law Dictionary* (6th ed), which was published in 1990. The current edition defines "reckless" differently, and in a manner consistent with use of the term by most courts:

> Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. • Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do. [*Black's Law Dictionary* (10th ed), p 1462.]

The dictionary then directs readers to compare—"Cf."—the contrasting definition of "careless."

382, 385; 166 NW2d 688 (1968). When the Legislature identifies a requisite intent without defining it, I submit that the legal definition of that intent must comport with the common law. Under the common law, "recklessness" and "carelessness" involve different and distinct mental states, and this Court erred in *Gregg* by conflating them.

When a statute omits a definition of a legal term of art, our Supreme Court looks to the common law for guidance. In *McMurchy*, 249 Mich at 169-170, our Supreme Court elucidated the definition of "negligence" that applied to the negligent-homicide statute under consideration. "[Negligence] consists of a want of reasonable care or in the failure of duty which a person of ordinary prudence should exercise under all the existing circumstances in view of the probable injury." *Id*. at 170. The "settled" law regarding negligence "is neither vague, uncertain, or indefinite," the *McMurchy* Court explained, and "[j]ust as we can ascertain civil liability by certain rules, so also can we determine criminal liability by similar rules." *Id*. at 170, 171. And "[t]he very same evidentiary facts required to prove civil liability for negligence may be used to prove criminal liability." *Id*. at 170.

Recklessness and negligence are not interchangeable legal concepts, however. Our Supreme Court has defined reckless misconduct in the civil context as bordering on willfulness; the reckless actor appreciates that harm may result from his act, but does not care.

> "One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the wilful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely

> willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not." [*Gibbard v Cursan*, 225 Mich 311, 321; 196 NW 398 (1923),[4] quoting *Atchison, T & S F R Co v Baker*, 79 Kan 183; 98 P 804 (1908).]

The Legislature's approach to the gross negligence exception to governmental immunity sheds further light on the meaning of "recklessness" under Michigan law by equating the two concepts. Gross negligence is defined by the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). The Supreme Court has followed the Legislature's lead, using the terms "gross negligence" and "reckless" interchangeably when interpreting the meaning of "gross negligence." See *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999) ("In addition to requiring that a plaintiff show reckless conduct, the content or substance of the evidence proffered must be admissible in evidence.").

This Court has applied the gross negligence/recklessness standard quite rigorously:

> Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting

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[4] Overruled by *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994) (rejecting *Gibbard*'s definition of "gross negligence").

> standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.
>
> The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004) (citation omitted).]

Assuming that under Michigan law gross negligence and recklessness are roughly congruent concepts, the standard they describe differs substantially from that of general negligence. A grossly negligent or reckless individual is willfully indifferent to the safety of others, while a negligent actor merely fails to measure up to the standard of ordinary care.

The United States Supreme Court explored the meaning of the term "recklessness" in *Farmer v Brennan*, 511 US 825; 114 S Ct 1970; 128 L Ed 2d 811 (1994), a case addressing the liability of prison officials for assaults committed by inmates against a transsexual prisoner. Longstanding Supreme Court precedent established that to state a claim under the Eighth Amendment, a prisoner must prove that prison officials were deliberately indifferent to his or her health or safety. *Id*. at 834. In *Farmer*, the Court explored the meaning of "deliberate indifference," homing in on the mental state required to justify liability. The Court explained that the deliberate-indifference standard "entails something more than mere negligence" and something less than "purpose or knowledge." *Id*. at 835-836. The Court observed that many appellate courts had "routinely equated deliberate in-

difference with recklessness," and it turned to a detailed examination of the contours of the deliberate-indifference standard. *Id*. at 836.

"[T]he term recklessness is not self-defining," *id*., the Court began, and its characteristics differ depending on whether the underlying case is civil or criminal:

> The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. See Prosser and Keeton § 34, pp. 213–214; Restatement (Second) of Torts § 500 (1965). *The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware*. See R. Perkins & R. Boyce, Criminal Law 850–851 (3d ed. 1982); J. Hall, General Principles of Criminal Law 115–116, 120, 128 (2d ed. 1960) . . . ; American Law Institute, Model Penal Code § 2.02(2)(c), and Comment 3 (1985); but see *Commonwealth* v. *Pierce*, 138 Mass. 165, 175–178 (1884) (Holmes, J.) (adopting an objective approach to criminal recklessness). [*Farmer*, 511 US at 836-837 (emphasis added).]

The prisoner-petitioner in *Farmer* urged the Court to adopt the civil-law recklessness paradigm, while the warden-respondent advocated the approach consistent with the criminal law. The Court chose a definition much closer to the latter:

> We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. [*Id*. at 837.]

Summarizing, the Court held that "subjective recklessness as used in the criminal law is a familiar and

workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Id*. at 839-840.

Drawing on these precedents, I suggest that the "recklessness" standard incorporated in MCL 750.136b(3)(a) requires proof that a defendant disregarded a known, substantial, and unjustifiable risk of serious injury. In my view, recklessness requires *conscious* disregard of risk—anything less, such as mere "indifference," is more consistent with negligence.[5] A second aspect of the "recklessness" concept bears emphasis. When used in civil cases in Michigan or by the United States Supreme Court, determining whether conduct is inherently "reckless" involves an assessment of *risk*. Shortcutting the analysis to "carelessness" or "utter indifference to consequences" omits this critical component of the concept.[6]

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[5] Although somewhat difficult to parse, obiter dictum in *People v Datema*, 448 Mich 585, 598-599; 533 NW2d 272 (1995), seems to signal the Court's approval of a definition of "recklessness" that incorporates the concepts of "wantonness" and "willfulness." "Wilful and wanton misconduct . . . describes conduct that is *either* wilful—i.e., intentional, *or* its effective equivalent. '[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm *or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does*.' " *Jennings*, 446 Mich at 140 (citation omitted; alteration in original).

[6] These ideas are neither new nor my own. As a justice of the Massachusetts Supreme Court, Oliver Wendell Holmes described the role of risk as follows:

> If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done,

The portion of the second-degree child abuse statute governing Murphy's prosecution does not criminalize parental negligence. Rather, the prosecutor charged Murphy under the subdivision of the statute declaring that "[a] person is guilty of child abuse in the second degree if . . . the person's reckless act causes serious physical harm or serious mental harm to a child." MCL 750.136b(3)(a). The same subdivision of the statute permits conviction on proof that "[t]he person's omission causes serious physical harm or serious mental harm to a child . . . ." *Id*. Notably, the Legislature specifically defined "omission" in this context as "a *willful* failure to provide food, clothing, or shelter necessary for a child's welfare or *willful* abandonment of a child." MCL 750.136b(1)(c) (emphasis added).

The statutory language leads to two inescapable conclusions: the Legislature intended that a person could be convicted under MCL 750.136b(3)(c) only on proof of "recklessness" or "willful" failure to provide for a child's needs. The statute simply does not countenance conviction based on mere negligence, despite *Gregg*.

The Model Penal Code supplies a definition of "recklessly" that comports with Michigan law and, in my view, merits adoption:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. [Model Penal Code, § 2.02(c) (1985).]

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in view either of the actor's knowledge or of his conscious ignorance. [*Commonwealth v Pierce*, 138 Mass 165, 179 (1884).]

Many states have adopted this definition, either statutorily or under the common law. See *State v O'Connell*, 149 Vt 114, 115 n 1; 540 A2d 1030 (1987); *People v Hall*, 999 P2d 207, 217 (Colo, 2000); *State v Chavez*, 146 NM 434, 445-446; 211 P3d 891 (2009).

Chavez supplies valuable insights applicable in child abuse cases. The defendant in that case was convicted of child abuse by endangerment based on "impoverished and dirty living conditions that, in the State's opinion, posed a significant danger" to Chavez's children. *Chavez*, 146 NM at 436. One of the children, Shelby, died after having been placed to sleep in a dresser drawer filled with blankets and padding when her bassinet broke. *Id*. The jury acquitted the defendant of child abuse resulting in death, but found him guilty of child abuse by endangerment regarding Shelby and two other surviving children. *Id*.

The New Mexico Supreme Court "explore[d] the sufficiency and nature of the evidence necessary to sustain a child endangerment conviction when it is based only on filthy living conditions and without any underlying criminal conduct." *Id*. The court observed that the applicable jury instruction directs the jury that to convict of child endangerment, it must find that "defendant's conduct created a *substantial and foreseeable risk* of harm." *Id*. at 440 (quotation marks omitted). Whether the charged conduct meets that standard, the court explained, depends on "the gravity of the risk that serves to place an individual on notice that his conduct is perilous, and potentially criminal . . . ." *Id*. at 441. The court reviewed cases from New Mexico and other jurisdictions in which convictions had been reversed because the risk of harm was "too remote, which may indicate that the harm was not foreseeable." *Id*. As applied to cases involving "filthy

living conditions," the court concluded that the state bears the burden of proving "a substantial and foreseeable risk that such filthy living conditions endangered the child." *Id*. at 442.

The *Chavez* court also addressed in detail the charge levied against the defendant arising from his daughter's death. The state pursued the prosecution "under a criminal negligence theory and, therefore, was required to prove beyond a reasonable doubt that Defendant 'knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.' " *Id*. at 445.[7] The court summarized this burden as follows:

> Thus, the State had the burden to first establish the actus reus of endangerment—that the drawer created a substantial and foreseeable risk of harm. Once the danger is established, the State must also show that a reasonable person would have apprehended the risk, and that Defendant recklessly disregarded the risk by allowing Shelby to sleep in the drawer.
>
> The State sought to show that the sleeping arrangement created a serious danger to Shelby due to Shelby's size in relation to the drawer and bedding. At five months old, Shelby was approximately twenty-six inches long. The drawer that Defendant chose for his daughter measured 29–by–15 inches. Several witnesses testified that the drawer, particularly when filled with soft bedding and a blanket, did not allow Shelby much room to move around. The State presented testimony that if the bedding blocked Shelby's nose and mouth, she may not have had room to free herself, creating a possibility that she could suffocate. In addition, witnesses testified that if Shelby became pressed up against the wall of the drawer, she might re-breathe her expelled air, high in carbon dioxide, creat-

[7] The court specifically noted that this requirement was based on Model Penal Code, § 2.02(c). *Chavez*, 146 NM at 446.

> ing a risk of asphyxiation. This is the sort of substantial injury contemplated by our endangerment statute.
>
> However, in addition to the gravity of the potential injury, we must also consider whether it was foreseeable that an injury would actually occur. In performing this review, we note the absence of evidence in the record to indicate that the sleeping conditions presented anything more than a mere possibility of harm. [*Id*. at 446.]

The trial evidence supported only that placing a child to sleep in a drawer carried a "very small, unpredictable and unmeasurable" degree of risk, especially when compared with "failing to secure a child in a car seat." *Id*. Further, the court expounded, "[t]he elevated risk, if any, created by the small size of the drawer in relation to Shelby's body, and by including soft bedding in the drawer which restricted the infant's ability to move, is not quantifiable based solely on common knowledge or experience." *Id*. at 446-447. In language I find directly pertinent here, the court expressed:

> Specific evidence was needed to assist the jury in ensuring that a conviction would be based on science and not emotion. This is particularly important in this case, where the trial focused on the death of an infant and the level of parenting was easy to criticize. Natural factors of sympathy and even outrage in the face of an infant death can create a perilous situation where judgment is based on emotion and not evidence. [*Id*. at 447.]

III. APPLICATION

Applying the legal framework I have described, I conclude that Murphy's failure to vacuum her mother's bedroom or otherwise locate the stray pill did not evidence conscious disregard of a substantial and unjustifiable risk that death would result from her conduct. Perhaps Murphy was negligent in failing to

clean Cheeks's room and in permitting Trinity to crawl on a dirty carpet. But the standard is recklessness, not negligence. It stretches credulity that Murphy—or any objective, reasonable person—would have perceived that allowing the child in that room would expose her to a substantial and unjustifiable risk of serious harm. No evidence supports that Murphy consciously disregarded a *foreseeabl*e risk that the child would find something fatally toxic on the carpet and die; the pills were in a child-proof container on a shelf above Trinity's reach. Nor can such awareness on Murphy's part be inferred. What occurred here was unforeseen, wholly unanticipated, and shocking. While most people understand that filthy living conditions are not healthy for a child, it is a quantum leap to conclude that a dirty home necessarily presents a substantial and foreseeable risk of serious injury. And in this case, the harm was simply not predictable or foreseeable.

To demonstrate that Murphy's conduct created a substantial and unjustifiable risk of serious harm, the prosecutor would have had to produce some fact or create some inference supporting that Murphy knew or should have known that a pill had fallen on the carpet, or likely had fallen. No such facts or inferences existed. Even after all the evidence was collected and analyzed, the source of the pill remained unclear. Assuming it was on the carpet—a good guess, but a guess nevertheless—no one knows when, how, or why that happened. The evidence did not come close to establishing a foreseeable danger or that Murphy disregarded a known, substantial, and unjustifiable risk.

As in *Chavez*, this was a case built on emotion rather than fact or law. See *id*. Because any possible "act" that Murphy engaged in did not qualify as reckless, I would vacate her conviction on this ground.

PEOPLE v WOODARD

Docket No. 336512. Submitted September 6, 2017, at Lansing. Decided September 19, 2017, at 9:10 a.m. Leave to appeal denied 501 Mich 1027.

Glorianna Woodard was charged in the Jackson Circuit Court with operating a motor vehicle while intoxicated, third offense, MCL 257.625, and operating a vehicle while her license was suspended or revoked, MCL 257.904. Defendant moved to suppress evidence of her blood alcohol content, asserting that, although she had consented to have her blood drawn, she later submitted a document withdrawing her consent for further search of her blood sample, which rendered the subsequent warrantless analysis of her blood unconstitutional. The trial court, Thomas D. Wilson, J., denied this motion and defendant's motion for reconsideration. The Court of Appeals granted defendant's interlocutory application for leave to appeal.

The Court of Appeals *held*:

1. The Fourth Amendment of the United States Constitution and Article 1, § 11 of the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. A search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable or justifiable expectation of privacy. Ordinarily, searches or seizures conducted without a warrant are unreasonable per se; however, there are exceptions to the warrant requirement, including a search conducted pursuant to consent. When conducting a consent search, the police are limited by the terms of the defendant's consent. A suspect may withdraw consent at any time. However, a revocation of consent does not operate retroactively to invalidate the search conducted before withdrawal of consent. Any evidence obtained during the consensual portion of that search is admissible. In this case, having consented to the blood draw and having made no effort to withdraw her consent until after the search was complete, defendant had no grounds on which to object to the search. The seizure of defendant's blood was also within the scope of her consent because, when giving consent to a blood draw for alcohol testing, the typical reasonable person would have understood that the evidence the authorities intended to seize was a

sample of blood for alcohol analysis. Moreover, because the blood itself was collected before defendant attempted to withdraw her consent, her withdrawal of consent came too late to invalidate the seizure of her blood. Having consented to the search and voluntarily surrendered her possessory interest in the blood sample, there was no basis on which defendant could object to the seizure of her blood.

2. The trial court did not err by denying defendant's motion to suppress the result of her blood alcohol test. Obtaining and examining evidence may be considered a search if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable. Because, considering the totality of the circumstances, society was not prepared to recognize a reasonable expectation of privacy in the alcohol content of a blood sample voluntarily given by a defendant to the police for the purposes of blood alcohol analysis, the testing of this lawfully obtained evidence did not constitute a distinct search for Fourth Amendment purposes, and any effort to withdraw consent after this evidence had been lawfully obtained could not succeed. Other jurisdictions have reasoned that the scientific analysis of a sample does not involve any further search and seizure of a defendant's person and that, once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property that can be subject to a battery of scientific tests. This notion is bolstered by the Michigan statutes that deem drivers to have consented to blood alcohol testing and by the Michigan Supreme Court's decision in *People v Perlos*, 436 Mich 305 (1990), which considered the implied-consent statutes when analyzing the reasonableness of a privacy expectation for purposes of the Fourth Amendment and concluded that there was no reasonable expectation of privacy in hospital blood alcohol test results given that motorists have a diminished expectation of privacy in view of the strong public interest in curtailing drunk driving. By extension, this reasoning applied to situations in which, in the context of drunk driving, the police procure a blood sample for alcohol testing pursuant to a defendant's consent. Further, when a suspect gives consent to a search and then revokes that consent, the revocation of consent does not deprive the police of any evidence obtained during the consent search. In short, the examination of evidence procured pursuant to a consent search does not constitute a second search or seizure.

Affirmed and remanded for further proceedings.

SEARCHES AND SEIZURES — CONSENT — WITHDRAWALS OF CONSENT — BLOOD SAMPLES — ANALYSIS OF EVIDENCE.

The examination of evidence procured pursuant to a search for which consent was given does not constitute a second search or

seizure for purposes of the constitutional protections against unreasonable searches and seizures; a withdrawal of consent to analyze evidence that was obtained pursuant to a consent search does not render the results of the analysis inadmissible (US Const, Am IV; Const 1963, art 1, § 11).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Robert K. Gaecke, Jr., for defendant.

Before: HOEKSTRA, P.J., and METER and K. F. KELLY, JJ.

HOEKSTRA, P.J. In this interlocutory appeal, defendant, Glorianna Woodard, has been charged with operating a motor vehicle while intoxicated, third offense, MCL 257.625, and operating a vehicle while her license was suspended or revoked, MCL 257.904. In the trial court, defendant filed a motion to suppress evidence of her blood alcohol content, asserting that the analysis of her blood constituted an illegal search performed after she withdrew her consent for a blood test. The trial court denied this motion and denied defendant's motion for reconsideration. Defendant filed an interlocutory application for leave to appeal, which this Court granted.[1] Because the trial court did not err by denying defendant's motion to suppress, we affirm and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

On March 6, 2015, Michigan State Police Trooper Anthony Ramirez conducted a traffic stop of a vehicle

[1] *People v Woodard*, unpublished order of the Court of Appeals, entered April 4, 2017 (Docket No. 336512).

driven by defendant. Initially, Ramirez stopped the vehicle because the license plate light was not working and the license plate had a "smoke tinted" cover. However, based on defendant's watery and bloodshot eyes, the smell of alcohol in the vehicle, and defendant's unsteady gait and performance on field sobriety tests, Ramirez believed that defendant was intoxicated. At Ramirez's request, defendant agreed to perform a preliminary breath test. Ramirez then arrested defendant for operating a motor vehicle while intoxicated, and Ramirez asked defendant to consent to a blood test. Defendant consented to a blood test, and Ramirez transported defendant to a hospital where blood was drawn. The blood sample was then sent to the Michigan State Police Laboratory for analysis.

On March 9, 2015, before testing on defendant's blood sample had been conducted, defendant's attorney sent Trooper Ramirez, the Jackson County Prosecutor, and the Michigan State Police Forensic Science Division a document entitled "Notice of Defendant's Withdrawal of Consent to Search, Demand to Cease and Desist Further Warrantless Search, and Demand for Return of Blood Samples." In relevant part, this document stated:

> NOW COMES the Defendant, GLORIANNA WOODARD, by and through counsel, the Maze Legal Group, PC, by William J. Maze, and hereby provides notice that she withdraws her consent for further voluntary search of her blood sample based upon the following:
>
> 1. Defendant, GLORIANNA WOODARD, is alleged to have voluntarily permitted a withdrawal of his [sic] blood on or about March 6, 2015.
>
> * * *

> 6. Defendant now affirmatively withdraws her consent for further search, demanding that the police, prosecutor and state laboratory immediately cease and desist from further search of the blood evidence, demanding that these state actors immediately obtain a search warrant to justify any search and/or continued detention of the blood sample, returning the blood sample to Defendant forthwith if a warrant is not sought and obtained immediately by the government.
>
> * * *
>
> 9. If the Prosecuting Attorney, Michigan State Police Forensic Science Division, or the Michigan State Police Jackson Post, desires to keep the blood sample and/or conduct any testing that has not already occurred on the blood sample, [defendant] demands that any search be conducted pursuant to a search warrant.

The parties who received this notice did not heed its demand to cease further testing and return the blood sample. The subsequent analysis of defendant's blood sample revealed that she had a blood alcohol content of 0.212% at the time of the blood draw. The prosecutor charged defendant with operating a motor vehicle while intoxicated, third offense, and operating a vehicle while her license was suspended or revoked.

In the circuit court, defendant moved to suppress the results of her blood alcohol test, asserting that although she consented to the blood draw, she revoked her consent before the tests were conducted and, in the absence of a warrant, the analysis of her blood constituted an unlawful search. In response, the prosecutor maintained that defendant did not have a privacy interest that would prevent the analysis of a lawfully obtained blood sample. Citing *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990), the trial court agreed with the prosecutor, concluding that testing of a law-

fully obtained sample did not violate the Fourth Amendment. In denying defendant's motion for reconsideration, the trial court similarly reasoned that "once consent is given, blood is drawn, then they can go forward with the testing at that point . . . ." Following denial of her motion for reconsideration, defendant filed an interlocutory application for leave to appeal, which we granted.

On appeal, defendant argues that the trial court erred by denying her motion to suppress the results of her blood test. In making this argument, defendant does not dispute that she voluntarily consented to Ramirez's request for a blood test, and she does not challenge the lawfulness of the blood draw at the hospital. Instead, defendant maintains that the subsequent analysis of her blood constituted a separate and distinct search. Because consent may be withdrawn at any time, defendant argues that until her blood was analyzed, she could withdraw her consent to the blood test and demand the return of her blood sample. In view of her notice to authorities withdrawing her consent, defendant contends that any tests on her blood without a warrant were per se unreasonable and that the results of the testing must be suppressed.

II. STANDARDS OF REVIEW

A trial court's factual findings made when ruling on a motion to suppress are reviewed for clear error. *People v Tavernier*, 295 Mich App 582, 584; 815 NW2d 154 (2012). "But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference[.]" *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). We review de novo whether the Fourth Amendment was violated and whether the exclusionary rule ap-

plies. *People v Mungo (On Second Remand)*, 295 Mich App 537, 545; 813 NW2d 796 (2012). We also review de novo the trial court's ultimate decision on a motion to suppress. *Williams*, 472 Mich at 313.

III. ANALYSIS

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000), citing US Const, Am IV and Const 1963, art 1, § 11. "[A] search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011) (quotation marks and citation omitted). In comparison, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). The touchstone of these protections is reasonableness, which "is measured by examining the totality of the circumstances." *Williams*, 472 Mich at 314. "Ordinarily, searches or seizures conducted without a warrant are unreasonable per se," and "when evidence has been seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial." *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005).

However, there are exceptions to the warrant requirement, including a search conducted pursuant to consent. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). " 'Fourth Amendment rights are waivable and a defendant may always consent to a

search of himself or his premises.' " *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001) (citation omitted). When conducting a consent search, the police are limited by the terms of the defendant's consent. *People v Powell*, 199 Mich App 492, 496; 502 NW2d 353 (1993). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Frohriep*, 247 Mich App at 703 (quotation marks and citation omitted). Additionally, just as a suspect may limit the scope of the search at the outset, a suspect may also withdraw consent at any time. *Dagwan*, 269 Mich App at 343; *Powell*, 199 Mich App at 498, 500. However, revocation of consent does not operate retroactively to invalidate the search conducted before withdrawal of consent. *Powell*, 199 Mich App at 497, 499. More fully, this Court has explained the revocation of consent as follows:

> [A] suspect may revoke his consent to search at any time. The revocation of the consent to search, however, does not invalidate the search conducted pursuant to the valid consent of the suspect before that consent was revoked. Any evidence obtained during the consensual portion of that search is admissible. However, once the consent is revoked, the police must stop the search unless continuing the search may be justified under some basis other than the suspect's consent. Finally, any evidence obtained during the consensual portion of the search may be considered in determining whether a continued search may be justified on some other basis. [*Id*. at 500-501.]

In this case, the state conduct at issue involves the collection of a blood sample from defendant's person and the analysis of that blood to determine defendant's blood alcohol content. In defendant's view, this conduct may be subdivided into two distinct searches, so that the

analysis of defendant's blood is a "search" for which she may withdraw her consent at any time before this analysis is conducted. In comparison, the prosecution maintains that, once the blood sample was lawfully removed from defendant's body and collected by the police for alcohol analysis, the "search" was complete, meaning that defendant was not entitled to the return of this lawfully seized evidence and that she no longer had a reasonable expectation of privacy in the alcohol content of that sample. In short, we must decide whether the analysis of a blood sample, obtained with consent for the purposes of alcohol testing, constitutes a "search" within the meaning of the Fourth Amendment.

A. THE SEARCH AND SEIZURE

We begin our analysis with the unremarkable proposition that drawing defendant's blood for analysis constituted a search within the meaning of the Fourth Amendment. *Birchfield v North Dakota*, 579 US ___, ___; 136 S Ct 2160, 2173; 195 L Ed 2d 560 (2016); *Borchard-Ruhland*, 460 Mich at 293. Specifically, drawing blood for investigative purposes necessitates a physical intrusion, penetrating beneath the skin into one's veins, thereby infringing a deep-rooted expectation of privacy that society is prepared to recognize as reasonable. *Missouri v McNeely*, 569 US 141, 148; 133 S Ct 1552; 185 L Ed 2d 696 (2013); *Skinner v R Labor Executives' Ass'n*, 489 US 602, 616; 109 S Ct 1402; 103 L Ed 2d 639 (1989). However, we note that this search, i.e., this physical intrusion beneath the skin, is completed upon the drawing of blood. *Johnson v Quander*, 370 US App DC 167, 178; 440 F3d 489 (2006).[2] Having

[2] While the decisions of lower federal courts and other state courts are not binding on this Court, they may be considered as persuasive authority. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011).

consented to the blood draw and having made no effort to withdraw her consent until after the search was complete, defendant has no grounds on which to object to this search.

It follows from our recognition that the blood draw was a search that the evidence seized during the course of the consent search was defendant's blood. See *State v Perryman*, 275 Or App 631, 637; 365 P3d 628 (2015) ("A blood draw conducted by the police is simultaneously a search of a person and a seizure of [evidence]—that person's blood."). This seizure of blood is also within the scope of defendant's consent because, when giving consent to a blood draw for alcohol testing, the " 'typical reasonable person' would understand" that the evidence the authorities intend to seize is obviously a sample of blood for alcohol analysis. *Frohriep*, 247 Mich App at 703. Moreover, because the blood itself was collected before defendant attempted to withdraw her consent, her withdrawal of consent came too late to invalidate the seizure of her blood. In other words, defendant cannot retroactively withdraw her consent to the blood draw, and her attempt to withdraw consent after the search cannot deprive the police of evidence lawfully collected during the course of the consent search. See *Powell*, 199 Mich App at 499, 501. Having consented to the search and voluntarily surrendered her possessory interest in the blood sample, there is thus no basis on which defendant can object to the seizure of her blood on March 6, 2015.

B. THE ANALYSIS OF LAWFULLY OBTAINED EVIDENCE

Given that the evidence seized during the valid consent search was defendant's blood, the question becomes whether the subsequent analysis of this lawfully obtained evidence constitutes a "search" so that,

before the analysis was conducted, defendant could withdraw her consent, prevent the blood alcohol testing, and demand the return of her blood sample. We recognize that "obtaining and examining" evidence may be considered a search, provided that doing so "infringes an expectation of privacy that society is prepared to recognize as reasonable[.]" *Skinner*, 489 US at 616; see also *Jacobsen*, 466 US at 122. However, considering the totality of the circumstances,[3] we conclude that society is not prepared to recognize a reasonable expectation of privacy in the alcohol content of a blood sample voluntarily given by a defendant to the police for the purposes of blood alcohol analysis. Accordingly, the testing of this lawfully obtained evidence does not constitute a distinct search for Fourth Amendment purposes and any effort to withdraw consent after this evidence has been lawfully obtained cannot succeed.

We are not aware of any binding cases that specifically considered whether consent to blood alcohol testing may be withdrawn before the analysis of the voluntarily provided blood sample. However, there is persuasive authority holding that, once a blood sample has been lawfully obtained for purposes of analysis, the subsequent testing of that sample has " 'no independent significance for fourth amendment purposes.' " *Dodd v Jones*, 623 F3d 563, 569 (CA 8, 2010), quoting *United States v Snyder*, 852 F2d 471, 474 (CA 9, 1988). While these cases have often been decided in the context of blood seized pursuant to a warrant, they stand for the proposition that the testing of blood evidence "is an essential part of the seizure," *State v*

[3] Whether an expectation is one that society recognizes as reasonable depends on the totality of the circumstances. *Antwine*, 293 Mich App at 195.

VanLaarhoven, 248 Wis 2d 881, 891; 2001 WI App 275; 637 NW2d 411 (2001), and that "the right to seize the blood . . . encompass[es] the right to conduct a blood-alcohol test at some later time," *Snyder*, 852 F2d at 474. Thus, these cases reason that the extraction and testing of blood are "a single event for fourth amendment purposes," regardless of how promptly the subsequent test is conducted. *Id*.

In reaching this conclusion, the Court in *Snyder* relied heavily on *Schmerber v California*, 384 US 757, 768; 86 S Ct 1826; 16 L Ed 2d 908 (1966), a United States Supreme Court decision involving the Fourth Amendment implications of a compelled blood alcohol test. According to *Snyder*, although *Schmerber* did not expressly address whether testing of blood is a separate search, the Court in *Schmerber* "viewed the seizure and separate search of the blood as a single event for fourth amendment purposes." *Snyder*, 852 F2d at 474. See also *Vernonia Sch Dist 47J v Acton*, 515 US 646, 652; 115 S Ct 2386; 132 L Ed 2d 564 (1995) (characterizing "state-compelled collection and testing" of biological fluids as a singular " 'search' subject to the demands of the Fourth Amendment"). In contrast, defendant quotes *Skinner*, 489 US at 616, 618, arguing that collection and testing must be considered separate searches because the *Skinner* Court referred to the testing of biological samples as a "further invasion" of privacy and referred to "searches" in the plural form when stating that "collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches . . . ." However, the issue in *Skinner* was a Fourth Amendment challenge to drug-testing of railroad employees, during which the Court weighed privacy interests against government interests for purposes of determining whether "special needs" justified compulsory collection

and testing of biological fluids without a warrant. *Id*. at 620 (quotation marks and citation omitted). The Court was simply not considering whether the testing of a biological sample that had already been lawfully seized by law enforcement officials constituted a second and distinct "search" with Fourth Amendment implications independent of the collection of the sample. See *State v Swartz*, 517 SW3d 40, 49 (Mo App, 2017); *State v Fawcett*, 877 NW2d 555, 560 (Minn App, 2016); *State v Riedel*, 259 Wis 2d 921, 930 n 6; 2003 WI App 18; 656 NW2d 789 (2002). In short, we do not read *Skinner* as deciding the issue now before us, and defendant's reliance on *Skinner* is misplaced. Instead, we find persuasive *Snyder*'s recognition that collection and testing of blood are "a single event for fourth amendment purposes." *Snyder*, 852 F2d at 473-474.

In rejecting efforts to characterize the collection and analysis of blood evidence as separate searches, courts have frequently concluded that there is no objectively reasonable expectation of privacy in a sample lawfully obtained for the purposes of analysis, such that testing of the sample does not involve a search or seizure with Fourth Amendment implications. See *State v Hauge*, 103 Hawaii 38, 51; 79 P3d 131 (2003), and cases therein ("Our review of the case law of other jurisdictions indicates that the appellate courts of several states have ruled that expectations of privacy in lawfully obtained blood samples . . . are not objectively reasonable by 'society's' standards.").[4] More fully, these cases reason as follows:

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[4] See also *State v Loveland*, 696 NW2d 164, 166; 2005 SD 48 (2005) ("After the urine sample was seized by the police, testing the sample for the presence of illegal substances required no further seizure of [the defendant's] person or effects."); *State v Notti*, 316 Mont 345, 350; 2003 MT 170; 71 P3d 1233 (2003) ("[A] defendant's privacy interest in blood samples or blood profiles is lost when the defendant consents to a blood

> It is also clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person. In this regard we note that the defendant could not plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property, such as a gun or a controlled substance. Although human blood, with its unique genetic properties, may initially be quantitatively different from such evidence, once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests. . . . [*State v Barkley*, 144 NC App 514, 519; 551 SE2d 131 (2001) (quotation marks and citation omitted).]

From these various persuasive authorities, we draw the basic understanding that blood which has been lawfully collected for analysis may be analyzed without

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draw or where it has been obtained through proper judicial proceedings."); *State v Barkley*, 144 NC App 514, 519; 551 SE2d 131 (2001) ("Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body . . . .") (quotation marks and citation omitted); *Wilson v State*, 132 Md App 510, 550; 752 A2d 1250 (2000) ("Any legitimate expectation of privacy that the appellant had in his blood disappeared when that blood was validly seized in 1991."); *People v King*, 232 App Div 2d 111, 117; 663 NYS2d 610 (1997) ("It is also clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample."). None of these cases is directly on point because none involved an attempt by a defendant to withdraw consent before initial analysis of the blood occurred, but instead these cases typically involved efforts to prevent the police from reanalyzing the evidence or using it for additional purposes or in a subsequent, unrelated case. Nevertheless, we find these cases persuasive in their discussion of the reasonable privacy interests that remain when a defendant has surrendered a biological sample to law enforcement authorities.

infringing additional privacy interests or raising separate Fourth Amendment concerns.[5]

More specifically, the notion that there is no privacy interest that would prevent blood alcohol analysis on a sample of blood lawfully collected for that purpose is bolstered by Michigan's implied consent statutes and the Michigan Supreme Court's decision in *Perlos*, 436 Mich 305. In part, *Perlos* involved consideration of whether there was a reasonable expectation of privacy in blood alcohol test results when the testing was conducted for purposes of medical treatment following an accident and the results were then provided to law enforcement authorities pursuant to MCL 257.625a(9).[6] *Perlos* is not directly on point because it involved evidence that police obtained from a third

[5] Relying on *Riley v California*, 573 US___; 134 S Ct 2473; 189 L Ed 2d 430 (2014), defendant disputes the basic assertion that lawfully obtained evidence may be examined by police, and he argues that applying this rule to blood would exalt the privacy interests in cellular telephones over an individual's privacy interests in her own blood. However, *Riley* is readily distinguishable because it involved the seizure of evidence incident to arrest. Recognizing that searches incident to arrest are conducted for officer safety and the preservation of evidence, the Court determined that a cell phone may be seized to prevent destruction of evidence and the physical phone may examined to ensure that it cannot be used as weapon, but that the police must obtain a warrant to examine the data on the phone. See *Riley*, 573 US at ___, 134 S Ct at 2484-2485. We do not read *Riley* as creating a broad rule that police must obtain a warrant to examine lawfully seized evidence. Instead, *Riley* involved a search incident to arrest, in which the only justifications for seizing the phone are to ensure officer safety and to preserve evidence. In contrast, in the case of a blood draw, "[t]he only justification for the seizure of defendant's blood was the need to obtain evidence of alcohol content." *Snyder*, 852 F2d at 474. Given the context in which *Riley* was decided, we fail to see its relevance in a case in which defendant consented to the search and seizure in question for the purposes of blood alcohol analysis.

[6] The implied consent statutes have since been amended, and the comparable provision may now be found at MCL 257.625a(6)(e).

party, i.e., blood test results obtained from the hospital as opposed to the analysis of a blood sample by a state actor. However, what we find instructive is *Perlos*'s consideration of the implied consent statutes as a source for analyzing the reasonableness of a privacy expectation for purposes of the Fourth Amendment. See *id*. at 325-331. For example, in concluding that there was no reasonable expectation of privacy in hospital blood alcohol test results, the Court noted, among other considerations, that "when people drive, they encounter a diminished expectation of privacy," *id*. at 327, particularly in view of the strong public interest in curtailing drunk driving, as evinced in the implied consent statutes, and that, furthermore, the procedures of the implied consent act are narrowly tailored insofar as they do not allow discretionary testing of blood by the police for any reason and thus do not pose a risk of unrestricted access to medical information, *id*. at 327-330. Ultimately, given the "minimal intrusion" and motorists' diminished expectation of privacy, the Court determined that there is no reasonable expectation of privacy in a blood alcohol test result. *Id*. at 326, 330.

By extension, this reasoning applies to situations in which, in the context of drunk driving, police procure a blood sample for alcohol testing pursuant to a defendant's consent. The individual has consented to the taking of blood, meaning that the sample has been lawfully obtained; and, once the sample is collected with consent, the analysis of the blood is for the limited purpose of determining the blood alcohol content.[7] Cf. *id*. In view of the implied consent statute and the

[7] We note that there has been no suggestion that the police used defendant's blood sample for any purpose other than the analysis of her blood alcohol content.

reasoning in *Perlos*, it is apparent that society is not prepared to recognize as reasonable a privacy interest in the blood alcohol content of a sample voluntarily supplied to the police for the purposes of blood alcohol analysis. See *id*.; see also *State v Simmons*, 270 Ga App 301, 303; 605 SE2d 846 (2004) (considering Georgia's implied consent statute and concluding that consent once given could not be withdrawn); *Loveland*, 696 NW2d at 166 ("Once a urine sample is properly seized, the individual that provided the sample has no legitimate or reasonable expectation that the presence of illegal substances in that sample will remain private."). Absent a protected privacy interest, there is no "search" within the meaning of the Fourth Amendment and attempts to withdraw consent after a sample has been lawfully obtained would not render blood alcohol analysis unlawful.[8]

[8] According to defendant, the implied consent statute and concerns about drunk driving cannot lead to the conclusion that consent to a blood test cannot be withdrawn following the procurement of the voluntary sample. Specifically, defendant contends that this result is foreclosed by *McNeely*, 569 US at 145, 163, which held that "compelled blood draws implicate a significant privacy interest" and that the natural metabolization of alcohol did not create a "*per se* exigency" justifying nonconsensual, warrantless blood testing in all drunk driving cases. However, *McNeely* does not stand for the proposition that consent to blood testing may be withdrawn *after* a sample has been obtained with the suspect's consent. To the contrary, *McNeely* is entirely consistent with our analysis because in *McNeely*, before the sample was drawn, the defendant refused to grant consent to the blood test. *Id*. at 146. The fact that the defendant did not consent to the blood draw was significant because, while the Court acknowledged that motorists have a diminished expectation of privacy, the Court concluded that this "does not diminish a motorist's privacy interest in preventing an agent of the government *from piercing his skin*." *Id*. at 159 (emphasis added). In contrast, when a blood sample is obtained lawfully with the defendant's consent, this piercing of skin is wholly lawful and, once this sample has been lawfully obtained, testing of the sample does not constitute a second search.

In considering whether a defendant may withdraw consent to a blood test after submitting a blood sample for testing, to the extent testing involves the police's continued possession of the blood sample, we also emphasize the established rule that when a suspect gives consent to a search and then revokes that consent, the revocation of consent does not "deprive the police of any evidence obtained during the course of the consent search." *Powell*, 199 Mich App at 499. In other words, a defendant cannot withdraw consent after the seizure and thereby demand the return of evidence lawfully obtained during the consent search. *Id*. at 499. More fully, in *Jones v Berry*, 722 F2d 443, 449 n 9 (CA 9, 1983), the court rejected the assertion that the defendant could demand return of documents seized during a consent search, explaining:

> No claim can be made that items seized in the course of a consent search, if found, must be returned when consent is revoked. Such a rule would lead to the implausible result that incriminating evidence seized in the course of a consent search could be retrieved by a revocation of consent.

This approach is consistent with our decision in *Powell* and with the decisions of several other courts that have considered the issue. See *United States v Mitchell*, 82 F3d 146, 151 (CA 7, 1996); *United States v Guzman*, 852 F2d 1117, 1122 (CA 9, 1988); *United States v Assante*, 979 F Supp 2d 756, 762 (WD Ky, 2013); *United States v Grissom*, 825 F Supp 949, 953 (D Kan, 1993); *State v Guscette*, 678 NW2d 126, 131 (ND, 2004); and *State v Myer*, 441 NW2d 762, 766 (Iowa, 1989). Quite simply, withdrawal of consent after the search has been completed does not entitle a defendant to the return of evidence seized during the course of a consent search because those items are lawfully in the posses-

sion of the police; and, by the same token, a defendant who consents to the search in which evidence is seized cannot, by revoking consent, prevent the police from examining the lawfully obtained evidence.[9] In short, the examination of evidence procured pursuant to a consent search does not constitute a second search or seizure.

IV. CONCLUSION

Ultimately, this is not a case about withdrawing consent to search; it is a case in which the search to obtain defendant's blood has been completed with her consent and defendant nevertheless wishes to prevent

[9] Defendant concedes that typically evidence seized during a consent search need not be returned, but she contends that this rule should not apply to prevent her from demanding the return of her blood because, unlike other types of evidence, it is not "immediately apparent" that her blood contains evidence of criminality. Such an argument is disingenuous because many types of evidence do not evince criminality without some analysis. For example, until tested, police may strongly suspect that a white powder is cocaine, but it could also be sugar or talcum powder. See *Jacobsen*, 466 US at 122. Likewise, "a fingerprint . . . has no independent value to the police until it is tested and compared to other, previously collected fingerprints." *Raynor v State*, 440 Md 71, 91; 99 A3d 753 (2014). Yet we doubt that defendant would suggest that she could demand the return of a white powder found during a consent search or fingerprints voluntarily given to the police. In other words, we are not persuaded by defendant's argument that her proposed rule can be narrowly circumscribed to allow for the return of unanalyzed blood but not other types of evidence. If an individual may demand the return of blood obtained during a lawful consent search, provided that the blood has not yet been subjected to testing, the same reasoning would allow an individual to demand the return of almost any item seized during a lawful consent search, such as suspected drugs that have not been analyzed, a gun that has not yet been subjected to ballistics testing, fingerprints that have not yet been compared, documents that have not yet been read, etc. Such a rule is not consistent with *Powell*'s recognition that the police cannot be deprived of evidence lawfully obtained during the course of a consent search. And it is clear that defendant's blood is evidence of her intoxication obtained during a consent search.

the police from examining the evidence—i.e., her blood—which was lawfully collected during the consent search.[10] However, once the blood was lawfully procured by the police pursuant to defendant's consent, the subsequent analysis of the blood did not constitute a separate search, and defendant simply had no Fourth Amendment basis on which to object to the analysis of the blood for the purpose for which it was drawn. Stated differently, once police procured a sample of defendant's blood pursuant to her consent, she had no reasonable expectation of privacy in the blood alcohol content of that sample and it could be examined for that purpose without her consent. Consequently, defendant's efforts to withdraw consent after her blood had already been collected came too late to invalidate the consent search or to deprive police of the authority to analyze the lawfully obtained blood in their possession to determine defendant's blood alcohol content. It follows that defendant was not entitled to suppress the result of her blood alcohol test, and the trial court did not err by denying defendant's motion to suppress.[11]

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[10] On appeal, defendant analogizes this case to a consensual pat-down in which the suspect withdraws consent before a police officer reaches into the suspect's pocket containing baggies of possible drugs. Just as the suspect may prevent the search of his pocket by withdrawing consent, defendant contends she may prevent the search of her blood. Such a comparison is not apropos. Instead, to borrow defendant's analogy, we are faced with a situation in which the police have already, with defendant's consent, searched the pocket and seized the baggies. The question is whether, having lawfully obtained the baggies, the police may analyze the contents of the baggies to ascertain whether or not the substance is a drug.

[11] As an alternative argument, the prosecutor argues that, even if defendant effectuated the withdrawal of her consent, there was probable cause to obtain a warrant for the analysis of defendant's blood. Having determined that defendant did not withdraw her consent in time to invalidate the analysis of her blood, we need not reach this issue.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

METER and K. F. KELLY, JJ., concurred with HOEKSTRA, P.J.

In re REDD GUARDIANSHIP

Docket No. 335152. Submitted September 7, 2017, at Detroit. Decided September 19, 2017, at 9:15 a.m. Leave to appeal denied 503 Mich ___.

Nichole Legardy filed a petition in the Oakland County Probate Court for removal of Gary Redd as guardian of his mother, Dorothy Redd. Legardy, Gary's daughter, alleged that Gary was no longer suitable to serve as Dorothy's guardian under Michigan's Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. Daniel A. O'Brien, J., agreed, removed Gary as guardian, and named Legardy and Jennifer Carney, an attorney, as Dorothy's coguardians. Although Dorothy herself had testified that she wished for Gary to remain her guardian, the court concluded that it was only required to honor Dorothy's preference when the person of her choice was suitable to serve as her guardian. The court ultimately found that Gary's unwillingness to facilitate relationships between Dorothy and her other family members rendered him unsuitable to continue as Dorothy's guardian. The court ordered Gary's removal as guardian, and Gary appealed as of right.

The Court of Appeals *held*:

1. Under MCL 700.5306(1), a court may appoint a guardian to manage the care and supervision of a person when clear and convincing evidence shows that the person is incapacitated. According to MCL 700.5306a(1)(aa), the incapacitated person (the ward) has the right to choose the person who will be appointed as his or her guardian if the person chosen is suitable and willing to serve. EPIC also includes provisions for removing a guardian after a petition seeking removal has been filed under MCL 700.5310(2) by the ward or another person interested in the ward's welfare, but EPIC does not contain a specific standard for removal of a guardian. In this case, there was no dispute that Dorothy was incapacitated, that the appointment of a guardian was appropriate, and that Gary was entitled to serve as Dorothy's guardian under MCL 700.5313(2)(b) unless there was a sufficient basis for his removal. Considering the purpose of this part of EPIC—to protect incapacitated individuals by appointing them guardians who have the skills and willingness to act in their best

interests—the standard for appointment of a guardian also serves as the standard for removal of a guardian. Therefore, to remove a guardian, the probate court must find that the guardian is no longer suitable or willing to serve.

2. EPIC does not define the word "suitable," but the word is used in a statutory context indicating that the overarching purpose of a guardian is to provide for the care, custody, and control of the ward, as well as to provide for the ward's financial, medical, and social well-being. EPIC makes clear that a guardian's focus of concern must be on the ward, that decisions made on the ward's behalf must be in the interests of the ward, and that the guardian must be qualified—that is, "suitable"—to achieve these purposes. This statutory context taken together with dictionary definitions of the term "suitable" confirm that a suitable guardian is one who is qualified and able to provide for the ward's care, custody, and control. Evidence particularly relevant to determining whether an existing guardian remains suitable includes evidence indicating (1) whether the guardian is still qualified and able, and (2) whether the guardian satisfactorily provided for the ward's care, custody, and control in the past.

3. EPIC does not explicitly provide an evidentiary standard for determining whether a current guardian preferred by the ward should be removed, but EPIC does specifically state in MCL 700.5306(1) that the *appointment* of a guardian for a person requires that a probate court find by clear and convincing evidence that the person is incapacitated and that the appointment of a guardian for that person is necessary. The fact that EPIC does not specify an evidentiary standard for *removal* of a guardian requires a conclusion that the Legislature intentionally omitted naming a standard for removal. When a statute fails to state the standard a probate court is to use to establish a particular fact, the default standard in civil cases—preponderance of the evidence—applies. Therefore, the preponderance-of-the-evidence standard applies when determining whether a person is suitable to serve as a ward's guardian under MCL 700.5312(2). The probate court properly concluded that determining whether Gary was suitable required a factual finding based on the record evidence and that Legardy had the burden of proving that Gary was no longer suitable to serve as Dorothy's guardian. Moreover, the court did not clearly err in its factual findings and did not abuse its discretion by removing Gary as Dorothy's guardian and replacing him with Legardy. Deferral to the probate court's credibility determinations is required because of the probate court's unique vantage point regarding

witnesses, their testimony, and other influencing factors not readily available to the reviewing court. The court found that even though nearly all witnesses agreed that Dorothy was very family-oriented and wished to have relationships with her family members, Gary actively impeded Dorothy's relationships with other family members and exerted undue influence over her.

Affirmed.

1. GUARDIANS AND WARDS — ESTATES AND PROTECTED INDIVIDUALS CODE — REMOVAL OF A GUARDIAN — STANDARD FOR REMOVAL.

Removal of a guardian under the Estates and Protected Individuals Code requires that the probate court find that the guardian is no longer suitable or willing to serve (MCL 700.5301 *et seq*.).

2. GUARDIANS AND WARDS — ESTATES AND PROTECTED INDIVIDUALS CODE — WORDS AND PHRASES — SUITABLE — DEFINITION.

A suitable guardian is a person who is qualified and able to provide for a ward's care, custody, and control (MCL 700.5301 *et seq*.).

3. GUARDIANS AND WARDS — ESTATES AND PROTECTED INDIVIDUALS CODE — REMOVAL OF A GUARDIAN — BURDENS OF PROOF AND PERSUASION.

A guardian's suitability must be determined by a preponderance of the evidence, and a party seeking a guardian's removal bears the burden of proving by a preponderance of the evidence that the guardian is no longer suitable to serve (MCL 700.5301 *et seq*.).

Anne Argiroff, PC (by *Anne Argiroff*) for Gary Redd.

Before: GADOLA, P.J., and CAVANAGH and SWARTZLE, JJ.

SWARTZLE, J. Dorothy Redd is an elderly woman with several relatives who care a great deal for her. One of her sons, Gary Redd, was appointed as Dorothy's[1] guardian in 2014. Two years later, Gary's daughter, Nichole Legardy, sought to remove Gary as guardian because she alleged that he was no longer "suitable" to serve in that role under Michigan's Estates and Pro-

[1] Because of the number of relatives with the same last name, we use first names to refer to the family members involved in this case.

tected Individuals Code (EPIC), MCL 700.1101 *et seq*. The probate court agreed, removed Gary as guardian, and appointed Nichole in his place.[2] Gary now appeals, claiming that the probate court applied the wrong standard for removal as well as the wrong burden of proof. As explained below, we conclude that the probate court did not err in removing Gary as Dorothy's guardian, and we affirm.

I. BACKGROUND

Dorothy is 93 years old and is the mother of five adult children: Gary, Michael Redd, Jerome Redd, Sean Burke, and Antonio Burke. At Dorothy's request, Gary had held power of attorney over her affairs since at least 2005.

In 2012, Dorothy was living in her home in Detroit with three of her sons, Jerome, Sean, and Michael. According to a report prepared by Dorothy's guardian ad litem in 2014, while living in that home, Dorothy's physical and mental condition deteriorated. Dorothy weighed less than 100 pounds and suffered from episodes of delusion. These health-related matters culminated in June 2012, when Gary received a phone call that Dorothy was roaming the streets in her nightgown telling neighbors that thirty or forty people were in her home trying to kill her. In the days following this incident, Gary moved Dorothy into his home, where she resided until August 2016.

In June 2014, Gary filed a petition with the Oakland County Probate Court seeking appointment as Dorothy's guardian. Jerome and his daughter, Katrina

[2] The probate court also removed Gary as conservator, though he does not take issue with this removal in his statement of questions presented. MCR 7.212(C)(5).

Tao-Muhammad, opposed the petition and argued that Gary was preventing Dorothy from visiting with family. The probate court found that Dorothy lacked the capacity to care for herself and appointed Gary and an attorney, Jennifer Carney, as coguardians.

Over the next two years, several disputes arose between the family members. Several family members continued to argue that Gary was preventing Dorothy from visiting family and that Gary was unduly influencing Dorothy against her family members. Jerome and Katrina also questioned whether Gary was properly managing Dorothy's assets and whether Gary should be added to the lease on Dorothy's old home. Michael, among other family members, requested that the probate court prevent Gary from evicting him and Dorothy's other family members from Dorothy's old home. The probate court entered numerous orders aimed at facilitating Dorothy's visitation with her family members, improving the accounting of Dorothy's finances, and preventing the eviction of Dorothy's family members from her old home. The probate court nevertheless refused to remove Gary as Dorothy's guardian, despite several motions seeking his removal.

In August 2016, the probate court changed course after learning of a physical altercation between Gary and Nichole regarding Dorothy's lack of visitation with family members. The probate court heard testimony from several past and current members of the family, a police officer, and several unrelated individuals. In all, 17 persons testified. Of those 17 persons, at least 10 testified that Gary was unduly influencing Dorothy's opinions of her family and was preventing her from carrying on relationships with various family members. Importantly, several persons who previously sup-

ported Gary's guardianship now believed that Gary was an unsuitable guardian. Among these individuals were Gary's daughter, Nichole, and Dorothy's coguardian, Carney. The probate court found particularly insightful a police officer's testimony that while Gary had taken Dorothy to the police station as part of a court-ordered visit with several family members, he blocked her from interacting substantively with her family members and seemed to be undermining the entire visit.

For her part, Dorothy testified that she wished for Gary to continue as her guardian. The probate court concluded, however, that it was only required to honor Dorothy's preference when the person of her choice was suitable to serve as guardian. Ultimately, the probate court found that Gary's unwillingness to facilitate relationships between Dorothy and various family members rendered Gary unsuitable to continue as her guardian. The probate court removed him as guardian and appointed Nichole as coguardian with Carney. Gary appeals this decision as of right.

II. ANALYSIS

A. STANDARD OF REVIEW

We review the probate court's dispositional rulings for an abuse of discretion. *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). "A probate court 'abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes.' " *Id*. at 329 (citation omitted). We review the probate court's findings of fact for clear error. *Id*. at 328. A factual finding is clearly erroneous when this Court " 'is left with a definite and firm conviction that a mistake has been made.' " *Id*. at 329 (citation omit-

ted). We review de novo any statutory or constitutional interpretation by the probate court. *Id*. at 328.

B. GUARDIANSHIP FOR INCAPACITATED INDIVIDUALS UNDER EPIC

Article V, Part 3 of EPIC, MCL 700.5301 *et seq*., concerns the appointment of guardians for incapacitated individuals (wards). Under MCL 700.5303(1), an individual "in his or her own behalf, or any person interested in the individual's welfare," may file a petition seeking a finding of incapacity and the appointment of a guardian. "The court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record." MCL 700.5306(1). EPIC sets forth a prioritized list of persons who could be appointed as guardian, including a person whom the ward "chooses to serve as guardian," MCL 700.5313(2)(b), but only if that person is "suitable and willing to serve," MCL 700.5313(2).

If a guardian is appointed, the ward is granted a number of rights by statute. MCL 700.5306a(1). Relevant to this case, the ward is granted the right to "choose the person who will serve as guardian, if the chosen person is suitable and willing to serve." MCL 700.5306a(1)(aa). EPIC also includes provisions for removing a guardian. MCL 700.5310. In this matter, Gary was removed after a petition was filed under MCL 700.5310(2), which provides that "[t]he ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a

successor guardian, modifying the guardianship's terms, or terminating the guardianship."

C. A GUARDIAN CAN BE REMOVED IF HE IS NO LONGER "SUITABLE"

There is no dispute that Dorothy is incapacitated and that the appointment of a guardian was appropriate. Because Dorothy wished for Gary to serve as her guardian, and because Gary was willing to serve, Gary was entitled to remain as her guardian under MCL 700.5313(2)(b) unless there was sufficient ground for his removal under MCL 700.5310.

EPIC does not set forth a specific standard for removal of a guardian. MCL 700.5310 provides the right to petition for an order removing a guardian, but the statute is otherwise silent as to how a probate court is to determine whether the guardian should be removed. While MCL 700.5313(2) explicitly states that a person who is "suitable and willing" can be *appointed* a guardian in certain circumstances, the section does not similarly state that the same standard applies to remove a person as guardian. The remaining provisions of EPIC dealing with guardians for incapacitated individuals provide little insight on this matter.

In construing the meaning of a particular provision in a statute, in the absence of a definition, we turn first to the statutory context. *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010). Elsewhere in EPIC, the Legislature provided for the appointment and removal of a guardian for a minor, as well as the appointment and removal of a conservator for a minor or incapacitated person. In the first circumstance, the Legislature set forth the same standard for appointment and removal of a minor's guardian—when the appointment or removal serves the minor's welfare. Compare MCL 700.5212 with MCL 700.5219(1). In the

second circumstance, the Legislature set forth different standards for appointment and removal of a conservator. For appointment, the potential conservator must explain "the basis of the claim to priority for appointment," MCL 700.5404(2), and the court can consider several enumerated factors, including whether the potential conservator is "suitable and willing to serve," MCL 700.5409(1)(h). For removal, however, a petitioner must simply establish that removal of a current conservator would be "for good cause." MCL 700.5414. Given how appointments and removals are handled in other parts of EPIC, little can be gleaned from those parts on the appropriate standard for removal of a guardian in the incapacitated-individuals context.

Returning to the appointment of a guardian for an incapacitated individual under MCL 700.5313, while that section does not directly state that the same standard applies to removal, it does provide some guidance on the matter. Specifically, the section generally sets forth the priority of potential guardians. In several places, however, the section further provides that the court may appoint someone else when a previously identified or designated person is not "suitable or willing to serve." See, e.g., MCL 700.5313(3) and (4). While this language certainly applies to persons who were identified-but-disqualified prior to any appointment, it also would appear to apply to a person who was previously designated (and appointed) as a guardian but *who no longer* is "suitable or willing to serve." In this case, the standard for appointment—suitable and willing to serve—would be the standard for removal as well. We find such a reading to be a reasonable construction of the statute, especially considering that the purpose of this part of EPIC is to protect incapacitated individuals with guardians who

have the skills and willingness to act in the best interests of those individuals. See *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001). Thus, we hold that to remove a guardian under MCL 700.5310, the probate court must find that the guardian is no longer suitable or willing to serve.

D. WHETHER A GUARDIAN IS "SUITABLE"

We must next construe the meaning of "suitable," as EPIC does not define the term, nor is there controlling authority defining the term in this context. Beginning again with statutory context, *McCormick*, 487 Mich at 191-192, the overarching purpose of a guardian under EPIC is to provide "for the ward's care, custody, and control," MCL 700.5314. In doing so, EPIC prohibits certain financial self-dealing by the guardian with respect to the ward. See MCL 700.5313(1). Moreover, the code provides that a guardian could be someone who served in that role out-of-state if the person is otherwise "qualified, and serving in good standing." MCL 700.5313(2)(a). Finally, EPIC sets forth several specific duties of a guardian, including to provide for the ward's financial, medical, and social well-being as well as to make an accounting to the court or other interested individuals. MCL 700.5314. EPIC thus makes clear that the guardian's focus of concern must be on the ward, that decisions made on behalf of the ward must be in the interests of the ward and not the guardian, and that the guardian must be qualified to achieve the purposes set forth in EPIC.

Looking to authoritative dictionaries for further guidance, *Anzaldua v Neogen Corp*, 292 Mich App 626, 632; 808 NW2d 804 (2011), *Black's Law Dictionary* (8th ed) defines "suitable" as "fit and appropriate for [its] intended purpose." Similarly, *Merriam Webster's Colle-*

giate Dictionary (11th ed) defines the term as "adapted to a use or purpose" or "able/qualified." Taken together, the statutory context and guidance from dictionaries confirm that a "suitable" guardian is one who is qualified and able to provide for the ward's care, custody, and control. With respect to whether an existing guardian remains suitable, it logically follows that particularly relevant evidence would include (1) evidence on whether the guardian was still qualified and able, and (2) evidence on whether the guardian did, in fact, satisfactorily provide for the ward's care, custody, and control in the past.

E. THE STANDARD OF PROOF NEEDED TO SHOW THAT A GUARDIAN IS NOT "SUITABLE"

With respect to the evidentiary standard to use on whether a current, ward-preferred guardian should be removed, EPIC does not explicitly provide for one. As with the previous questions, then, we look first to the statutory context of EPIC. When initially determining whether a person needs a guardian, EPIC specifically states that the probate court must find "by clear and convincing evidence" that an individual is incapacitated and that the appointment of a guardian is necessary. MCL 700.5306(1). Unlike the initial-determination stage, however, the Legislature chose not to set forth a particular evidentiary standard with respect to whether a person is unsuitable to be named—or to remain as—a guardian. See MCL 700.5310; MCL 700.5313(2). We must construe this "omission of a provision in one statute that is included in another statute . . . as intentional." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). Accordingly, we conclude that the Legislature did not intend to apply the "clear and convincing evidence" standard to the question of a person's suitability to remain a guardian.

We find additional guidance by considering whether the question of suitability is left to the discretion of the probate court. In *In re Williams Estate*, 133 Mich App, 1, 11; 349 NW2d 247 (1984), this Court answered that question by comparing two provisions of EPIC. Specifically, MCL 700.5313(3)[3] provides in relevant part that "[i]f there is no person chosen, nominated, or named under subsection (2), or if none of the persons listed in subsection (2) are suitable or willing to serve, the court *may* appoint as a guardian an individual who is related to the individual who is the subject of the petition in the following order of preference." (Emphasis added.) The *Williams Estate* Court concluded that the Legislature's use of the term "may" in this provision indicated that the appointment of an individual under MCL 700.5313(3) was to be committed to the discretion of the probate court. *Williams Estate*, 133 Mich App at 11.

Unlike in *Williams Estate*, however, the probate court's determination in this case was made under the immediately preceding subsection, which states that the probate court "*shall* appoint a person, if suitable and willing to serve," who is preferred by the guardian. MCL 700.5313(2) (emphasis added). The Legislature's use of the word "shall" in this context "indicates a mandatory and imperative directive." *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014). Thus, this mandatory directive indicates that a standard giving significant discretion to the probate court is not the correct one to use here.

When a statute fails to state the standard that probate courts are to use to establish a particular fact, the default standard in civil cases—preponderance of the evidence—applies. *Mayor of Cadillac v Blackburn*,

[3] The former version of this statute, which is substantially the same as the current version, was codified at MCL 700.454(3).

306 Mich App 512, 522; 857 NW2d 529 (2014). Because the Legislature has not explicitly provided otherwise, we conclude that a probate court must use the preponderance-of-the-evidence standard when determining whether a person is "suitable" to serve as a ward's guardian under MCL 700.5313(2). Although this reading means that one standard—clear and convincing evidence—applies to whether a person should become a ward, but a different standard—preponderance of the evidence—applies to whether a particular person is suitable to be the ward's guardian, such a bifurcated system is found elsewhere in EPIC. In the child-welfare context, for example, the Legislature similarly set forth a clear-and-convincing-evidence standard for the probate court's determination that a child should come within the protective custody of the court, MCL 712A.2; MCL 712A.19b(3), but then remained silent on the standard to use for best-interest determinations, MCL 712A.19b(5). This Court interpreted the omission of a standard in the latter context as intentional and applied the preponderance-of-the-evidence standard. See *In re Moss*, 301 Mich App 76, 90 & n 2; 836 NW2d 182 (2013). That our Court has previously understood the Legislature to have adopted bifurcated standards elsewhere in EPIC lends further support to our conclusion here.

Applying this statutory analysis to the case at hand, before the probate court could remove Gary as Dorothy's guardian, it was required to find, by a preponderance of the evidence, that Gary was not qualified or able to provide for his mother's care, custody, and control. Particularly relevant evidence on this question would include whether Gary did, in fact, satisfactorily provide for his mother's care, custody, and control in the past.

F. THE PROBATE COURT PROPERLY APPLIED THE PREPONDERANCE-OF-THE-EVIDENCE STANDARD

Gary claims on appeal that the probate court applied the wrong standard to his removal. Gary points this Court to the following passage he claims indicates that the probate court erroneously used a discretionary standard:

> You know, I—it is interesting in this trial—you know, and the question is Gary Redd's suitability, and that's what we're—we're trying to figure out. I have to decide that. . . . And I don't know, Gary's—you say it's their burden of proof. Yeah, admittedly some evidence has to be presented by someone that Dorothy Redd's preference, you know, her person nominated is not suitable so logically it would come from them.
>
> But when we think of somebody having a burden of proof, we think of the standard of proof where it's—there's clear and convincing evidence with regard to the need for a guardian. There isn't really a—a standard of proof stated for determining whether one's suitable. It's a fact question, I guess, to be decided by the Judge, and then, a decision to appoint is an exercise of discretion by the Judge. So I have to find whether Gary Redd is suitable or not.

While the probate court mentioned the exercise of discretion in appointing a guardian, reading the probate court's comments as a whole, it is clear that the probate court understood that whether Gary was "suitable" was a question of fact that must be decided before the court could determine whether to honor Dorothy's stated preference. Thus, on the question of suitability, the probate court did not apply a discretionary standard. Rather, it correctly understood that the question was a factual one, requiring a factual finding based on record evidence. The probate court further correctly placed the burden of proof on Nichole as the moving party. Therefore, we find no fault with respect to the probate court's

determination that suitability was a question of fact and that the moving party had the burden.

G. THE PROBATE COURT DID NOT CLEARLY ERR IN ITS FACTUAL FINDINGS

Gary also argues that the evidence did not support removing him as Dorothy's guardian and replacing him with Nichole. While Gary takes issue with several of the probate court's specific factual findings, his arguments amount to an attack on the probate court's credibility determinations of the various witnesses who testified in this matter. It is well-established, however, that we "will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

This intra-family dispute has been highly contentious for years, and there was wide disagreement by various members about the best course of care for Dorothy. Still, 10 of the 17 testifying witnesses either directly testified or strongly implied that Gary was exerting undue influence over Dorothy and that Gary prevented Dorothy from maintaining relationships with several family members. Importantly, Gary's own daughter, Nichole, and Dorothy's coguardian, Carney (a lawyer unrelated to any of the family members), testified that Gary was preventing Dorothy from seeing family members and exerting undue influence over her. These accounts were further supported by a police officer's testimony that Gary was not facilitating visitation with Dorothy's family members.

Part of a guardian's responsibility is to provide for the ward's social well-being. Nearly all witnesses agreed that Dorothy was very family-oriented and wished to have relationships with her family members. The record amply supports that Gary was not willing to facilitate these relationships and was, in fact, actively impeding them. Moreover, there was evidence presented that Nichole had long attempted to mend the family discord and had opened her home to all family members as a meeting place. Based on our review of this and the rest of the record evidence, we conclude that the probate court did not clearly err with respect to its factual findings and did not abuse its discretion by removing Gary as guardian and replacing him with Nichole under MCL 700.5310 and MCL 700.5313(4).

H. REMAND TO A DIFFERENT JUDGE IS NOT WARRANTED

Finally, Gary argues that this case should be remanded to a different judge because the judge currently presiding over the matter is biased against Gary. We disagree.

"The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case." *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). This Court "may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Id*. at 602-603.

The bulk of Gary's arguments simply take issue with the fact that the probate court's factual findings and

legal rulings were not in his favor. As explained above, we find no error with respect to the probate court's findings and rulings here. Moreover, "[r]epeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying." *Id*. at 603. The party seeking reassignment must demonstrate that the probate judge would be "unable to rule fairly on remand." *Id*. We conclude that Gary has failed to establish that the current probate judge would be unable to rule fairly on remand. Moreover, we find that reassignment would only "entail excessive waste or duplication," *id*., given the probate court's familiarity with this lengthy and complicated dispute.

III. CONCLUSION

Under EPIC, a "suitable" guardian is one who is qualified and able to provide for the ward's care, custody, and control. When a preponderance of the evidence weighs against the suitability of the ward's current choice for guardian, the probate court must remove that person as guardian. We hold that the probate court did not clearly err in concluding that a preponderance of the evidence weighed against Gary's ongoing suitability as guardian.

Affirmed.

GADOLA, P.J., and CAVANAGH, J., concurred with SWARTZLE, J.

PEOPLE v WOOD

Docket No. 331462. Submitted June 13, 2017, at Detroit. Decided September 19, 2017, at 9:20 a.m. Leave to appeal sought.

Charles W. Wood moved in the Oakland Circuit Court to suppress evidence seized from his vehicle following a traffic stop. Phyllis C. McMillen, J., granted Wood's motion and dismissed the charge against him, possession of a controlled substance (codeine), MCL 333.7403(2)(b)(*ii*). A Michigan State Police trooper had pulled Wood over for speeding. While the trooper stood near Wood's vehicle, he saw several pill bottles and several nitrous oxide canisters in the rear of the car. Wood refused the trooper's request to search the car, but despite Wood's refusal, the trooper ordered Wood out of the car and searched it. The trooper found the nitrous oxide canisters, a canister used for huffing (inhaling chemical agents like nitrous oxide), an empty bottle of codeine syrup, and pill bottles with the names removed. The trooper also found six codeine pills inside Wood's jacket. The trooper confiscated only the codeine pills. When the court granted Wood's motion to suppress the evidence, it did not specifically grant or deny his motion to dismiss the case for lack of untainted evidence. After a hearing, the court granted Wood's motion to dismiss. The prosecution appealed as of right.

The Court of Appeals *held*:

1. A matter is moot when no actual controversy exists in a case, and except under specific circumstances not applicable here, a court should not rule on moot issues. Wood argued that the rule set forth in *People v Richmond*, 486 Mich 29 (2010)—which held that the prosecution's appeal of a suppression order was moot because the case had been voluntarily dismissed by the prosecution's own motion—should apply in this case because dismissal of the charge against him meant that the admissibility of the evidence against him was no longer in dispute. This case and the *Richmond* case were distinguishable, however, because this case did not involve a voluntary dismissal by the prosecution. Rather, Wood moved to dismiss the case. In other words, the prosecution's own action in *Richmond*—its voluntary dismissal of the case—rendered moot any controversy concerning the admissibility of

the evidence. In this case, however, the prosecution did not seek dismissal of the case, and the prosecution's challenge to the trial court's order suppressing the evidence was not moot.

2. Searches and seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional. The automobile exception to the warrant requirement requires that an officer have probable cause to search the automobile. Probable cause exists to search an automobile without a warrant when objective facts would justify the issuance of a warrant by a magistrate. The determination whether probable cause exists should be made in a commonsense manner in light of the totality of circumstances. Despite Wood's admission that he had inhaled nitrous oxide four days before the traffic stop, probable cause to search Wood's vehicle did not exist because it was not unlawful to possess the nitrous oxide canisters. Therefore, the canisters in Wood's vehicle did not form the basis for probable cause to search the vehicle. In addition, Wood's statement, coupled with the presence of the nitrous oxide canisters, did not support a finding of probable cause to search Wood's vehicle because the applicable statute, MCL 752.272, prohibits the inhalation of nitrous oxide for the purpose of causing intoxication. The trooper did not suspect that Wood was intoxicated—Wood was not driving erratically and did not appear to be intoxicated or impaired when the trooper spoke with him. Under the circumstances, the trial court properly determined that the automobile exception to the warrant requirement could not be used to justify the search of Wood's vehicle.

3. A law enforcement officer may conduct an inventory search of a person's vehicle under the search-incident-to-arrest exception to the warrant requirement if the underlying arrest is valid and the search is conducted by the officer in accordance with standardized department procedures. In this case, the prosecution also argued that the warrantless search of Wood's vehicle was justified under the incident-to-arrest exception to the warrant requirement because Wood admitted to having inhaled nitrous oxide and, as a result, the trooper had reasonable cause to believe that a misdemeanor punishable by imprisonment for more than 92 days had been committed and reasonable cause to believe that Wood had committed it. However, Wood was arrested for possession of codeine pills, not for inhaling nitrous oxide, and the codeine pills therefore were only discovered as a result of an illegal search. In *People v Mead (On Remand)*, 320 Mich App 613 (2017), the Court held that an arrest cannot justify a search at the same time that the search justifies the arrest, i.e., a search cannot

be justified as being incident to an arrest if probable cause for the contemporaneous arrest is provided by the fruits of that search.

Affirmed.

MURRAY, J., concurring in part and dissenting in part, agreed with the majority that the prosecution's appeal was not moot but disagreed with the majority's conclusion that the arrest and the warrantless search were not justified by probable cause. The trooper was authorized to arrest Wood under MCL 764.15(1)(d) because Wood admitted to committing a misdemeanor offense punishable by more than 92 days' imprisonment and there were a number of nitrous oxide canisters in Wood's vehicle that were evidence of that crime. That there might have been an innocent explanation for the canisters did not deprive the trooper of probable cause to arrest Wood. Probable cause does not depend on the inculpatory nature of particular conduct; probable cause may arise from the degree of suspicion attached to noncriminal conduct. Wood's admission to the crime of inhaling nitrous oxide, coupled with the presence of the nitrous oxide canisters in plain view, provided the trooper with a degree of suspicion sufficient to arrest Wood. *Mead* was distinguishable because probable cause for Wood's arrest did not result from an unlawful search because the canisters were in plain view from the trooper's lawful position. Because Wood's arrest was supported by probable cause, the search of Wood's vehicle was a proper search incident to arrest.

1. SEARCHES AND SEIZURES — WARRANTLESS SEARCHES — AUTOMOBILES — PROBABLE CAUSE — NITROUS OXIDE CANISTERS.

A defendant's admission to having inhaled nitrous oxide days earlier and the defendant's possession of nitrous oxide canisters does not provide sufficient probable cause to justify a warrantless search of the defendant's automobile (MCL 752.272).

2. SEARCHES AND SEIZURES — WARRANTLESS SEARCHES — SEARCHES INCIDENT TO ARREST.

An arrest may not be justified by evidence discovered during an illegal search, and a warrantless search may not be justified by an illegal arrest (US Const, Am IV; Const 1963, art 1, § 11).

3. APPEALS — DISMISSAL OF CASE — PREDISMISSAL MOTION — MOOTNESS OF APPEAL.

The prosecution's appeal of a suppression order entered before a case is dismissed because of a lack of evidence is not moot when the prosecution is not the party that sought the dismissal.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Louis F. Meizlish*, Assistant Prosecuting Attorney, for the people.

Siferd Moise Law Group, PLLC (by *Erica Moise*) for defendant.

Before: STEPHENS, P.J., and K. F. KELLY and MURRAY, JJ.

K. F. KELLY, J. The prosecutor appeals by right an order dismissing a charge of possession of a controlled substance (codeine), a violation of MCL 333.7403(2)(b)(*ii*). The dismissal was based on the circuit court's earlier opinion and order that granted defendant's motion to suppress evidence. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

On March 14, 2015, Michigan State Police Trooper Everett Morris observed defendant traveling 83 miles per hour in a 70-miles-per-hour zone. Morris decided to conduct a traffic stop. Defendant was the lone occupant of the car. Morris testified that he "noticed several pill bottles along with several like whippet canisters.[1] They would be nitrous oxide . . . [o]n the rear floorboard." Morris observed about a dozen of the containers. He explained: "They caught my attention because I've dealt with them before where people use them and they huff 'em for a temporary high." Morris confronted defendant about the canisters:

[1] These canisters are also commonly called "whip-its," "whippits," or "whipits." We use the "whippet" spelling in this opinion for consistency with the spelling used in the hearing transcript.

A. . . . We discussed the huffing of the whippets or nitrous oxide that were in the back of the seat. I asked him, you know, when the last time it was that he used it.

Q. And what did he say?

A. He stated four days ago.

Q. Okay. And what, if anything, did you say?

A. I informed him that that stuff will kill your brain.

Q. And did he respond to your statement?

A. I believe he said I know.

Morris unsuccessfully sought defendant's consent to search the car. He nevertheless ordered defendant out of the car and searched it. In addition to the nitrous oxide whippets, Morris found a canister that can be used for inhaling nitrous oxide. Morris also found an empty bottle of codeine syrup with the name removed, as well as pill bottles with the names removed. Morris found six pills, which were determined to be codeine, located inside a jacket belonging to defendant. Morris was not concerned that defendant was actually intoxicated at the time, and he did not confiscate the whippets, the canister, or the empty medicine bottles.

On January 19, 2016, the circuit court granted defendant's motion to suppress the evidence but did not specifically grant or deny defendant's motion to dismiss the case for lack of untainted evidence. The parties subsequently appeared before the court on January 21, 2016:

Mr. Meizlish [prosecutor]: Your Honor, as I imagine you recall, you entered an order suppressing the evidence in this matter. . . . Both sides agreed that if—you should—that you could set the matter for a trial right now.

The Court: Okay. So, everybody waives their right to a trial?

Ms. Moise [defense counsel]: Yes.

Mr. Meizlish: We're just setting it for trial right now.

The Court: We'll set it right now.

Mr. Meizlish: All right. Your Honor, we are unable to proceed at this time.

Ms. Moise: Your Honor, I move for the Court to dismiss this matter.

The Court: The prosecutor being unable to proceed, the Court will dismiss the charges.

Mr. Meizlish: Your Honor, I've prepared an order.

The Court: Do you want to sign it, then—

Mr. Meizlish: Sure.

The Court: —we can be done with it? All right. We're all set.

The circuit court entered an order that provided, "I hereby grant Defendant's motion to dismiss the matter." The prosecution now appeals by right. In response, defendant argues that the appeal is moot.

II. MOOTNESS

Defendant argues that the prosecution's actions have rendered this appeal moot in keeping with *People v Richmond*, 486 Mich 29; 782 NW2d 187 (2010). An appellate court reviews de novo whether an issue is moot. *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016).

In *Richmond*, the circuit court granted the defendant's motion to suppress the evidence because the affidavit supporting the search warrant was insufficient to establish probable cause. *Richmond*, 486 Mich at 33. There, as here, the circuit court's ruling resulted in the exclusion of *all* the evidence against the defendant. *Id*. at 32-33. "The prosecutor then moved to voluntarily dismiss the case without prejudice, stating

that '[g]iven the Court's decision, it would make more sense for me to dismiss this case at this time since we are not able to go forward since the evidence has been suppressed.' " *Id*. at 33 (alteration in original). The circuit court signed an order dismissing the case without prejudice " 'on the motion of the People.' " *Id*. The prosecutor then appealed the circuit court's decision to suppress the evidence. *Id*. This Court reversed the circuit court's order and remanded the case for reinstatement of the charges against the defendant. *Id*. On appeal in the Michigan Supreme Court, the defendant argued for the first time that the Court of Appeals should not have considered the prosecution's appeal "because the issue was moot after the prosecution voluntarily obtained dismissal of the case." *Id*. The Supreme Court agreed and held "that the prosecution's voluntary dismissal of the charges rendered its appeal moot and, because a court should not hear moot issues except in circumstances that are not applicable under the facts of this case, the Court of Appeals erred by reaching the substantive issues of the prosecution's appeal." *Id*. at 34. The matter was moot because there was no actual controversy. The Court explained:

> In this case, the prosecution's own action clearly rendered its subsequent appeal moot. After the circuit court suppressed the evidence, the prosecution moved to dismiss the charges against defendant. As a result of the prosecution's voluntarily seeking dismissal of the charges, the circuit court dismissed the charges without prejudice and any existing controversy between the parties was rendered moot. Once the charges were dismissed, an action no longer existed, and, thus, there was no longer any controversy left for the Court of Appeals to consider. Accordingly, because all the charges against defendant had been dismissed at the time of the prosecution's appeal, the Court of Appeals judgment was based on a pretended controversy that did not rest upon existing facts

> or rights. Because a court cannot tender advice on matters that are no longer in litigation, the Court of Appeals made a determination on a mere barren right—a purely moot question, which, under this Court's precedent, it did not have the power to decide. [*Id*. at 35-36 (quotation marks and citations omitted).]

We decline defendant's invitation to extend the *Richmond* rule to situations in which the prosecution does not specifically seek to dismiss the case. The Court's focus in *Richmond* was clearly on the prosecution's actions. In this case, the prosecution did not seek a dismissal. The order clearly states that it was defendant's motion. This case is distinguishable from *Richmond* because it does not involve a voluntary dismissal by the prosecution. Instead, defendant requested that the circuit court dismiss the charges as part of the motion to suppress.

III. SUPPRESSION

The prosecution argues that Morris had probable cause to search defendant's vehicle under the automobile exception based on defendant's admission that he committed the crime of inhaling a chemical agent, MCL 752.272, and based on Morris's observation of several nitrous oxide canisters and pill bottles on the vehicle's floorboard. The prosecution further argues that there was probable cause to arrest defendant for inhaling nitrous oxide, which would have triggered an inventory search of the vehicle and would have led to the inevitable discovery of the codeine pills. "We review de novo the circuit court's ultimate ruling on a motion to suppress evidence." *People v Barbarich*, 291 Mich App 468, 471; 807 NW2d 56 (2011).

The circuit court properly suppressed the evidence seized because it was the result of an unlawful search. Our Court has stated:

> The Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution protect against *unreasonable* searches and seizures. Generally, searches or seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional. This does not mean that all searches and seizures conducted without a warrant are forbidden; only those that are unreasonable. The United States Supreme Court has carved out numerous exceptions to the general rule that warrantless searches are unreasonable using a test that balances the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference. . . .
>
> . . . Each of these exceptions, however, still requires reasonableness and probable cause. [*People v Barbarich*, 291 Mich App 468, 472-473; 807 NW2d 56 (2011) (quotation marks and citations omitted).]

"Probable cause exists when the facts and circumstances known to the police officers at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence will be found in a particular place." *People v Beuschlein*, 245 Mich App 744, 750; 630 NW2d 921 (2001).

A. AUTOMOBILE EXCEPTION

"An exception to the warrant requirement exists for searches of automobiles." *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999). Once again, however, "[t]he exception applies only to searches supported by probable cause." *Id*. "The determination whether probable cause exists to support a search, including a search of an automobile without a warrant, should be made in a commonsense manner in light of the totality of the circumstances." *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999). "[T]he probable-cause

determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." *United States v Ross*, 456 US 798, 808; 102 S Ct 2157, 2164; 72 L Ed 2d 572 (1982).

The question in this case is whether Morris, under the totality of the circumstances, had probable cause to believe that a crime had been or was being committed and that evidence of the crime would be found in the car. The prosecution relies heavily on *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000), and argues that the totality of the circumstances revealed a fair probability that Morris would find evidence that defendant committed the crime of inhaling chemical agents in violation of MCL 752.272, as well as possession or use of controlled substances under MCL 333.7404(2)(b).

In *Kazmierczak*, the Michigan Supreme Court concluded that:

> when a qualified person smells an odor sufficiently distinctive to identify contraband, the odor alone may provide probable cause to believe that contraband is present. Thus, the odor provides a "substantial basis" for inferring a "fair probability" that contraband or evidence of a crime will be found. Here, Officer Bordo testified that he had previous experience involving marijuana investigations and that he recognized "a very strong smell of marijuana emanating from the vehicle." The trial court found the officer's testimony to have been credible. Under such circumstances, probable cause to search for marijuana existed. [*Kazmierczak*, 461 Mich at 421-422 (citation omitted).]

Here, the prosecution argues that, like Bordo in *Kazmierczak*, Morris had probable cause to believe that a search of defendant's vehicle would reveal evidence of the crime of possession of a controlled

substance based on defendant's admission that he committed the crime of inhaling a chemical agent and based on Morris's observation of several nitrous oxide canisters and pill bottles on the vehicle's floorboard. However, *Kazmierczak* is distinguishable from the case at bar in a significant way—the possession of marijuana in *Kazmierczak* was a crime in and of itself, whereas defendant's possession of the nitrous oxide canisters and pill bottles was perfectly legal. The canisters did not form the basis for probable cause to search defendant's vehicle.

The prosecution argues, however, that the canisters along with defendant's admission provided probable cause for the search. Defendant admitted that he had inhaled nitrous oxide four days before the traffic stop, and inhalation of a chemical agent is prohibited by MCL 752.272:

> No person shall, for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction or dulling of the senses or nervous system, intentionally smell or inhale the fumes of any chemical agent or intentionally drink, eat or otherwise introduce any chemical agent into his respiratory or circulatory system. This shall not prohibit the inhalation of any anesthesia for medical or dental purposes.

But defendant's statement could not form the basis for probable cause to search defendant's vehicle. The statute does not prohibit possessing nitrous oxide canisters; rather, it prohibits the misuse of the canisters. Therefore, the statute addresses intoxication and impairment. Morris never suspected that defendant was intoxicated or impaired when he pulled defendant over. Defendant had been speeding, but there was no testimony that he had been driving erratically. Nor did Morris suspect that defendant was intoxicated or im-

paired when Morris spoke with defendant. This case would be entirely different had Morris observed defendant in an impaired state or suspected that defendant was in an impaired state. Instead, Morris believed that defendant's statement and the presence of the canisters created probable cause to believe that *other* controlled substances would be found.

B. ARREST AND INVENTORY SEARCH

"[A]n inventory search of a person in detention is constitutional if the underlying arrest was valid and the search was conducted by the police in accordance with standardized department procedures." *People v Houstina*, 216 Mich App 70, 77; 549 NW2d 11 (1996). Such a search "is considered to be an administrative function rather than a part of a criminal investigation." *Id*.

The inventory exception to the warrant requirement does not apply because defendant's arrest was not valid.

> A police officer may make an arrest without a warrant if there is probable cause to believe that a felony was committed by the defendant, or probable cause to believe that the defendant committed a misdemeanor in the officer's presence. "Probable cause is found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed." The standard is an objective one, applied without regard to the intent or motive of the police officer. [*People v Chapo*, 283 Mich App 360, 366-367; 770 NW2d 68 (2009) (citations omitted).]

MCL 764.15(1)(d) permits warrantless arrests for misdemeanors that occur outside an officer's presence when "[t]he peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days . . . has been committed and reasonable cause to believe the person committed it." The prosecu-

tion argues that Morris was entitled to arrest defendant for inhaling a chemical agent. A person who commits that crime "is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $100.00, or both." MCL 752.273. Yet, the fact remains that defendant was arrested for possession of codeine pills found as a result of an illegal search, not for inhaling nitrous oxide.

We find instructive this Court's recent opinion in *People v Mead (On Remand)*, 320 Mich App 613; 908 NW2d 555 (2017). In *Mead*, a police officer stopped a driver for an expired license plate. *Id*. at 616. The driver subsequently consented to a search of the vehicle. *Id*. As part of that search, the officer opened a backpack belonging to the defendant, who was a passenger in the car, and found methamphetamine. *Id*. The primary issue in the defendant's appeal was whether he had standing to challenge the search. This Court concluded that he did not. *Id*. at 615. However, the Michigan Supreme Court remanded the case back to this Court for further consideration of the issue, along with an instruction that this Court consider " 'whether there are any other grounds upon which the search may be justified.' " *Id*. at 616 (citation omitted). On remand, this Court ultimately concluded that defendant lacked standing to challenge the validity of the search. *Id*. at 616-618. For our purposes, however, the informative portion of the Court's decision was when it addressed whether there were other grounds justifying the search. This Court concluded that there were not. Specifically, it rejected the prosecution's claim that the arrest exception to the warrant requirement applied. The Court first noted:

> "[T]here is no reason to believe that evidence relevant to the crime of arrest would be found in the vehicle" when

> police are addressing "civil infractions" or a person "driving without a valid license." [*People v Tavernier*, 295 Mich App 582, 586; 815 NW2d 154 (2012).] "[J]ustifying the arrest by the search and at the same time the search by the arrest, just will not do." *Smith v Ohio*, 494 US 541, 543; 110 S Ct 1288; 108 L Ed 2d 464 (1990) (quotation marks, alterations, and citation omitted). For example, a "search of a container cannot be justified as being incident to an arrest if probable cause for the contemporaneous arrest was provided by the fruits of that search." *People v Champion*, 452 Mich 92, 116-117; 549 NW2d 849 (1996). [*Mead*, 320 Mich App at 624.]

With that in mind, the Court concluded that the police officer lacked probable cause to arrest the defendant:

> In this case, Officer [Richard] Burkart did not search the backpack incident to the arrest of [the defendant] or [the driver]. Officer Burkart stopped the vehicle because of an expired license plate. It is unclear how the vehicle could contain evidence of an expired license plate. Officer Burkart repeatedly testified that he had no intent to arrest [the driver] for the infraction. Additionally, Officer Burkart testified that [the defendant] and [the driver] admitted to using narcotics. But he did not testify that drug use was the basis for the stop of the vehicle, that either admitted to possessing drugs that night, that either admitted using drugs that night, or that either exhibited signs of being under the influence of narcotics. Upon viewing the video of the traffic stop, it does not appear that [the driver] or [the defendant] is within reaching distance of the backpack or passenger compartment of the vehicle at the time of the search. Therefore, Officer Burkart lacked probable cause for a lawful arrest as is required to permit a search incident to arrest. [*Id*.]

These facts are eerily similar to those before us. We see no reason to conclude differently.

Affirmed.

STEPHENS, P.J., concurred with K. F. KELLY, J.

MURRAY, J. (*concurring in part and dissenting in part*). A Michigan State Police Trooper pulled defendant over for speeding. When the trooper reached the vehicle, he saw approximately a dozen "whippet" or nitrous oxide containers in the backseat, along with some empty pill bottles. Knowing that canisters containing nitrous oxide are used for "huffing," which is illegal under state law, the trooper asked defendant when he last huffed. Defendant answered, "[F]our days ago." The majority concludes that the trooper did not, at that point, have probable cause to search the vehicle. But because defendant admitted to having committed a crime, and the otherwise legal containers that were the apparatus to commit the crime were in plain view, under the controlling law, the trooper had probable cause to arrest defendant without a warrant and search his vehicle. Consequently, for the reasons briefly stated below, the trial court's order should be reversed and the matter remanded for further proceedings.[1]

Upon de novo review of the circuit court's ruling on the motion to suppress evidence, *People v Barbarich*, 291 Mich App 468, 471; 807 NW2d 56 (2011), it is evident that Michigan State Police Trooper Everett Morris had probable cause to search defendant's motor vehicle. More specifically, Trooper Morris had probable cause to believe that defendant had committed a crime under Michigan law and, therefore, could have properly searched the vehicle incident to an arrest. *People v Nguyen*, 305 Mich App 740, 756; 854 NW2d 223 (2014). As the United State Supreme Court made clear many

[1] I concur in the majority opinion's determination that this appeal is not moot because the circumstances in the present case are dispositively different than those set forth in *People v Richmond*, 486 Mich 29; 782 NW2d 187 (2010).

decades ago, the test we are to apply in determining whether probable cause to arrest existed is whether the trooper "had reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the [defendant] *had committed* or was committing an offense." *Beck v Ohio*, 379 US 89, 91; 85 S Ct 223; 13 L Ed 2d 142 (1964) (emphasis added). The probable cause standard does not require that a trooper conclude that actual criminal activity had occurred or was occurring, but only that there was a probability or substantial chance of criminal activity. *Illinois v Gates*, 462 US 213, 246; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Here, it is undisputed that Michigan law permits warrantless arrests when the trooper "has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony *has been committed* and reasonable cause to believe the person committed it." MCL 764.15(1)(d) (emphasis added). It is likewise undisputed that "huffing"—that is, inhaling chemicals—is a 93-day misdemeanor, MCL 752.273, and so an officer can arrest an individual without a warrant when reasonable cause exists to believe that huffing occurred. The evidence shows that Trooper Morris had probable cause to arrest defendant without a warrant.

At the evidentiary hearing, Trooper Morris testified that defendant had approximately a dozen "whippets," or nitrous oxide canisters, on the floorboard of his vehicle. Trooper Morris also testified that defendant indicated that he had huffed approximately four days earlier (thus admitting to the commission of a 93-day misdemeanor),[2] and in further discussions with the

[2] That this crime occurred, according to defendant, four days earlier, does not alter the outcome. For one thing, the statute of limitations

trooper, admitted that he realized that huffing could damage his brain. These undisputed facts unquestionably lead to the conclusion that Trooper Morris had probable cause to believe that defendant had committed a crime subject to 93 days' imprisonment within the past four days. That there could be an innocent explanation for possessing the canisters (though that is doubtful given defendant's admission) does not deprive the officer of probable cause to arrest. This point has been repeatedly made by the Supreme Court. In *Gates*, 462 US at 243 n 13, the United States Supreme Court emphasized that:

> The Illinois Supreme Court thought that the verification of details contained in the anonymous letter in this case amounted only to "[t]he corroboration of innocent activity," 85 Ill. 2d 376, 390, 423 N. E. 2d 887, 893 (1981), and that this was insufficient to support a finding of probable cause. We are inclined to agree, however, with the observation of Justice Moran in his dissenting opinion that "[i]n this case, just as in *Draper* [*v United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959)], *seemingly innocent activity became suspicious in light of the initial tip*." *Id*., at 396, 423 N. E. 2d, at 896. *And it bears noting that all of the corroborating detail established in Draper was of entirely innocent activity*—a fact later pointed out by the Court in both *Jones* v. *United States*, [362 US 257, 269-270; 80 S Ct 725; 4 L Ed 2d 697 (1960)], and *Ker* v. *California*, [374 US 23, 36; 83 S Ct 1623; 10 L Ed 2d 726 (1963)].

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certainly had not expired. Additionally, in the context of information contained in search warrants, the expiration of well more than four days has been held insufficient to cause the evidence to become stale, see, e.g., *State v Lantz*, 21 Neb App 679, 684-686; 842 NW2d 216 (2014), and so too here, where potential evidence of defendant's recent huffing was sitting in plain view of Trooper Morris. And, as the prosecution points out, when assessing the situation before him, Trooper Morris was not required to accept defendant's version of when the crime occurred. *Criss v Kent*, 867 F2d 259, 263 (CA 6, 1988).

> This is perfectly reasonable. As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, *innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our citizens'* [sic] *demands*. We think the Illinois court attempted a too rigid classification of the types of conduct that may be relied upon in seeking to demonstrate probable cause. See *Brown* v. *Texas*, [443 US 47, 52; 99 S Ct 2637; 61 L Ed 2d 357 (1979)]. *In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts*. [Emphasis added.]

See also *United States v Sokolow*, 490 US 1, 9-10; 109 S Ct 1581; 104 L Ed 2d 1 (1989) (analogizing *Gates* and other probable-cause cases to the reasonable-suspicion standard and recognizing that "[a]ny one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion"); *State v Sisco*, 239 Ariz 532, 536; 373 P3d 549 (2016) (quoting *Gates*, 462 US at 243 n 13, and holding that "[p]robable cause, however, does not turn on the 'innocence' or 'guilt' of particular conduct, but instead on the 'degree of suspicion that attaches to particular types of non-criminal acts' ").

Hence, it is not enough for the majority to assert that possession of the canisters in plain view on the car floor was legal because *Gates* and other cases teach us that whether items are ordinarily "innocent" is not the relevant inquiry. Instead, we must focus on the degree of suspicion attached to those containers. And Trooper Morris testified that he was well aware of the use of "whippets" for huffing, and that huffing was a crime.

Adding to the potential criminal use of the canisters was defendant's candid admission that he had engaged in huffing no more than four days earlier. Thus, the combination of factors (even if some could in isolation be considered facially "innocent" or "legal") presented to Trooper Morris created probable cause to arrest defendant without a warrant and to conduct a search of the vehicle.

That portion of *People v Mead (On Remand)*, 320 Mich App 613; 908 NW2d 555 (2017), relied upon by the majority, does not alter this outcome. In relevant part, that case dealt with whether evidence *found in a backpack* located in a car could be justified by a search incident to an arrest. *Mead*, 320 Mich App at 616. Our Court properly concluded that it could not because the officer had no reason to believe that "the vehicle could contain evidence of an expired license plate," which was the reason that the officer pulled over the defendant. *Id*. at 624. Thus, a search of the backpack could not be supported by an arrest of the defendant for expired plates.

Here, however, Trooper Morris's discovery of the canisters did not result from a search, and there can be no reasonable argument that it did as the canisters were in plain view from Trooper Morris's lawful standpoint. See *Texas v Brown*, 460 US 730, 740; 103 S Ct 1535; 75 L Ed 2d 502 (1983), and *People v Daniels*, 160 Mich App 614, 620; 408 NW2d 398 (1987). *Mead*'s discussion of what is permissible for a search incident to an arrest would be instructive if the canisters and pill bottles were located in a container within the vehicle, but as these items were in plain view of Trooper Morris, he was free to arrest defendant and search for any additional evidence of a controlled substance violation. See, e.g., *United States v Huff*, 782

F3d 1221, 1226 (CA 10, 2015) ("Upon seeing the uncased weapon [in plain view from outside the vehicle], the officers had the requisite probable cause both to conduct a search of the vehicle and to initiate an arrest based upon this weapons violation."), *State v Hunter*, 62 So 3d 340, 344 (La App, 2011) ("Upon making a valid traffic stop, the police officers were lawfully in a position to observe in plain view the clear plastic bag containing cocaine. The evidence of drugs gave the officer probable cause to arrest the defendant and then to search the interior of the vehicle for weapons and evidence as an incident to the lawful arrest. Therefore, the search of the automobile and the seizure of the drugs satisfied the constitutional guidelines for a warrantless search."), and *United States v Sparks*, 291 F3d 683, 690-691 (CA 10, 2002) (listing cases standing for the proposition that an officer who gains probable cause from viewing an item in a vehicle can then either search the vehicle under the plain-view doctrine, or arrest the occupant and search the vehicle).

The majority opines that defendant's "statement could not form the basis for probable cause to search defendant's vehicle" because MCL 752.272 "addresses intoxication and impairment," and Trooper Morris testified that defendant was neither intoxicated nor impaired. But the statute's language says no such thing. Rather, the statute focuses on the person's reason for taking the prohibited action by stating that a person shall not "for the purpose of" causing intoxication, etc., intentionally inhale or otherwise introduce chemical agents into his or her respiratory or circulatory system. The statute does not require that the person succeed in that purpose, i.e., succeed in getting intoxicated. To the contrary, it simply requires that the person take the prohibited actions for the purpose of achieving intoxication.

For these reasons, I would reverse the trial court's order granting defendant's motion to suppress and remand for further proceedings.

WINKLER v MARIST FATHERS OF DETROIT, INC (ON REMAND)

Docket No. 323511. Submitted August 2, 2017, at Lansing. Decided September 21, 2017, at 9:00 a.m.

Bettina Winkler brought an action in the Oakland Circuit Court, alleging that Marist Fathers of Detroit, Inc., denied her admission to its high school because of her learning disability in violation of MCL 37.1402 of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. Plaintiff attended the middle school division of Notre Dame Preparatory High School and Marist Academy, but defendant denied her admission to the high school division of its school. Defendant moved for summary disposition under MCR 2.116(C)(4) and (10), arguing that under the ecclesiastical abstention doctrine, the circuit court lacked subject-matter jurisdiction to review the admission decision of a religious school, that the PWDCRA does not apply to religious schools, and that even if the act did apply to defendant, there was no genuine dispute that defendant's decision was based on plaintiff's academic record, not her learning disability. Plaintiff sought a preliminary injunction. The court, Rudy J. Nichols, J., denied defendant's (C)(4) motion, concluding that the court had subject-matter jurisdiction over plaintiff's PWDCRA claim. The court also denied defendant's (C)(10) motion, reasoning that the motion was premature because discovery had just started and that plaintiff had failed to establish that the PWDCRA does not apply to religious schools. The court also denied plaintiff's request for a preliminary injunction. Defendant appealed. In an unpublished per curiam opinion issued November 12, 2015, the Court of Appeals, SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ., reversed the trial court's order and remanded the case to the trial court for entry of summary disposition in favor of defendant under MCR 2.116(C)(4). The Court of Appeals concluded that, under the First Amendment, the trial court lacked subject-matter jurisdiction to review defendant's admission decision, reasoning that courts may not analyze the decision-making process of a religious institution. The Court of Appeals accordingly declined to address defendant's argument that the PWDCRA does not apply to religious schools and defendant's remaining (C)(10) arguments that were not resolved by the trial court. Plaintiff sought leave to

appeal. In lieu of granting leave to appeal, the Supreme Court reversed the Court of Appeals' judgment and held that the ecclesiastical abstention doctrine does not operate to divest courts of subject-matter jurisdiction. The Supreme Court remanded the case to the Court of Appeals to consider defendant's argument that it was entitled to summary disposition because the PWDCRA did not apply to its school.

On remand, the Court of Appeals *held*:

MCL 37.1401 defines the term "educational institution" as a public or private school and includes examples of both public and private institutions, but it does not specifically refer to religious, denominational, or parochial schools. Although defendant did not deny that it operated a private school, defendant contended that the PWDCRA did not apply to its school because the statutory language defining the educational institutions to which the PWDCRA applies does not mention religious schools. Dictionary definitions of the term "private school," however, indicate that the term "private school" includes schools maintained by religious organizations and nongovernmental agencies. And related statutory provisions also support the conclusion that the PWDCRA's definition of the term "educational institution" includes schools run by religious organizations. Defendant's school therefore qualifies as an educational institution under the PWDCRA. On remand, the trial court must first determine whether and to what extent the adjudication of the legal and factual issues presented by plaintiff's claim would require the resolution of ecclesiastical questions—and thus, deference to any answers defendant provided to those questions. If the trial court determines that the issues are subject to its disposition, the trial court must then determine whether defendant violated the PWDCRA when it denied plaintiff admission to its high school.

Trial court ruling affirmed and case remanded to the trial court.

CIVIL RIGHTS — PERSONS WITH DISABILITIES CIVIL RIGHTS ACT — WORDS AND PHRASES — "EDUCATIONAL INSTITUTIONS" — RELIGIOUS SCHOOLS.

A religious school is an educational institution for purposes of the Persons With Disabilities Civil Rights Act (MCL 37.1401).

Nacht, Roumel, Salvatore, Blanchard & Walker, PC (by *Nicholas Roumel*) and *Fried Saperstein Abbatt PC* (by *Harold S. Fried* and *Layne A. Sakwa*) for Bettina Winkler.

Bodman PLC (by *Karen L. Piper* and *Thomas J. Rheaume, Jr.*) for Marist Fathers of Detroit, Inc.

Amicus Curiae:

Chris E. Davis for Michigan Protection & Advocacy Service, Inc.

ON REMAND

Before: SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM. This case returns to us on remand from the Michigan Supreme Court. In this action alleging discrimination under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., this panel, relying on *Dlaikan v Roodbeen*, 206 Mich App 591; 522 NW2d 719 (1994), previously held that the trial court "does not have subject-matter jurisdiction to review plaintiff's claim based on constitutional protections afforded by the First Amendment." *Winkler v Marist Fathers of Detroit, Inc*, unpublished per curiam opinion of the Court of Appeals, issued November 12, 2015 (Docket No. 323511), p 5. Therefore, this Court reversed the trial court's order denying defendant's motion for summary disposition. *Id*. In an opinion issued on June 27, 2017, the Michigan Supreme Court reversed this Court's decision. The Michigan Supreme Court explained:

> While *Dlaikan* and some other decisions have characterized the ecclesiastical abstention doctrine as depriving civil courts of subject matter jurisdiction, it is clear from the doctrine's origins and operation that this is not so. The ecclesiastical abstention doctrine may affect how a civil court exercises its subject matter jurisdiction over a given claim; it does not divest a court of such jurisdiction

> altogether. To the extent *Dlaikan* and other decisions are inconsistent with this understanding of the doctrine, they are overruled. [*Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 330; 901 NW2d 566 (2017).]

The Michigan Supreme Court remanded the case to this Court to consider defendant's alternative argument that it was entitled to summary disposition because the PWDCRA does not apply to defendant's school. *Id*. at 344.

I. FACTS AND PROCEDURAL HISTORY

This Court's earlier opinion recites the following factual history underlying this case:

> Notre Dame Marist Academy (Marist) is a private, Catholic middle school in Pontiac, Michigan. Notre Dame Preparatory School (Notre Dame) is a private, Catholic high school in Pontiac, Michigan. Together, Marist and Notre Dame constitute the defendant in this case, Marist Fathers of Detroit, Inc, [doing business as] Notre Dame Preparatory High School and Marist Academy. Plaintiff, Bettina Winkler, enrolled in Marist as both a seventh-grade and eighth-grade student. According to plaintiff's complaint, she was "assured on numerous occasions that if she enrolled at Marist for 7th and 8th grade, she would be guaranteed placement in Notre Dame Prep for High School 9th grade." However, plaintiff was not granted admission to Notre Dame. Approximately two months after being denied admission to Notre Dame, plaintiff was diagnosed with certain learning disabilities.[1] Thereafter, this lawsuit was filed, alleging in pertinent part discrimination under the Persons With Disabilities Civil Rights Act (PWDCRA), [MCL 37.1101] *et seq*. Plaintiff alleged that despite being "long aware that [she] had a learning

[1] According to the complaint, plaintiff was diagnosed with moderate dyslexia and dyscalculia on March 20, 2014, along with "a specific learning disability in math, Attention Deficit/Hyperactivity Disorder (ADHD), and an adjustment disorder with anxiety."

> disability," defendant denied her admission to Notre Dame and "consistently relied upon her learning disability . . . as a justification" for doing so. [*Winkler*, unpub op at 1-2.]

Procedurally, in the trial court, plaintiff's parents, Helga Dahm Winkler and Marvin Winkler, filed a complaint on behalf of their daughter, alleging disability discrimination under the PWDCRA, violation of Michigan's Consumer Protection Act (MCPA), MCL 445.901 *et seq*., and claims of tortious fraud and misrepresentation.[2] Defendant moved for summary disposition under MCR 2.116(C)(4) and (10). Defendant claimed that summary disposition was warranted pursuant to MCR 2.116(C)(4) and focused primarily on this Court's prior ruling in *Dlaikan*, asserting that civil courts lacked subject-matter jurisdiction over a religious school's admissions decisions pursuant to the First Amendment of the United States Constitution. Defendant also sought summary disposition under MCR 2.116(C)(10), arguing that it was not aware of plaintiff's disability at the time she was denied admission to the high school and that it had provided accommodations to plaintiff after learning of plaintiff's disability. Plaintiff responded to the motion, asserting, in relevant part, that defendant's status as a religious school did not exempt it from being subject to the PWDCRA. Plaintiff further asserted that defendant was on notice in 2012 of plaintiff's attention-deficit/hyperactivity disorder (ADHD) diagnosis and suspected learning disability. Plaintiff also argued that *Dlaikan* was not applicable and was factually distinguishable from this case. In reply, defendant asserted that as a private school, it did not fall within the ambit of the PWDCRA.

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[2] Plaintiff voluntarily dismissed her MCPA, fraud, and misrepresentation claims.

The trial court issued an opinion and order denying defendant's motion for summary disposition. As relevant to the issue on remand, the trial court denied defendant's motion for summary disposition under MCR 2.116(C)(10), explaining, in pertinent part, as follows:

> While the [PWDCRA] does not expressly address religious schools, it is basic that under rules of statutory construction, words and phrases are to be construed according to the ordinary rules of grammar and dictionary meanings. Here it appears that Notre Dame Prep High School is a public or private institution or school system; Defendant fails to establish that the PWDCRA does not apply to the Notre Dame Prep High School given [the applicable] definitions in the Act. [Citations omitted.]

Defendant filed an application for leave to appeal in this Court, which was granted.[3] On appeal in this Court, as relevant to this remand, defendant argued that the PWDCRA is not applicable to religious schools. Plaintiff responded that the PWDCRA was clearly applicable to religious schools given the definition of an educational institution in MCL 37.1401, demonstrating the Legislature's decision to not exempt such schools.[4] As noted, this Court reversed the trial court's ruling; we concluded that the trial court lacked subject-matter jurisdiction because defendant's actions

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[3] *Winkler v Marist Fathers of Detroit, Inc*, unpublished order of the Court of Appeals, entered December 18, 2014 (Docket No. 323511).

[4] On appeal, plaintiff's position was supported by an amicus curiae brief filed by Michigan Protection & Advocacy Service, Inc. In agreement with plaintiff's position that the PWDCRA was applicable to religious schools, the amicus curiae brief focused on the plain language of MCL 37.1401, asserting that the wording of the statute did not contain any limitations or exceptions to the word "private." It further asserted that defendant's focus on the language or content of unrelated statutes was irrelevant because the other statutes were not *in pari materia* with MCL 37.1401.

in denying plaintiff admission to its school were protected by the First Amendment. Accordingly, this Court did not reach the issue whether defendant is an "educational institution" as contemplated by MCL 37.1401.

Plaintiff subsequently filed an application for leave to appeal in the Michigan Supreme Court, and following the submission of briefs and oral argument, the Michigan Supreme Court issued an opinion holding, in pertinent part, as follows:

> The existence of subject matter jurisdiction turns not on the particular facts of the matter before the court, but on its general legal classification. By contrast, application of the ecclesiastical abstention doctrine is not determined by reference to the category or class of case the plaintiff has stated. . . . What matters instead is whether the actual adjudication of a particular legal claim would require the resolution of ecclesiastical questions; if so, the court must abstain from resolving those questions itself, defer to the religious entity's resolution of such questions, and adjudicate the claim accordingly. The doctrine, in short, requires a case-specific inquiry that informs how a court must adjudicate certain claims within its subject matter jurisdiction; it does not determine whether the court has such jurisdiction in the first place. The instant panel thus erred, albeit understandably, in deeming summary disposition warranted under MCR 2.116(C)(4), and we reverse that determination. [*Winkler*, 500 Mich at 341 (citations omitted).]

The Michigan Supreme Court noted that defendant, even without disputing "this general understanding of the ecclesiastical abstention doctrine," also argued that plaintiff's claim of an alleged violation of the PWDCRA could not survive application of the doctrine. *Id*. at 342. Specifically, defendant argued that despite the ability of a civil court to exercise jurisdiction over plaintiff's "challenge to its admissions decision, the court cannot disrupt that decision or award the plain-

tiff relief as to it without impermissibly passing judgment on ecclesiastical matters." *Id*. Defendant's argument was premised on "an analogy between the students of its high school and the clergy and membership of a church." *Id*. Arguing that church authorities maintain the final say in matters of expulsion or excommunication from the church and that civil courts cannot interfere in such decisions, defendant contended that "[a] parochial school's admission or expulsion of a student is no different . . . given the 'integral part' such a school can play in furthering 'the religious mission of the Catholic Church' and in 'transmitting the Catholic faith to the next generation.' " *Id*. at 343 (citation omitted).

In response, the Michigan Supreme Court stated, in pertinent part:

> Whether this analogy is generally sound, and whether it holds up in the instant case (or in *Dlaikan*, for that matter), we see no reason to reach at this time. It is for the circuit court, in the first instance, to determine whether and to what extent the adjudication of the legal and factual issues presented by the plaintiff's claim would require the resolution of ecclesiastical questions (and thus deference to any answers the church has provided to those questions). It is enough for our purposes here to clarify that, contrary to the suggestion of *Dlaikan* and other decisions, the circuit court does, in fact, have subject matter jurisdiction over the plaintiff's claim, and the judicial power to consider it and dispose of it in a manner consistent with the guarantees of the First Amendment. Simply put, to the extent that application of the ecclesiastical abstention doctrine might still prove fatal to the plaintiff's claim for relief under the PWDCRA, it will not be for lack of "jurisdiction of the subject matter" under MCR 2.116(C)(4). [*Id*. at 343-344.]

Consequently, the Michigan Supreme Court reversed this Court's judgment regarding defendant's entitle-

ment under MCR 2.116(C)(4) to summary disposition of the jurisdictional issue. With reference to the issue currently on remand before this Court, our Supreme Court stated:

> As to the defendant's entitlement to summary disposition under MCR 2.116(C)(10), the Court of Appeals previously declined to reach those arguments on which the circuit court had not yet ruled; we see no reason to disrupt that decision. The circuit court did, however, reject the defendant's argument that the PWDCRA does not apply to its school, a ruling which the defendant challenged on appeal but which the panel saw no need to review given its jurisdictional determination. Having reversed the jurisdictional determination, we remand this matter to the Court of Appeals for consideration of that challenge. [*Id*. at 344.]

II. ANALYSIS

The issue on remand—whether the PWDCRA is applicable to defendant, a religious school—is significant, yet narrow in focus. On remand, we are not instructed to evaluate whether defendant violated the PWDCRA with regard to its dealings with plaintiff. Rather, the Michigan Supreme Court has directed us to address only the first step in analyzing plaintiff's claim—whether defendant's school qualifies as an "educational institution" as that term is defined in MCL 37.1401.

The starting point in our analysis is the statutory language at issue, and our analysis is guided by the rules of statutory construction. Certain legal principles are widely recognized concerning statutory construction. Specifically,

> [a] court's primary goal when interpreting a statute is to discern legislative intent first by examining the plain language of the statute. [*Driver v Naini*, 490 Mich 239,

> 246-247; 802 NW2d 311 (2011).] Courts construe the words in a statute in light of their ordinary meaning and their context within the statute as a whole. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). A court must give effect to every word, phrase, and clause, and avoid an interpretation that renders any part of a statute nugatory or surplusage. *Id*. Statutory provisions must also be read in the context of the entire act. *Driver*, 490 Mich at 247. It is presumed that the Legislature was aware of judicial interpretations of the existing law when passing legislation. *People v Likine*, 492 Mich 367, 398 n 61; 823 NW2d 50 (2012). When statutory language is clear and unambiguous, courts enforce the language as written. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246-247; 801 NW2d 629 (2010). [*Lee v Smith*, 310 Mich App 507, 509; 871 NW2d 873 (2015).]

Further:

> "Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006) (quotation marks and citation omitted). The purpose of judicial statutory construction is to ascertain and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). In determining the Legislature's intent, we must first look to the language of the statute itself. *Id*. Moreover, when considering the correct interpretation, the statute must be read as a whole. *Id*. at 237. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. *Walters v Leech*, 279 Mich App 707, 709-710; 761 NW2d 143 (2008). The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. *Id*. at 710; see also *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930). 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 Complaint of*

Pelland Against Ameritech Michigan, 254 Mich App 675, 687; 658 NW2d 849 (2003); *Lumley v Univ of Michigan Bd of Regents*, 215 Mich App 125, 129-130; 544 NW2d 692 (1996) . . . . [*In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009).]

MCL 37.1102 sets forth the purpose underlying the enactment of the PWDCRA as follows:

(1) The opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right.

(2) Except as otherwise provided in article 2 [MCL 37.1201 *et seq*.], a person shall accommodate a person with a disability for purposes of employment, public accommodation, public service, education, or housing unless the person demonstrates that the accommodation would impose an undue hardship.

MCL 37.1402, which is part of Article 4 of the PWDCRA, MCL 37.1401 *et seq*., prohibits certain actions by an "educational institution." Specifically, MCL 37.1402 states as follows:

An educational institution shall not do any of the following:

(a) Discriminate in any manner in the full utilization of or benefit from the institution, or the services provided and rendered by the institution to an individual because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution or its services, or because of the use by an individual of adaptive devices or aids.

(b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, because of a disability that is unrelated to the individual's ability to

> utilize and benefit from the institution, or because of the use by an individual of adaptive devices or aids.
>
> (c) Make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information, or make or keep a record, concerning the disability of an applicant for admission for reasons contrary to the provisions or purposes of this act.
>
> (d) Print or publish or cause to be printed or published a catalog or other notice or advertisement indicating a preference, limitation, specification, or discrimination based on the disability of an applicant that is unrelated to the applicant's ability to utilize and benefit from the institution or its services, or the use of adaptive devices or aids by an applicant for admission to the educational institution.
>
> (e) Announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of a disability that is unrelated to the group or member's ability to utilize and benefit from the institution or its services, or because of the use by the members of a group or an individual in the group of adaptive devices or aids.
>
> (f) Develop a curriculum or utilize textbooks and training or learning materials which promote or foster physical or mental stereotypes.

With regard to educational institutions, MCL 37.1103(d) defines "disability" to include:

> (*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> * * *
>
> (C) For purposes of article 4 [MCL 37.1401 *et seq*.], is unrelated to the individual's ability to utilize and benefit from educational opportunities, programs, and facilities at an educational institution.

MCL 37.1401 defines "educational institution" in the following manner:

> As used in this article, "educational institution" *means a public or private institution or a separate school or department of a public or private institution*, includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, school district, or university, and a business, nursing, professional, secretarial, technical, or vocational school, and includes an agent of an educational institution. [Emphasis added.]

Thus, the restrictions in MCL 37.1402 apply to defendant if defendant qualifies as an "educational institution" under MCL 37.1401.

Primarily, defendant argues that because the definition of an "educational institution" in MCL 37.1401 does not specifically refer to religious, denominational, or parochial schools, it does not encompass defendant's institutions. In support of this position, defendant identifies other statutes that include more specific references, arguing that omission of the words "denominational," "parochial," and "religious" indicates that the Legislature intended to omit such organizations from the ambit of MCL 37.1401. Defendant also relies on caselaw indicating that "when enacting legislation, the Legislature is presumed to be fully aware of existing laws . . . ." *In re Medina*, 317 Mich App 219, 227; 894 NW2d 653 (2016) (quotation marks and citation omitted). In addition, 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[.]" *Id*. (quotation marks and citations omitted; alteration in original). We disagree with defendant's interpretation of the statutory language.

In our view, defendant's position does not adhere to broader rules of statutory construction. As noted, "[t]he primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature," and "[t]he first criterion in determining intent is the specific language of the statute." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 101-102; 693 NW2d 170 (2005). Importantly, "[t]he Legislature is presumed to have intended the meaning it plainly expressed." *Id*. at 102. Consequently, "[n]othing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Id*. The identified and stated purpose of the PWDCRA is to afford opportunities for access to housing, employment, and education "without discrimination because of a disability" and to mandate accommodations for individuals "with a disability" to fulfill this goal. MCL 37.1102(1) and (2). To achieve the stated purpose, MCL 37.1401 identifies an "educational institution" as including "a public or private institution or a separate school or department of a public or private institution," including "elementary or secondary school[s]." Notably, defendant does not dispute its status as a "private" school; rather, it contends that omission from the statute of language specific to religious schools obviates the statute's application to defendant. According to *Black's Law Dictionary* (10th ed), p 1546, a "private school" is defined as "[a] school maintained by private individuals, religious organizations, or corporations, funded, at least in part, by fees or tuition, and open only to pupils selected and admitted based on religious affiliations or other particular qualifications."[5]

[5] Where a word is not otherwise defined in a statute, this Court may turn to dictionary definitions for guidance in interpreting the statute. *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 254 n 27; 901 NW2d 534 (2017).

In addition, "private school" is defined in *Merriam-Webster's Collegiate Dictionary* (11th ed) as "a school that is established, conducted, and primarily supported by a nongovernmental agency." Given these definitions, the term "private school" must be broadly construed to encompass schools run by nongovernmental agencies, including religious organizations, such as defendant. Therefore, we conclude that defendant's schools qualify as "educational institutions" as that term is defined by MCL 37.1401. Our determination is buttressed by related statutory provisions contained in the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and the private, denominational, and parochial schools act, MCL 388.551 *et seq*.

First addressing the CRA, MCL 37.2401 provides a definition of the term "educational institution" that is almost identical to the definition set forth in the PWDCRA. Specifically, MCL 37.2401 states:

> As used in this article, "educational institution" means a public or private institution, or a separate school or department thereof, and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, local school system, university, or a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

Similar to the PWDCRA, the CRA also identifies prohibited practices of educational institutions to include the following:

> An educational institution shall not do any of the following:
>
> (a) Discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.

> (b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution, because of religion, race, color, national origin, or sex.
>
> (c) For purposes of admission only, make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the religion, race, color, national origin, age, sex, or marital status of a person, except as permitted by rule of the commission or as required by federal law, rule, or regulation, or pursuant to an affirmative action program.
>
> (d) Print or publish or cause to be printed or published a catalog, notice, or advertisement indicating a preference, limitation, specification, or discrimination based on the religion, race, color, national origin, or sex of an applicant for admission to the educational institution.
>
> (e) Announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of religion, race, color, national origin, or sex. [MCL 37.2402.]

Notably, the CRA provides an exception in MCL 37.2403, which states that "[t]he provisions of [MCL 37.2402] related to religion shall not apply to a religious educational institution or an educational institution operated, supervised, or controlled by a religious institution or organization which limits admission or gives preference to an applicant of the same religion." The CRA's statutory language illustrates that the Legislature clearly intended that the term "educational institution" be broadly and inclusively interpreted unless an exception is specifically set forth, as the Legislature did in MCL 37.2403. Consequently, we conclude that the rules of statutory construction do not favor defendant's position.

Similarly, a review of the private, denominational, and parochial school act, MCL 388.551 *et seq*., is

contrary to defendant's interpretation of the PWDCRA. The stated purpose of this act is "to provide for the supervision of private, denominational and parochial schools; to provide the manner of securing funds in payment of the expense of such supervision; to provide the qualifications of the teachers in such schools; and to provide for the endorsement of the provisions hereof." 1921 PA 302, title. Specifically, in accordance with MCL 388.552, "[a] private, denominational or parochial school within the meaning of this act *shall be any school* other than a public school giving instruction to children below the age of sixteen years, in the first eight grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state." (Emphasis added.) While defendant suggests that the inclusion of the words "denominational or parochial school," in addition to the word "private," is consistent with its position regarding the meaning attributable to the omission of such wording in MCL 37.1401, it may just as easily be construed that the use of the words "private, denominational or parochial" serves to reference any nonpublic institution encompassed by MCL 388.552, and also emphasizes the inclusiveness of the use of the term "private" in MCL 37.1401.

In support of its position, defendant also cites language in a variety of other statutes that define or identify schools as religious, denominational, or parochial. Defendant specifically refers to the following statutory provisions:

- MCL 333.7410(8)(b),[6] which is part of the Public Health Code, MCL 333.1101 *et seq*., defines

[6] Defendant refers to this statutory provision as MCL 333.7410(6)(b), which reflects the provision's iteration before it was amended by 2016 PA 128, effective August 23, 2016.

"school property" to include "public, private, denominational, or parochial school" property.

- MCL 207.213, which is part of the motor carrier fuel tax act, MCL 207.211 *et seq*., refers to the taxation of commercial motor vehicles and exempts those "owned by, or leased and operated by, a nonprofit private, parochial, or denominational, school . . . ."
- MCL 207.1030(1)(c), which is also part of the motor carrier fuel tax act, refers to the exemption of motor fuel from taxation when "sold directly by the supplier to a nonprofit, private, parochial, or denominational school . . . and . . . used in a school bus owned and operated . . . by the educational institution . . . ."
- MCL 257.627a(1)(b), which is part of the Michigan Vehicle Code, MCL 257.1 *et seq*., defines "school" to "mean[] an educational institution operated by a local school district or by a private, denominational, or parochial organization."
- MCL 750.212a(2)(e), which is part of the Michigan Penal Code, MCL 750.1 *et seq*., defines "vulnerable target" to include "[a] public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade 1 through 12."
- MCL 28.733(d), which is part of the Sex Offenders Registration Act, MCL 28.721 *et seq*., defines "school" to mean "a public, private, denominational, or parochial school . . . ."

"Contrary to [defendant's] claim, use of the *in pari materia* canon of construction does not aid [defendant's] cause." *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 73; 894 NW2d 535 (2017). "*In pari materia* (or the related-statutes canon) provides that

'laws dealing with the same subject . . . should if possible be interpreted harmoniously.' " *Id*. at 73 n 26 (citation omitted).[7] Predominantly, the *in pari materia* doctrine is inapplicable to the statutes defendant identifies because the statutes do not "deal[] with the same subject" matter as the PWDCRA. *Id*. The canon does, however, support plaintiff's allegation regarding the applicability of the PWDCRA in this case when compared with similar provisions in the CRA, because both deal with civil rights, share a common purpose, and "form a part of one regulatory scheme . . . ." *Measel v Auto Club Group Ins Co*, 314 Mich App 320, 329 n 7; 886 NW2d 193 (2016) (quotation marks and citation omitted). Therefore, on the basis of the plain and unambiguous language of MCL 37.1401, we agree with plaintiff that defendant qualifies as an "educational institution" for purposes of the PWDCRA.

We also note that the applicability of the PWDCRA to defendant is consistent with caselaw pertaining to standing and the PWDCRA, which indicates that

> the PWDCRA requires that "a person shall accommodate a person with a disability for purposes of employment, public accommodation, public service, education, or housing unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1102(2). Thus, when a person offers goods or services to the public, the PWDCRA imposes an affirmative duty to accommodate disabled persons if accommodation can be accomplished without undue hardship on the person offering the

[7] As an aside, we question whether use of the *in pari materia* canon is even of utility here, given its application as an "interpretive aid . . . [which] can only be utilized in a situation where the section of the statute under examination is itself ambiguous." *Tyler v Livonia Pub Sch*, 459 Mich 382, 392; 590 NW2d 560 (1999). "That not being the case here, in pari materia techniques are inappropriate." *Id*. However, we address application of the canon under the present facts because defendant urges this Court to use it as a tool in discerning the meaning of MCL 37.1401.

> goods or services to the public. [*MOSES, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 421; 716 NW2d 278 (2006).]

Clearly, however, a determination that defendant is subject to the PWDCRA does not resolve plaintiff's contention that defendant violated the PWDCRA by denying her admission to its high school. Thus, remand of that claim to the trial court is necessary to address and resolve that issue on the merits. We also take this opportunity to emphasize that the Michigan Supreme Court expressly stated that it will be "for the circuit court, in the first instance, to determine whether and to what extent the adjudication of the legal and factual issues presented by the plaintiff's claim would require the resolution of ecclesiastical questions (and thus deference to any answers the church has provided to those questions)." *Winkler*, 500 Mich at 343. In other words, when determining whether defendant's decision to deny plaintiff admission to its high school violated the PWDCRA, the trial court must remain cognizant of the well-settled legal principle that " 'the court may not substitute its opinion in lieu of that of the authorized tribunals of the church in ecclesiastical matters . . . .' " *Id*. at 338, quoting *First Protestant Reformed Church v DeWolf*, 344 Mich 624, 631; 75 NW2d 19 (1956).

III. CONCLUSION

We affirm the trial court's ruling that defendant meets the definition of an educational institution as set forth in MCL 37.1401, and we remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ., concurred.

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID v STATE OF MICHIGAN

Docket Nos. 338258 and 338259. Submitted September 7, 2017, at Lansing. Decided September 21, 2017, at 9:05 a.m.

The Council of Organizations and Others for Education about Parochiaid as well as several other groups (plaintiffs) brought an action in the Court of Claims against the state of Michigan, the Governor, the Department of Education, and the Superintendent of Public Instruction, seeking a declaration that § 152b of 2016 PA 249—which was signed into law on June 27, 2016, and which appropriated $2.5 million to reimburse nonpublic schools for the cost of compliance with various statutes and regulations—was unconstitutional under Const 1963, art 8, § 2, ¶ 2, and Const 1963, art 4, § 30. Plaintiffs additionally sought a writ of mandamus prohibiting the disbursement of funds under § 152b and injunctive relief preventing public funds from going to nonpublic schools. In Docket No. 338258, Immaculate Heart of Mary, two state senators, two state representatives, and several parents (collectively, Immaculate Heart et al.) moved to intervene as parties in interest under MCR 2.209, and in Docket No. 338259, the Michigan Catholic Conference (MCC) and the Michigan Association of Non-Public Schools (MANS) similarly moved to intervene as parties in interest under MCR 2.209. The Court of Claims, CYNTHIA D. STEPHENS, J., denied both motions, concluding that it lacked jurisdiction over nonstate actors as defendants under MCL 600.6419(1)(a). Immaculate Heart et al. and the MCC and MANS filed applications for leave to appeal. The Court of Appeals granted the applications and consolidated the appeals.

The Court of Appeals *held*:

1. The Court of Claims is a court of limited jurisdiction that does not possess the broad and inherent powers of a constitutional court. MCL 600.6419, which specifically outlines the jurisdiction of the Court of Claims, contains a requirement that the action be against the state or any of its departments or officers. Therefore, with regard to the nonstate actors, appellants could not intervene because the Court of Claims lacked subject-matter jurisdiction over them. With regard to the state legislators,

MCL 600.6419(7) defines the phrase "the state or any of its departments or officers," in relevant part, to include an officer of any legislative body of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function. Therefore, the Court of Claims lacks jurisdiction to hear actions against persons who, although public officials, are being sued in their individual capacities. In order for the Court of Claims to have jurisdiction over a claim against an officer of the state, the officer must have been acting, or reasonably believed that he or she was acting, within the scope of his or her authority at the time of the alleged wrongful conduct, not at the time he or she moved to intervene or become part of the action. In this case, plaintiffs brought no claims against any of the state legislators for allegedly wrongful conduct during which they were acting, or reasonably believed that they were acting, within the scope of their authority while engaged in or discharging a government function in the course of their duties. Accordingly, there were no claims or demands against the state legislators for the Court of Claims to have jurisdiction over. The Court of Claims correctly held that it lacked subject-matter jurisdiction over claims against Immaculate Heart et al. and the MCC and MANS.

2. MCL 600.6422(1) provides that the practice and procedure in the Court of Claims shall be in accordance with the statutes and court rules prescribing practice in the circuit courts of this state, except as otherwise provided. MCR 2.209 provides the court rule for intervention of parties in an action. However, MCR 2.209 does not apply when the court does not have statutory jurisdiction to decide a proposed intervenor's rights. In this case, MCR 2.209 did not apply because the Court of Claims lacked statutory jurisdiction over claims against Immaculate Heart et al. and the MCC and MANS.

Affirmed.

1. COURTS — COURT OF CLAIMS — JURISDICTION — CLAIMS AGAINST A STATE OFFICER.

MCL 600.6419, which specifically outlines the jurisdiction of the Court of Claims, contains a requirement that the action be against the state or any of its departments or officers; MCL 600.6419(7) defines the phrase "the state or any of its departments or officers," in relevant part, to include an officer of any legislative body of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function; in order

for the Court of Claims to have jurisdiction over a claim against an officer of the state, the officer must have been acting, or reasonably believed that he or she was acting, within the scope of his or her authority at the time of the alleged wrongful conduct, not at the time he or she moved to intervene or become part of the action.

2. COURTS — COURT OF CLAIMS — JURISDICTION — INTERVENTION OF PARTIES.

MCL 600.6422(1) provides that the practice and procedure in the Court of Claims shall be in accordance with the statutes and court rules prescribing practice in the circuit courts of this state, except as otherwise provided; MCR 2.209 provides the court rule for intervention of parties in an action; MCR 2.209 does not apply when the court does not have statutory jurisdiction to decide a proposed intervenor's rights.

White Schneider PC (by *Jeffrey S. Donahue* and *Andrew J. Gordon*) for the Council of Organizations and Others for Education about Parochiaid.

Daniel S. Korobkin, *Kristin Totten*, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union of Michigan, Michigan Parents for Schools, and 482Forward.

Dickinson Wright PLLC (by *Brandon C. Hubbard* and *Ariana F. Pellegrino*) for the Michigan Association of School Boards, the Michigan Association of School Administrators, Michigan School Business Officials, the Michigan Association of Intermediate School Administrators, the Michigan Association of Secondary School Principals, the Middle Cities Education Association, the Michigan Elementary and Middle School Principals Association, the Kalamazoo Public Schools, and the Kalamazoo Public Schools Board of Education.

Bursch Law PLLC (by *John J. Bursch*), *Doster Law Offices, PLLC* (by *Eric E. Doster*), and *Warner Norcross & Judd LLP* (by *Conor B. Dugan* and *Brian P. Lennon*) for Immaculate Heart of Mary, Senator Phil Pavlov, Senator Patrick Colbeck, Representative Tim Kelly,

Representative Kim LaSata, Stephen Sanford, Jennifer Sanford, Nathaniel Chol, Rochiel Atem, Andrew Lauppe, Carrie Lauppe, Stephen Sweetland, and Bernadine Sweetland in Docket No. 338258.

Dykema Gossett PLLC (by *Lori McAllister*, *Leonard C. Wolfe*, *Courtney F. Kissel*, and *Kyle M. Asher*) for the Michigan Catholic Conference and the Michigan Association of Non-Public Schools in Docket No. 338259.

Before: HOEKSTRA, P.J., and METER and K. F. KELLY, JJ.

METER, J. In Docket No. 338258, Immaculate Heart of Mary, Senator Phil Pavlov, Senator Patrick Colbeck, Representative Tim Kelly, Representative Kim LaSata, Stephen Sanford, Jennifer Sanford, Nathaniel Chol, Rochiel Atem, Andrew Lauppe, Carrie Lauppe, Stephen Sweetland, and Bernadine Sweetland (collectively, Immaculate Heart et al.) moved to intervene as defendants in a lawsuit filed by plaintiffs. In Docket No. 338259, the Michigan Catholic Conference (MCC) and the Michigan Association of Non-Public Schools (MANS) moved to intervene as defendants in the same lawsuit filed by plaintiffs. Plaintiffs' complaint named the state of Michigan, the Governor, the Department of Education, and the Superintendent of Public Instruction as defendants. The Court of Claims denied the motions to intervene. Thereafter, Immaculate Heart et al. and the MCC and MANS filed applications for leave to appeal, and this Court granted the applications and consolidated the appeals. *Council of Organizations & Others for Ed About Parochiaid v Michigan*, unpublished order of the Court of Appeals, entered May 11, 2017 (Docket No. 338258); *Council of Organizations & Others for Ed About Parochiaid v Michigan*, unpub-

lished order of the Court of Appeals, entered May 11, 2017 (Docket No. 338259). Thus, Immaculate Heart et al. and the MCC and MANS now appeal by leave granted. We conclude that the Court of Claims lacked subject-matter jurisdiction over claims against Immaculate Heart et al. and the MCC and MANS, and therefore we affirm the decision of the Court of Claims to deny the motions to intervene.

Plaintiffs filed their complaint on March 21, 2017. The complaint asserted that although Const 1963, art 8, § 2, ¶ 2, prohibits public funds from being used to aid private, denominational, or other nonpublic schools, § 152b of 2016 PA 249, which was signed into law on June 27, 2016, appropriated $2.5 million to reimburse nonpublic schools for the cost of compliance with various statutes and regulations. The complaint further asserted that although Const 1963, art 4, § 30, requires approval from two-thirds of both the Senate and House of Representatives in order to appropriate public money for private purposes, 2016 PA 249 did not pass through the Senate by a two-thirds vote. The complaint sought a declaration that the appropriation of funds under § 152b was unconstitutional under Const 1963, art 8, § 2, ¶ 2, and Const 1963, art 4, § 30; a writ of mandamus prohibiting the Superintendent of Public Instruction and the Michigan Department of Education from disbursing funds under § 152b; and injunctive relief preventing public funds from going to nonpublic schools.

On March 28, 2017, the MCC and MANS moved to intervene as parties in interest under MCR 2.209. The MCC and MANS indicated that, as organizations, they have fought to protect the rights of students enrolled in Michigan's nonpublic schools. In part, the MCC and MANS asserted that § 152b properly permits nonpub-

lic schools to seek reimbursement for compliance with various state-mandated health, safety, and welfare requirements. The MCC and MANS argued that they had the right to intervene because they filed a timely application, that they had an interest in the subject of the action that would be affected by the outcome of the action, and that their interests may not be adequately represented by the named parties. The MCC and MANS explained that they and their members would incur loss if § 152b were found unconstitutional, that they would provide a unique perspective to the case because they had firsthand knowledge of how funds are used and of school operations, and that "no party currently involved in this litigation stands to lose in the way that Intervenors' members and students do." In the alternative, the MCC and MANS argued that they should be allowed to intervene on a permissive basis because they filed a timely application, their defense involved a common question of law with the proceeding, and their participation would not cause prejudice or delay.

In April 2017, Immaculate Heart et al. moved to intervene as parties in interest under MCR 2.209.[1] Immaculate Heart et al. attached a proposed answer to their motion, and the proposed answer asserted that Const 1963, art 8, § 2, ¶ 2, was added by Proposal C, the adoption of which was "the direct result of a smear campaign against the Catholic Church and Catholic

[1] According to the briefs, the individuals who are not state legislators are parents who "have children who attend private religious schools, have children who attend public schools but wish to send those children to private religious schools, or both." In addition, "[p]roposed intervening defendant Representative Tim Kelly voted in support of 2016 PA 249, and he, along with Senator Phil Pavlov, Senator Patrick Colbeck, and Representative Kim LaSata, seek to enforce the policy the legislation [sic] enacted in Section 152b."

schools, orchestrated by the Council Against Parochiaid and its allies." The proposed answer further asserted that § 152b of 2016 PA 249 was valid because Const 1963, art 8, § 2, ¶ 2, was unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

Immaculate Heart et al. filed a brief in support of their motion and argued that they could intervene as of right because their application was timely, they had an interest in the action, and the named parties would not adequately represent their interests. Immaculate Heart et al. further argued that the state defendants could not take the legal position that Const 1963, art 8, § 2, ¶ 2, was unconstitutional. In the alternative, Immaculate Heart et al. argued that they should be allowed to intervene on a permissive basis because they filed a timely application, their defense involved a common question of law with the proceeding, and their participation would not cause prejudice or delay.

On April 11, 2017, the MCC and MANS filed a proposed answer, which asserted their position outlined in their motion to intervene. The proposed answer also alleged that plaintiffs failed to state a claim, that some or all plaintiffs lacked standing, and that Const 1963, art 8, § 2, ¶ 2, was unconstitutional under the First and Fourteenth Amendments of the United States Constitution if interpreted in the way plaintiffs asserted.

On May 2, 2017, the trial court issued an opinion and order denying both motions to intervene. The trial court concluded that the MCC and MANS established a basis to intervene under MCR 2.209; however, the trial court noted that it must deny the motion to intervene if it lacked jurisdiction to decide the proposed intervenors' rights. The trial court explained that it lacked jurisdiction over nonstate actors as

defendants under MCL 600.6419(1)(a) and held that it must deny the motions to intervene. As part of its jurisdictional discussion, the trial court noted that if not for the jurisdictional issue, "the motion to intervene as defendants by Immaculate Heart of Mary *et. al*. would be redundant and their proposed interest would be adequately represented by MCC and MANS." The trial court further noted that "to the extent the state legislators could be considered to have sought intervention in their roles as state legislators, the [c]ourt would be disinclined to find that their interests were not already adequately represented by the named state Defendants and the Attorney General."

Immaculate Heart et al. now appeal by leave granted in Docket No. 338258, and the MCC and MANS now appeal by leave granted in Docket No. 338259.

On May 22, 2017, this Court issued an order staying the proceedings in part. *Council of Organizations & Others for Ed v Michigan*, unpublished order of the Court of Appeals, entered May 22, 2017 (Docket No. 338258).[2]

Appellants contend that the Court of Claims erred by ruling that it could not grant the motions to intervene because of a lack of subject-matter jurisdiction.

"Whether the trial court had subject-matter jurisdiction is a question of law that this Court reviews de novo." *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016) (quotation marks and citation

[2] This Court subsequently granted a motion for partial relief from stay, allowing "plaintiffs to make a filing(s) in the Court of Claims in accordance with the verification requirements of MCL 600.6431." *Council of Organizations & Others for Ed v Michigan*, unpublished order of the Court of Appeals, entered June 21, 2017 (Docket Nos. 338258 and 338259).

omitted). "We review de novo questions of statutory interpretation, with the fundamental goal of giving effect to the intent of the Legislature." *Id*. "That intent is clear if the statutory language is unambiguous, and the statute must then be enforced as written." *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003), amended on other grounds 468 Mich 1216 (2003).

For purposes of this appeal, we will assume, without deciding, that all appellants would be allowed to intervene if solely the intervention court rule, MCR 2.209, were under consideration. MCR 2.209 states:

> (A) Intervention of Right. On timely application a person has a right to intervene in an action:
>
> (1) when a Michigan statute or court rule confers an unconditional right to intervene;
>
> (2) by stipulation of all the parties; or
>
> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (B) Permissive Intervention. On timely application a person may intervene in an action
>
> (1) when a Michigan statute or court rule confers a conditional right to intervene; or
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> (C) Procedure. A person seeking to intervene must apply to the court by motion and give notice in writing to all parties under MCR 2.107. The motion must

> (1) state the grounds for intervention, and
>
> (2) be accompanied by a pleading stating the claim or defense for which intervention is sought.
>
> (D) Notice to Attorney General. When the validity of a Michigan statute or a rule or regulation included in the Michigan Administrative Code is in question in an action to which the state or an officer or agency of the state is not a party, the court may require that notice be given to the Attorney General, specifying the pertinent statute, rule, or regulation.

Notwithstanding this court rule, existing statutory and common law—most notably MCL 600.6419(1) and *Estes v Titus*, 481 Mich 573; 751 NW2d 493 (2008)—demonstrates that appellants could not, in fact, intervene in plaintiffs' lawsuit because the Court of Claims lacked subject-matter jurisdiction over claims against nonstate actors.

"[A] judgment entered by a court that lacks subject-matter jurisdiction is void, [and] subject-matter jurisdiction is established by the *pleadings* and exists when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 561; 840 NW2d 375 (2013) (quotation marks and citations omitted). In other words, "[a] court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint," and "[i]f it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists." *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996). "[T]he [l]ack of jurisdiction of the subject matter may be raised at any time and the parties to an action cannot confer jurisdiction by their conduct or action nor can they waive the

defense by not raising it." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51 n 3; 832 NW2d 728 (2013) (quotation marks and citation omitted; second alteration in *Hillsdale*).

Concerning the jurisdiction of the Court of Claims, MCL 600.6419(1) provides, in part:

> Except as otherwise provided in this section, the court has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

"The Court of Claims is a court of legislative creation. Its statutory powers are explicit and limited." *Feliciano v Dep't of Natural Resources*, 97 Mich App 101, 109; 293 NW2d 732 (1980).[3] "[T]he Court of Claims is a court of limited jurisdiction which does not possess the broad and inherent powers of a constitutional court." *Meda v City of Howell*, 110 Mich App 179, 183; 312 NW2d 202 (1981). "Therefore, the Court of Claims lacks jurisdiction to hear actions against persons who, although public officials, are being sued in their individual capacities." *Id*. "Where a court lacks jurisdiction over the subject matter of a suit, any action with respect to such a cause, other than dismissal, is absolutely void." *Id*. In *Meda*, the Court stated that "the Court of Claims lacked *subject-matter jurisdiction* over defendants in their individual capacities . . . ." *Id*. (emphasis added).

[3] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority[.]" *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

In *Estes*, 481 Mich at 583-584, the Michigan Supreme Court discussed jurisdiction and a motion to intervene under MCR 2.209(A)(3):

> Plaintiff's motion to intervene was based on MCR 2.209(A)(3), which allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties. The court rule would otherwise have applied in the divorce because neither of the Tituses adequately represented plaintiff's interest as a potential creditor. *However, the rule did not apply because the creditor sought to intervene in a divorce action in which the court did not have statutory jurisdiction to decide the intervenor's rights*. Court rules cannot establish, abrogate, or modify the substantive law.
>
> In *Yedinak v Yedinak*, [383 Mich 409; 175 NW2d 706 (1970),] we addressed this same issue in the context of the court rules of permissive and necessary joinder. The majority in *Yedinak* found that nothing in these rules gave the divorce courts "power to disregard statutory provisions pertaining to divorce and to litigate the rights of others than the husband and wife." The same reasoning applies here. The divorce court properly denied plaintiff's motion to intervene in the divorce proceedings, and plaintiff correctly concluded that an appeal from the denial order would have been futile. [Citations omitted; emphasis added.]

MCL 600.6419, which *specifically outlines* the jurisdiction of the Court of Claims, contains a requirement that the action be "against the state or any of its departments or officers . . . ." Indeed the very essence of the Court of Claims is to hear claims against the state. Thus, the nature of a defendant as a private individual necessarily relates to the subject-matter jurisdiction of the Court of Claims. See, e.g., *Meda*, 110 Mich App at 183; see also *Haider v Mich Technological Univ*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 1997 (Docket No. 183350), p 3

(holding that "[b]ecause the individual defendants are not executive officers, the Court of Claims did not have subject-matter jurisdiction over" claims against them).[4]

It is true that MCL 600.6422(1) indicates that "[p]ractice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing practice in the circuit courts of this state, except as otherwise provided in this section." The MCC and MANS therefore argue that MCR 2.209 is the proper authority for determining whether they may intervene. This argument is misguided, however, in light of the clear guidance of *Estes*. Again, in *Estes*, 481 Mich at 583, the Supreme Court stated that MCR 2.209 "would otherwise have applied" but that it did not, in fact, apply because "the court did not have statutory jurisdiction to decide the intervenor's rights." Just as the court did not have statutory jurisdiction to decide the intervenor's rights in *Estes*, the Court of Claims does not have statutory jurisdiction to decide the potential intervenors' rights as defendants in the present case.

The Court of Claims correctly held that given the nature of the proceedings, MCR 2.209 is inapplicable because the Court of Claims lacked subject-matter jurisdiction over claims against appellants as defendants.[5]

Immaculate Heart et al. argues that the state legislators were seeking to intervene in their official capacities and thus cannot be barred from intervening by MCL 600.6419 and *Estes*.

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[4] Unpublished opinions are not binding but may be used as guides. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 20 n 16; 672 NW2d 351 (2003).

[5] Appellants note that Court of Claims cases exist in which no party evidently objected, on jurisdictional grounds, to intervention by non-state parties. The existence of these cases does not mandate reversal in the present case, in which the jurisdictional issue is squarely before us.

MCL 600.6419(7) defines the phrase "the state or any of its departments or officers" as

> this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

The Court of Claims opined that the state legislators were "seeking to intervene in capacities outside of their state governmental roles." On appeal, Immaculate Heart et al. argue that the state legislators were seeking to intervene as legislators, i.e., in the capacity of their governmental roles, by arguing that Const 1963, art 8, § 2, ¶ 2, is unconstitutional. We conclude that both positions misconstrue the definition outlined in MCL 600.6419(7), as used in MCL 600.6419(1)(a).

MCL 600.6419(1)(a) gives the Court of Claims jurisdiction "[t]o hear and determine any . . . demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments or officers . . . ." MCL 600.6419(7) defines the phrase "the state or any of its departments or officers" to include "an officer, employee, or volunteer of . . . any . . . legislative . . . body . . . of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function . . . ." Thus, the Court of Claims has jurisdiction "[t]o hear and determine any . . . demand for . . . equitable[] or declaratory relief . . . against" "an officer . . . [who is] acting . . . within the scope of his or her authority while engaged in or discharging a government function . . . ." When read in the context of a

claim *against* the state's officers, it is clear that for the Court of Claims to have jurisdiction, the officer must have been acting, or reasonably believed he or she was acting, within the scope of his or her authority at the time of the alleged wrongful conduct, not at the time he or she moved to intervene or become a part of the action. Plaintiffs are raising no claims against any of the state legislators for allegedly wrongful conduct during which they were acting, or reasonably believed that they were acting, within the scope of their "authority while engaged in or discharging a government function in the course of [their] duties." There were, simply, no claims or demands against the state legislators for the Court of Claims to have jurisdiction over.[6]

Affirmed.

HOEKSTRA, P.J., and K. F. KELLY, J., concurred with METER, J.

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[6] It is tempting to conclude that because Representative Tim Kelly voted in favor of 2016 PA 249, MCL 600.6419 encompasses him. However, we must construe MCL 600.6419 as written, *Weakland*, 467 Mich at 347, and plaintiffs are not making a claim against him for that vote. In other words, plaintiffs are not alleging wrongful conduct on the part of individual legislators but are seeking a declaration that the vote *as a whole* is necessarily limited by the Michigan Constitution and that the state, the Governor, the Department of Education, and the Superintendent of Public Instruction must not enforce it.

VULIC v DEPARTMENT OF TREASURY

Docket No. 333255. Submitted July 11, 2017, at Lansing. Decided September 26, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 1087.

Davor Vulic filed a tax appeal petition in the small claims division of the Michigan Tax Tribunal, challenging a tax assessment issued by the Department of Treasury under the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. Vulic, a Michigan resident, had purchased 1,799 cartons of cigarettes from an unlicensed out-of-state business and shipped them to a friend in Bosnia-Herzegovina. The cigarettes were purchased with funds from an account in Vulic's name. Vulic's friend reimbursed him, or paid him in advance, for the costs of obtaining and shipping the cigarettes, and Vulic did not profit from the endeavor. The cigarettes were eventually sold at the friend's store in Bosnia-Herzegovina. Neither Vulic nor his friend was licensed to sell or receive cigarettes in Michigan, and no taxes were paid in Michigan for the cigarettes. Vulic claimed that he should not be liable for the tax because he was not a "consumer" of the cigarettes, the cigarettes had been located in Michigan for less than 24 hours, the cartons had not been opened in Michigan, the cigarettes had not been smoked in Michigan, and all relevant taxes had been paid on the cigarettes at their final destination. The department moved for summary disposition of Vulic's petition under MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). The administrative law judge (ALJ) hearing the matter, Peter M. Kopke, J., issued a proposed opinion and judgment denying the department's motion for summary disposition under MCR 2.116(C)(8), concluding that Vulic's petition stated a claim upon which relief could be granted. The ALJ also denied the department's motion under MCR 2.116(C)(10) because the statutory bases for its motion were irrelevant to the matter or were wrongly applied. According to the ALJ, the department addressed violations of the TPTA not applicable to Vulic as an unclassified acquirer and incorrectly asserted that Vulic was personally liable under MCL 205.728(1) for the tax when no consideration accompanied the transfer of ownership of the cigarettes from Vulic to his friend in Bosnia-Herzegovina. The ALJ did, however, grant summary

disposition to the department under MCR 2.116(I)(1) because, under MCL 205.428(1), Vulic was a consumer responsible for paying the tax on tobacco products obtained for the purpose of resale that were under his control or in his possession. The ALJ determined that Vulic's contention that the TPTA's purpose was to collect the tax from the consumer and that "consumer" meant the person who actually smoked the cigarettes was without merit. The TPTA states that the consumer of tobacco products must pay the tax, but the ALJ noted that "consumer" is broadly defined in the Use Tax Act (UTA), MCL 205.91 *et seq*., as a person who has purchased tangible personal property for storage, use, or other consumption in Michigan. "Use" is defined by the UTA as the exercise of a right or power over tangible personal property incident to ownership, including transactions in which possession of the property is transferred to another. Vulic filed exceptions to the proposed opinion and judgment, and the department filed a response. The tribunal, Steven H. Lasher, J., reviewed the exceptions, response, and evidence submitted and concluded that Vulic did not demonstrate good cause to modify the ALJ's proposed opinion and judgment. Consequently, the tribunal held that summary disposition in the department's favor was appropriate. Vulic appealed.

The Court of Appeals *held*:

1. The TPTA is a pervasive group of tobacco product regulations that levies taxes on tobacco products in Michigan and generates revenue for the benefit of Michigan schools. Vulic, who was not licensed under MCL 205.423(1) to purchase, possess, acquire for resale, or sell cigarettes and who acted as a transporter or an unclassified acquirer of the cigarettes, argued that he could not be personally liable for taxes on the 1,799 cartons of cigarettes he purchased for a friend in Bosnia-Herzegovina. Vulic argued that MCL 205.427a establishes that the Legislature intended the TPTA to levy a tax on tobacco products and to require the ultimate consumer—in this case, the smoker—to pay the tax. However, MCL 205.427 makes clear that taxes may be imposed not only on the ultimate consumer of cigarettes, but also on licensees and other persons, including inanimate legal entities such as partnerships, limited liability companies, and corporations. To limit payment of the tax under the TPTA to the ultimate consumer would render part of the TPTA nugatory, an outcome that should be avoided when construing statutory language. The legislative intent expressed in MCL 205.427a is merely that the persons assessed taxes under the TPTA will pass the taxes along to the ultimate consumers.

2. Vulic was personally liable for the tax according to MCL 205.428(1) because he was in control or in possession of a tobacco product in violation of the TPTA. That fact alone established Vulic's personal tax liability. In addition, Vulic sold a tobacco product to another person for purposes of resale without being licensed to do so under the TPTA. Vulic's conduct qualified as the prohibited sale of cigarettes by an unlicensed person because his conduct constituted a transaction by which the ownership of tangible personal property was transferred for consideration, MCL 205.422(r), even though Vulic claimed he did not profit from the transaction. Profit is not required to establish consideration; consideration is a bargained-for exchange without regard to profit. Vulic and his friend reached an agreement about the arrangement, and it could be presumed that the mutual promises made by Vulic and his friend were adequate. Even if the arrangement did not constitute a transaction by which the ownership of tangible personal property was transferred for consideration, the exchange was a gift—the voluntary transfer of property to another without compensation—for which personal tax liability also arises under MCL 205.422(r). Vulic's attempts to avoid personal liability for the taxes due in Michigan on the 1,799 cartons of cigarettes Vulic purchased and then shipped to Bosnia-Herzegovina failed because it was undisputed that Vulic was not licensed to sell cigarettes or to purchase them for resale. Nor was Vulic, as he asserted, merely a gratuitous bailee of the cigarettes. Therefore, the tribunal erred by determining that Vulic's personal liability for the tax levied against the cigarettes he purchased could not be established because no consideration accompanied the transfer of cigarettes and, consequently, no sale occurred.

3. MCL 205.428(1) of the TPTA prohibits a person from being in control or possession of individual unstamped packages of cigarettes, and the tribunal concluded that Vulic was in control or possession of many unstamped packages of cigarettes, notwithstanding his failure to open the cartons or the boxes in which the cigarettes were shipped. Vulic argued that his failure to open the cartons or boxes prevented him from possessing or controlling the individual contents of the cartons or boxes. Vulic's argument was unpersuasive because it rested on a strained reading of the statutory language. Therefore, the tribunal correctly determined that Vulic was personally liable for paying the tax levied on the individual unstamped packages of cigarettes in his control or possession.

4. The plain language of MCL 205.428(1) established Vulic's tax liability. Recourse to dictionary definitions or definitions

provided in the UTA was not necessary. Therefore, the tribunal erred by engaging in that analysis.

Affirmed in part, vacated in part, and remanded for entry of an order granting summary disposition in favor of the department.

RONAYNE KRAUSE, J., dissenting, would have reversed the tribunal's decision because no consideration accompanied the transfer of cigarettes from Vulic to his friend. Consequently, there was no sale and no violation of the TPTA from which personal tax liability could arise. Nor was the transfer of cigarettes from Vulic to his friend a gift. To interpret the word "sale" as any possible transfer of tobacco products would render nugatory the Legislature's definition of the word in MCL 205.422(r). In addition, Vulic's brief possession of the unopened cartons and boxes of cigarettes did not constitute his possession of individual packages of cigarettes for purposes of MCL 205.428(1). Of primary import is the TPTA's instruction that the tax on tobacco products is intended to be borne by the consumer of those tobacco products and that personal tax liability may be imposed on a person in control or in possession of a tobacco product contrary to the requirements of the TPTA. It is true that Vulic's conduct was contrary to the TPTA—the TPTA expressly prohibits an unclassified acquirer, as defined in MCL 205.422(z), like Vulic from importing or acquiring a tobacco product from an unlicensed wholesaler or unlicensed secondary wholesaler for use, sale, or distribution. And even though no sale occurred between Vulic and his friend, the questions remained whether Vulic acquired the cigarettes for use or distribution and whether Vulic qualified as a consumer by whom the tax was intended to be paid. Definitions of "use" and "distribution" do not appear in the TPTA, and the tribunal's first resort for defining the terms should have been to lay dictionaries. It was improper for the tribunal to look to the UTA for those definitions because the terms "use" and "distribution" are not ambiguous and do not have unique legal meanings. Furthermore, the UTA is a different statutory scheme with a different intent and definitions crafted to serve that different intent, and the UTA expressly exempts from the use tax property purchased for resale. "Distribution" is generally understood to entail the transfer of something to multiple recipients. Vulic did not acquire the cigarettes for distribution because he acquired them for the purpose of passing them on to a single recipient. Nor did Vulic acquire the cigarettes for use. "Use" is not defined in the TPTA, but it has several different relevant meanings, all of which pertain to engaging in the consumption of something, putting

something into action or service, or expending something. Vulic did not qualify as a consumer of the cigarettes. "Consumer" means a person who utilizes economic goods. It is abundantly and readily obvious that barring a specific definition in the TPTA to the contrary, the plain and unambiguous meaning of "use" or "consumption" in the context of the TPTA is the final end goal of a cigarette—smoking it. The tribunal therefore erred by holding Vulic personally liable for the taxes assessed by the department.

1. TAXATION — TOBACCO PRODUCTS TAX ACT — PAYMENT OF TAX — CONSUMER.

MCL 205.427a of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., states that the act's intention is that the tax imposed under the TPTA be paid by the consumer of the tobacco product; payment of the tax, however, is not limited to the ultimate consumer of a tobacco product; under MCL 205.427, other persons—licensees, for example—may be obligated to pay a tax on tobacco products, and under MCL 205.428(1), a person other than a licensee may be held personally liable for the tax.

2. TAXATION — TOBACCO PRODUCTS TAX ACT — WORDS AND PHRASES — "SALE" — CONSIDERATION.

Under MCL 205.422(r) of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., a "sale" is a transaction by which the ownership of tangible personal property is transferred for consideration and applies also to use, gifts, exchanges, barter, and theft; consideration for a sale under the TPTA does not require a party to profit financially from the transfer of ownership—mutual promises between competent parties may constitute adequate consideration.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Adam P. Sadowski*, Assistant Attorney General, for respondent.

Legalquest Network, PC (by *Roger R. Rathi* and *Aaron D. Ingber*) for petitioner.

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

BOONSTRA, J. Petitioner appeals by right the Michigan Tax Tribunal's (the Tribunal) grant of summary

disposition in favor of respondent. Because we hold that summary disposition was properly granted, but do so primarily for different reasons than those cited by the Tribunal, we affirm in part and vacate in part the Tribunal's final opinion and judgment, and we remand for entry of an order granting summary disposition in favor of respondent for the reasons stated in this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioner purchased 1,799 cartons (each carton containing 10 packs) of cigarettes from an out-of-state business and shipped them to a friend in Bosnia-Herzegovina. The cigarettes were purchased with funds from an account in petitioner's name. The friend reimbursed petitioner (or paid him in advance) for his costs in obtaining and shipping the cigarettes, and petitioner made no profit from the endeavor. His friend asserted via letter that all relevant taxes and duties in Bosnia-Herzegovina were appropriately paid. The cigarettes were eventually sold at petitioner's friend's store. No taxes were paid for the cigarettes in Michigan, and neither petitioner nor the out-of-state business was licensed to sell or receive cigarettes in Michigan. Respondent assessed tax on petitioner under the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. Petitioner contested the tax, asserting that he should not be liable for taxes on the cigarettes because he was not a "consumer" of the cigarettes, noting that the cigarettes were located in Michigan for less than 24 hours, the cigarette cartons were never opened in Michigan, the cigarettes were never smoked in Michigan, and all relevant taxes were paid at their final destination. The Tribunal disagreed. This appeal followed. We note that the only issue before us is whether

petitioner is personally liable for taxes under the TPTA, not whether petitioner's actions were otherwise lawful.

II. STANDARD OF REVIEW

We review de novo the Tribunal's grant of summary disposition. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). We generally give deference to an administrative agency's interpretation of a statute the agency is delegated to administer, but we are not bound to such an interpretation. *Bechtel Power Corp v Dep't of Treasury*, 128 Mich App 324, 329; 340 NW2d 297 (1983). Notwithstanding any deference that might be afforded to the Tribunal, we review de novo the interpretation and application of statutory language. *Paris Meadows*, 287 Mich App at 141-142. Plain and unambiguous language in a statute must be enforced as written, and a forced construction or implication will not be upheld. *Sebastian J Mancuso Family Trust v Charlevoix*, 300 Mich App 1, 4-5; 831 NW2d 907 (2013).

III. ANALYSIS

The TPTA " 'can aptly be described as a pervasive group of tobacco product regulations . . . .' " *Value, Inc v Dep't of Treasury*, 320 Mich App 571, 577; 907 NW2d 872 (2017), quoting *People v Beydoun*, 283 Mich App 314, 328; 770 NW2d 54 (2009). It " 'contains detailed definitions, licensing and stamping requirements, recordkeeping and document maintenance obligations, schedules of tax rates, civil and criminal penalties for violations of the TPTA, procedures governing seized property, and a delineation of tobacco tax disbursements for various purposes.' " *Value, Inc*, 320 Mich App at 577, quoting *Beydoun*, 283 Mich App at 328. "[T]he

TPTA is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded." *Value, Inc*, 320 Mich App at 577 (quotation marks and citations omitted; alteration in original).

Petitioner argues that he is not subject to tax under the TPTA because he was not a "consumer" of the tobacco products at issue. We disagree.

The TPTA provides, in part, that "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so." MCL 205.423(1). Under the statutory definitions, petitioner was either a "transporter"[1] or an "unclassified acquirer"[2] of the cigarettes at issue. It is undisputed that petitioner was not licensed under the TPTA. Petitioner therefore was not entitled under the TPTA to "purchase, possess, acquire for resale, or sell" cigarettes. *Id*.

The TPTA further provides for a tax to be levied on the sale of tobacco products. MCL 205.427(1). Most licensees are required to file a monthly return reporting specified information, MCL 205.427(2), and to "pay . . . the tax levied in subsection (1) for tobacco products sold during the calendar month covered by

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[1] Under the TPTA, " '[t]ransporter' means [with certain exceptions not relevant here] a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act." MCL 205.422(y).

[2] Under the TPTA, " '[u]nclassified acquirer' means [with certain exceptions not relevant here] a person . . . who imports or acquires a tobacco product from a source other than a wholesaler or secondary wholesaler licensed under this act for use, sale, or distribution." MCL 205.422(z).

the return, less [specified] compensation," MCL 205.427(3). In addition, MCL 205.428(1) provides:

> A person, other than a licensee, who is in control or in possession of a tobacco product contrary to this act, who after August 31, 1998 is in control or in possession of an individual package of cigarettes without a stamp in violation of this act, or who offers to sell or does sell a tobacco product to another for purposes of resale without being licensed to do so under this act, shall be personally liable for the tax imposed by this act, plus a penalty of 500% of the amount of tax due under this act.

Because petitioner was not a licensee under the TPTA, respondent assessed taxes on petitioner under MCL 205.428(1).

Petitioner argues, however, that he is not liable for tax under the TPTA because "[i]t is the intent of [the TPTA] to impose the tax levied under this act upon the consumer of the tobacco products by requiring the consumer to pay the tax at the specified rate." MCL 205.427a. Petitioner's argument is therefore premised on a reading of MCL 205.427a that would restrict respondent's right to impose a tax under the TPTA except "upon the consumer of the tobacco products." *Id*.

In the overall context of the TPTA and its pervasive regulatory scheme, however, it is clear that taxes may be imposed under the act not only on the ultimate "consumer" of cigarettes, but on licensees and other persons. MCL 205.427(3) and (8). Indeed, the TPTA defines "person" to include inanimate legal entities other than individuals who might "consume" a cigarette, MCL 205.422(o).[3] The TPTA further provides that "[a] person liable for the tax may reimburse itself

[3] The TPTA defines "person" as "an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity." MCL 205.422(o).

by adding to the price of the tobacco products an amount equal to the tax levied under this act." MCL 205.427(8). We therefore reject petitioner's interpretation of the TPTA as allowing for a tax to be imposed only on a "consumer." Petitioner's interpretation would improperly render much of the TPTA nugatory. See *Ally Fin, Inc v State Treasurer*, 317 Mich App 316, 330; 894 NW2d 673 (2016) (" 'Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.' ") (citation and alteration omitted). Rather, it is clear that the legislative intent expressed in MCL 205.427a is merely that the persons assessed taxes under the TPTA will ultimately pass those taxes along to consumers. The fact that a person does not do so does not serve to except him or her from the reach of the TPTA when he or she elects to engage in conduct falling within the ambit of the TPTA.

The question thus becomes whether petitioner satisfies the conditions for tax liability under MCL 205.428(1). We conclude that he does. At a minimum, petitioner was in "control or in possession of a tobacco product contrary to [the] act." MCL 205.428(1). This alone is sufficient for personal tax liability.

In addition, petitioner "[sold] a tobacco product to another for purposes of resale without being licensed to do so under [the] act . . . ." *Id*. Under the TPTA, "sale" means "a transaction by which the ownership of tangible personal property is transferred for consideration and applies also to use, gifts, exchanges, barter, and theft." MCL 205.422(r). The Tribunal concluded that because petitioner merely passed the cigarettes on at cost, there was no consideration. Consideration is "a bargained-for exchange" with "a benefit on one side, or

a detriment suffered, or service done on the other." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (quotation marks and citation omitted). It is undisputed that petitioner acquired the cigarettes, paid for them, and transferred them to his friend, who compensated petitioner for petitioner's costs. It was therefore a sale, albeit one on which petitioner did not net a profit.[4] Although petitioner argues that he used his friend's money to make the purchase and that he never actually acquired ownership of the cigarettes but was merely a "gratuitous bailee," nothing in the record supports that characterization apart from petitioner's own statement that he made no profit on the transaction. See 8A Am Jur 2d, Bailments, § 2, p 522. A bailment is a change in possession, but not a change in title. See 8A Am Jur 2d, Bailments, § 51, p 574. The transaction may well have been a bailment if, for example, petitioner's friend had ordered and agreed to pay for the cigarettes to be shipped to petitioner's home and then to be shipped to their next destination, leaving petitioner merely responsible for providing an interim location for the cigarettes. See *id*. However, on this record, the transaction was not a mere bailment because petitioner purchased the cigarettes, had them shipped to his home, shipped them to his friend, and received compensation.

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[4] Courts do not generally inquire into the sufficiency of consideration. *Harris v Chain Store Realty Bond & Mtg Corp*, 329 Mich 136, 145; 45 NW2d 5 (1950). Here, it appears that petitioner agreed to purchase the cigarettes and ship them out of the country, and petitioner's friend agreed to either reimburse or pay petitioner upfront for petitioner's costs. The fact that the transaction did not result in monetary profit to petitioner does not compel the conclusion that there was no consideration or that no sale occurred. "When [two] competent parties, through a process of give and take, reach an agreement it can be presumed that the mutual promises were considered adequate." *Id*.

Moreover, even if this were not a "transaction by which the ownership of tangible personal property is transferred for consideration," MCL 205.422(r), it would be a gift. Consideration is not a factor in the case of use, gifts, or theft. See, e.g., *Black's Law Dictionary* (10th ed) (defining "gift" as "[t]he voluntary transfer of property to another without compensation" and "gratuitous gift" as "[a] gift made without consideration, as most gifts are").[5] We therefore conclude that the Tribunal erred by determining that MCL 205.428(1) does not provide for petitioner's tax liability as a person who sells or offers a tobacco product for the purposes of resale without a license.

We note that the Tribunal ultimately held that petitioner was in control or possession of many unstamped packages of cigarettes, notwithstanding his failure, before shipping the cigarettes out of the country, to open the cartons or the boxes in which the cigarettes were shipped and, thus, petitioner was liable under that portion of MCL 205.428(1) that establishes tax liability for an unlicensed person "in control or in possession of an individual package of cigarettes without a stamp in violation of this act . . . ." Petitioner contended that by virtue of his failure to open the cartons or boxes that were indisputably in his possession and control, he somehow did not possess or control their individual contents. We find that argument to be unpersuasive because it rests on a strained construction of statutory language. We therefore affirm this aspect of the Tribunal's determination. However, for the reasons stated, we need not, and do not, rest our decision solely on this ground. We nonetheless invite

[5] In certain circumstances not present here, a "gift" may be given as compensation for services rendered. See "remunerative donation" in *Black's Law Dictionary* (10th ed), p 595.

the Legislature to clarify its use of the term "individual package" in this context to better aid taxing authorities in the future.

For all these reasons, we conclude that petitioner was subject to tax under the TPTA. We need not go any further. Our analysis, which is based on the plain language of MCL 205.428(1), provides for petitioner's tax liability without regard to whether petitioner was a "consumer" and without recourse to dictionary definitions or the definitions of "consumer" and "use" provided in the Use Tax Act, MCL 205.91 *et seq*. The Tribunal therefore erred by engaging in that analysis.

We affirm in part and vacate in part the Tribunal's final opinion and judgment. We remand for entry of an order granting summary disposition in favor of respondent for the reasons stated in this opinion. MCR 7.216(A)(7). We do not retain jurisdiction.

MARKEY, P.J., concurred with BOONSTRA, J.

RONAYNE KRAUSE, J. (*dissenting*). I respectfully dissent. I agree with the majority that the only issue before us is whether petitioner is personally liable for taxes under the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., not whether his actions were otherwise lawful. However, I believe the majority misreads the plain language of the applicable statutes. I would reverse.

As an initial matter, I suspect that the unusual facts of this case may present a situation not anticipated by our Legislature and therefore that the Legislature did not think to cover this particular set of facts. However, be that as it may, we may not depart from the plain language of a statute even to avoid an absurd result. *Piccalo v Nix*, 466 Mich 861 (2002). In the event of any

ambiguity in a revenue statute, the statute "must be construed against the taxing authority." *Ecorse Screw Machine Prod Co v Corp & Securities Comm*, 378 Mich 415, 418; 145 NW2d 46 (1966).

The TPTA defines the word "sale" as "a transaction by which the ownership of tangible personal property is transferred for consideration and applies also to use, gifts, exchanges, barter, and theft." MCL 205.422(r). The Tax Tribunal concluded that because petitioner merely passed the cigarettes on at cost, no consideration was provided and, by implication, none of the other transaction types that may be considered a sale occurred. Respondent's construction to the contrary would render nugatory almost the entirety of the statutory language, effectively deleting everything after "transferred." Courts must avoid construing statutes in such a way that any portion thereof is rendered nugatory. *Ally Fin, Inc v State Treasurer*, 317 Mich App 316, 330; 894 NW2d 673 (2016). A sale must entail more than merely transferring an item, and there is no reason not to defer to the Tax Tribunal's conclusion that some form of consideration is the touchstone. Consequently, petitioner is not personally liable for taxes under the TPTA for selling or offering to sell tobacco products.

Likewise, the majority's conclusion that the transfer must have been a gift if no consideration was exchanged would do the same: if literally any possible transfer would lead to liability, then the Legislature's specifications would be nugatory. Put another way, the Legislature *must* be presumed to have limited the situations in which transfer of ownership of tangible personal property would constitute a sale, or it would not have included "for consideration and applies also to use, gifts, exchanges, barter, and theft." MCL 205.422(r). Because

we must avoid rendering any portion of a statute nugatory and must construe revenue statutes in favor of the taxpayer, and because petitioner's acts of passing the cigarette cartons on to his friend at cost do not seem to neatly fit any of the specified categories, I conclude that petitioner's actions do not constitute "sales" under the TPTA. If the Legislature had intended *any* transfer of cigarettes to be a sale, it would have defined "sale" more simply as "a transaction by which the ownership of tangible personal property is transferred." Incongruous as the result might be, we may not depart from the plain language of the statute as enacted by the Legislature.

Furthermore, I find nothing even slightly ambiguous about the term "individual package," both words being well understood and entirely clear in context. The majority concludes that because petitioner was in possession of *unopened cartons* of cigarettes, he must have been in control of the *individual packages* therein, completely eviscerating the Legislature's specification of "individual packages" in MCL 205.428(1).[1] We must presume that the Legislature specified this for some reason. Petitioner was never in possession of individual packages of cigarettes *as* individual packages. Again, we may not depart from the plain language of the statute as enacted by the Legislature, even if the result strikes us as strange. I do, however, concur with the majority's invitation to the Legislature to clarify the TPTA should this not have been its intended result.

Although not addressed by the majority, my conclusions require me to address a further provision of the TPTA under which personal tax liability may be im-

[1] See also MCL 205.422(k) ("Individual package does not include cartons, cases, or shipping or storage containers that contain smaller packaging units of cigarettes.").

posed for being "in control or in possession of a tobacco product contrary to this act . . . ." MCL 205.428(1). Respondent argues that petitioner is an "unclassified acquirer" under MCL 205.422(z) because he was "a person . . . who imports or acquires a tobacco product from a source other than a wholesaler or secondary wholesaler licensed under this act for use, sale, or distribution." The TPTA expressly forbids, *inter alia*, the purchase or possession of tobacco by an unclassified acquirer without a license. MCL 205.423(1). Therefore, respondent somewhat confusingly appears to argue that if petitioner is an "unclassified acquirer," then by definition his lack of a license means his purchase or possession of the cigarettes was "contrary to this act" and that he is personally liable for the taxes. There is no dispute that petitioner acquired the cigarettes from an unlicensed source; the question is therefore whether he did so "for use, sale, or distribution." MCL 205.422(z).

As discussed, the Tax Tribunal properly found that no "sale" occurred. Neither "use" nor "distribution" is defined by the TPTA. However, "distribution" is generally understood to entail transferring something to *multiple* recipients, which clearly also did not occur. See "distribute" in *Merriam-Webster's Collegiate Dictionary* (11th ed). "[I]n doubtful cases, revenue statutes must be construed against the taxing authority." *Ecorse*, 378 Mich at 418. It would be inappropriate to conclude that petitioner acquired the cigarettes for "distribution" because he clearly only acquired them for the purpose of passing them on to a *single* recipient. Consequently, the critical question is whether petitioner acquired the cigarettes for "use." The Tax Tribunal found that he did by referring to definitions of "consumer" and "use" provided in the Use Tax Act (UTA), MCL 205.91 *et seq*.

By default, our Legislature has instructed that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language" unless they have some "peculiar and appropriate meaning." MCL 8.3a. If an undefined word is common and lacks a unique legal meaning, courts consult a lay dictionary. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). "It is a cardinal rule of statutory construction that the legislative intent must be gathered from the language used, if possible, and that such language shall be given its ordinary meaning unless a different interpretation is indicated." *Goethal v Kent Co Supervisors*, 361 Mich 104, 111; 104 NW2d 794 (1960). Helpfully, the Legislature has expressly stated, "It is the intent of [the TPTA] to impose the tax levied under this act upon the consumer of the tobacco products by requiring the consumer to pay the tax at the specified rate." MCL 205.427a. However, like the word "use," the word "consumer" is undefined in the TPTA.

Both "use" and "consumer" are common words. The proper first resort should therefore have been to a dictionary, not to a different statutory scheme with a different intent and definitions crafted to serve that different intent. Respondent argues that this Court has held that it is appropriate to refer to a definition found in another statutory scheme, but that is a misreading or misunderstanding of what this Court has held. Rather, this Court held that *ambiguous* language in the TPTA should be construed in light of our Supreme Court's construction of similarly ambiguous language in the UTA. *S Abraham & Sons, Inc v Dep't of Treasury*, 260 Mich App 1, 14-15; 677 NW2d 31 (2003). There is no ambiguity at issue here. It is inappropriate to refer to a dictionary to define a word *if* an act provides its own definition. *Betten Auto Ctr,*

Inc v Dep't of Treasury, 478 Mich 864, 864 (2007). However, here the Tax Tribunal simply lifted entirely a definition from one act and applied it to another without considering the different purposes behind the different acts.

In contrast to the TPTA, the UTA is an "excise or privilege tax" on "the use, storage or consumption of tangible personal property brought into the State in interstate commerce, after it has come to rest in this State." *Western Electric Co v Dep't of Revenue*, 312 Mich 582, 595-596; 20 NW2d 734 (1945). "Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose," and they must be read together as a whole when interpreting any discrete provision therein. *Detroit v Mich Bell Tel Co*, 374 Mich 543, 558, 132 NW2d 660 (1965), abrogated on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109, 119; 715 NW2d 28 (2006). The definitions of "use" in MCL 205.92(b) and "consumer" in MCL 205.92(g) of the UTA were not intended to be read in complete isolation from the entirety of the UTA. In other words, the definitions must be understood in the context of any exemptions from applicability *also* included in the UTA. In particular, petitioner observes that "property purchased for resale" is explicitly exempt from the use tax. MCL 205.94(1)(c)(*i*). The cigarettes did not and were not intended to come to rest in Michigan. The Tax Tribunal's rote application of definitions from the UTA to the TPTA was, under the circumstances, improper and out of context.

According to *Merriam-Webster's Collegiate Dictionary* (11th ed), a "consumer" is, in relevant part, "one that utilizes economic goods" and to "consume" means, in relevant part, "to utilize as a customer." To "use" has

several possible meanings, of which all relevant possibilities pertain to engaging in the consumption of something, putting something into action or service, or expending something. It is abundantly and readily obvious that barring a specific definition *in the act* to the contrary, the plain and unambiguous import of these words is that use or consumption for purposes of the TPTA means the final end goal of a cigarette: smoking it. It is therefore equally plain and unambiguous that petitioner was neither a consumer nor a user of the cigarettes.

It is undisputed that petitioner never intended to smoke the cigarettes, nor were any of the cigarettes ever smoked in Michigan. He therefore did not purchase them for "use" according to the common, everyday meaning of that word, which this Court must presume was the usage intended by the Legislature for purposes of the TPTA because it did not include a definition in the TPTA. Likewise, petitioner was not a "consumer" according to the common, everyday meaning of that word. The Tax Tribunal therefore erred by finding petitioner personally liable for the taxes assessed by respondent.

PEOPLE v DIXON-BEY

Docket No. 331499. Submitted June 8, 2017, at Lansing. Decided September 26, 2017, at 9:05 a.m. Leave to appeal sought.

Dawn M. Dixon-Bey was charged in the Jackson Circuit Court with first-degree murder, MCL 750.316, in connection with the stabbing death of her boyfriend (the victim) in their home, and she was convicted following a jury trial of second-degree murder, MCL 750.317. Defendant initially claimed that the victim was stabbed during an altercation before he returned to their home; defendant later admitted that she had stabbed the victim but claimed that she had acted in self-defense. During the trial, the court, John G. McBain, J., qualified Detective Gary Schuette as an expert in interpreting evidence at homicide scenes. The detective contrasted defendant's behavior during her interrogation with how, in his experience, an individual would normally behave during an interrogation after committing an offense in self-defense; on that basis, the detective opined that defendant's behavior was not in conformity with that of an individual who had acted in self-defense. The detective was also allowed to testify that—given the force needed to stab the victim through the chest and into the heart twice—defendant had likely stabbed the victim when the victim was lying down. The trial court also allowed testimony from MM, the victim's child, that defendant had sought to prevent MM from having custody of her half-sister, JS, who was the biological child of defendant and the victim. In that regard, MM testified that the day after the victim was killed, defendant had prevented MM from seeing JS. Finally, the trial court allowed testimony that defendant had stabbed the victim's hand with a knife earlier in their relationship, that the wound had required reconstructive surgery, and that defendant had previously stated that she could kill the victim and claim self-defense at any time. The court imposed a minimum sentence of 35 years in prison, which was outside the guidelines minimum sentence range of 12 to 20 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. MRE 701 provides that if a witness is testifying as a lay witness, not as an expert, the witness's opinion testimony is

limited to those opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. In contrast, MRE 702 provides that if the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion if the testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. The interplay between MRE 701 and MRE 702 is unclear when a police officer provides testimony based on his or her training and experience. In light of the detective's extensive knowledge, skill, experience, training, and education with respect to homicide investigation—which was established in detail on the record—the trial court did not abuse its discretion when it qualified the detective as an expert under MRE 702 in interpreting evidence at homicide investigations. However, even though the detective had been involved in other cases in which a suspect had claimed self-defense, the detective did not have the requisite knowledge, skill, experience, training, and education to offer an expert opinion as to whether individuals act in a certain way after killing in self-defense or whether defendant's behavior in this case was consistent with that behavior. Accordingly, the trial court abused its discretion when it allowed the detective to testify in that regard. Similarly, there was no evidence on the record that the detective possessed the knowledge, skill, experience, training, and education required to offer an expert opinion regarding the amount of force necessary to stab into a human heart. Accordingly, the trial court abused its discretion by allowing the detective to testify that defendant would have lacked the strength to stab the victim twice in the heart if he had been standing up at the time and that he therefore believed defendant had stabbed the victim while he was lying down on the couch. The error was not outcome-determinative—and defendant was not entitled to a new trial—because other evidence undermined defendant's self-defense claim, the jury was properly instructed regarding expert testimony, and trial counsel effectively challenged the detective's theory and credibility during cross-examination and closing argument.

2. MM's testimony regarding her custody dispute with defendant was relevant in that it portrayed defendant in a manner that conflicted with the testimony of defendant's other daughters and

friends who had testified that defendant was in shock and emotional the day after defendant was killed; MM's testimony supported a finding that defendant had influenced JS's and defendant's other daughters' statements or trial testimony through her actions related to the ongoing custody dispute. MM's testimony—which affected whether the jury believed the testimony of defendant's daughters and reflected on defendant's state of mind after the victim was killed—was not unfairly prejudicial because her testimony was a fraction of that heard by the jury over six days of testimony and the testimony may even have supported defendant's self-defense claim. Accordingly, the trial court's conclusion that MM's testimony was relevant was not outside the range of principled and reasonable outcomes, and the trial court did not abuse its discretion by allowing the testimony.

3. Defendant was not denied effective assistance of counsel by trial counsel's failure to challenge the detective's and MM's testimony on the grounds asserted on appeal because the arguments were meritless.

4. MRE 404(a) generally prohibits the admission of character evidence to show that the individual acted in conformity with that character trait on a particular occasion. However, under MRE 404(b)(1), character evidence may be admissible for other purposes, including proof of intent in doing an act. In this case, the prosecution sought to admit testimony—that defendant had previously stabbed the victim and had made threatening statements toward the victim—to prove defendant's intent. The testimony undermined and rebutted defendant's claim that her decision to stab the victim was emotional, that the act was made in self-defense, that she had never threatened the victim, and that she had been the victim of one-way physical violence by the victim for several months before she killed the victim. In light of these facts, the trial court did not abuse its discretion by admitting testimony under MRE 404(b)(1) regarding defendant's earlier stabbing of the victim.

5. The proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630 (1990). In that regard, the sentence imposed by the trial court must be proportionate to the seriousness of the circumstances surrounding the offense and the offender; the inquiry is not whether the sentence imposed departs from or adheres to the advisory guidelines minimum sentence range. The guidelines nonetheless are a highly relevant consideration that a trial court must take into account when sentencing

a defendant, and the guidelines are a guidepost for combating disparity in sentencing. Relevant factors for determining whether a departure sentence is more proportionate than a sentence within the recommended minimum sentence range include (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight. A trial court must justify the sentence imposed to facilitate appellate review; that justification must explain why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been. In this case, the guidelines recommended minimum sentence range was 12 to 20 years in prison. The trial court failed to adequately explain why a minimum sentence of 35 years was more proportionate than a different sentence within the guidelines would have been. With regard to defendant's background, her prior record variable score was zero, and the trial court did not mention anything else from her background to justify the departure. With regard to the nature of the offense, the reasons discussed by the trial court when imposing sentence—that defendant stabbed the victim twice in the chest, that the killing was cold-blooded, and that the trial court believed the killing was premeditated—did not provide reasonable grounds for the departure because the stated reasons were already contemplated by offense variable (OV) 1 (aggravated use of a weapon), MCL 777.31; OV 2 (lethal potential of the weapon possessed or used), MCL 777.32; and OV 5 (psychological injury to a member of the victim's family), MCL 777.35. Although the trial court believed that the killing was premeditated, the jury convicted defendant of second-degree murder, which does not require a showing of premeditation. In light of the convicted offense, under MCL 777.36(2)(a), the trial court was unable to score OV 6 (offender's intent to kill or injure another individual) to reflect a premeditated intent absent information that was not presented to the jury. The trial court erred by relying on premeditated intent to justify the departure because there was no indication on the record that the court had additional information that was not presented to the jury. Additional factors relied on by the court to justify the departure—the victim's standing in the community, defendant's attempt to minimize her role in the stabbing, and defendant's marriage to an imprisoned man throughout her long-term relationship with the victim—were not unique to defendant or relevant to a proportionality determination. Accordingly, the sentence of 35 to 70 years in prison was unreasonable, and the trial court abused its discretion by violating the principle of proportionality when it imposed the sentence.

Conviction affirmed, sentence vacated, and case remanded for resentencing.

BOONSTRA, J., concurring in part and dissenting in part, agreed that defendant's conviction should be affirmed but disagreed with the majority's decision to remand for resentencing. The trial court's sentence reflected a reasoned process and a reasoned decision in that the trial court listened to the arguments of defense counsel and the prosecution at sentencing, listened at sentencing to the statements made by defendant, a member of the victim's family, and a friend of the victim, reviewed the testimony presented at trial, and considered the guidelines recommended minimum sentence range. Judge BOONSTRA would have deferred to the trial court's determination that the guidelines did not adequately capture the circumstances of the case because of the court's greater familiarity with the case and experience in sentencing. While the trial court was constrained from assessing 50 points for premeditation under OV 6 because the jury was not required to find premeditation for the convicted offense of second-degree murder, the offense variable did not prohibit the court from concluding that the guidelines minimum sentence range failed to consider defendant's premeditated intent to kill given that defendant had previously threatened to stab the victim and claim self-defense, defendant had previously stabbed the victim, and defendant had disposed of the weapon after committing the offense. Accordingly, Judge BOONSTRA would have concluded that defendant's upward departure sentence was within the range of principled and reasonable outcomes.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

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

Before: O'BRIEN, P.J., and HOEKSTRA and BOONSTRA, JJ.

O'BRIEN, P.J. Defendant, Dawn Marie Dixon-Bey, was arrested after admittedly stabbing her boyfriend, Gregory Stack (the victim), to death in their home on

February 14, 2015. At first, she claimed that the victim must have been stabbed during an altercation with others before returning to their home. Later, however, defendant admitted that she was the person who stabbed the victim but claimed that she had only done so in self-defense. She was subsequently charged with first-degree murder, MCL 750.316, and, after an eight-day jury trial, was found guilty of second-degree murder, MCL 750.317. She was sentenced to 35 to 70 years in prison and appeals as of right. On appeal, defendant argues that she was deprived of her constitutional right to a fair trial, that the trial court abused its discretion by admitting evidence about defendant's attempts to prevent the victim's daughter from having custody of her half-sister (the biological daughter of the victim and defendant), that she was deprived of her constitutional right to the effective assistance of counsel, that the trial court abused its discretion by admitting evidence about a previous occasion on which she had stabbed the victim, and that resentencing is required because the trial court unreasonably departed from the advisory minimum sentence guidelines range. For the reasons set forth in this opinion, we affirm defendant's conviction but vacate her sentence and remand for resentencing.

As indicated, defendant argues on appeal, in part, that she was deprived of her constitutional right to a fair trial. Generally, she takes issue with the trial court's decision to qualify Detective Gary Schuette as an expert in interpreting evidence at a homicide scene. Specifically, she argues that she was deprived of her constitutional right to a fair trial because the trial court erroneously permitted Detective Schuette "to essentially tell the jury that [defendant]'s claim of self-defense was a sham based on his expertise." Defendant asserts that Detective Schuette was not permitted to

offer that opinion because he "was not qualified as an expert in behavioral science with regard to how people engaged in self-defense are expected to act," because "his small sampling from personal experience would not support a peer-based review of experts," because his "testimony was speculative," and because the testimony "foreclosed any possibility that the jury would believe that Dawn acted in self-defense." While we agree with defendant's position that the admission of some of Detective Schuette's testimony was erroneous, we do not agree that reversal is required because defendant has not demonstrated that the admission of the testimony was outcome-determinative.

"This Court reviews for an abuse of discretion a trial court's decision to admit or exclude expert witness testimony. This Court also reviews for an abuse of discretion a trial court's decision on an expert's qualifications." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009) (citations omitted). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). "Questions whether a defendant was denied a fair trial, or deprived of his liberty without due process of law, are reviewed de novo." *Steele*, 283 Mich App at 478. A trial court's interpretation and application of a court rule, like a statute, is reviewed de novo. *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997).

At issue in this case are MRE 701 and 702, which govern the admissibility of opinion testimony. MRE 701 governs the admissibility of opinion testimony by lay witnesses:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited

> to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 702 governs the admissibility of expert testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

As this Court has recognized before, the interplay between MRE 701 and MRE 702 is somewhat unclear when a police officer provides testimony based on his or her training and experience. See *People v Dobek*, 274 Mich App 58, 77; 732 NW2d 546 (2007) ("The caselaw on this issue is not entirely clear."). In *Dobek*, the prosecution offered the testimony of a police officer, Bruce Leach, "regarding delayed disclosure" in sexual-assault cases "as simply a police officer giving lay testimony based on his training and experience without . . . being first qualified as an expert, while suggesting to the jury that Leach was an expert on the subject." *Id*. at 76. The trial court ruled that the testimony was admissible as lay testimony and instructed the jury as such. *Id*. at 76-77. On appeal, defendant challenged this ruling, arguing that this testimony required that the police officer be qualified as an expert. *Id*. at 76.

This Court analyzed the issue as follows:

Because Leach was testifying about delayed disclosure on the basis of his knowledge, experience, and training, it would appear that his testimony constituted expert opinion testimony and not lay opinion testimony under MRE 701, which is limited to opinions or inferences that are "rationally based on the perception of the witness" and that are "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." The caselaw on this issue is not entirely clear. For example, in *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576; 657 NW2d 804 (2002), the trial court permitted a police officer to give lay opinion testimony under MRE 701 that the plaintiff was not wearing his seatbelt. This Court affirmed, rejecting the plaintiff's claims that the trial court should not have admitted evidence under MRE 701, that expert testimony under MRE 702 was necessary, and that the officer was not qualified to give an expert opinion on the issue. The *Chastain* panel held that the lay opinion was not admitted in error because the testimony was based on the officer's perceptions at the scene of the accident and because the opinion was not based on his past experience in investigating car accidents. *Chastain*, [254 Mich App] at 586-590. The Court stated, "A careful examination of [the officer's] testimony establishes that although his opinion in this case was consistent with conclusions he had drawn in other cases he had investigated, his past experience did not form the basis of his opinion." *Id*. at 590. Here, Leach's testimony on delayed disclosure was drawn from his past experiences and training.

In *Co-Jo, Inc v Strand*, 226 Mich App 108; 572 NW2d 251 (1997), the plaintiffs argued that an off-duty fireman's opinion testimony regarding the speed at which a building burned was improperly admitted as lay opinion testimony under MRE 701 because expert testimony was required and the fireman was not qualified as an expert. This Court held that the trial court did not abuse its discretion in admitting the opinion evidence regarding the speed and intensity of the fire. *Co-Jo*, [226 Mich App] at 117. The *Co-Jo* panel stated:

> [The fireman's] conclusions were based on observation of the fire for over thirty minutes. The opinion testimony was limited to describing the fire in relation to other building fires [the fireman] had witnessed. The reliability of his conclusions was premised on his extensive experience in observing other building fires and investigating their causes. The testimony was of a general nature, without any reference to technical comparison of scientific analysis. [*Id*.]

> Under *Co-Jo*, it could be reasonably argued that Leach's testimony was acceptable lay opinion testimony. *Co-Jo* appears to be at odds with *Chastain*. We, however, do not need to resolve the issue, and the apparent conflict in the caselaw gives credence to a conclusion that the prosecutor did not pursue the challenged questioning in bad faith. Assuming that expert testimony was required, Leach was more than qualified to give an expert opinion on delayed disclosure to the extent of the testimony actually presented. He testified at length about his extensive knowledge, experience, training, and education concerning the sexual abuse of children. Leach has personally participated in the investigation of hundreds of criminal sexual conduct cases involving child victims. And he had received training in the investigation of cases involving delayed disclosure. With his background and experience in investigating child sex abuse cases and interviewing victims, Leach became knowledgeable regarding delayed disclosure, and, according to Leach, delayed disclosure is common and happens quite frequently with child victims. On this record, the disputed testimony was admissible, and the prosecutor acted in good faith in eliciting the testimony. Accordingly, reversal is unwarranted. [*Dobek*, 274 Mich App at 77-79 (alterations in original).]

In this case, the trial court qualified Detective Schuette "as an expert in interpreting evidence at . . . homicide scenes." In our view, the trial court did not err in this regard. Detective Schuette described, in detail,

his extensive knowledge, skill, experience, training, and education with respect to homicide investigations. Specifically, Detective Schuette testified that he had participated in "[h]undreds" of homicide investigations; that he participated in extensive law-enforcement training, including, for example, several "homicide schools" and "evidence technician school"; and that he "taught Criminalistics which is processing of crime scenes, interpreting . . . crime scenes . . . ." In addition, Detective Schuette testified that, on previous occasions, he had testified as an expert in "[e]vidence interpretation and general homicide investigations." Ultimately, the trial court found this knowledge, skill, experience, training, and education sufficient for purposes of MRE 702, and we agree with that decision despite the fact that, as defendant claims, it may have been a rather "broad" qualification.

Whether Detective Schuette was permitted to offer an opinion as to whether defendant was acting in self-defense is a different, and more complicated, issue. As indicated earlier, defendant claims that Detective Schuette was allowed "to essentially tell the jury that [defendant]'s claim of self-defense was a sham based on his expertise." To support this claim, defendant points, in relevant part, to two portions of Detective Schuette's testimony at trial.[1]

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[1] Defendant additionally calls attention to a third portion of testimony that includes Detective Schuette's assertion that he, in essence, fed her the idea of self-defense when trying to determine whether or not she was a suspect. He testified that while interviewing defendant, he "noticed that there was some red marks on her hands" that "caused [him] to believe that maybe she was involved . . . ." Her potential involvement directly contradicted the original statement that she had made to Detective Schuette, as well as to several other officers, that the victim sustained the ultimately lethal wounds in a fight before returning home. Detective Schuette testified:

First, she points to the following exchanges between the prosecutor and Detective Schuette regarding how individuals acting in self-defense generally act afterward:

> *Q*. All right, and once you learned that there was two stab wounds, did that change your strategy or your focus at all?
>
> *A*. It did. I was surprised by the fact that there had been two stab wounds. I began to lean towards a little bit more away from—I—I should say it like this. The self-defense theory was slowly beginning to break apart and I believed that this was weighing heavily on the other side of self-defense. I was skeptical because I always want an

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> As—as that's developing more I began to talk to her a little bit more about Greg. And one of my strategies in a circumstance like this is to initially blame the victim. That is typically the easiest way and the most accepted way for a suspect to begin to speak with you. And the way that I do that is I start asking about whether or not the victim was a nice person, a bad person, a great guy, a bad guy, did he drink, did he do drugs? Things of that nature. And then begin to look for clues as to whether or not that person—excuse me, the interviewee is going to tell me that that—that the victim was, "Hey, he was a bad guy" or—or whatever the case may be "He was a drunk" or those kinds of things.
>
> And then I—I kind of lock onto them and then I begin to develop a strategy as to how to approach the victim and typically that's used through a self-defense claim. "Well, because he was a bad guy, you know, nobody would blame you", "you know I would understand", "this is self-defense". You know, those kinds of things to kind of get over that hump of who did this. Because we were still there, as far as I was concerned, of, you know, who did this? We didn't know for sure and I was trying to get over that hump to make the determination of—of her being a potential suspect.

We disagree with defendant's argument that this testimony constituted expert testimony, much less inadmissible expert testimony. Rather, Detective Schuette's recollection of a sequence of events is fact testimony, and witnesses are permitted to offer both fact and expert testimony. See, e.g., *People v Bynum*, 496 Mich 610, 635 n 43; 852 NW2d 570 (2014).

autopsy report first, so I held off making any official report myself about it until I received the autopsy report a little bit later on in March.

Q. Okay, and by the time you talked to several other individuals, looked at the autopsy report, listened to the interview from—or not the interview, but the phone conversation with Megan Marshall and what you knew from your talking to Dawn Dixon-Bey, I'm gathering by what you're saying is that it's clear that you eventually lean away from a self-defense theory?

A. Yes, probably the 23rd was a turning point in the investigation, not only from the—the standpoint of receiving the autopsy results, the preliminary autopsy results via word of mouth from Officer Peters, but also in speaking with Mr.—Mr. [Thomas] Gove and the prior statement that he had obtained from her.

* * *

Q. All right, so it's safe to say based—about the 23rd was when your focus really starts to turn towards this wasn't self-defense?

A. Correct.

Q. All right, now you had indicated that you've done hundreds of homicide investigations?

A. Yes.

Q. All right, have you dealt with situations where there has been self-defense?

A. Oh, absolutely.

Q. All right, have you interviewed people who had actually been the person who used self-defense?

A. Yes.

Q. All right, in your experience do they tend to act a certain way?

A. Yes.

Q. And how is that?

A. They're very excited, crying often times, not always but often times they're crying, they're very excited. They are giving you all the information and then asking if they're in trouble afterward. I didn't mean it, they're telling me all sorts of different things. I had to do it, I didn't mean it, I hear a lot of that kind of rattle can statements that come from them. Probably the most important thing that I look for in that circumstance is the excitability and the detail about how everything came about.

Q. Okay, now you had indicated—I—I guess is it fair to say that's not what you got from talking to Dawn Dixon-Bey?

A. No, it's not at all.

Additionally, defendant also points to Detective Schuette's testimony that the victim was likely lying down during the stabbing. In that regard, Detective Schuette testified on direct examination, in relevant part, as follows:

Q. All right, and based off of the interviews that you've conducted, the autopsy results and your viewing of the crime scene, were you able to interpret that crime scene and—and develop a theory of what you thought took place?

A. Yes.

Q. And what is that?

A. Well, first off—

Q. And I guess, what did you base that on as well?

A. —what I based that on was the evidence that was at the scene, the autopsy results and the information that I had gathered through other witnesses. The one constant in all of the information surrounding the statements Ms. Dixon-Bey had made was the dog cage. I noted that the dog cage was, in fact, in the living room, so that certainly could have been a factor in the assault or what had occurred.

* * *

So, I began to hypothesize about it occurring in the living room and what I want to mention before I say this is that there were no other cuts, there were no defensive wounds on Mr. Stack.

Q. Why is that significant to you?

A. If she was attacking him or they're engaged in an altercation, the marks she had on her were readily apparent. The marks on him were not, there were none. There was none noted by the pathologist, there was none seen by the rescue personnel, there was none in—in the autopsy photographs.

Q. So, that led you to believe what?

A. That led me to believe that he was in a state of surprise when this occurred. Likely he was lying down and I say likely, because I don't know, he could have been standing up against the wall, but likely there would have been some sort of transfer, some sort of item that I would—had seen like a smearing or something of that nature that wasn't present. So, lying down made more sense, it gives you that pressure/counter pressure that's needed so the strength wouldn't—wouldn't be as much to be able to plunge something into something that's static or something that's moving, there's more strength required in the moving. So, if it's static and the knife is plunged in, also there's a lot more force that can be exerted by someone who is smaller downward rather than upward or outward. So, plunged downward and then back up and then back in again, seemed to make more sense.

When we looked at the fingernail clippings of Mr. Stack, there was no DNA underneath them of Ms. Dixon-Bey which would be indicative of an assault that was occurring and he's fighting for his life and he's reaching out and grabbing, that would cause me to think, especially if he was standing up or in a standing area, it would cause me to think that he would have some sort of evidence on him of trying to save his own life. But, that didn't exist, so it caused me to believe that he was in an state of surprise when all of this occurred.

Q. Yeah, so based off your interpretation of the crime scene, is it fair to say you don't even believe there was a struggle?

A. Yes.

In our view, Detective Schuette's expertise did not extend to offering a profile of the "certain way" in which those who kill in self-defense act during interrogations. While it certainly appears that Detective Schuette has been involved in cases in which individuals have claimed that they acted in self-defense, we cannot conclude that his participation in an unidentified number of these cases qualifies him to offer expert opinions regarding whether individuals act a "certain way" after killing in self-defense as well as whether defendant's behavior in this case was consistent with that "certain way." Detective Schuette's expertise was in the area of interpreting evidence at homicide investigations, not in psychology or some other behavioral science, and nothing in the record suggests that his knowledge, skill, experience, training, and education addressed such areas. While it is true that Detective Schuette need not necessarily be a psychologist to offer this type of testimony, it is equally true that he does need to have the requisite knowledge, skill, experience, training, and education to be qualified as an expert in the area about which he is offering expert testimony, and the record before us simply does not support a conclusion that he was adequately qualified to make sweeping "expert" generalizations about the demeanor of those who kill in self-defense. Consequently, we conclude that the trial court's decision to admit Detective Schuette's expert testimony in this regard fell beyond the range of principled outcomes.[2]

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[2] Relatedly, without more information about the basis for Detective Schuette's assertions regarding the behaviors of individuals who kill in

Similarly, we also conclude that Detective Schuette's expertise did not extend to offering opinions with respect to the force necessary to stab someone through the chest and into the heart. Central to Detective Schuette's testimony with respect to what he believed happened was his opinion that defendant lacked the requisite "extraordinary amount of strength" to stab the victim twice while he was supposedly standing and acting as the aggressor. However, there is nothing in the record that supports Detective Schuette's basis for his opinions regarding force. Furthermore, while it is

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self-defense, we also have concerns with respect to the reliability of Detective Schuette's testimony on this topic. Detective Schuette did not disclose how many interviews of individuals who kill in self-defense he had conducted, nor did he explain how he determined that the people interviewed had in actuality acted in self-defense. Cf. *People v Kowalski*, 492 Mich 106, 131-133; 821 NW2d 14 (2012) (opinion by KELLY, J.). Furthermore, he did not claim familiarity with literature, peer-reviewed or otherwise, to support the assertion that people who kill in self-defense react in a certain way during police interviews or that the lack of such behavioral characteristics is inconsistent with a claim of self-defense. Cf. *id*.; *Dobek*, 274 Mich App at 96. Given Detective Schuette's failure to provide any support for his personal behavioral-science theories, it is notable that at least one court has disallowed testimony from police officers with respect to how someone who kills in self-defense should act after the fact, reasoning that "predictions of specific human behavior in response to traumatic experiences and opinions based thereon have not yet reached the level of scientific reliability to be worthy of admission as evidence in a court of law." *Ordway v Commonwealth*, 391 SW3d 762, 775-777 & n 6 (Ky, 2013). That court reasoned that "how guilty people typically behave" or "how innocent people do not act" were not legitimate subjects for expert opinion. *Id*. at 777 (quotation marks omitted). We share these concerns, both in terms of the reliability of such expert demeanor evidence generally and, more specifically, in terms of whether Detective Schuette was qualified to offer those opinions. Overall, by allowing him to offer testimony on the behaviors of those who kill in self-defense and to then testify that defendant did not behave in this manner, the trial court allowed Detective Schuette to venture into an area beyond his stated expertise and to offer unreliable "expert" opinions based on nothing more than an unspecified number of interviews with people who had purportedly killed in self-defense.

true that, as already described, Detective Schuette maintains the requisite knowledge, skill, experience, training, and education to testify as an expert in the interpretation of homicide scenes, we are unable to find anything in his testimony with respect to the knowledge, skill, experience, training, and education that might support a conclusion that he was knowledgeable, skilled, experienced, trained, and educated to ascertain the amount of force necessary to stab a human heart. Cf. *People v Hartford*, 159 Mich App 295, 303; 406 NW2d 276 (1987) (allowing a police officer to testify as an expert regarding gunshot wounds when the officer had completed "both undergraduate and graduate courses in homicide investigation which included the topic of specific information that can be obtained from examining gunshot wounds"). In fact, even Detective Schuette acknowledged that there was no objective way to "test" his theory and that he lacked the ability to actually "measure" the amount of force necessary to stab someone. We also find it noteworthy that Dr. Reuben Ortiz-Reyes, the pathologist whose reports were relied upon by Detective Schuette in offering his opinion, expressly testified that the amount of force necessary depends on the sharpness of the knife, a factor that could not be considered in this case in light of the fact that the knife was never found.[3] In other words, Detective Schuette's premise that the

[3] More specifically, the pathologist explained that the victim had been stabbed twice in the heart and that either wound would have been fatal. When asked about the force involved in the stabbing, the pathologist testified as follows:

> *Q*. Thank you. In order for a—an object to actually puncture through the chest and get to the heart what does it have to go through to get to the heart?
>
> *A*. Has to go first, the skin, then the muscle, then the—in this case there was a—some cartilage, and then the pericardium. The

stabbing would require considerable force is not supported by the medical testimony in this case, and Detective Schuette does not appear to have the scientific, technical, or specialized knowledge necessary to form his own independent opinion of the force necessary to stab the victim through the chest into the heart, particularly when the knife used in the stabbing had not been recovered. Absent a sound basis for a major premise underlying his opinion, Detective Schuette's theory of the killing amounted to nothing but speculation, and this unreliable speculation could not assist

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pericardium is a sac that involves the heart. And then the muscle of the heart. It has to go through all these parts in order to penetrate inside the heart.

Q. In your experience how much force would—would that take to make it through all that?

A. This questions [sic] come all the time. How—how—how much force is needed? Depends on many factors. First, is the knife really sharp? It's like cutting any kind of meat. When you're cutting a steak, or you kill a deer and you're cutting. Sometimes depends if you really [sic] working the knife, you—(undecipherable)—hard time. It's the same in—in the human skin. The skin is a little tough to get in but once the skin is taken away—inside—everything inside is so soft that doesn't require much force to do it—only the skin.

Q. Okay. What about getting . . . out of that same area? Would that require more force, less force, or does it depend?

A. That depends also the sharpness of the knife. Because when you are pulling out if it's really well—a good knife is going to come out easy. When you are—tried to take out. If you are going to pull again, then it's going to be easier because there is already some injury to the skin that allow it to go in so easy.

Similarly, on cross-examination, the pathologist stated that with a "quality blade," "you don't need anything" in terms of force while, in comparison, "if you use something that is really rough, of course, it's going to require a lot of force." Further, the pathologist specified that he could not determine what type of knife caused the wounds, he could not tell how sharp the knife was, and he could not offer an opinion on the amount of force necessary without having the knife.

the jury. Consequently, we conclude that the trial court's decision to admit Detective Schuette's expert testimony in this regard fell beyond the range of principled outcomes.

Nevertheless, while it is our conclusion that Detective Schuette's testimony as described above was erroneously admitted, we ultimately conclude that defendant has not demonstrated that the error was outcome-determinative. See *People v Coy*, 243 Mich App 283, 304; 620 NW2d 888 (2000). The ultimate issue before the jury was whether defendant acted in self-defense, i.e., whether the victim lunged at her and essentially impaled himself on the knife as claimed by defendant or whether she stabbed the victim while he lay on the couch as claimed by the prosecution. Defendant presented her version of the events leading up to the victim's death at trial through her own testimony and that of other witnesses; likewise, the prosecution presented its version of the events leading up to the victim's death through various witnesses' testimony. While the testimony at issue went directly to this ultimate issue and was relied on by the prosecution during its closing argument, it is our view that, considering the record as a whole, Detective Schuette's testimony was not the only evidence undermining defendant's self-defense claim. That is, even without the testimony at issue, the record reflects significant evidence that undermined defendant's self-defense claim. For example, defendant initially denied stabbing the victim and stated that the victim came home with a stab wound. It was only later that defendant began to claim self-defense, after the possibility of self-defense had been suggested to her by police. "[C]onflicting statements tend to show a consciousness of guilt," *People v Unger*, 278 Mich App 210, 225-226; 749 NW2d 272 (2008), and "[a] jury may infer con-

sciousness of guilt from evidence of lying or deception," *id*. at 227. Further, although defendant claimed that she put the knife down in the house, the weapon was not found in the house, and efforts to hide or suppress evidence can also be seen as indicative of consciousness of guilt. See *id*. at 226. While defendant claimed the altercation took place in the kitchen, the testimony indicated that there were no signs of a struggle in the kitchen. Likewise, the victim had no injuries or signs of defendant's DNA on his person to suggest that he had been in a physical altercation before the stabbing. Perhaps most significantly, in terms of medical evidence, the pathologist explained that there were *two* distinct stab wounds in the heart that could have been inflicted through one hole in a shirt and that neither wound was the result of surgical intervention. This contradicts defendant's testimony that she only stabbed the victim once, and it undercuts her claim of self-defense insofar as it seems excessive, even if threatened, to inflict two fatal stab wounds to the heart. In addition, evidence was introduced which indicated that, in the past, defendant had threatened to stab the victim and that she had actually stabbed the victim during fights.

In addition to the strong evidence of defendant's guilt, the risk that the jury might give undue weight to Detective Schuette's testimony was alleviated to some extent by a proper jury instruction on expert testimony, including the fact that the jury did not have to believe the expert's testimony and instructions on evaluating expert testimony. See *Kowalski*, 492 Mich at 137 n 74; *People v Peterson*, 450 Mich 349, 378; 537 NW2d 857 (1995). Further, defense counsel effectively challenged Detective Schuette's theory and credibility at trial. For instance, defense counsel cross-examined the detective on flaws in his theory, including the fact

that his testimony on "force" was not in accord with the pathologist's opinions. During closing arguments, defense counsel then vigorously argued that Detective Schuette's version of events was simply "one man's theory that is not supported by the physical evidence and in some instances is contrary to the evidence." Additionally, on cross-examination, Detective Schuette conceded that a 170-pound man, such as the victim, lunging at a knife would create enough force to penetrate to the heart, which was a proposition that the pathologist would not confirm or deny, meaning that, to some extent, the defense arguably benefited from Detective Schuette's "expert" testimony on this topic. Cf. *Peterson*, 450 Mich at 377. Overall, given the strong evidence of defendant's guilt, it does not appear that the introduction of Detective Schuette's expert opinion testimony on self-defense affected the outcome of the trial, and for that reason defendant is not entitled to relief on appeal. We therefore conclude that, while the testimony at issue was erroneously admitted, its admission was not outcome-determinative and does not entitle defendant to appellate relief. See *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015) (explaining that preserved nonconstitutional evidentiary error is not grounds for reversal unless it is more probable than not that the error affected the outcome of the trial).

On appeal, defendant also argues that the trial court erred by admitting evidence of defendant's attempts to prevent MM, the victim's biological daughter, from having custody of her half-sister, JS.[4] During trial, MM

[4] JS is undisputedly the victim's biological child; however, it appears that she was not, at the time of the victim's death, his legal child. This apparently led to a contentious custody dispute that the Department of Health and Human Services eventually became involved in. This dispute was made more complicated because, despite being in a long-

testified that, on the day after defendant killed the victim, JS was at MM's baby shower and wanted to stay with her afterwards but defendant would not allow it. MM also testified that defendant's other daughters blamed MM for the Department of Health and Human Services' eventual involvement in JS's life. Defendant claims that this testimony was both irrelevant and unfairly prejudicial. In essence, defendant asserts, "it characterized [defendant] as an evil person intent on destroying [JS]'s life in order to spite [the victim]'s family."[5] We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Steele*, 283 Mich App at 478. First, defendant argues that the testimony at issue was irrelevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence is admissible; irrelevant evidence is not. MRE 402.

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term relationship with the victim, defendant remains married to another man, who, under Michigan law, would presumptively be the child's legal father. See *In re KH*, 469 Mich 621, 634; 677 NW2d 800 (2004) ("The presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and case law.").

[5] Notably, despite claiming that the testimony at issue portrayed defendant "as an evil person," defendant does *not* argue that the testimony at issue constituted improper character evidence. See MRE 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith . . . ."). Indeed, she does not mention the phrases "character evidence" or MRE 404 in her argument in this regard. Because a complex analysis is required when determining whether character evidence of a defendant or a victim is admissible in a case in which a defendant raises a self-defense theory in response to a charge of first-degree murder, see, e.g., *People v Harris*, 458 Mich 310, 314-321; 583 NW2d 680 (1998), it is not this Court's role to create such an argument for her.

"Evidence that a defendant made efforts to influence [a] . . . witness is relevant if it shows consciousness of guilt." *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Second, defendant argues that the testimony at issue, assuming it was relevant, was unfairly prejudicial. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. MRE 403 does not prohibit prejudicial evidence; rather, it prohibits evidence that is *unfairly* prejudicial. *People v Mardlin*, 487 Mich 609, 616; 790 NW2d 607 (2010). In essence, evidence is unfairly prejudicial when there exists a danger that marginally probative evidence might be given undue weight by the jury. *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.).

In our view, MM's testimony was relevant. That is, MM's testimony had a tendency to make the existence of a fact that was of consequence to the determination of the action more probable or less probable than it would have been without the evidence. MRE 401. To be relevant, evidence need only have a tendency to make the existence of *any fact that is of consequence* more or less probable. In this case, MM's testimony regarding the custody dispute provided a conflicting portrayal of defendant after the victim's death, including the very next day. MM testified that defendant, as well as defendant's other daughters, actively prevented JS from continuing to have a relationship with MM after the victim's death. Defendant's daughters and friends, on the other hand, testified that defendant was shocked and emotional about the victim's death, and MM's testimony certainly undermines that theory. See,

e.g., *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978) ("Because of the absence of direct evidence, the prosecutor in the instant case was forced to use circumstantial evidence in his attempt to prove that the defendant had the requisite state of mind at the time of the shooting to support a conviction of second-degree murder."). Furthermore, MM's testimony in this regard likely reflected on defendant's and defendant's daughters' testimony that the victim was an angry drunk whom defendant was scared of, which the prosecution contends supports a finding that defendant influenced JS's and her other daughters' statements or trial testimony. See, e.g., *Schaw*, 288 Mich App at 237 (providing that a defendant's efforts to influence a witness were relevant, and thus admissible, because they "showed consciousness of guilt"). We therefore conclude that the trial court's ruling that this testimony was relevant did not fall outside the range of reasonable outcomes.

Similarly, we are also of the view that MM's testimony was not unfairly prejudicial. That is, we see no reason why her testimony would have been given undue weight by the jury. See *Feezel*, 486 Mich at 198. First, it is important to keep in mind that this testimony, which had a tendency to affect whether the jury believed defendant's daughters' testimony and reflected defendant's state of mind shortly after the victim was killed, was a brief portion of one witness's testimony during six days of testimony over an eight-day trial. Furthermore, defendant's conclusory claim that it portrayed her "as an evil person" is simply not supported by the record. In fact, if one were to assume that defendant was acting in self-defense as she claimed, her desire to prevent the biological child of the victim, i.e., the person she claimed was trying to kill or injure her, from continuing to have relationships with

her children may have actually supported her defense. In our view, any prejudicial effect from the fact that the jury might have viewed defendant negatively because of how she handled JS's custody after the victim died is minimal at best when compared to the probative value that this testimony had on several witnesses' biases and defendant's mindset shortly after the victim was killed. Additionally, as alluded to earlier, defendant does not make any argument with respect to whether MM's testimony impermissibly reflected on her character. We therefore conclude that the trial court's ruling that this testimony was not unfairly prejudicial did not fall outside the range of reasonable outcomes.

Relatedly, defendant briefly argues on appeal that her trial counsel's failure to object to Detective Schuette's and MM's testimony as described constituted ineffective assistance of counsel. "The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). As explained by the *Trakhtenberg* Court:

> Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. Const 1963, art 1, § 20; US Const, Am VI. In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. [*People v*] *Armstrong*, 490 Mich [281,] 290[; 806 NW2d 676 (2011)]; see, also, *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994) (adopting the federal constitutional standard for an ineffective-assistance-of-counsel claim as set forth in *Strickland*[*v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)]). [*Trakhtenberg*, 493 Mich at 51-52.]

Importantly, an attorney's "[f]ail[ure] to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). The arguments made by defendant with respect to her ineffective-assistance-of-counsel claim rely entirely on her positions as described earlier, all of which we ultimately concluded were meritless. Consequently, an objection by trial counsel would have been meritless. *Id*. We therefore conclude that defendant's trial counsel's performance did not fall below an objective standard of reasonableness and was not outcome-determinative. *Trakhtenberg*, 493 Mich at 51-52.

Next, defendant argues that the trial court abused its discretion by admitting evidence about a previous occasion in which she had stabbed the victim. Specifically, defendant argues that the fact that she had stabbed the victim toward the beginning of their relationship, approximately 10 years before the instant stabbing, has no bearing on her intent at the time of the stabbing at issue in this case. She claims, in relevant part, as follows:

> The notion that [defendant] developed a motive or intent to stab [the victim] when they first got together and waited over 10 years to effectuate the plan is absurd on its face. If [defendant] intended to murder [the victim], there were numerous opportunities given the repeated testimony of [the victim's] drinking and drug use.

Therefore, defendant asserts, this evidence had no tendency to prove or disprove whether she was acting in self-defense at the time and that, even if it did, the minimal probative value was substantially outweighed by the danger of unfair prejudice. We disagree.

As stated earlier, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.

Steele, 283 Mich App at 478. Additionally, evidence is admissible only if it is relevant, MRE 402, meaning that it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," MRE 401. However, even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. In support of this argument, unlike the evidentiary argument already discussed, defendant argues that MRE 404 precluded admission of this evidence because it is improper character evidence. Specifically, MRE 404(a) generally prohibits the admission of character evidence to establish actions in conformity with that character. Despite this general prohibition, character evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act . . . ." MRE 404(b)(1). "At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). See also *Mardlin*, 487 Mich at 616 ("[T]he rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character.").

In this case, it is apparent that the prosecution sought to admit evidence that defendant had previously stabbed the victim, not to demonstrate criminal propensity, *Martzke*, 251 Mich App at 289, but to disprove defendant's claim that her decision to stab the

victim was emotional and made in self-defense, i.e., to prove her intent, MRE 404(b)(1). According to one of the victim's friends, the victim had called him on several occasions asking for a ride from the home after having had an argument with defendant. On multiple occasions, after the friend arrived, he witnessed defendant threaten to stab the victim, e.g., "I'm going to stab your ass." Specifically the friend testified that on one occasion the victim "was bleeding and everything and he's like, 'you bitch, I can't believe you stabbed me.' " At this point, defendant's trial counsel objected, and the trial court sustained that objection and gave a curative instruction. However, after defendant testified, the trial court decided to allow questioning with respect to the previous stabbing given the nature of defendant's testimony. Specifically, the prosecution argued, and the trial court decided, that rebuttal testimony about defendant's prior stabbing of the victim was admissible pursuant to MRE 404(b) because it reflected on defendant's motive or intent. This additional testimony included several witnesses recalling the victim's comment that defendant had tried to kill him by stabbing him and Detective Schuette's testimony that medical records confirmed that the victim had sustained injuries similar to those described by the victim at that time.

We agree with the trial court's conclusion that this rebuttal testimony was admissible. Indeed, much like a victim's prior acts of violence, a defendant's prior acts of violence are also highly relevant as to whether a defendant was acting in self-defense. See, e.g., *People v Taylor*, 195 Mich App 57, 61; 489 NW2d 99 (1992). Contrary to defendant's argument on appeal, the prior stabbing had little, if anything, to do with defendant's intent and patience over the 10 years leading up to the murder. Rather, it undermined defendant's testimony

that she had never threatened the victim.[6] Indeed, defendant's testimony portrayed her as the victim of one-way physical violence for several months leading up to the stabbing.[7] Consequently, defendant's prior acts of violence, and especially her prior stabbing of the victim, are highly relevant when determining whether she was acting in self-defense when she stabbed the victim. *Id*. We therefore conclude that the trial court did not abuse its discretion by admitting evidence of defendant's prior stabbing of the victim.[8]

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[6] In fact, defendant denied having "ever threatened Greg whatsoever with physical harm[.]" In our view, this express denial opened the door, so to speak, for rebuttal testimony regarding instances in which defendant had threatened or actually committed physical violence against the victim. Stated simply, this rebuttal testimony addressed defendant's intent and credibility, not her character.

[7] With respect to the stabbing at issue in this case, defendant testified that the victim "lunged at" her and that she was "not sure what happened after that." According to defendant, after stabbing the victim, "he's standing there and he lifts his shirt and . . . we both kind of see the cut and he turns around and he goes in and sits down on the couch." Defendant testified that she eventually called 911 and performed CPR until law enforcement arrived. When asked why she told the police officers that the victim was stabbed outside the home, defendant claimed that she "didn't want him getting in trouble for fighting and arguing and drinking, because he was trying to get his license and he couldn't have anything to do with drinking and police or anything."

[8] It is also conceivable that evidence of the prior stabbing could have been admitted pursuant to MCL 768.27b(1). That statute provides, in relevant part, for the admission of "evidence of the defendant's commission of other acts of domestic violence . . . for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403" when the defendant is criminally charged with an offense involving domestic violence. MCL 768.27b(1). One might argue that the 10-year limitation on this type of evidence prohibits the admission of the prior stabbing in this case; however, a similar argument could be made that the admission of the prior stabbing would serve the "interest of justice." See MCL 768.27b(4). In any event, because we agree with the trial court's decision with respect to MRE 404, our discussion in this regard is largely irrelevant.

Lastly, defendant argues that resentencing is required because the trial court unreasonably departed from the advisory guidelines minimum sentence range. Defendant claims that the trial court's comments at sentencing "reflected the judge's personal opinion about the characters of [the victim] and [defendant], rather than facts that are capable of being evaluated and confirmed by an appellate court." In support of her argument, defendant calls attention to some of the trial court's statements—such as "Mr. Stack had a lot of really great qualities and he had one major fatal flaw, that's that he stayed in a relationship with you"—and asserts that such comments show that the trial court "was likely moved by the devastation to the [victim's] family," which resulted in a sentence that was not based on objective reasoning. She also argues, especially given her lack of criminal history, that "the long sentence does not appear to serve any of the objectives of incarceration . . . ." Stated simply, defendant argues that the trial court's sentence was not reasonably proportionate to the crime and the offender. We agree.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). In *Steanhouse*, the Michigan Supreme Court clarified that "the relevant question for appellate courts reviewing a sentence for reasonableness" is "whether the trial court abused its discretion by violating the principle of proportionality . . . ." *Id*. The principle of proportionality is one in which

> "a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender." [*Id*. at 472, quoting *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990).]

Under this principle, " 'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " *Steanhouse*, 500 Mich at 472, quoting *Milbourn*, 435 Mich at 661. Part of the *Steanhouse* Court's reasoning for adopting the "principle-of-proportionality test" for reviewing a sentence for reasonableness was "its history in our jurisprudence." *Steanhouse*, 500 Mich at 471. Accordingly, although the *Lockridge* Court corrected a constitutional flaw in the sentencing guidelines by making them fully advisory,

> nothing else in [that] opinion indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in [*United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005)] or its progeny compels us to depart from our longstanding practices applicable to sentencing. Since we need not reconstruct the house, we reaffirm the proportionality principle adopted in *Milbourn* and reaffirmed in [*People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003)] and [*People v Smith*, 482 Mich 292; 754 NW2d 284 (2008)]. [*Steanhouse*, 500 Mich at 473.]

However, to the extent that dicta from our Supreme Court's prior opinions were "inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines

sentences," it "disavow[ed] those dicta." *Id*. at 474, citing *Gall v United States*, 552 US 38, 51; 128 S Ct 586; 169 L Ed 2d 445 (2007).

In this case, defendant was sentenced after *Lockridge* was issued, and the trial court expressly recognized that the guidelines minimum sentence range was advisory. Consequently, it is apparent that the trial court was aware that its upward departure sentence would be reviewed for reasonableness on appeal. To begin the sentencing hearing, the trial court acknowledged that the guidelines minimum sentence range was 12 to 20 years. The prosecutor requested, in relevant part, that "the court exceed the guidelines significantly" and "sentence Ms. Dixon-Bey at a minimum, on the low end, to 30 years." The trial court, apparently agreeing with the prosecutor's argument, sentenced defendant to a minimum term of 35 years in prison. The trial court reasoned as follows:

> All right, well the court sat through this trial, for several weeks I listened to a lot of testimony and I've learned that few people in this business are perfect. And Mr. Stack had a lot of really great qualities and he had one major fatal flaw, that's that he stayed in a relationship with you. And I—I—I don't buy your—your theory that this was just some kind of domestic situation and you struck out at him in some type of vulnerability. In fact, I think some—some—some facts that were well established during the trial are significant and that's the—first, is that you stabbed him not [once] but twice in the heart.
>
> Mr. Carter, [sic] might've—oh, you know, maybe Dr. Ortiz-Reyes, you know, cut that when he was doing the autopsy. That—that wasn't—there was a second stab wound and it was directly to the heart. One and one half years before this even occurred you slashed Mr. Stack, you know, such that he had to have reconstructive surgery on his hand. So, this wasn't the first time there was a domestic act of violence with you involving a knife with

> the victim. In fact, you told Mr. Gove that all I have to do is stick him in the chest and then claim self-defense. That was a statement that you made before the alleged time when he was—Mr. Stack was stabbed twice in—in the heart.
>
> And then, on—on—on the night in question we know the murder weaponed [sic] vanished. It was never found, never able to be processed by the police. So, you had the presence of mind to do that.
>
> You had the presence of mind to go ahead and try to minimize your role and then try to turn the focus, you know, back on Mr. Stack as being the cause. Well, today the focus is about you. An intent can be determined by what you did, what you said, both before, during and after the crime. And, frankly, you plunged that knife into Mr. Stack's heart twice and you brutally murdered him in cold blood. And for that by the power vested in me in the State—by the State of Michigan you're to serve thirty-five (35) years to seventy (70) years in the Michigan Department of Corrections, five hundred dollars ($500.00) in court costs, three hundred and seventy-five dollars ($375.00) in fines, a hundred and thirty dollars ($130.00) to the Crime Victims Rights Fund, sixty-eight dollars ($68.00) in State court costs, three hundred and fifty dollars ($350.00) in attorney's fees, sixty dollars ($60.00) in the DNA fee.
>
> You know, with you married to another man in prison I'm just amazed he ever even stayed with you in the—in a relationship. And—and by the way, I did consider the sentencing guidelines which were 12 years to 20 years but I considered that the additional level of depraved heart and murder and the cold calculated nature of you brutally stabbing him twice in the heart and letting him bleed to death and die in this matter. So, the court believes my sentence is within the range. The guidelines are only advisory so you will serve that time. You'll be an old woman before you get out of prison.

It is our view that the 15-year upward departure was unreasonable and that, in light of the record before

us, the trial court abused its discretion by violating the principle of proportionality. When our Supreme Court adopted the principle of proportionality in *Milbourn*, it noted that it did so, in part, to "effectively combat unjustified disparity" in sentencing. *Milbourn*, 435 Mich at 647. Therefore, "[o]ne of the purposes of the proportionality requirement is to minimize idiosyncrasies." *Smith*, 482 Mich at 311. The *Milbourn* Court pointed to the sentencing guidelines as an aid to accomplish the purposes of proportionality, noting that they were "a useful tool in carrying out the legislative scheme of properly grading the seriousness and harmfulness of a given crime and given offender within the legislatively authorized range of punishments." *Milbourn*, 435 Mich at 657-658. In *Smith*, our Supreme Court reiterated that the sentencing guidelines "provide[] objective factual guideposts that can assist sentencing courts in ensuring that the offenders with similar offense and offender characteristics receive substantially similar sentences." *Smith*, 482 Mich at 309 (quotation marks and citations omitted).

More recently in *Steanhouse*, our Supreme Court noted that the Legislature had incorporated the principle of proportionality into the legislative sentencing guidelines. *Steanhouse*, 500 Mich at 472, citing *Babcock*, 469 Mich at 263. In the same opinion, our Supreme Court repeated its "directive from *Lockridge* that the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts ' "must consult" ' and ' "take . . . into account when sentencing . . . ." ' " *Steanhouse*, 500 Mich at 474-475, quoting *Lockridge*, 498 Mich at 391, in turn quoting *Booker*, 543 US at 264. Because the guidelines embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a "useful tool" or

"guideposts" for effectively combating disparity in sentencing. Therefore, relevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range continue to include (1) whether the guidelines accurately reflect the seriousness of the crime, see *People v Houston*, 448 Mich 312, 321-322; 532 NW2d 508 (1995), and *Milbourn*, 435 Mich at 657; (2) factors not considered by the guidelines, see *Houston*, 448 Mich at 322-324, and *Milbourn*, 435 Mich at 660; and (3) factors considered by the guidelines but given inadequate weight, see *Houston*, 448 Mich at 324-325, and *Milbourn*, 435 Mich at 660 n 27.[9] When making this determination and sentencing a defendant, a trial court must " 'justify the sentence imposed in order to facilitate appellate review,' " *Steanhouse* 500 Mich at 470, quoting *Lockridge*, 498 Mich at 392, which "includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been," *Smith*, 482 Mich at 311.

In this case, the trial court did not adequately explain why a minimum sentence of 35 years was more proportionate than a different sentence within the guidelines would have been. Defendant's prior record variable score was zero. She had a number of very old misdemeanors, but they were all nonviolent. Without a criminal history, the trial court had no basis to conclude that defendant was a "recidivist . . . criminal" who deserved a "greater . . . punishment" than that contemplated by the guidelines. *Id*. at 305 (quotation marks and citation omitted). The trial court offered no

[9] Other factors listed by this Court in *People v Steanhouse*, 313 Mich App 1, 46; 880 NW2d 297 (2015), rev'd in part on other grounds 500 Mich 453 (2017), include "the defendant's misconduct while in custody, *Houston*, 448 Mich at 323, the defendant's expressions of remorse, *id*., and the defendant's potential for rehabilitation, *id*."

other explanation as to why defendant's background may warrant a departure sentence. Accordingly, on the record before us, nothing in defendant's background supports the conclusion that a departure sentence was more proportionate than a sentence within the guidelines. See *Steanhouse*, 500 Mich at 474 (stating that a trial court must take into account the nature of the offense and the background of the offender when sentencing a defendant).

We now turn to the nature of defendant's offense. See *id*. Of the various factors discussed by the trial court, none provided reasonable grounds for the departure.[10] In fact, most, if not all, of the factors discussed by the trial court to support its departure sentence were contemplated by at least one offense variable (OV). The trial court emphasized that defendant had stabbed the victim twice in the chest. However, defen-

[10] While second-degree murder is a serious crime, we note that the trial court never indicated that it believed the guidelines inadequately reflected this seriousness. In contrast, in *Houston*, 448 Mich at 321, the Court noted the trial court's statement regarding the inadequacy of the guidelines:

> "We have seen what I find to be ridiculously low guidelines in the offense of Criminal Sexual Conduct in the First Degree, just in general."

The Michigan Supreme Court stated that "[t]he observation [was] well taken" and they agreed "with the trial judge's conclusion that the recommended range [was] too low . . . ." *Id*. at 321-322. The *Houston* Court concluded, "Unless there is some basis for deciding what range would have been appropriate, we cannot reliably conclude that the sentence was disproportionate." *Id*. at 322. In contrast to *Houston*, the trial court in this case did not express a belief that the sentencing guidelines inadequately reflected the seriousness of second-degree murder. Therefore, we cannot conclude on that basis that the recommended sentence was less proportionate than the trial court's departure sentence. See *Smith*, 482 Mich at 311 n 42 (noting that the Legislature likely "did not overlook the basic fact" that certain crimes were heinous "when establishing sentencing guidelines for" those crimes).

dant's aggravated use of a lethal weapon is contemplated in the scoring of OV 1 (aggravated use of weapon), MCL 777.31, and OV 2 (lethal potential of weapon possessed or used), MCL 777.32. The trial court offered no rationale as to why that scoring was insufficient to reflect the nature of the stabbing. The trial court also pointed to the impact of the victim's death on his family, but OV 5 (psychological injury to member of victim's family), MCL 777.35, was scored to reflect that impact. Again, the trial court failed to offer any explanation as to why that scoring was insufficient. Further, the trial court's reliance on the fact that defendant apparently failed to disclose the location of the murder weapon would ordinarily trigger the application of OV 19 (interfering with the administration of justice), MCL 777.49, not an upward departure. The trial court also referred to the "cold-blooded" nature of the crime; yet we find it interesting that the trial court and parties apparently agreed that OV 7 (aggravated physical abuse), MCL 777.37, under which points may be assessed for excessive brutality, should not be scored given the facts and circumstances of this case.

The trial court's reference to the "cold-blooded" nature of the crime may have been based on its belief that the killing was premeditated, which it also emphasized was part of the basis for its sentence. Generally, OV 6 (offender's intent to kill or injure another individual), MCL 777.36, can be scored to reflect an offender's intent and does not warrant an upward departure. However, under MCL 777.36(2)(a), a sentencing court must score OV 6 "consistent[ly] with a jury verdict unless the judge has information that was not presented to the jury." As a result, a sentencing court may be constrained under the guidelines from scoring OV 6 as highly as it otherwise would have.

In this case, defendant was charged with first-degree murder, MCL 750.316, but the jury convicted her of second-degree murder, MCL 750.317. Although a jury may find premeditation when convicting an offender of first-degree murder, it is not required to find premeditation for second-degree murder. See *People v Hoffmeister*, 394 Mich 155, 158; 229 NW2d 305 (1975). Accordingly, because defendant was convicted of second-degree murder in this case, the trial court was constrained by MCL 777.36(2)(a) from scoring OV 6 to reflect a premeditated intent absent "information that was not presented to the jury." There is no indication on the record that the trial court had any information that was not presented to the jury, yet it nonetheless concluded that defendant acted with premeditation. The Legislature expressly gave trial courts an opportunity to find a premeditated intent for crimes to which such an intent does not necessarily attach. Absent the legislatively prescribed condition necessary to trigger that ability, we are highly skeptical of a trial court's decision to sentence a defendant convicted of second-degree murder as though the murder were premeditated. See *Steanhouse*, 500 Mich at 472 (noting that the principle of proportionality is intended " 'to fulfill the overall legislative scheme of criminal punishment' "), quoting *Milbourn*, 435 Mich at 651. Moreover, even if the trial court had scored this variable at 50 points, reflecting a premeditated intent, rather than as it did at 25 points, reflecting an unpremeditated intent, MCL 777.36, that change would have increased defendant's overall OV score from 70 points to 95 points, leaving her recommended minimum sentence range unchanged, MCL 777.61. Therefore, even if the trial court believed that this variable was given inadequate weight and should have been scored to reflect a premeditated intent, that determination would not have

supported a conclusion that a departure sentence was more proportionate.

Other factors relied on by the trial court were not unique to defendant or otherwise relevant to a proportionality determination. The trial court highlighted the victim's standing in the community and defendant's attempts to minimize her role in the stabbing. Neither factor is, in our view, unique to defendant's crime, nor supported by the record. The trial court also referred to defendant's marriage with a man who was in prison during her relationship with the victim. Although an offender's relationship to the victim may be a sentencing factor that is not included in the guidelines, see *Milbourn*, 435 Mich at 660-661, defendant's relationship with the victim was that of a long-term girlfriend. There is nothing on the record to indicate that defendant's marriage to a different man affected her relationship with the victim, and we cannot supplement the trial court's reasoning when it failed to give an explanation. See *Smith*, 482 Mich at 304 ("Similarly, if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified."). Accordingly, while we do not seek to minimize the victim's death, we cannot conclude on the record before us that the trial court's 15-year upward departure sentence was more reasonable and proportionate than a sentence within the recommended guidelines range would have been. See *id*. at 305-306 (stating that a trial court should explain the extent of a departure); *Steanhouse*, 500 Mich at 474 (noting that appellate courts may consider the extent to which a sentence deviates from the guidelines).

In urging the opposite conclusion, the dissent articulates the reasons given by the trial court for its departure sentence and then states,

> Under the applicable abuse-of-discretion standard, given the level of deference that we afford to trial judges because of their greater familiarity with the facts and experience in sentencing, I cannot find on the record before us that the trial court's sentence was not a principled outcome.

However, reliance solely on a trial court's familiarity with the facts of a case and its experience in sentencing cannot "effectively combat unjustified disparity" in sentencing because it construes sentencing review "so narrowly as to avoid dealing with disparity altogether," especially in this case. *Milbourn*, 435 Mich at 647. The *Milbourn* Court expressly recognized that a proportionality determination "becomes considerably more difficult" when, like in the case before us, "the Legislature has set no minimum or has prescribed a maximum of a lengthy term of years or life." *Id*. at 654. To deal with this difficulty, the *Milbourn* Court directed courts to consider the sentencing guidelines because they offered "the best 'barometer' of where on the continuum from the least to the most threatening circumstances a given case falls." *Id*. at 656. Following *Lockridge* and *Steanhouse*, trial courts are still required to consult the now advisory guidelines and take them into account when sentencing. *Steanhouse*, 500 Mich at 474-475. Yet despite the fact that this case embodies the difficult proportionality determination described in *Milbourn*, the dissent indicates that it would affirm without reference to the sentencing guidelines.

In large part, the dissent's reluctance to refer to the sentencing guidelines appears based on the *Steanhouse* Court's directive that proportionality in Michigan be measured on the basis of the seriousness of the offense rather than by the degree to which the sentence deviates from the guidelines. We of course agree that *Steanhouse* directs that proportionality in Michigan be

based upon the seriousness of the offense and not a deviation from the guidelines, but we disagree that *Steanhouse* encourages appellate courts to determine proportionality in a void without consideration of the sentencing guidelines. *Steanhouse* generally reaffirmed our Supreme Court's prior jurisprudence regarding the principle of proportionality, implicitly condoning *consideration* of the sentencing guidelines in a proportionality determination, and it only disavowed its earlier opinions to the extent that they indicated in dicta that there was a *presumption* of disproportionality when a sentence departed from the guidelines. More explicitly, the *Steanhouse* Court quoted *Gall* for the proposition that " 'appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines.' " *Id*. at 474, quoting *Gall*, 522 US at 47. Accordingly, we read *Steanhouse* as directing appellate courts to use the sentencing guidelines as an aid when doing so assists in determining whether a sentence is proportionate. Because the range of sentences in this case was so large—up to life imprisonment—we believe that consideration of the guidelines was useful in determining the proportionality of the sentence.[11]

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[11] To the extent that the dissent does discuss the sentencing guidelines, it reasons that, if the trial court had scored OV 6 at 50 points rather than 25 points and OV 19 at 10 points rather than zero points, then defendant's OV score would have been over the maximum contemplated by the guidelines, thereby justifying the trial court's sentence. However, particularly with respect to OV 19, the fact that the trial court *could have* scored OV 19 but chose not to tends to support that the trial court did not consult the guidelines and take them into account when sentencing, which supports that a departure sentence was not reasonable. *Steanhouse*, 500 Mich at 474-475. It also bears noting that in appellate reviews of sentences generally, an appellate court should avoid supplementing or otherwise justifying the trial court's otherwise insufficient reasoning with reasoning of its own. See *Smith*, 482 Mich at 304.

Accordingly, we affirm defendant's conviction, vacate defendant's sentence, and remand this matter for resentencing consistent with this opinion. We do not retain jurisdiction.

HOEKSTRA, J., concurred with O'BRIEN, P.J.

BOONSTRA, J. (*concurring in part and dissenting in part*). I concur with the majority in affirming defendant's conviction. I respectfully dissent, however, from the majority's holding that the trial court's sentencing departure violated the principle of proportionality.

As the majority acknowledges, we review a trial court's sentencing departure for "reasonableness," *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015), and we review for an abuse of discretion the reasonableness of the sentence imposed by the trial court, *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). In reviewing a sentence for reasonableness, we must apply the "principle-of-proportionality test" that was adopted in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). *Steanhouse*, 500 Mich at 471.

Our Supreme Court recently emphasized in *Steanhouse* that " 'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " *Id*., quoting *Milbourn*, 435 Mich at 661. And the Court specifically disavowed "dicta in our proportionality cases [that] could be read to have urg[ed] that the guidelines should almost always control" and that thus could be interpreted as "creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Steanhouse*, 500 Mich at 474 (quotation marks and citations omitted;

second alteration in original). The *Steanhouse* Court also specifically disavowed the statement in *Milbourn* that departure sentences should " 'alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme.' " *Id*., quoting *Milbourn*, 435 Mich at 659. "Rather than impermissibly measuring proportionality by reference to deviations from the guidelines, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse*, 500 Mich at 474, quoting *Milbourn*, 435 Mich at 636. See also *People v Walden*, 319 Mich App 344, 351-352; 901 NW2d 142 (2017).

Again, the trial court's application of the principle-of-proportionality test is reviewed by this Court for an abuse of discretion. *Steanhouse*, 500 Mich at 471. An abuse of discretion occurs when the trial court's decision falls outside the "range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The abuse-of-discretion standard acknowledges that "[b]ecause of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case." *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003). Moreover, "[a]t its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Id*. at 269. "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*.

I am unable to conclude on the record before us that the trial court selected an unprincipled outcome in this case.

In rendering a sentence, a trial court in Michigan is no longer obliged to articulate a substantial and compelling reason to depart from the sentencing guidelines range. *People v Lockridge*, 498 Mich at 391-392 (striking down that requirement of MCL 769.34(3)). But a court must still "justify the sentence imposed in order to facilitate appellate review." *Id*. at 392. See also *Steanhouse*, 500 Mich at 470. Indeed, that requirement "reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Rita v United States*, 551 US 338, 356; 127 S Ct 2456; 168 L Ed 2d 203 (2007).

However, when a trial court justifies a sentence, "[t]he appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances," and "[t]he law leaves much, in this respect, to the judge's own professional judgment." *Id*. "The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id*. Depending on the circumstances, that statement of reasons may be "brief but legally sufficient." *Id*. at 358. "By articulating reasons, even if brief, the sentencing judge . . . assures reviewing courts (and the public) that the sentencing process is a reasoned process . . . ." *Id*. at 357.

The sentencing judge in this case arguably could have said more. And saying more rather than less

certainly aids an appellate court in assessing the reasonableness of a sentence. Ultimately, however, the relevant inquiry is whether the trial court followed a "reasoned" process that led to a "reasoned" decision. *Id*. at 356-359.

At the sentencing in this case, the trial court first entertained objections to the proposed guidelines minimum sentence range of 144 months to 240 months. The court denied a defense request to change the scoring of Offense Variable (OV) 6 (offender's intent to kill or injure another individual), MCL 777.36, from 25 to zero points. The court also denied a prosecution request to change the scoring of OV 10 (exploitation of vulnerable victim), MCL 777.40, from zero to five points.

> Defense counsel then addressed the trial court as follows:
>
> Your Honor, I—I will be brief as you were the Judge that sat through the jury trial and heard the evidence. You've heard the prosecutor's theory of the case and you heard my client's theory of the case. Obviously, the jury believed that there was some culpability on my client and they came back with a verdict of second degree murder. But, when you look at the full facts of this case and the living arrangements and the way this couple had lived for the last ten years I think there's no doubt that this was a very hostile relationship, so to speak, at times. And I'd ask the court to be lenient on my client and ask for the lower part of the guidelines. The guidelines score her at 144 to 240, I believe, at—on the minimum range and we'd ask that your Honor score—sentence her to the lower end of that guideline.

Defendant presented a statement on her own behalf, the victim's sister presented a statement on behalf of the victim's family, and the court also heard from the victim's best friend. The prosecution then addressed the court, requesting that it "significantly exceed the

sentencing guidelines" and sentence defendant "at a minimum, on the low end, to 30 years." The prosecution argued:

> I'm asking the court to significantly exceed the—the sentencing guidelines. I recognize that they're basically recommendations at this point. I'm asking that the court sentence Ms. Dixon-Bey at a minimum, on the low end, to 30 years. You know, we—the legislature comes up with these numbers and I think generally they do a good job in terms of recommending sentences when it comes to something like this, a cold blooded murder. The—the pain and the suffering that this family has to go through as a result of the defendant, the—these numbers can't possibly capture any of that. There's just no possible way that it can.
>
> Ms. Dixon-Bey spent the entire trial painting a—this picture of an abusive relationship about how Greg abused her. And I firmly believe that there was an abusive relationship, but she was the abuser. She was the one who had stabbed him multiple times in the past. Greg was the one who refused to cooperate with the police, who refused to cooperate with the prosecutor.
>
> You know, she also spent all this time talking about how he—his drinking got worse and worse. Well, that's what happens when you're being abused. That's what happens in an abusive relationship. That's why his drinking got worse and worse, because of her. The—I—I can't possibly fathom what—what the family's going through. The—the—the court heard the testimony. I'm not going to resuscitate the testimony but, you know, this—this was no accident. She stabbed him twice straight through the heart. She had done it in the past, she planned to do it, she told people she was gonna do it and she did it on that day.
>
> The—the court has a profound opportunity to do great justice for the Stack family, for Greg and for the community, you know, that Greg was taken away from the family but he was also taken away from the community, and by all accounts he was a wonderful member of the community and I'm asking that the court sentence her to at least 30 years on the minimum end. That would put her in her 70s

to make sure that the community is protected from her for as long as it possibly can be.

The trial court then articulated its sentence, and the reasons therefore, as follows:

All right, well the court sat through this trial, for several weeks I listened to a lot of testimony and I've learned that few people in this business are perfect. And Mr. Stack had a lot of really great qualities and he had one major fatal flaw, that's that he stayed in a relationship with you. And I—I—I don't buy your—your theory that this was just some kind of domestic situation and you struck out at him in some type of vulnerability. In fact, I think some—some—some facts that were well established during the trial are significant and that's the—first, is that you stabbed him not one but twice in the heart.

Mr. Carter, [sic] might've—oh, you know, maybe Dr. Ortiz-Reyes, you know, cut that when he was doing the autopsy. That—that wasn't—there was a second stab wound and it was directly to the heart. One and one half years before this even occurred you slashed Mr. Stack, you know, such that he had to have reconstructive surgery on his hand. So, this wasn't the first time there was a domestic act of violence with you involving a knife with the victim. In fact, you told Mr. Gove that all I have to do is stick him in the chest and then claim self-defense. That was a statement that you made before the alleged time when he was—Mr. Stack was stabbed twice in—in the heart.

And then, on—on—on the night in question we know the murder weaponed [sic] vanished. It was never found, never able to be processed by the police. So, you had the presence of mind to do that.

You had the presence of mind to go ahead and try to minimize your role and then try to turn the focus, you know, back on Mr. Stack as being the cause. Well, today the focus is about you. An intent can be determined by what you did, what you said, both before, during and after the crime. And, frankly, you plunged that knife into Mr.

> Stack's heart twice and you brutally murdered him in cold blood. And for that by the power vested in me in the State—by the State of Michigan you're to serve thirty-five (35) years to seventy (70) years in the Michigan Department of Corrections, five hundred dollars ($500.00) in court costs, three hundred and seventy-five dollars ($375.00) in fines, a hundred and thirty dollars ($130.00) to the Crime Victims Rights Fund, sixty-eight dollars ($68.00) in State court costs, three hundred and fifty dollars ($350.00) in attorney's fees, sixty dollars ($60.00) in the DNA fee.
>
> You know, with you married to another man in prison I'm just amazed he ever even stayed with you in the—in a relationship. And—and by the way, I did consider the sentencing guidelines which were 12 years to 20 years but I considered that the additional level of depraved heart and murder and the cold calculated nature of you brutally stabbing him twice in the heart and letting him bleed to death and die in this matter. So, the court believes my sentence is within the range. The guidelines are only advisory so you will serve that time. You'll be an old woman before you get out of prison.

On the basis of the record, I conclude that the trial court's sentencing decision reflects a reasoned process and a reasoned decision. The record makes clear that the court listened to the arguments of defense counsel and the prosecution. It listened to defendant, as well as to a family member and a friend of the victim. It evaluated the evidence after having spent several weeks listening to the testimony. It specifically took into account the now-advisory sentencing guidelines and found that they did not adequately capture the circumstances before it. It noted what it saw as a heightened level of depravity underlying this particular murder, its "cold calculated nature," the fact that defendant stabbed the victim in the heart not once but twice, the fact that she had stabbed the victim in the past and that she had told a third party that she could

stab the victim in the chest and then claim self-defense (precisely as she later did in this case), the fact that she disposed of the murder weapon after the killing, and the fact that her relatively young age necessitated a lengthy sentence to adequately secure the protection of the public.

In my judgment, the trial court's decision was a reasoned one that resulted from a reasoned sentencing process. Under the applicable abuse-of-discretion standard, given the level of deference that we afford to trial judges because of their greater familiarity with the facts and experience in sentencing, I cannot find on the record before us that the trial court's sentence was not a principled outcome.

Moreover, while the trial court " 'must . . . continue to consult the applicable guidelines minimum sentence range and take it into account when imposing a sentence,' " *Steanhouse*, 500 Mich at 470, quoting *Lockridge*, 498 Mich at 392, the trial court expressly noted that it had done so here.[1] More significantly, proportionality in Michigan is not measured by the degree to which a departure sentence deviates from the guidelines but rather by the seriousness of the offense. *Steanhouse*, 500 Mich at 472 ("Rather than impermissibly measuring proportionality by reference to deviations from the guidelines, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' "), quoting *Milbourn*, 435 Mich at 636. I find no abuse of discretion in the trial court's assessment of the circum-

[1] I am puzzled by the majority's suggestion that I read *Steanhouse* as "encourag[ing] appellate courts to determine proportionality in a void without consideration of the sentencing guidelines."

stances of this offense and this offender as sufficiently serious to warrant the sentence imposed.

To the extent, however, that we are to review the trial court's consideration of the guidelines, I also find no error. The majority suggests that the factors cited by the trial court were already taken into account by the guidelines. To that I must hearken back to the Supreme Court's disavowal in *Steanhouse* of earlier dicta suggesting that the "guidelines should nearly always control" and the already-noted admonition that proportionality is not measured in relation to the guidelines. *Steanhouse*, 500 Mich at 474 (quotation marks and citations omitted). Moreover, I would not characterize the trial court's discussion of the two stab wounds as merely referring to the use of a knife as reflected in OV 1 (aggravated use of weapon), MCL 777.31, and OV 2 (lethal potential of weapon possessed or used), MCL 777.32; rather, it is clear that the trial court was referring to the two stab wounds to the heart of the victim in the context of other past and threatened stabbings and as supporting its conclusion that defendant had planned and cold-bloodedly carried out the murder with a depraved heart. The majority finds it significant that the trial court referred to the "cold-blooded" nature of defendant's crime without insisting that OV 7 (aggravated physical abuse), MCL 777.37, be scored at 50 points. I do not find this particularly significant, however, as cold-bloodedness is not necessarily a synonym for excessive brutality under OV 7.

Moreover, while the trial court was constrained by the language of MCL 777.36(2)(a)[2] from scoring OV 6 (offender's intent to kill or injure another individual) at

[2] "The sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury."

50 points rather than 25 points, it was not constrained from finding that the guidelines minimum sentence range did not take into account defendant's premeditated intent to kill. The trial court referred to the fact that defendant had talked about stabbing the victim and claiming self-defense, that she had stabbed the victim in the past, and that she disposed of the murder weapon after committing the offense. These facts support the inference that defendant's intent was given inadequate weight. And although OV 19 (interference with the administration of justice), MCL 777.49, was not scored, defendant's conduct in both initially lying to the police and in disposing of the murder weapon could not adequately have been captured by the scoring of this variable, because only one score of 10 points would have been permitted despite defendant's multiple acts of interference with the administration of justice.

I also note that if 30 or more additional OV points had been assessed, such as by scoring OV 6 at 50 points rather than 25 and scoring OV 19 at 10 points rather than zero, defendant would have been subject to the highest OV level under the guidelines. See MCL 777.61. An offender with no prior record who is scored at the highest OV level for second-degree murder may be given, under the recommended guidelines, a minimum prison sentence of 162 to 270 months or life. *Id*. Consequently, had certain OVs been scored differently, as I believe the record justified in this case, the trial court could have sentenced defendant to a minimum term of life in prison without even departing from the guidelines. See *People v Johnson*, 202 Mich App 281, 291; 508 NW2d 509 (1993) (holding that sentencing a defendant to a term of years that exceeds the recommended term of years in the guidelines is a departure even when a sentence of life would not be a departure).

Finally, it is clear that the trial court considered the extent of its departure and was aware that defendant, in the trial court's words, would be "an old woman" before getting out of prison. The trial court considered defendant's previous acts of domestic violence against the victim (including slashing him with a knife to the point where he needed reconstructive surgery), her premeditated intent (as evidenced by her suggestion that she could stab the victim in the chest and claim self-defense), as well as her post-offense conduct and lack of remorse, in making this decision. I would hold that the trial court's sentence was not outside the range of principled outcomes, notwithstanding whether a different trial court (or this Court) may have reached a different outcome. *Steanhouse*, 500 Mich at 471; *Babcock*, 469 Mich at 268.

I would affirm the trial court in all respects.

ALLSTATE INSURANCE COMPANY v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 331885. Submitted September 12, 2017, at Detroit. Decided October 3, 2017, at 9:00 a.m.

Plaintiff, Allstate Insurance Company, brought an action in the Wayne Circuit Court against Lorenzo Causey, seeking to recover no-fault benefits it had paid to or on behalf of Amanda Pettaway, a pedestrian whom Causey had struck while driving a motor vehicle. Following the accident, Pettaway applied for personal protection insurance (PIP) benefits through the Michigan Assigned Claims Plan, which is adopted and maintained by the Michigan Automobile Insurance Placement Facility, and Pettaway's claim was assigned to plaintiff in April 2013. Plaintiff subsequently learned that Causey was insured by State Farm Mutual Automobile Insurance Company on the date of the accident, and an order was entered in May 2015 reflecting the parties' stipulation to plaintiff's filing an amended complaint identifying State Farm as a party defendant. Causey was dismissed from the case without prejudice. State Farm moved for summary disposition, asserting that plaintiff's claim was untimely and barred by MCL 500.3175(3) because it was filed more than two years after the assignment of Pettaway's claim and had not been brought within one year after the date of the last payment to the claimant. State Farm asserted that there were only two payments plaintiff had made relating to Pettaway's claim within one year of the amended complaint—payments made in July and August 2014 to Van Dyke Spinal Rehabilitation—and that State Farm had already issued payments in those amounts. Plaintiff asserted that it was entitled to summary disposition, arguing that the payments it had made to Pettaway's medical providers within one year of filing its amended complaint satisfied the requirements of MCL 500.3175(3). The court, Edward Ewell Jr., J., granted summary disposition in favor of State Farm. Plaintiff moved for reconsideration, which the court denied. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 500.3114(1), if a pedestrian injured in a motor vehicle accident does not have no-fault insurance and neither

does a relative in that person's household, then, under MCL 500.3115(1)(a), the pedestrian may claim PIP benefits from insurers of owners or registrants of motor vehicles involved in the accident. Pursuant to MCL 500.3172(1), if no insurance is available, then the pedestrian may obtain benefits through the Michigan Assigned Claims Plan, which serves as the insurer of last priority. MCL 500.3175 provides recourse to an assigned claims insurer that later discovers a higher priority insurer. In this case, neither Pettaway nor any relative domiciled in her household was a named insured in a no-fault insurance policy, and because Pettaway did not know that Causey had no-fault insurance, she sought PIP benefits through the Michigan Assigned Claims Plan. However, State Farm, as the insurer of the vehicle involved in the accident, was in the highest order of priority to pay Pettaway's claim for PIP benefits.

2. MCL 500.3175(3) provides that an action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of two years after the assignment of the claim to the insurer or one year after the date of the last payment to the claimant. In this case, it was undisputed that plaintiff's amended complaint identifying State Farm as a party defendant was filed more than two years after it was assigned Pettaway's claim; therefore, to be timely under MCL 500.3175(3), plaintiff's reimbursement action had to have been commenced within one year after the date of the last payment to the claimant.

3. The Supreme Court held in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), that while no-fault insurers may directly pay healthcare providers on the injured person's behalf, healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of PIP benefits under the no-fault act. Therefore, with regard to defining the "claimant" for purposes of MCL 500.3175(3), in order to have a "claim" under the no-fault act, a person must have a right to payment of PIP benefits from a no-fault insurer. In this case, the claimant was Pettaway because she had a right to PIP benefits from plaintiff.

4. MCL 500.3112 provides that PIP benefits are payable to or for the benefit of an injured person or, in case of his or her death, to or for the benefit of his or her dependents. With regard to identifying "the date of the last payment to the claimant" for purposes of MCL 500.3175(3), because no-fault-insurers are permitted to make payments to healthcare providers on the injured person's behalf in order to discharge their obligation "to the claimant," a no-fault insurer's payment to a healthcare provider

who provides necessary services to the injured person constitutes a payment "to the claimant." In this case, because plaintiff made payments to Van Dyke Spinal Rehabilitation in August 2014 on behalf of the claimant Pettaway, plaintiff's amended complaint filed in May 2015 was a timely reimbursement action against State Farm under MCL 500.3175(3).

5. MCL 500.3175(3) is a statute of limitations, not a statute that limits the period during which payments may be reimbursed. If the Legislature had intended to preclude assigned claims insurers from recovering reimbursement of no-fault benefits that were paid more than a year before the filing of the action, it knew how to do so given that other sections of the no-fault act, such as MCL 500.3145(1), preclude reimbursement for benefits paid more than a year before the filing of the action. As a statutory scheme, the no-fault act contemplates that the higher priority insurer will fully reimburse the Michigan Automobile Insurance Placement Facility and the assigned claims insurer; consequently, there is no restriction on the recoverable damages in a timely filed reimbursement action under MCL 500.3175(3). In this case, plaintiff's claim was timely because it was brought within a year of its last payment "to the claimant" for purposes of MCL 500.3175(3), and therefore plaintiff was entitled to recover all no-fault benefits paid on Pettaway's behalf for which defendant was responsible as the higher priority insurer. The trial court erred by granting summary disposition in favor of defendant and instead should have granted plaintiff summary disposition under MCR 2.116(I)(2).

Reversed and remanded.

1. INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — ACTION TO ENFORCE RIGHTS TO INDEMNITY OR REIMBURSEMENT AGAINST A THIRD PARTY — NO-FAULT INSURER'S PAYMENT TO A HEALTHCARE PROVIDER.

MCL 500.3175(3) provides that an action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of two years after the assignment of the claim to the insurer or one year after the date of the last payment to the claimant; a no-fault insurer's payment to a healthcare provider who provides necessary services to an injured person constitutes a payment "to the claimant" for purposes of MCL 500.3175(3).

2. INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — ACTION TO ENFORCE RIGHTS TO INDEMNITY OR REIMBURSEMENT AGAINST A THIRD PARTY — REIMBURSEMENT OF ALL NO-FAULT BENEFITS.

MCL 500.3175(3) provides that an action to enforce rights to indemnity or reimbursement against a third party shall not be

> commenced after the later of two years after the assignment of the claim to the insurer or one year after the date of the last payment to the claimant; an assigned claims insurer may be reimbursed for all no-fault benefits paid to or on behalf of the person entitled to them when it files a timely claim under MCL 500.3175(3).

Anselmi Mierzejewski Ruth & Sowle PC (by *Michael D. Phillips*) for Allstate Insurance Company.

Julie A. Taylor & Associates (by *James J. Kim*) for State Farm Mutual Automobile Insurance Company.

Before: BECKERING, P.J., and MARKEY and RIORDAN, JJ.

MARKEY, J. Plaintiff, Allstate Insurance Company, an assigned claims insurer, appeals by right the trial court's order granting defendant State Farm Mutual Automobile Insurance Company (defendant), the insurer of the at-fault driver, Lorenzo Causey, summary disposition under MCR 2.116(C)(7) (statute of limitations) and (10) (no genuine issue of a material fact).[1] Because plaintiff's reimbursement action was timely under MCL 500.3175(3) and because plaintiff was entitled to reimbursement from defendant for all the no-fault benefits, we reverse and remand.

I. SUMMARY OF FACTS AND PROCEEDINGS

On October 31, 2012, Causey was driving a motor vehicle when he struck Amanda Pettaway as she was crossing the road at an intersection, causing her injuries. Pettaway applied for personal protection insurance (PIP) benefits through the Michigan Assigned Claims

[1] Because the parties do not appeal the trial court's previous grant of summary disposition to Lorenzo Causey, this opinion will refer to State Farm as "defendant."

Plan. In a letter dated April 10, 2013, the Michigan Assigned Claims Plan informed Pettaway's attorney that Pettaway's claim had been assigned to plaintiff.

Plaintiff retained Data Surveys, Inc. (Data Surveys) to investigate Pettaway's claim. Data Surveys' report dated May 10, 2013, confirmed that Causey was the owner of the vehicle involved in the accident but indicated that the company had not been able to directly contact him. The Data Surveys report stated that Causey "refused to come to the front door and was conveying information through his daughter to the investigator," specifically "that the involved vehicle reportedly was his only automobile" and that the vehicle was not insured.

On November 20, 2014, plaintiff brought suit against Causey, seeking to recover under MCL 500.3177(1)[2] for all the no-fault benefits it had paid to or on behalf of Pettaway. On February 25, 2015, Causey's counsel filed an appearance and plaintiff learned that Causey was, in fact, insured by State Farm on the date of the accident. On May 27, 2015, an order was entered reflecting the parties' stipulation to plaintiff's filing an amended complaint identifying State Farm as a party defendant, which was filed with the stipulation. Plaintiff asserted in the amended complaint that it was entitled under MCL 500.3175 and MCL 500.3177 to recover $40,974.42 from defendant as the amount of no-fault benefits it had paid to or on Pettaway's behalf.

Defendant asserted that plaintiff's claim was untimely and barred by MCL 500.3175(3). This statute,

[2] "MCL 500.3177(1) allows an insurer paying benefits in a case involving an uninsured vehicle to seek reimbursement from the owner of that vehicle[.]" *Cooper v Jenkins*, 282 Mich App 486, 490; 766 NW2d 671 (2009).

which pertains to insurers' assigned claims under the Michigan Assigned Claims Plan, states, in part, that "[a]n action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of 2 years after the assignment of the claim to the insurer or 1 year after the date of the last payment to the claimant." MCL 500.3175(3).

Causey also moved for summary disposition under MCR 2.116(C)(10) on the basis that plaintiff could not recover benefits from him because it was undisputed that his vehicle was insured by defendant on the date of the accident and, therefore, he was not an "uninsured" motorist under MCL 500.3177. Plaintiff opposed Causey's motion, asserting that Causey was a necessary party to the action because Causey "fraudulently concealed the identity of his insurer" and that the tolling provisions of MCL 600.5855 should be applied to its claim. On September 14, 2015, after hearing oral argument, the trial court granted Causey's motion and dismissed Causey from the case without prejudice.

On November 18, 2015, defendant moved for summary disposition under MCR 2.116(C)(7) and (10) on the ground that the amended complaint did not comply with MCL 500.3175(3) because it was filed more than two years after the assignment of Pettaway's claim and had not been brought within "1 year after the date of the last payment to the claimant." Defendant argued that the only payments plaintiff made relating to Pettaway's claim within one year of the amended complaint were made on July 3, 2014 ($814.92) and August 11, 2014 ($2037.30) to Van Dyke Spinal Rehabilitation. Defendant further asserted that it had "issued payments" in those amounts to plaintiff's attorneys and the Michigan Assigned Claims Plan. Thus, defendant argued, no

controversy existed because defendant had already reimbursed plaintiff for the payments plaintiff had made within the year before filing the amended complaint.

In response to defendant's motion, plaintiff asserted that it, rather than defendant, was entitled to summary disposition under MCR 2.116(I)(2). Plaintiff maintained that the limitations period was tolled because Causey fraudulently concealed that State Farm provided insurance coverage for Causey and his vehicle. Plaintiff also argued that the payments it had made to Pettaway's medical providers within one year of filing its amended complaint satisfied the requirements of MCL 500.3175(3). Plaintiff asserted that defendant's position—that a one-year-back rule applies to an assigned insurer's right to reimbursement—was without merit.

On January 8, 2016, the trial court heard oral argument on defendant's motion. The first part of the hearing focused on whether the statute of limitations could be tolled because of Causey's purportedly "fraudulent" behavior. The parties argued over whether plaintiff could prove its allegations because plaintiff had not attached any affidavits to its motion. The trial court indicated that it "begrudgingly" had to grant defendant's motion, apparently on the basis of plaintiff's failure to present evidence that would be admissible to prove fraud. The parties then argued the limitations period found in MCL 500.3175(3). Plaintiff argued that because defendant had reimbursed plaintiff for the payments to Van Dyke Spinal Rehabilitation Center made in July and August 2014 that defendant also was obligated to reimburse plaintiff for all the payments that plaintiff had made on Pettaway's PIP claim. The trial court disagreed with this argument and granted

defendant's motion for summary disposition "for the reasons stated on the record." An order to that effect was entered on January 8, 2016.

Plaintiff moved the trial court to reconsider, arguing that under *Farm Bureau Ins Co v Chukwueke* (*Chukwueke I*), unpublished per curiam opinion of the Court of Appeals, issued January 17, 2013 (Docket No. 306827), plaintiff was entitled to reimbursement of the other payments it made to Van Dyke Spinal totaling $20,495.55. Defendant responded by arguing, in part, that according to *Farm Bureau Ins Co v Chukwueke* (*Chukwueke II*), unpublished per curiam opinion of the Court of Appeals, issued June 16, 2015 (Docket No. 320600), plaintiff was only entitled to reimbursement for payments made after May 27, 2014, which defendant had already tendered. In denying plaintiff's motion for reconsideration, the trial court ruled that "[b]ased on the rationale in [*Chukwueke I*], Plaintiff is only entitled to reimbursement for payments made after May 27, 2014; these payments have been reimbursed by Defendant."

Plaintiff now appeals by right.

II. ANALYSIS

A. STANDARD OF REVIEW / PRINCIPLES OF LAW

This Court reviews de novo a ruling on a motion for summary disposition. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). We also review questions of statutory interpretation de novo. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010).

MCR 2.116(C)(7) "permits summary disposition where the claim is barred by an applicable statute of limitations." *Nuculovic*, 287 Mich App at 61. When addressing such a motion, a trial court must accept as

true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Although not required to do so, a party moving for summary disposition under Subrule (C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If no material facts are disputed, whether a plaintiff's claim is barred by the pertinent statute of limitations is a question of law for the court to determine. *Dextrom*, 287 Mich App at 429.

"If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2). "The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Atchison v Atchison*, 256 Mich App 531, 535; 664 NW2d 249 (2003). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). A court may go beyond the statutory text to ascertain legislative intent only if an ambiguity exists in the language of the statute. *Id*. at 312. But a statutory provision is ambiguous only if it irreconcilably conflicts with another provision or is equally

susceptible to more than a single meaning. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007). "Words and phrases used in a statute should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole." *City of Rockford v 63rd Dist Court*, 286 Mich App 624, 627; 781 NW2d 145 (2009) (quotation marks and citation omitted).

B. APPLYING MCL 500.3175(3)

We conclude that the trial court erred by granting defendant summary disposition and by denying plaintiff summary disposition. Plaintiff's reimbursement action was timely under MCL 500.3175(3), and plaintiff was entitled to reimbursement from defendant for all the no-fault benefits it paid on Pettaway's behalf.

The purpose of the no-fault act, MCL 500.3101 *et seq*., "is to ensure the compensation of persons injured in automobile accidents." *Hill v Aetna Life & Cas Co*, 79 Mich App 725, 728; 263 NW2d 27 (1977). "The priority statutes, MCL 500.3114 and MCL 500.3115, define against whom an individual may make a claim for benefits." *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 215; 895 NW2d 490 (2017). If a pedestrian injured in a motor vehicle accident does not have no-fault insurance and neither does a relative in that person's household, MCL 500.3114(1), then the person may claim PIP benefits from "[i]nsurers of owners or registrants of motor vehicles involved in the accident," MCL 500.3115(1)(a).

In this case, neither Pettaway nor any relative domiciled in her household was a named insured in a no-fault insurance policy. MCL 500.3114(1). So defendant, as the insurer of the vehicle involved in the motor vehicle-pedestrian accident, was in the highest order of

priority to pay Pettaway's claim for PIP benefits under MCL 500.3115(1). But because Pettaway did not know that Causey had no-fault insurance, she sought PIP benefits through the Michigan Assigned Claims Plan. "If no insurance is available, a person may obtain benefits through the Assigned Claims Plan, which serves as the insurer of last priority." *Titan Ins Co v American Country Ins Co*, 312 Mich App 291, 298; 876 NW2d 853 (2015); MCL 500.3172(1). The Michigan Automobile Insurance Placement Facility adopts and maintains the Michigan Assigned Claims Plan. MCL 500.3171(2). An insurer assigned a claim under the Michigan Assigned Claims Plan "shall make prompt payment of loss in accordance with this act" and is "entitled to reimbursement by the Michigan automobile insurance placement facility for the payments . . . ." MCL 500.3175(1). Furthermore, an "insurer to whom claims have been assigned shall preserve and enforce rights to indemnity or reimbursement against third parties . . . ." MCL 500.3175(2).

The parties also rely on MCL 500.3172(1) as the source of plaintiff's right to reimbursement. That subsection also provided for Pettaway's initial claim for PIP benefits from the Michigan Assigned Claims Plan. MCL 500.3172(1) provides:

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through the assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss,

> or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. *In that case, unpaid benefits due or coming due may be collected under the assigned claims plan and the insurer to which the claim is assigned is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility*. [Emphasis added.]

In *Allen v Farm Bureau Ins Co*, 210 Mich App 591, 597; 534 NW2d 177 (1995), this Court read the emphasized statutory language as the source of an assigned claims insurer's "statutorily created right to reimbursement . . . ." But the emphasized language plainly refers to the situation in which a no-fault insurer is unable to provide PIP benefits because of "financial inability"; it refers to "that case," apparently referring only to the last situation described in the preceding sentence when it states that the assigned insurer "is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility," MCL 500.3172(1), which description only matches defaulting insurers in the last situation described in the preceding sentence.

An assigned claims insurer's *general* right to reimbursement is found in MCL 500.3175, which provides "recourse" "to an assigned-claim insurer that later discovers a higher priority insurer." *Spencer v Citizens Ins Co*, 239 Mich App 291, 305; 608 NW2d 113 (2000). MCL 500.3175(2) provides that an assigned insurer "shall preserve and enforce rights to indemnity or reimbursement against third parties and account to the Michigan automobile insurance placement facility for the rights and shall assign the rights to the Michigan automobile insurance placement facility on reimbursement by the Michigan automobile insurance placement facility."

Thus, an assigned claims insurer "has both the authority and the duty to enforce any available rights to indemnity or reimbursement that could have been pursued by claimants against third parties." *Auto-Owners Ins Co v Mich Mut Ins Co*, 223 Mich App 205, 210; 565 NW2d 907 (1997). The term "third parties," as used in MCL 500.3175, includes insurers that were liable for no-fault benefits that were paid by an assigned insurer. *Id*.

In this case, the dispute centers on the limitations period found in MCL 500.3175(3), which provides that "[a]n action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of 2 years after the assignment of the claim to the insurer or 1 year after the date of the last payment to the claimant." Plaintiff does not dispute that its amended complaint identifying State Farm as a party defendant was filed more than two years after it was assigned Pettaway's claim. Hence, plaintiff's reimbursement action must have been commenced within "1 year after the date of the last payment to the claimant" to be timely under MCL 500.3175(3).

1. CLAIMANT

"No provision of the no-fault act expressly defines 'claimant.' " *Covenant Med Ctr*, 500 Mich at 221 (BERNSTEIN, J., dissenting). Defendant does not dispute plaintiff's assertion that "[a] medical provider is a claimant . . . ." This Court has recognized that under the no-fault act there exists a distinction between the terms "injured person"[3] and "claimant." See *Lake-*

[3] MCL 500.3109(2) defines "injured person" as "a natural person suffering accidental bodily injury."

land Neurocare Ctrs v State Farm Mut Auto Ins Co, 250 Mich App 35, 40-41; 645 NW2d 59 (2002) (holding that a medical provider could recover attorney fees as "a claimant" under MCL 500.3148(1)), overruled by *Covenant Med Ctr*, 500 Mich 191. Further, the no-fault act expressly authorizes insurance companies to pay PIP benefits directly to medical providers. MCL 500.3112. This provision provides, in part:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. [MCL 500.3112.]

Of course, our Supreme Court's recent decision in *Covenant Med Ctr*, 500 Mich 191, casts significant doubt on whether medical providers can be considered claimants under the no-fault act. In *Covenant Med Ctr*, the Court overruled *Lakeland Neurocare Ctrs* and numerous other published opinions of this Court when it held "that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act." *Id*. at 196. The Court rejected the plaintiff's argument that numerous provisions of the no-fault act supported the conclusion that healthcare providers could maintain such actions. *Id*. at 204-218. The plaintiff primarily relied on MCL 500.3112, which the Court noted "undoubtedly allows no-fault insurers to directly pay healthcare providers for the benefit of an injured person, [but] its terms do not grant healthcare providers a statutory cause of action against

insurers to recover the costs of providing products, services, and accommodations to an injured person." *Id*. at 195-196.

Pertinent to this case, the plaintiff in *Covenant Med Ctr* also relied on MCL 500.3148(1), which provides that "[a]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue," and MCL 500.3145, which provides the limitations period for the recovery of PIP benefits "payable under this chapter" and specifically refers to "the claimant." *Covenant Med Ctr*, 500 Mich at 214 n 37. The plaintiff argued that "the Legislature's use of the word 'claimant,' instead of 'injured person,' demonstrates that other persons, like providers, may bring lawsuits to recover PIP benefits." *Id*. The Court disagreed, reasoning as follows:

> Plaintiff's reliance on the references to "claimant" rather than "injured person" in MCL 500.3145(1) and MCL 500.3148 is helpful to plaintiff's argument only if healthcare providers are proper claimants under the no-fault act. The provisions cited by plaintiff do not establish that providers possess a claim under the act. Because MCL 500.3145(1) and MCL 500.3148 do not create rights to PIP benefits that do not otherwise exist, plaintiff's reliance on these provisions is misplaced. [*Id*.]

The Court also noted that "[t]he relevant dictionary definitions of 'claim' include 'a demand for something due or believed to be due' and 'a right to something.' " *Covenant Med Ctr*, 500 Mich at 211 n 31, quoting *Merriam-Webster's Collegiate Dictionary* (11th ed). The Court concluded that "to have a 'claim' under the no-fault act, a provider must have a right to payment of PIP benefits from a no-fault insurer," *Covenant Med Ctr*, 500 Mich at 211 n 31, and held that the plaintiff had not demonstrated that "the no-fault act elsewhere

confers on a healthcare provider a right to claim benefits from a no-fault insurer," *id*. at 211.

Important to this case, our Supreme Court in *Covenant Med Ctr* was not interpreting MCL 500.3175(3) or directly addressing the issue of whether "claimant," as used under the no-fault act, includes medical providers. But the Court's implicit ruling that a healthcare provider does not have a right to claim benefits from a no-fault insurer apparently precludes a healthcare provider from being a "claimant" under the no-fault act. Although a healthcare provider may request and receive payment from a no-fault insurer for services furnished to an injured person, MCL 500.3112; *Covenant Med Ctr*, 500 Mich at 195, 208-209, that does not mean that the provider is a "claimant" entitled to receive no-fault benefits. Rather, it is the injured person who is the claimant that receives PIP benefits, in the form of the insurer paying the healthcare providers.

We note that this interpretation of "claimant" if applied to MCL 500.3175(3) does not lead to the term "claimant" being interpreted synonymously with "the injured person," as the panel in *Chukwueke I* feared, because the no-fault act specifically provides that a claimant may not always be an injured person. For example, MCL 500.3105(4) provides, in part, that "[b]odily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant." So that subsection contemplates that the claimant could intentionally cause the injured person bodily injury.

Another obvious example of a claimant being different from the injured person is when the injured person dies as a result of the accident. See, e.g.,

MCL 500.3108(1) (providing that PIP "benefits are payable for a survivor's loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value"); MCL 500.3112 (providing that PIP "benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents"). When the injured person dies, the person claiming no-fault benefits will necessarily be a different person from the one who was injured.

In this case, the claimant is Pettaway because she had a right to PIP benefits from plaintiff. MCL 500.3172(1); MCL 500.3175(1). The next issue pertains to identifying "the date of the last payment to the claimant." MCL 500.3175(3). The record indicates that plaintiff made payments to Pettaway's healthcare or service providers, as permitted by MCL 500.3112. If read in isolation, one could interpret MCL 500.3175(3) as requiring an assigned claims insurer to bring a reimbursement action within one year of the last payment made directly to the claimant. But a word or phrase in a statute must not be read in a vacuum; it must be harmonized with the whole statute. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). Thus, "[a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *Id*. Because no-fault insurers are permitted to make payments to healthcare providers "on the injured person's behalf," *Covenant Med Ctr*, 500 Mich at 196, 210, 214 n 36; MCL 500.3112, to discharge their obligation "to the claimant," we interpret the phrase "payment to the claimant" in MCL 500.3175(3) as including payments made to healthcare providers on the claimant's behalf.

Indeed, in the first published case addressing MCL 500.3175(3), this Court found that an assigned claims insurer timely filed its reimbursement action when it "last paid benefits to or on behalf of [the claimant] on October 16, 1984, and commenced the present action on October 8, 1985." *Allstate Ins Co v Faulhaber*, 157 Mich App 164, 168; 403 NW2d 527 (1987). The *Chukwueke I* panel properly characterized that statement as dicta, unpub op at 5 n 3, because the *Faulhaber* Court was addressing whether MCL 500.3175 should apply retroactively, not whether payments to the claimant include payments made on behalf of the claimant. See *Faulhaber*, 157 Mich App at 166-167. As the Supreme Court recently explained, to derive a rule of law from the facts of a case "when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture." *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016). Nevertheless, it is telling that the Court naturally read MCL 500.3175(3) as applying to payments made on behalf of the claimant.

Our conclusion that a no-fault insurer's payment to a healthcare provider who provides necessary services to the injured person constitutes a payment "to the claimant" for purposes of MCL 500.3175(3) is grounded on our reading of this provision in harmony with the no-fault act as a whole, *G C Timmis & Co*, 468 Mich at 421; *City of Rockford*, 286 Mich App at 627, considering that a no-fault insurer may make payments on behalf of the injured person directly to healthcare providers in order to "discharge its liability to an injured person," *Covenant Med Ctr*, 500 Mich at 196; MCL 500.3112. Consequently, in this case, because plaintiff made payments to Van Dyke Spinal Rehabilitation in August 2014 on behalf of the claimant Pettaway, plaintiff's

amended complaint filed in May 2015 was a timely reimbursement action against defendant under MCL 500.3175(3).

2. SCOPE OF RELIEF

Having determined that plaintiff's action was timely, we must consider the question of what damages it may recover. Plaintiff argues that this Court should determine that plaintiff is entitled to reimbursement of all no-fault benefits paid to or on behalf of Pettaway if any single benefit is paid within one year of filing the reimbursement action. Defendant argues that when a plaintiff commences a reimbursement action more than two years after the assignment of the claim, as in this case, MCL 500.3172 should be read together with MCL 500.3175(3) to limit reimbursement to payments made within one year before the filing of the complaint.

Defendant does not assert that the one-year-back rule of MCL 500.3145 applies to the present reimbursement action, but consideration of that provision sheds light on the instant matter. MCL 500.3145(1) provides, in pertinent part, as follows:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, *the claimant may not recover*

> *benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* [Emphasis added.]

Under the emphasized language, "even where the period of limitations is tolled under the notice of injury or payment of benefits exceptions, an insured can only recover benefits for losses incurred within one year preceding the commencement of the action." *Hudick v Hastings Mut Ins Co*, 247 Mich App 602, 607; 637 NW2d 521 (2001) (quotation marks and citation omitted). But MCL 500.3175(3), rather than MCL 500.3145(1), provides the "limitation period for actions brought by an assignee insurer for indemnity or reimbursement." *Allen*, 210 Mich App at 597.

Unlike MCL 500.3145(1), MCL 500.3175(3) does not limit the damages that may be recovered in a timely action. Instead, MCL 500.3175(3) is a statute of limitations, not a statute that limits the period during which payments may be reimbursed. If the Legislature had intended to preclude assigned claims insurers from recovering reimbursement of no-fault benefits that were paid more than a year before the filing of the action, MCL 500.3145(1) shows that it clearly knew how to do so. See *People v Houston*, 473 Mich 399, 410; 702 NW2d 530 (2005).

Furthermore, MCL 500.3172 highlights that higher priority insurers are to fully reimburse no-fault benefits wrongly paid through the Michigan Assigned Claims Plan. When a dispute over coverage for PIP benefits arises between two insurers, "MCL 500.3172(3) establishes a procedure by which a claimant is provided personal protection insurance benefits while the insurers resolve their dispute." *Spectrum Health v Grahl*, 270 Mich App 248, 255; 715 NW2d 357 (2006). MCL 500.3172(3) provides that the insurers

shall notify the Michigan Automobile Insurance Placement Facility of their dispute, who in turn will assign the claim to an insurer. MCL 500.3172(3)(a) and (b). That insurer then commences an action, joining the disputing insurers as party defendants, and "[t]he circuit court shall declare the rights and duties of any interested party whether or not other relief is sought or could be granted." MCL 500.3172(3)(e). If the circuit court determines reimbursement should be ordered, the order "shall include all benefits and costs paid or incurred by the Michigan automobile insurance placement facility and all benefits and costs paid or incurred by insurers determined not to be obligated to provide applicable personal protection insurance benefits . . . ." MCL 500.3172(3)(f).

To be clear, MCL 500.3172(3) does not apply to this case because plaintiff's assignment did not arise out of a coverage dispute between insurers. But the section is illustrative of how the statute considers that the no-fault insurer with the highest priority provide reimbursement for "all benefits and costs paid or incurred by the Michigan automobile insurance placement facility and all benefits and costs paid or incurred by insurers determined not to be obligated to provide applicable personal protection insurance benefits," which would include assigned insurers.

As a statutory scheme, the no-fault act contemplates that the higher priority insurer will fully reimburse the Michigan Automobile Insurance Placement Facility and the assigned claims insurer; consequently, there is no restriction on the recoverable damages in a timely filed reimbursement action that can be read into MCL 500.3175(3). Thus, we hold that plaintiff is entitled to recover all no-fault benefits paid on Pettaway's behalf for which defendant was, in fact, responsible as the higher priority insurer.

Defendant argues that plaintiff's reading of the statute would frustrate the primary purposes of statutes of limitations of "(1) encouraging the plaintiffs to diligently pursue claims and (2) protecting the defendants from having to defend against stale and fraudulent claims." *Wright v Rinaldo*, 279 Mich App 526, 533; 761 NW2d 114 (2008). Specifically, defendant argues that "[p]laintiff's ability to revive old payments would maintain a constant threat of litigation, and would encourage delay in asserting a legal right that is practicable to assert." But this argument ignores the requirement of the no-fault act that an assigned claims insurer "shall make prompt payment of loss in accordance with this act." MCL 500.3175(1). Thus, assignee insurers cannot "revive" a reimbursement action at any time as defendant suggests. Rather, they must make prompt payment, MCL 500.3175(1); they then may bring a reimbursement claim within a year from the date of the last payment, MCL 500.3175(3).

In sum, MCL 500.3175(3) only pertains to when a reimbursement action must be brought. In contrast to MCL 500.3145(1), it does not preclude reimbursement for benefits paid more than a year before the filing of the action. Although MCL 500.3172(3)(f) is not directly applicable to the matter before us, no provision of the no-fault act suggests that an assigned claims insurer should not be fully reimbursed. Thus, reading the no-fault act as a whole, *City of Rockford*, 286 Mich App at 627, we must conclude that an assigned claims insurer may be reimbursed for all no-fault benefits paid to or on behalf of the person entitled to them, MCL 500.3112, in this case claimant Pettaway, when it files a timely claim under MCL 500.3175(3).

Here, plaintiff's claim was timely because it was brought within a year of its last payment "to the

claimant" for purposes of MCL 500.3175(3). Accordingly, plaintiff was entitled to recover from defendant all the no-fault benefits it paid to Pettaway or on her behalf. Consequently, we hold that the trial court erred by granting defendant summary disposition; it instead should have granted plaintiff summary disposition under MCR 2.116(I)(2).

Given our holding regarding MCL 500.3175(3), we decline to address the parties' arguments concerning tolling. "An issue is moot if this court cannot fashion a remedy." *Silich v Rongers*, 302 Mich App 137, 151-152; 840 NW2d 1 (2013). "As a general rule, an appellate court will not decide moot issues." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

We reverse and remand this matter to the trial court for further proceedings consistent with this opinion. Plaintiff, as the prevailing party, may tax its costs under MCR 7.219. We do not retain jurisdiction.

BECKERING, P.J., and RIORDAN, J., concurred with MARKEY, J.

NORTLEY v HURST

Docket No. 333240. Submitted October 3, 2017, at Lansing. Decided October 10, 2017, at 9:00 a.m. Leave to appeal denied 502 Mich 880.

Sarah L. Nortley brought a legal malpractice action in the Jackson Circuit Court against defendants—attorney Dennis Hurst, Hurst's law firm, and Michael Rosenthal (another attorney in Hurst's firm). Defendants had represented Nortley in a divorce proceeding. Nortley filed her complaint on January 15, 2016, more than six years after defendants' representation of Nortley ended in 2009 (21 days after the judgment of divorce entered) but within six months of the time Nortley claimed that she learned of the asserted basis for the malpractice action. Defendants moved for summary disposition under MCR 2.116(C)(7), claiming that Nortley's complaint was untimely. Nortley opposed the motion, arguing that her complaint was timely filed within six months of her discovery of the claim and that MCL 600.5838b, a statute of repose, should not bar her complaint because it became effective after her claim accrued and did not have retroactive effect. Nortley also claimed that application of the statute of repose would violate her right to due process because the statutory period expired before she knew about the basis of her malpractice claim. The court, Richard N. LaFlamme, J., held that the statute of repose barred Nortley's claim and granted defendants' motion. Nortley appealed.

The Court of Appeals *held*:

1. Legislative intent governs whether a statute applies retroactively or prospectively, but a statute is presumed to have prospective application unless the Legislature clearly and unequivocally has demonstrated its intent for the statute to have retroactive effect. But this presumption does not apply when the statute is remedial or procedural in nature and when its retroactive application will not deny a party's vested rights. In this case, the trial court correctly granted defendants' motion for summary disposition under MCR 2.116(C)(7) because Nortley filed her complaint after the six-year period of repose established in MCL 600.5838b(1)(b) and because retroactive application did not deny Nortley a vested right. Retroactive application

of MCL 600.5838b(1)(b) did not prevent Nortley from filing a timely claim. When the statute of repose went into effect, Nortley still had more than two years to bring a timely claim. The fact that Nortley did not discover the claim until after the statutory period of repose had expired does not change the analysis. Unlike a statute of limitations, a statute of repose bars a claim after a fixed period of time from the act or omission giving rise to the claim and may prevent accrual of a claim even if the injury occurs after the statutory period has expired. Here, the statute of repose capped the time Nortley had to bring the claim without regard to when she discovered it.

2. A statute affords due process when it bears a reasonable relation to a permissible legislative objective. Statutes of limitations and statutes of repose in the area of malpractice are enacted for the reasonable legislative purpose of protecting professionals from stale claims and unlimited liability. Nortley's claim accrued in July 2009, after defendants' representation of her terminated. The statute of repose became effective in January 2013, and the period of repose expired six years from the time Nortley's claim accrued; that is, it expired in July 2015. Therefore, the complaint Nortley filed in January 2016 was barred by MCL 600.5838b(1)(b). Retroactive application of the statute of repose to Nortley's claim did not violate her right to due process because it did not immediately extinguish her claim. Therefore, the trial court did not err when it granted defendants' motion for summary disposition under MCR 2.116(C)(7).

Affirmed.

STATUTES — STATUTES OF LIMITATIONS AND REPOSE — RETROACTIVE APPLICATION — VESTED RIGHTS.

A statute of repose like MCL 600.5838b may be applied retroactively without denying a party its vested right to a claim when the statute does not immediately extinguish the party's claim; statutes of repose establish a fixed time within which a party must file a complaint beginning when the act or omission giving rise to the claim occurred; a statute of repose may prevent a claim from accruing if the injury occurs after the period of repose expires.

Blaske & Blaske, PLC (by *Thomas H. Blaske* and *John F. Turck IV*) and *Speaker Law Firm, PLLC* (by *Liisa R. Speaker*) for Sarah Nortley.

Dungan & Kirkpatrick, PLLC (by *Michael Dungan*) for Dennis Hurst and Dennis Hurst & Associates.

White & Hotchkiss, PLLC (by *Eric C. White*) for Michael Rosenthal.

Before: TALBOT, C.J., and O'CONNELL and O'BRIEN, JJ.

O'CONNELL, J. Plaintiff, Sarah Lynn Nortley, appeals as of right the trial court's grant of defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). Nortley challenges the trial court's conclusion that the six-year statutory period of repose barred her claim because the statute of repose went into effect after her claim accrued. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Nortley retained defendant Dennis Hurst, of the law firm Dennis Hurst & Associates, in August 2008 to represent her in a divorce proceeding. Defendant Michael Rosenthal was also a member of the firm. The judgment of divorce, entered on June 12, 2009, contained a provision terminating representation 21 days after the date of entry of the judgment.

The divorce became final 11 days before the tenth anniversary of the marriage. A person can claim Social Security benefits through a former spouse if the marriage lasted 10 years or more.[1] Nortley alleged that

[1] 20 CFR 404.331(a)(2) (2017). The regulation contains additional requirements for a person to claim Social Security benefits through a former spouse. 20 CFR 404.331(b) through (f) (2017). Among other requirements, the claimant is not entitled to a former spouse's benefit if the claimant is remarried or if the claimant is entitled to a benefit greater than the former spouse's benefit. 20 CFR 404.331(c) and (e) (2017).

she learned about this rule on September 5, 2015, during a conversation with her mother.

Nortley brought a legal malpractice claim against defendants on January 15, 2016. Nortley contended that defendants failed to advise her that Social Security benefits were only available to a former spouse if the marriage lasted 10 years or more.

Defendants Hurst and the law firm denied the allegations of malpractice, maintaining that they fully advised Nortley about all aspects of the divorce. Defendant Rosenthal answered separately to deny the allegations because he only attended one court hearing on behalf of Hurst and did not participate in advising Nortley about the divorce.

Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that two statutes of limitations, MCL 600.5805(1) and (6) and MCL 600.5838(2), and a statute of repose, MCL 600.5838b, barred Nortley's malpractice claim. Nortley opposed the motion, arguing that she brought the action within the statutory period of limitations because she filed it within six months of discovering the basis for the claim. Nortley contested defendants' invocation of the statute of repose because it went into effect after the cause of action accrued and did not apply retroactively. Finally, Nortley argued, retroactive application of the statute of repose violated her right to due process because the statutory period expired before she knew about the basis of the malpractice claim. The trial court concluded that the statute of repose barred Nortley's claim and granted defendants' motion for summary disposition.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant summary disposition. *Nuculovic v Hill*, 287 Mich App

58, 61; 783 NW2d 124 (2010). This Court also reviews de novo the trial court's application of a statute of limitations, *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 227; 859 NW2d 723 (2014), and whether a statute is constitutional, *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000).

Summary disposition under MCR 2.116(C)(7) is appropriate when a statute of limitations bars the claim. *Nuculovic*, 287 Mich App at 61. This Court accepts a plaintiff's allegations as true and considers all admissible evidence to decide whether the plaintiff has presented a genuine issue of material fact. *Id*.

The primary goal of statutory interpretation is to effectuate the Legislature's intent by applying the plain language of the statute. *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). If the statute is clear and unambiguous, we apply it as written. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386; 389; 559 NW2d 98 (1996). If the statute is ambiguous, "judicial construction is appropriate." *Id*. at 389-390. This Court construes statutes of limitations and repose to promote the policy of protecting defendants from stale claims. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

III. ANALYSIS

A professional malpractice claim accrues when the professional stops serving the plaintiff in a professional capacity on the matter giving rise to the claim. MCL 600.5838(1). A plaintiff must bring a malpractice action within two years of accrual of the claim, MCL 600.5805(1) and (6), or within six months of when he or she discovered or should have discovered the claim, MCL 600.5838(2), whichever is later. An action for legal malpractice, however, must be commenced within

six years of the act or omission giving rise to the claim or before expiration of the period of limitations in MCL 600.5805, whichever period is earlier. MCL 600.5838b(1). This six-year statutory period of repose went into effect on January 2, 2013. 2012 PA 582.

In this case, the claim accrued on July 3, 2009, when defendants' representation ceased 21 days after entry of the judgment of divorce. Nortley filed her complaint on January 15, 2016, beyond both the two-year period of limitations and the six-year period of repose. Nortley argues that the statute of repose does not apply retroactively to bar her claim because the Legislature enacted it after the claim accrued and did not provide for retroactive application. Accordingly, Nortley contends, the complaint was timely because she filed it within six months of discovering the existence of the claim. We disagree.

Legislative intent governs whether a statute applies retroactively or prospectively only. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). Generally, a new or amended statute applies prospectively unless the Legislature clearly and unequivocally intends for the statute to have retroactive effect. *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006). Reference to events that have already occurred "does not require a finding that the statute operates retroactively." *Id*. at 156. An exception to the general rule presuming prospective application only is a statute that is remedial or procedural in nature and whose retroactive application will not deny vested rights. *Id*. at 158.

The enactment of the statute of repose did not deny Nortley a vested right. Nortley's legal malpractice claim accrued in July 2009. When the statute of repose

went into effect on January 2, 2013, Nortley still had more than two years to bring a timely claim within the six-year period of repose. Thus, the amended legislation did not prevent Nortley from filing a timely claim. This circumstance distinguishes this case from cases examining the immediately preclusive effect of a newly enacted statute of limitations. See, e.g., *Davis*, 272 Mich App at 166 (noting that a new one-year deadline immediately precluded the plaintiff's existing claim). Accordingly, we apply the statute of repose as written to Nortley's then viable claim to conclude that her complaint was untimely.

Nortley's discovery of the claim after the six-year period of repose does not alter this conclusion. Unlike a statute of limitations, a statute of repose bars a claim after a fixed period of time from the defendant's act or omission and may prevent accrual of a claim even if the injury happens after the statutory period has expired. *Frank v Linkner*, 500 Mich 133, 142; 894 NW2d 574 (2017). The statute setting the deadlines for bringing a legal malpractice claim makes clear that the six-year period of repose caps the time for bringing a claim within six months of discovery. See MCL 600.5838b(1). Therefore, the trial court did not err by granting defendants' motion for summary disposition.

We also reject Nortley's argument that retroactive application of the statute of repose to bar her claim violates due process. A statute comports with due process if it "bears a reasonable relation to a permissible legislative objective." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 404; 738 NW2d 664 (2007) (quotation marks and citation omitted).

Nortley relies on *Price v Hopkin*, 13 Mich 318 (1865), and *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d

336 (1980), to support her argument. In *Price*, 13 Mich at 322-323, 325, 328, the Supreme Court held that the enactment of a statute shortening the adverse possession period from 20 years to 15 years deprived the plaintiff of due process by immediately barring the plaintiff's claim. In *O'Brien*, 410 Mich at 14-16, the Supreme Court concluded that a six-year period of repose for claims against architects and engineers did not violate due process when it prevented the plaintiffs from bringing claims that accrued after six years. The Supreme Court reasoned that the statute of repose balanced interests in protecting architects and engineers from unlimited liability and redressing plaintiffs' injuries. *Id*. at 16.

Likewise, in this case, the statute of repose reflects the reasonable legislative purpose of protecting professionals from stale claims. See *Frankenmuth Mut Ins Co*, 456 Mich at 515. Moreover, unlike *Price*, 13 Mich at 323-324, enactment of the six-year period of repose did not immediately extinguish Nortley's claim. Therefore, application of the statute of repose to Nortley's claim did not violate due process.

We affirm.

TALBOT, C.J., and O'BRIEN, J., concurred with O'CONNELL, J.

INGHAM COUNTY v MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

Docket No. 334077. Submitted October 4, 2017, at Lansing. Decided October 10, 2017, at 9:05 a.m. Leave to appeal sought.

Plaintiffs, Ingham County, Jackson County, and Calhoun County, filed a four-count complaint in the Ingham Circuit Court, alleging that they were eligible for 10 years' worth of refunds for surplus contributions made to defendant, the Michigan County Road Commission Self-Insurance Pool. The counties moved for partial summary disposition under MCR 2.116(C)(9) (failure to state a valid defense) and MCR 2.116(C)(10) (no genuine issue of material fact). The pool filed a cross-motion for summary disposition under MCR 2.116(I)(2) (opposing party, rather than moving party, entitled to summary disposition). The court, Rosemarie E. Aquilina, J., granted the pool's cross-motion for summary disposition. The counties appealed.

The Court of Appeals *held*:

1. MCL 224.6, in conjunction with MCL 46.11, permits a county board of commissioners to dissolve an appointed county road commission by resolution whereby the former road commission's powers, duties, and functions transfer to the county board of commissioners. The counties in this case dissolved their respective road commissions, assumed the powers, duties, and functions of the road commissions, asserted that their boards of commissioners became successors in interest to the former road commissions, and claimed eligibility for the refund of surplus funds from prior-year premium contributions being held by the pool. The counties and the pool disputed the meaning of "dissolved" in MCL 46.11(s) and MCL 224.6(7). The counties argued that when the road commissions were dissolved the boards of commissioners absorbed the rights and interests of the former road commissions, and the pool argued that when the road commissions were dissolved they ceased to exist so that the counties could not absorb the former road commissions' powers, duties, and functions. Counties derive their authority from the Michigan Constitution and state statutes. Under MCL 224.9(3), road commissions have the authority to hold title to, or an

interest in, land even when it is not part of or necessary for a public street, highway, or park. Road commissions typically own a fleet of road maintenance vehicles, a garage facility to house those vehicles, and road maintenance materials and supplies. According to the pool's argument, those vehicles and facilities would become ownerless when a county board of commissioners dissolves its county's road commission and assumes its powers. In addition, the pool's narrow reading of the statute would, contrary to US Const, art I, § 10, and Const 1963, art 1, § 10, unconstitutionally impair contracts for road construction and maintenance involving the former road commissions. Courts must interpret a statute to avoid the conclusion that it is unconstitutional or that there are doubts about its constitutionality. The pool's narrow reading of "powers, duties, and functions" would result in the unconstitutional impairment of the former road commissions' contracts and render the statutory provisions permitting dissolution of the road commissions unconstitutional. The constitutionality of the relevant statutes in this case requires a conclusion that the counties became successors in interest to their former road commissions when they exercised their statutory right to dissolve the road commissions. As successors in interest, the counties took on all the statutory rights and responsibilities given to road commissions. The trial court erred when it granted summary disposition to the pool and ruled that the counties were not successors in interest to their former road commissions.

2. The pool's membership bylaws limited membership to road commissions. According to the pool, counties did not qualify for membership. But the pool's bylaws did not define a county road commission. Instead, the bylaws referred to the statutory authority of county road commissions. Because the counties' boards of commissioners were successors in interest to their dissolved road commissions as a matter of statutory interpretation, they were also eligible for membership in the pool. The pool argued that even if the counties were deemed to be successors in interest, they were not entitled to refunds of prior-year surplus contributions because they had withdrawn from membership in the pool. Jackson County, however, did not sign a withdrawal agreement and was therefore eligible for the refunds. And although Ingham County and Calhoun County had each signed an agreement to withdraw from the pool, the agreements they signed contained a provision limiting the scope of the withdrawal agreements to withdrawal of membership without affecting any other terms or conditions of the Declaration of Trust, the interlocal agreement, or the bylaws. The withdrawal agreements did not, therefore, alter the counties' eligibility for the refund of surplus premiums

from prior-year contributions to the pool. The counties were entitled to refunds of surplus premiums paid by their former road commissions through the date listed in each withdrawal agreement. The trial court erred by granting summary disposition to the pool with regard to the counties' eligibility for refunds of surplus premiums paid to the pool in prior years.

Reversed and remanded.

COUNTIES — BOARDS OF COMMISSIONERS — APPOINTED ROAD COMMISSIONS — DISSOLUTION.

A county board of commissioners is a successor in interest to a county road commission dissolved pursuant to MCL 224.6 and MCL 46.11; when a county board of commissioners by resolution dissolves an appointed county road commission, the former road commission's powers, duties, and functions transfer to the board of commissioners, and the board of commissioners assumes all statutory rights and responsibilities given to county road commissions (MCL 224.6(7); MCL 46.11(s)).

Cohl, Stoker & Toskey, PC (by *Bonnie G. Toskey* and *Amanda K. Wildeboer*) for Ingham, Jackson, and Calhoun Counties.

Smith Haughey Rice & Roegge (by *Stephanie C. Hoffer* and *D. Adam Tountas*) for the Michigan County Road Commission Self-Insurance Pool.

Before: TALBOT, C.J., and O'CONNELL and O'BRIEN, JJ.

O'CONNELL, J. Plaintiffs, Ingham County, Jackson County, and Calhoun County (collectively, the counties), appeal as of right the trial court's order granting summary disposition in favor of defendant, the Michigan County Road Commission Self-Insurance Pool (the Pool), under MCR 2.116(I)(2) (opposing party, rather than moving party, entitled to judgment). Because we agree with the counties that they are successors in interest to their respective counties' former road commissions, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

A Declaration of Trust created the Pool in April 1984. The Pool's bylaws limit membership to county road commissions located in the state of Michigan and require each member to sign an interlocal agreement. The appointed road commissions for Ingham County, Jackson County, and Calhoun County joined the Pool soon after its formation.

Members of the Pool made annual premium contributions to cover the payment of claims and the Pool's operating and administrative expenses. The Pool's bylaws and the interlocal agreements permitted the refund of surplus funds more than one year after payment of a member's premium contribution. The counties alleged that the Pool had a longstanding practice of refunding excess contributions to members out of unused reserves in proportion to premiums paid, typically calculated and refunded several years later.

In February 2012, the Legislature amended MCL 224.6 to permit transfer of "the powers, duties, and functions that are otherwise provided by law for an appointed board of county road commissioners . . . to the county board of commissioners by resolution as allowed under . . . MCL 46.11." MCL 224.6(7), as amended by 2012 PA 14. At the same time, the Legislature amended MCL 46.11 to give a county board of commissioners the authority to pass a resolution dissolving an appointed road commission and transferring the road commission's "powers, duties, and functions" to the county board of commissioners. MCL 46.11(s), as amended by 2012 PA 15. Pursuant to these amendments, the Ingham County, Jackson County, and Calhoun County Boards of Commissioners adopted resolutions to dissolve their county road commissions and take over their roles.

Ingham County adopted the dissolution resolution on April 24, 2012, effective June 1, 2012. About two weeks before adopting the resolution, Ingham County paid its contribution to the Pool for the fiscal year beginning April 1, 2012, apparently with the understanding that the Pool intended to amend its rules to permit the county successors to the dissolved road commissions to participate in the Pool. Ingham County maintained that it only learned later in May that the Pool would not allow the county to remain a member of the Pool. On May 30 and 31, 2012, the Ingham County road commission signed two agreements—one to withdraw from the Pool and one to cancel insurance through the Pool—effective June 1, 2012.

Calhoun County signed a similar withdrawal agreement on October 23, 2012, effective November 1, 2012. It appears that Jackson County did not sign a withdrawal agreement.

At Ingham County's request, the Pool agreed to refund the unused pro rata portion of the former road commission's annual contribution for the 2012–2013 fiscal year. The Pool declined, however, to refund surplus equity flowing from prior-year contributions because of the road commission's withdrawal from membership in the Pool.

The counties brought a four-count complaint against the Pool. The counties alleged that they were eligible for 10 years' worth of refunds because the Pool was still refunding contributions from 2002 premiums. The Pool refused to issue those refunds to the counties. Consequently, the counties maintained that the Pool's refusal reflected (1) unconstitutional lending under Const 1963, art 9, § 18; (2) extortion; (3) conversion; and (4) breach of contract. The Pool denied the counties' allegations and disputed their claims.

The counties filed a partial motion for summary disposition as to liability under MCR 2.116(C)(9) and (10). The Pool filed a cross-motion for summary disposition under MCR 2.116(I)(2). The trial court granted summary disposition under MCR 2.116(I)(2) in favor of the Pool, rejecting all of the counties' arguments.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Village of Dimondale v Grable*, 240 Mich App 553, 563; 618 NW2d 23 (2000). We also review de novo legal questions, *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998), including issues of statutory interpretation, *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 426; 648 NW2d 205 (2002), and contract interpretation, *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

Summary disposition under MCR 2.116(C)(9) is appropriate when a defendant fails to plead a valid defense and no factual development could defeat the plaintiff's claim. *Village of Dimondale*, 240 Mich App at 564. A motion for summary disposition under MCR 2.116(C)(9) "tests the sufficiency of a defendant's pleadings, [and] the trial court must accept as true all well-pleaded allegations . . . ." *Slater*, 250 Mich App at 425. To decide a motion for summary disposition under MCR 2.116(C)(9), the trial court may only consider the pleadings, which include complaints, answers, and replies but do not include the motion for summary disposition itself. *Village of Dimondale*, 240 Mich App at 565; MCR 2.110(A).

Summary disposition is proper when there is no genuine issue of material fact. MCR 2.116(C)(10). A

motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Finally, a trial court properly grants 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." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996).

III. ANALYSIS

A. SUCCESSORS IN INTEREST

MCL 224.1 permits a county to put to a vote the question of adopting the county road system. When a county has elected to adopt the county road system, the county is required to elect a board of county road commissioners, subject to four exceptions. MCL 224.6(1). The first exception permits the county board of commissioners to appoint a road commission, instead of holding an election, if the county "contains all or part of 12 surveyed townships . . . ." MCL 224.6(4). The second exception permits charter counties with a population of 750,000 or more to reorganize the powers and duties of a board of county road commissioners by amending the county charter. MCL 224.6(5). The third exception—at issue in this case—permits a county board of commissioners to dissolve an appointed board of county road commissioners and transfer its powers, duties, and functions to the county board of commis-

sioners. MCL 224.6(7). The fourth and final exception, similar to the third exception but for a county road commission whose members were elected, permits the county's electorate to decide on the question of dissolution of the county road commission and the transfer of its role to the county board of commissioners. MCL 224.6(8).

When the Ingham County, Jackson County, and Calhoun County Boards of Commissioners dissolved their counties' road commissions pursuant to MCL 46.11(s) and MCL 224.6(7), the powers, duties, and functions of the dissolved county road commissions passed to the respective counties' boards of commissioners. The parties dispute the meaning of the word "dissolved" in MCL 46.11(s) and MCL 224.6(7). The counties argue that the counties' boards of commissioners absorbed the rights and interests of the road commissions. The Pool counters that the road commissions ceased to exist when the counties dissolved them, so the counties could not absorb their powers, duties, and functions. The trial court agreed with the Pool, ruling that the counties were not successors in interest to their former road commissions because the statutes' references to dissolution signified the end of the road commissions' existence.

We disagree with the trial court. Reading MCL 224.6 as a whole shows that a county that has adopted the county road system must have a board of county road commissioners. The general rule in MCL 224.6(1) and its four exceptions make clear that a county that has adopted the county road system must have a road commission that is elected, MCL 224.6(1), appointed, MCL 224.6(4), reorganized by amendment to a county charter, MCL 224.6(5), or dissolved for its role to be transferred to the county board of commissioners,

MCL 224.6(7) (appointed road commission) and (8) (elected road Commission).[1] Therefore, when a county dissolves its road commission, the county board of commissioners becomes the successor in interest to the former road commission.

The Pool argues that the counties are not successors in interest to their dissolved road commissions because the statute provides for the transfer of only the "powers, duties, and functions" of the former road commissions but not their property rights or interests. The Pool contends that because the counties have only the powers expressly authorized by statute, the dissolved road commissions' property rights and interests did not transfer to the counties. We reject this stilted reading of the statute.

Counties derive their authority from the Michigan Constitution and state statutes. *Mich Muni Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 190; 597 NW2d 187 (1999). Local governments have only those powers expressly conferred by the Michigan Constitution or by statute, and they have the implicit authority to implement their express powers. *Id*. at 190-191.

Pertinent to the Pool's argument, road commissions have the authority to hold title or an interest in land and to sell or convey land that is not part of or necessary "for a public street, highway, or park." MCL 224.9(3). A typical county road commission would own a fleet of road maintenance vehicles, such as snow-

[1] The counties argue that the Legislature provided for the dissolution, not the abolition, of an appointed road commission to allow an *elected* county board of commissioners to take the place of an *appointed* road commission. This argument ignores the distinct provisions for the dissolution of both types of road commissions, appointed or elected. See MCL 224.6(7) and (8), respectively.

plows and salt trucks, in addition to a garage facility to house those vehicles along with road maintenance materials and supplies, including salt. Applying the Pool's argument, these facilities and equipment would become ownerless once a county board of commissioners dissolved its county's road commission and assumed its powers.

The counties further disagree with the Pool's narrow reading of the statute because it would unconstitutionally impair contracts for road construction and maintenance that involved the former road commissions. See US Const, art 1, § 10; Const 1963, art 1, § 10. Rather, the counties argue, the former road commissions' contractual rights transferred to the respective counties.

We agree. Whenever possible, courts must interpret a statute to avoid the conclusion that it is unconstitutional or that there are doubts about its constitutionality. *People v Nyx*, 479 Mich 112, 124; 734 NW2d 548 (2007) (opinion by TAYLOR, C.J.). Similarly, courts must read statutes as a whole. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). A statute that substantially impairs a contractual relationship is unconstitutional unless the statutory impairment serves "a significant and legitimate public purpose and . . . the means adopted to implement the legislation are reasonably related to the public purpose." *Health Care Ass'n Workers Compensation Fund v Dir of the Bureau of Worker's Compensation, Dep't of Consumer & Indus Servs*, 265 Mich App 236, 241; 694 NW2d 761 (2005). The Pool's narrow reading of "powers, duties, and functions" would result in the unconstitutional impairment of the former road commissions' contracts, rendering the statutory provisions permitting dissolution of the road commissions unconstitutional. We avoid

this result by interpreting the statutory provisions more comprehensively. Thus, we conclude that the counties became the successors in interest to their former road commissions when they exercised their statutory right to dissolve the road commissions. As successors in interest, the counties took on all statutory rights and responsibilities given to road commissions.

B. POOL MEMBERSHIP

The parties dispute whether the counties could be members of the Pool and thereby be eligible for surplus refunds of prior-year contributions. The Pool contends that the counties are not qualified for membership because the Pool's bylaws only permit road commissions to be members. This Court construes bylaws using the same rules applied to contract interpretation. *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015). We begin with the plain language of the bylaws and apply that plain language if it is clear and unambiguous. *Rossow*, 251 Mich App at 658.

The Pool's bylaws limit membership to county road commissions, but the bylaws do not define a county road commission. Instead, the bylaws refer to the statutory authority of county road commissions. Because we conclude that the counties were successors in interest to their dissolved road commissions as a matter of statutory interpretation, we likewise conclude that the successor counties are eligible for Pool membership by virtue of the statutory reference to county road commissions in the Pool's bylaws.

The Pool further argues that the counties are not entitled to refunds even if deemed successors in interest because they withdrew from the Pool. We examine

the language of the withdrawal agreements to determine their scope. See *Rossow*, 251 Mich App at 658.

First, the record contains no evidence that the Jackson County road commission signed a withdrawal agreement, and the Pool agrees that it did not. Thus, the Jackson County road commission did not withdraw from the Pool. Likewise, Jackson County's dissolution of its road commission did not automatically result in withdrawal from the Pool. Rather, Jackson County succeeded its dissolved road commission, so Jackson County is eligible for refunds from prior-year contributions made by its road commission.

Ingham County's and Calhoun County's road commissions each signed an agreement to withdraw from the Pool. These withdrawal agreements began by stating that the counties dissolved their road commissions pursuant to statute. The agreements made withdrawal from the Pool effective on the date the road commissions were dissolved. Further, the agreements contained a provision limiting their scope to withdrawal of membership without affecting "any other terms or conditions" of the Declaration of Trust, the interlocal agreement, or the bylaws. The Pool also agreed to administer claims arising from events occurring before the date of dissolution of the road commissions. Accordingly, reading the withdrawal agreements as a whole and in light of the limitation on their scope, the withdrawal agreements did not alter eligibility for the refund of surplus premiums from prior-year contributions. Having determined that the counties are successors in interest to their former road commissions, we conclude that the counties are entitled to refunds of surplus premiums reflecting their former road commissions' prior-year contributions through the date listed in each withdrawal agreement.

In conclusion, the trial court erred by granting summary disposition in favor of the Pool because the counties are successors in interest to their dissolved road commissions. As successors in interest, the counties are eligible for membership in the Pool. Additionally, Jackson County did not sign a withdrawal agreement, and the withdrawal agreements that Ingham County and Jackson County signed did not affect their entitlement to refunds. Thus, the counties are entitled to receive refunds of surplus premiums from prior-year contributions made by the former road commissions.[2]

We reverse and remand. We do not retain jurisdiction.

TALBOT, C.J., and O'BRIEN, J., concurred with O'CONNELL, J.

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[2] Accordingly, we do not address the counties' remaining arguments.

NASH ESTATE v CITY OF GRAND HAVEN

Docket No. 336907. Submitted October 3, 2017, at Grand Rapids. Decided October 10, 2017, at 9:10 a.m. Leave to appeal denied 503 Mich ___.

Diane Nash, as personal representative of the Estate of Chance Aaron Nash, brought an action in the Ottawa Circuit Court against the city of Grand Haven, seeking certain documents and information under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The case at bar constituted one of several lawsuits related to the death of Chance, who was involved in a fatal sledding accident at Duncan Park in the city of Grand Haven. In the underlying tort litigation, plaintiff sued the Duncan Park Commission, the Duncan Park Trustees, the individual trustees, and Duncan Park groundskeeper Robert DeHare. Plaintiff's original FOIA request sought documents and information from the city related to the accident, the underlying tort litigation, Duncan Park, and the employment of DeHare. The city denied plaintiff's request in part, stating that some information and records were exempt from disclosure pursuant to MCL 15.243(1)(g) because they were subject to the attorney-client privilege. Plaintiff then brought the instant lawsuit, and following an *in camera* review of documents and a bench trial, the court, Jon H. Hulsing, J., ordered the city to produce some documents to plaintiff and ruled that others were exempt from disclosure because they were subject to the attorney-client privilege. The court concluded that plaintiff prevailed in part on the FOIA claim but was not entitled to attorney fees. Plaintiff appealed, arguing that the trial court erred by applying federal precedent regarding the common-interest doctrine to the attorney-client privilege and that the trial court erred by failing to award her an appropriate portion of reasonable attorney fees.

The Court of Appeals *held*:

1. FOIA requires a public body to grant full disclosure of its records unless the records are specifically exempt under MCL 15.243. MCL 15.243(1)(g) provides that a public body may exempt from disclosure as a public record under the act information or records subject to the attorney-client privilege. The attorney-client privilege attaches to communications made by a client to an

attorney acting as a legal advisor and made for the purpose of obtaining legal advice. When the client is an organization, the privilege attaches to communications between the attorney and any employee or agent authorized to speak on its behalf in relation to the subject matter of the communication. Michigan courts look to federal precedent for guidance in determining the scope of the attorney-client privilege when a particular issue has been addressed by a federal court. The trial court in this case relied on *United States v BDO Seidman, LLP*, 492 F3d 806 (CA 7, 2007), in which the United States Court of Appeals for the Seventh Circuit outlined the application of the common-interest doctrine to the attorney-client privilege. The *Seidman* Court held that because an accounting firm and a law firm "shared a common legal interest" in ensuring compliance with a new regulation and ensuring that they could defend against enforcement actions, a document written to outside tax counsel was within the scope of the common-interest doctrine and thus protected by the attorney-client privilege. The common-interest doctrine similarly applies to the attorney-client privilege in Michigan.

2. The common-interest doctrine only will apply when the parties undertake a joint effort with respect to a common legal interest. A primary issue in the underlying litigation had been determining the ownership of Duncan Park and the nature of the city's relationship to the park, which had been created through a charitable trust for the benefit of the city and its people. The city had entered into a license agreement with the Duncan Park Commission to extend liability insurance coverage to Duncan Park, and the city had also hired attorneys to represent the Duncan Park tort defendants and the interests of the city in the underlying tort litigation. In the instant case, the city manager testified that the city acted in an advisory capacity for the tort defendants and that the city had a mutual interest in achieving a successful outcome in the tort litigation. Accordingly, the record supported the conclusion that the city shared with all defendants in the underlying tort action a common legal interest in matters related to the operation, use, maintenance, and protection of Duncan Park, and the tort defendants were involved in a joint effort to prevent or limit liability from attaching to parties involved in the operation of Duncan Park. A review of the documents supported the trial court's conclusion that these communications—with the exception of the amount of the attorney billings—were protected by the attorney-client privilege and that the privilege was not waived by disclosure to the city because the documents were confidential communications between representatives of the city or the city's attorneys and the tort defen-

dants or attorneys representing the tort defendants with whom the city shared a common legal interest and because the communications were made for the purpose of obtaining legal advice and services related to the underlying tort litigation.

3. MCL 14.254 provides, in pertinent part, that the attorney general shall have jurisdiction and control and shall represent the people of the state and the uncertain or indefinite beneficiaries in all charitable trusts in this state. In this case, Duncan Park had been created through a charitable trust for the benefit of the city and its people, and the city's attorneys were involved in negotiating the reformation of the Duncan Park Trust. Accordingly, the city's interest in protecting Duncan Park for the use of Grand Haven's citizens in accordance with the intent expressed in the trust deed was in alignment with the attorney general's interests in representing the people of Michigan and the beneficiaries of the charitable trust. Therefore, the trial court did not err by concluding that communications between an attorney representing the city and an assistant attorney general were protected by the attorney-client privilege and were exempt from disclosure.

4. MCL 15.240(6) provides, in pertinent part, that if a person asserting the right to receive a copy of all or a portion of a public record prevails in a FOIA action, then the court shall award reasonable attorney fees, costs, and disbursements; if the person prevails in part, then the court may, in its discretion, award all or an appropriate portion of reasonable attorney fees, costs, and disbursements. A party has prevailed under FOIA if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents. Whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under FOIA is entrusted to the sound discretion of the trial court. Accordingly, there was no merit to plaintiff's argument that a trial court cannot exercise its discretion to determine that a plaintiff that prevails only partially in a FOIA action is not entitled to any attorney fees. The record supported the trial court's determination that plaintiff was not entitled to attorney fees because plaintiff's success was relatively minor when considering the volume of documents. Additionally, the reasonableness of a defendant's actions is a proper consideration when the trial court is exercising its discretion to determine the appropriate attorney fees to award to a partially prevailing plaintiff.

Affirmed.

1. EVIDENCE — ATTORNEY-CLIENT PRIVILEGE — COMMON-INTEREST DOCTRINE.

The attorney-client privilege prevents the disclosure of communications made by a client to an attorney acting as a legal advisor and made for the purpose of obtaining legal advice; the common-interest doctrine, which prevents the disclosure of confidential communications between parties undertaking a joint effort with respect to a common legal interest, applies to the attorney-client privilege in Michigan.

2. RECORDS — FREEDOM OF INFORMATION ACT — PARTIALLY PREVAILING PLAINTIFF — ATTORNEY FEES — REASONABLENESS OF A DEFENDANT'S ACTIONS.

MCL 15.240(6) provides, in pertinent part, that if a person asserting the right to receive a copy of all or a portion of a public record prevails in an action to obtain those records under the Michigan Freedom of Information Act, MCL 15.231 *et seq*., then the court shall award reasonable attorney fees, costs, and disbursements; if the person prevails in part, then the court may, in its discretion, award all or an appropriate portion of reasonable attorney fees, costs, and disbursements; the reasonableness of a defendant's actions is a proper consideration when the trial court is exercising its discretion to determine the appropriate attorney fees to award to a partially prevailing plaintiff.

John D. Tallman, PLC (by *John D. Tallman*) for the Nash Estate.

McGraw Morris, PC (by *Craig R. Noland* and *Amanda M. Zdarsky*) for the city of Grand Haven.

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

MARKEY, J. Diane Nash, as personal representative of the Estate of Chance Aaron Nash, sought certain documents and information under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*., from defendant, the city of Grand Haven. Following an *in camera* review of documents that the city claimed were subject to the attorney-client privilege and a bench trial related to 12 documents the trial court identified during its *in camera* review as requiring further explanation, the trial court ordered the city to

produce some documents to plaintiff and ruled that others were exempt from disclosure because they were subject to the attorney-client privilege. The trial court concluded that plaintiff prevailed in part on the FOIA claim but was not entitled to attorney fees. Plaintiff now appeals by right. We affirm.

The instant case is one of a series of lawsuits related to the death of Chance Aaron Nash, who was involved in a fatal sledding accident on December 31, 2009, at Duncan Park in the city of Grand Haven. In the underlying tort litigation, plaintiff has sued the Duncan Park Commission, the Duncan Park Trustees, the individual trustees, and Duncan Park groundskeeper Robert DeHare.

Plaintiff's original FOIA request sought documents and information from the city related to the accident, the underlying tort litigation, Duncan Park, and the employment of DeHare. The city denied plaintiff's request in part, stating that it did not have information or documents related to DeHare's employment because he was not an employee of the city and that some information and records were exempt from disclosure pursuant to MCL 15.243(1)(g) because they were subject to the attorney-client privilege. Plaintiff filed the instant FOIA lawsuit while the underlying tort litigation was still pending. Plaintiff's complaint alleged that the city "denied, in part, Plaintiff's request, claiming the documents in its possession were exempt from disclosure as being subject to the attorney-client privilege" and that "[t]he requested public records are not exempt from disclosure and [the city] has arbitrarily and capriciously violated the FOIA." Plaintiff did not base the claim of a FOIA violation on any other ground.

On appeal, plaintiff first argues that the trial court erred by applying federal precedent regarding the common-interest doctrine to the attorney-client privilege. We disagree.

An appellate court "reviews de novo whether the trial court properly interpreted and applied FOIA." *ESPN, Inc v Mich State Univ*, 311 Mich App 662, 664; 876 NW2d 593 (2015). "Whether a public record is exempt from disclosure under the FOIA is a mixed question of fact and law, and we review the trial court's factual findings for clear error and review questions of law de novo." *Local Area Watch v Grand Rapids*, 262 Mich App 136, 142; 683 NW2d 745 (2004) (quotation marks and citation omitted). Under the clear-error standard of review, "the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court." *King v Oakland Co Prosecutor*, 303 Mich App 222, 225; 842 NW2d 403 (2013) (quotation marks and citation omitted). "Whether the attorney-client privilege applies to a communication is a question of law that we review de novo." *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 484; 691 NW2d 50 (2004).

"Michigan courts have interpreted the policy of the FOIA as one of full disclosure of public records unless a legislatively created exemption expressly allows a state agency to avoid its duty to disclose the information." *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524, 531; 606 NW2d 38 (1999). "Consistent with the FOIA's underlying policies, a public body is required to grant full disclosure of its records, unless they are specifically exempt under MCL 15.243." *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 281; 713 NW2d 28 (2005). "In construing the provisions

of the act, [courts must] keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991). "Also, when a public body refuses to disclose a requested document under the act, and the requester sues to compel disclosure, the public agency bears the burden of proving that the refusal was justified under the act." *Id*. See also MCL 15.240(4). "When ruling whether an exemption under the FOIA prevents disclosure of particular documents, a trial court must make particularized findings of fact indicating why the claimed exemption is appropriate." *Messenger*, 238 Mich App at 532.

Section 13, MCL 15.243(1)(g), states as follows:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (g) Information or records subject to the attorney-client privilege.

"The attorney-client privilege attaches to communications made by a client to an attorney acting as a legal adviser and made for the purpose of obtaining legal advice." *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 279; 568 NW2d 411 (1997). "The attorney-client privilege is designed to permit a client to confide in his attorney, knowing that his communications are safe from disclosure." *McCartney v Attorney General*, 231 Mich App 722, 730; 587 NW2d 824 (1998). "The scope of the privilege is narrow: it attaches only to confidential communications by the client to its advisor that are made for the purpose of obtaining legal advice." *Herald Co*, 224 Mich App at 279. "When the

client is an organization, the privilege attaches to communications between the attorney and any employee or agent authorized to speak on its behalf in relation to the subject matter of the communication." *Krug*, 264 Mich App at 485 (quotation marks and citation omitted). Typically, "[o]nce otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears." *Leibel v Gen Motors Corp*, 250 Mich App 229, 242; 646 NW2d 179 (2002) (quotation marks and citation omitted; alteration in original).

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co v United States*, 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981). This Court looks to federal precedent for guidance in determining the scope of the attorney-client privilege when a particular issue has been addressed by a federal court. See, e.g., *Leibel*, 250 Mich App at 236-237; *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 619-620; 576 NW2d 709 (1998).

Both the trial court, in its December 22, 2016 order, and the city on appeal relied on *United States v BDO Seidman, LLP*, 492 F3d 806, 814-817 (CA 7, 2007), in which the United States Court of Appeals for the Seventh Circuit outlined the application of the common-interest doctrine to the attorney-client privilege as follows:

> Although it ultimately was not adopted by Congress, the rule of attorney-client privilege promulgated by the Supreme Court in 1972 as part of the Proposed Federal Rules of Evidence has been recognized "as a source of general guidance regarding federal common law principles." Proposed Rule 503 provided:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) *by him or his lawyer to a lawyer representing another in a matter of common interest*, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Put simply, in order for the attorney-client privilege to attach, the communication in question must be made: (1) in confidence; (2) in connection with the provision of legal services; (3) to an attorney; and (4) in the context of an attorney-client relationship.

The purpose of the privilege is to "encourage full disclosure and to facilitate open communication between attorneys and their clients." Open communication assists lawyers in rendering legal advice, not only to represent their clients in ongoing litigation, but also to prevent litigation by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities. The cost of these benefits is the withholding of relevant information from the courts.

Recognizing the inherent tension between the beneficial goals of the attorney-client privilege and the courts' right to every person's evidence, the courts have articulated the following principles to inform our analysis of the scope of the common interest doctrine:

> (1) "[C]ourts construe the privilege to apply only where necessary to achieve its purpose."
>
> (2) Only those communications which "reflect the lawyer's thinking [or] are made for the purpose of eliciting the lawyer's professional advice or other legal assistance" fall within the privilege.

(3) Because one of the objectives of the privilege is assisting clients in conforming their conduct to the law, litigation need not be pending for the communication to be made in connection to the provision of legal services.

(4) Because "the privilege is in derogation of the search for truth," any exceptions to the requirements of the attorney-client privilege "must be strictly confined."

Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person. In effect, the common interest doctrine extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances. For that reason, the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise. Other than these limits, however, the common defense doctrine does not contract the attorney-client privilege. Thus, communications need not be made in anticipation of litigation to fall within the common interest doctrine. Applying the common interest doctrine to the full range of communications otherwise protected by the attorney-client privilege encourages parties with a shared legal interest to seek legal "assistance in order to meet legal requirements and to plan their conduct" accordingly. This planning serves the public interest by advancing compliance with the law, "facilitating the administration of justice" and averting litigation. Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication. [Citations omitted; emphasis added; alterations by the *Seidman* Court.]

In *Seidman*, the defendant accounting firm was involved in litigation with the IRS regarding poten-

tially abusive tax shelters promoted by the accounting firm. *Id*. at 808. A lawyer for the accounting firm wrote a memorandum to outside tax counsel "requesting legal advice on pending IRS regulations," and a copy of the memorandum was also received by an attorney at a different law firm that did not represent the defendant accounting firm but serviced the same clients as the accounting firm "on the same or related matters." *Id*. at 813. The attorney at this law firm claimed that she received the memorandum from the accounting firm as input regarding tax shelters that the law firm was preparing for the accounting firm and their common clients. *Id*. The Seventh Circuit held that the lower court did not err by concluding that the memorandum at issue was within the scope of the common-interest doctrine and thus protected by the attorney-client privilege. *Id*. at 814, 817. The *Seidman* Court reasoned that the accounting firm and law firm "shared a common legal interest 'in ensuring compliance with the new regulation issued by the IRS,' and in making sure that they could defend their product against potential IRS enforcement actions." *Id*. at 816 (citation omitted).

In *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 83-84; 862 NW2d 466 (2014), this Court applied the federal common-interest doctrine in the context of the work-product privilege. The *D'Alessandro* Court stated, "While courts in this state have not expressly addressed the so-called common-interest doctrine, several federal courts have concluded that the disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor . . . and the recipient . . . ." *Id*. at 82. This Court set forth the following explanation:

> "A reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient . . . . [T]he existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. This is true because when common litigation interests are present, the transferee is not at all likely to disclose the work product material to the adversary." [*Id*. at 83, quoting *United States v Deloitte LLP*, 391 US App DC 318, 330; 610 F3d 129 (2010) (alterations by the *D'Alessandro* Court).]

The *D'Alessandro* Court noted that the "[f]ederal courts' application of the common-interest doctrine is instructive" because of the similarity between state and federal rules regarding the work-product privilege and because "our courts routinely rely on federal cases for guidance in determining the scope of the work-product doctrine . . . ." *Id*. at 84 (quotation marks and citation omitted).

We conclude that the common-interest doctrine should similarly be applied to the attorney-client privilege in Michigan. See *id*. See also *Leibel*, 250 Mich App at 236-237; *Reed Dairy Farm*, 227 Mich App at 619-620. Plaintiff's argument that the common-interest doctrine should not apply simply because there is no Michigan case directly on point is unavailing. The waiver concept operates similarly in both the attorney-client privilege and work-product privilege contexts. *Leibel*, 250 Mich App at 248. It is also well established that this Court is free to adopt the analysis of a lower federal court "if it is persuasive and instructive." *Holman v Rasak*, 281 Mich App 507, 509; 761 NW2d 391 (2008).

In this case, even though the city was not named as a defendant in the underlying tort litigation, a primary issue in that litigation has been determining the own-

ership of Duncan Park and the nature of the city's relationship to Duncan Park. The park was created through a charitable trust for the benefit of Grand Haven and its people. At one point, the trial court in the underlying litigation ruled that the city held fee title to Duncan Park, although the trial court's order granting summary disposition on the ground of governmental immunity was subsequently reversed on appeal. *Nash v Duncan Park Comm*, 304 Mich App 599, 609-610, 636; 848 NW2d 435 (2014), judgment vacated in part 497 Mich 1016 (2015). Because of the dispute over who owns Duncan Park, City Manager Patrick McGinnis believed that the city was involved in the lawsuits "on some level." The record reflects that the Duncan Park Commission was created by city ordinance, pursuant to the terms of the trust deed, to manage and control Duncan Park. The record also indicates that the city entered into a license agreement with the Duncan Park Commission in which the city agreed to extend liability insurance coverage through its insurance carrier to Duncan Park, the Duncan Park Commission, the Duncan Park Trust, and the trustees—i.e., the Duncan Park tort defendants—in exchange for the use of the park. The city was the principal insured on the policy. There was also evidence that Selective Insurance, the city's insurance carrier, hired attorney Cynthia Merry and her law firm as defense counsel to represent the Duncan Park tort defendants and the interests of the city as necessary throughout the underlying tort litigation. Furthermore, the city hired attorney Gregory Longworth to represent groundskeeper DeHare in the tort litigation. Longworth was an attorney at a law firm that had served as the city's general counsel previously.

Additionally, there was evidence that McGinnis was deposed repeatedly during the underlying tort litiga-

tion and that plaintiff sought to depose the mayor of Grand Haven, even though the city was not a party. Counsel for the city entered a limited appearance at one point in the underlying tort litigation on behalf of the city and its officials who were nonparties.

McGinnis also testified at the trial in the instant FOIA matter that the city acted in an "advisory capacity" for the tort defendants throughout that litigation because of the city's close connection to the facts of the case. As the tort litigation proceeded, McGinnis consulted with the city's attorneys and the attorneys representing the tort defendants to discuss litigation strategy and positions that the city might take in response to positions taken by plaintiff. McGinnis consulted with the city's attorneys to discuss possible issues of exposure for the city. McGinnis testified that the city had a mutual interest in achieving a successful outcome in the tort litigation and that he believed that his communications with the various attorneys were confidential.

Therefore, the record supports the conclusion that the city shared with all of the defendants in the underlying tort action a common legal interest in matters related to the operation, use, maintenance, and protection of Duncan Park for the benefit of the people of Grand Haven and that the city and the tort defendants were involved in a joint effort to prevent or limit liability from attaching to the parties involved in the operation of Duncan Park. See *Seidman*, 492 F3d at 815-816 (stating that "the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest").

Our review of the documents at issue in light of the other record evidence supports the conclusion that

Documents 2 and 8 were confidential communications between representatives of the city or the city's attorneys and the tort defendants or attorneys representing the tort defendants with whom the city shared a common legal interest, as previously noted, and that these communications were made for the purpose of obtaining legal advice and services related to the underlying tort litigation. The same is true of Documents 4 and 10, communications that also included a representative of Selective Insurance, which was the company that provided the city's insurance policy that had been extended to the Duncan Park Commission through the license agreement. The same is also true of Document 1, with the exception of the amount of the attorney billings contained in this communication. As the trial court also found, this information was not protected by the privilege and was not exempt from disclosure; therefore, the trial court did not err by determining that these communications were protected by the attorney-client privilege and that the privilege was not waived by disclosure to the city. *Krug*, 264 Mich App at 485; *Herald Co*, 224 Mich App at 279; *Seidman*, 492 F3d at 815-817.

Regarding the communication between the city and the Michigan Attorney General's Office, the city argued in the circuit court that a shared interest was involved because the city's attorneys were directly involved in negotiating the reformation of the Duncan Park Trust that was sought in the probate court and because the city's fiduciary duties to the people of Grand Haven were aligned with the Attorney General's interests relating to the Duncan Park Trust. At the trial, counsel for the city further argued that the dynamics of the Duncan Park Trust reformation were part of the circumstances involved in the underlying tort litigation.

The petition for reformation that was submitted in the Ottawa County Probate Court[1] indicates that the Michigan Department of Attorney General is an interested party because it "[o]versees charitable trusts" and had executed a waiver of notice and consent. The petition also indicates that the trust needed to be reformed because the "governance structure of Duncan Park, as provided in the Deed, presents . . . conceptual difficulties," such as being open to the public as if publicly owned without providing governmental immunity for members of its governing body who, in turn, risk personal liability, potentially disqualifying Duncan Park from eligibility for certain funding that may only be directed to governmental and charitable entities, and requiring the city's involvement in Duncan Park without the transparency and accountability typically applicable to government bodies. The petition further stated that "Mrs. Duncan's intent to provide a public park with independent oversight for the perpetual benefit of the people of Grand Haven would be enhanced if the Deed is reformed" to make the city the sole trustee and allow the city to establish a governing board for Duncan Park by ordinance.

"In trust administration matters, the Attorney General constitutes a 'special party' under the Revised Probate Code," and "pursuant to the Supervision of Trustees for Charitable Purposes Act, the Attorney General is vested with jurisdiction and control to supervise and enforce charitable trusts." *In re Estes Estate*, 207 Mich App 194, 202; 523 NW2d 863 (1994) (citations omitted). Furthermore, MCL 14.254 provides, in pertinent part:

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[1] We take judicial notice of these other court proceedings. See *Sturgis v Sturgis*, 302 Mich App 706, 712; 840 NW2d 408 (2013).

> (a) The attorney general shall have jurisdiction and control and shall represent the people of the state and the uncertain or indefinite beneficiaries in all charitable trusts in this state, and may enforce such trusts by proper proceedings in the courts of this state.
>
> (b) The attorney general is a necessary party to all court proceedings (1) to terminate a charitable trust or to liquidate or distribute its assets, or (2) to modify or depart from the objects or purposes of a charitable trust as the same are set forth in the instrument governing the trust, including any proceeding for the application of the doctrine of cy pres, or (3) to construe the provisions of an instrument with respect to a charitable trust. A judgment rendered in such proceedings without service of process and pleadings upon the attorney general, shall be voidable, unenforceable, and be set aside at the option of the attorney general upon his motion seeking such relief. The attorney general shall intervene in any proceedings affecting a charitable trust subject to this act, when requested to do so by the court having jurisdiction of the proceedings, and may intervene in any proceedings affecting a charitable trust when he determines that the public interest should be protected in such proceedings. *With respect to such proceedings, no compromise, settlement agreement, contract or judgment agreed to by any or all parties having or claiming to have an interest in any charitable trust shall be valid unless the attorney general was made a party to such proceedings and joined in the compromise, settlement agreement, contract or judgment, or unless the attorney general, in writing, waives his right to participate therein.* The attorney general is expressly authorized to enter into such compromise, settlement agreement, contract or judgment as in his opinion may be in the best interests of the people of the state and the uncertain or indefinite beneficiaries. [Emphasis added.]

Accordingly, the city's interest in protecting Duncan Park for the use of Grand Haven's citizens in accordance with the intent expressed in the trust deed are in alignment with the Attorney General's interests in

representing the people of Michigan and uncertain or indefinite beneficiaries of charitable trusts: there was a common legal interest in ensuring that the trust was appropriately reformed to accomplish the expressed intent of the charitable trust. MCL 14.254(a) and (b); *Seidman*, 492 F3d at 815-816.

A review of Document 11 involving the communications between attorney Nicholas Curcio representing the city and Assistant Attorney General William Bloomfield supports the conclusion that these were confidential communications between these attorneys representing common legal interests made in connection with facilitating professional legal services related to reforming the Duncan Park Trust to protect those common interests. Therefore, the trial court did not err by determining that these communications were protected by the attorney-client privilege. *Krug*, 264 Mich App at 485; *Herald Co*, 224 Mich App at 279; *Seidman*, 492 F3d at 815-816.

Documents 3, 5, 6, and 7 are not at issue for purposes of the attorney-client privilege issue because they had already been disclosed to plaintiff before the bench trial. Documents 9 and 12 are also not at issue on appeal because the trial court ruled that they were not subject to the attorney-client privilege, so they were not exempt from disclosure.

With respect to the other documents the trial court reviewed *in camera* and determined were subject to the attorney-client privilege, we agree that all of those documents involved communications between representatives of the city and the city's attorneys related to legal advice about matters related to Duncan Park. Therefore, these documents were protected by the attorney-client privilege. *Krug*, 264 Mich App at 485; *Herald Co*, 224 Mich App at 279.

Because the attorney-client privilege applied to the challenged documents, they were exempt from disclosure. MCL 15.243(1)(g); *Detroit Free Press*, 269 Mich App at 281.

Next, plaintiff argues that MCL 15.240(6) does not grant the trial court discretion to determine that a plaintiff who prevails in part is not entitled to *any* attorney fees and that plaintiff is thus entitled to an appropriate portion of reasonable attorney fees. We disagree.

This Court "review[s] for an abuse of discretion an award of attorney fees to a prevailing plaintiff in an action under the FOIA" and reviews "a trial court's factual findings for clear error." *Prins v Mich State Police*, 299 Mich App 634, 641; 831 NW2d 867 (2013). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009) (quotation marks and citation omitted).

MCL 15.240(6) provides, in pertinent part:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements.

"A party has 'prevailed' under the FOIA if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents." *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992). "[I]f a plaintiff prevails completely in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees." *Prins*, 299 Mich App at 641. Nonetheless, "attorney fees and costs must be awarded under the first sentence of MCL 15.240(6) only when a party prevails completely," and "whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court." *Local Area Watch*, 262 Mich App at 150, 151.

The Court in *Local Area Watch* noted that because the plaintiff had not prevailed "on its central claim of access to executive (closed) session minutes," the trial court did not abuse its discretion by denying the plaintiff's request for reasonable attorney fees, costs, and disbursements and the defendants had acted reasonably even though the defendants had nonetheless violated FOIA by making some late disclosures. *Id*. at 151.

Local Area Watch, which was decided in 2004, is binding precedent, MCR 7.215(J)(1), and there is no merit to the argument that a trial court cannot exercise its discretion to determine that a plaintiff that prevails only partially in a FOIA action is not entitled to any attorney fees. Plaintiff's reliance on *Rataj v Romulus*, 306 Mich App 735, 756; 858 NW2d 116 (2014), is unavailing because the *Rataj* Court merely held on the facts of that case that the partially prevailing plaintiff was entitled to an appropriate portion of his attorney fees, costs, and disbursements. This Court

did not prohibit a trial court from determining in its discretion that an award of attorney fees is unwarranted. Plaintiff's reliance on *Bitterman v Village of Oakley*, 309 Mich App 53, 72-73; 868 NW2d 642 (2015), is misplaced for the same reason. Finally, plaintiff also relies on two decisions from this Court, *Dawkins v Dep't of Civil Serv*, 130 Mich App 669, 673-674; 344 NW2d 43 (1983), and *Booth Newspapers, Inc v Kalamazoo Sch Dist*, 181 Mich App 752, 759-760; 450 NW2d 286 (1989), that are not binding because they were decided before November 1, 1990. MCR 7.215(J)(1). Therefore, *Local Area Watch* articulates the governing rule.

In this case, the record supports the trial court's determination that plaintiff was not entitled to attorney fees. Plaintiff's success in this FOIA action was relatively minor when considering the volume of documents. Of the documents reviewed *in camera* by the trial court, the city was determined to have violated FOIA with respect to only eight pages of documents, two of which required redacting because the trial court only ordered the *amount* of the billed attorney fees to be disclosed.[2] This is a relatively inconsequential

[2] Five other documents had already been disclosed to plaintiff, and therefore the trial court did not make a ruling on these documents regarding the attorney-client privilege, although the trial court did rule that the city violated FOIA by disclosing one of those five documents late. Our statement that the city's FOIA violation constituted eight pages of documents includes this late-disclosed document, as well as the two documents and billing amounts that the trial court determined were not subject to the attorney-client privilege. It is unclear why these previously disclosed documents were in the packet of materials reviewed *in camera* if they had not been withheld, but counsel for the city indicated at the bench trial that these documents may have merely been attachments to the other e-mails that were submitted for *in camera* review. Counsel appeared to imply that these previously produced documents were inadvertently included with the materials that the city claimed were privileged.

amount compared to the volume of documents submitted, and most of the documents over which the city claimed attorney-client privilege were determined to actually be privileged. In light of plaintiff's protracted litigation involving the Duncan Park accident, which included discovery requests directed at the city and its employees—even though the city was not a defendant in those proceedings—the trial court did not abuse its discretion by deciding that attorney fees were not warranted for plaintiff's relatively minor partial victory. *Local Area Watch*, 262 Mich App at 150-151. Contrary to plaintiff's argument, the reasonableness of a defendant's actions is a proper consideration when the trial court is exercising its discretion to determine the appropriate attorney fees to award to a partially prevailing plaintiff. *Id*.

We affirm.

MURRAY, P.J., and SAWYER, J., concurred with MARKEY, J.

PEOPLE v POINTER-BEY

Docket No. 333234. Submitted October 3, 2017, at Detroit. Decided October 10, 2017, at 9:15 a.m.

Edward D. Pointer-Bey pleaded guilty in the St. Clair Circuit Court to charges of armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a; bank robbery, MCL 750.531; conspiracy to commit bank robbery, MCL 750.531 and MCL 750.157a; two counts of assault with a dangerous weapon (felonious assault), MCL 750.82; possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b; and being a felon in possession of a firearm (felon-in-possession), MCL 750.224f. The court denied defendant's motion to withdraw his plea after it had been accepted. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, by Daniel J. Kelly, J., to concurrent terms of 15 to 45 years of imprisonment for his convictions of armed robbery and conspiracy to commit armed robbery, and bank robbery and conspiracy to commit bank robbery, 4 to 8 years of imprisonment for each felonious-assault conviction, 5 to 10 years of imprisonment for his felon-in-possession conviction, and a 5-year consecutive term of imprisonment for his felony-firearm, second offense, conviction. After sentencing, defendant moved to withdraw his plea, and the trial court again denied defendant's motion. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. Under MCR 6.302, a valid plea must be understanding, voluntary, and accurate. For a plea to be understanding and voluntary under MCR 6.302(B)(2) and (C), a defendant must be fully aware of the direct consequences of the plea—particularly, he or she must be aware of the maximum possible sentence for a conviction and any applicable mandatory minimum required by law. Defendant claimed that he was not made aware of the sentencing consequences related to his convictions of felonious assault and felon-in-possession. The prosecution did fail to state the maximum possible sentences for Count 5, felonious assault, and Count 8, felon-in-possession. Because defendant was not made aware of the maximum possible sentences for those convic-

tions, the plea proceeding was defective, and defendant was entitled to withdraw his plea in its entirety. The trial court abused its discretion by failing to allow defendant to withdraw his plea, and on remand to the trial court, defendant must be given the opportunity to decide whether to allow the plea and sentence to stand or to withdraw the plea.

2. In order for a guilty plea to be accurate under MCR 6.302(D), there must be a factual basis for it. Defendant argued that there was no factual basis for his conviction of felony-firearm because he was sentenced as a second-time offender but did not have a prior conviction under MCL 750.227b. Defendant admitted at the plea hearing that he possessed a gun during the bank robbery and thus provided a factual basis for his felony-firearm conviction. Whether defendant had been previously convicted of felony-firearm did not concern the accuracy of his guilty plea to the instant charge of felony-firearm because a prior conviction of felony-firearm is not an element of the offense. The existence of a prior felony-firearm conviction was relevant to determining whether defendant was subject to a sentencing enhancement as a result of the prior conviction. MCL 750.227b(1) expressly states that the sentencing enhancement for a subsequent conviction of MCL 750.227b requires that a defendant have a prior conviction under MCL 750.227b. Defendant's prior conviction of possessing a firearm during the commission of a felony was under 18 USC 924(c), a federal statute similar to MCL 750.227b. But MCL 750.227b does not indicate that convictions under statutes from other jurisdictions should be deemed convictions under MCL 750.227b. Given that the federal conviction was not obtained under MCL 750.227b, it could not be used to enhance defendant's mandatory consecutive sentence for felony-firearm from two years for a first offense to five years for a second offense. Because defendant was given misinformation regarding the mandatory minimum sentence he faced for his conviction of felony-firearm, the plea proceedings were defective under MCR 6.302(B)(2), and he was entitled to withdraw his plea. In addition, defendant's sentence must be corrected because the five-year term of imprisonment imposed on defendant exceeded the statutory limit in MCL 750.227b(1) and was therefore invalid.

3. A defendant may be entitled to withdraw his or her guilty plea if the bargain on which the guilty plea was based was illusory, that is, if the defendant received no benefit from the agreement. Defendant argued that his plea was illusory because he was incorrectly informed that he was subject to a 25-year mandatory minimum as a fourth-offense habitual offender under

MCL 769.12 when, in fact, he was not. The 25-year minimum term of imprisonment would have been required if defendant's subsequent felony was a serious crime or conspiracy to commit a serious crime and one or more of defendant's prior felony convictions were "listed prior felonies." A "listed prior felony" is defined by MCL 769.12(6)(a) as a violation or attempted violation of the offenses specified in MCL 769.12(6)(a)(*i*) to (*v*). Defendant's federal conviction for armed robbery under 18 USC 2113(a) did not qualify as a listed prior felony because the language in MCL 769.12(6)(a) expressly defining "listed prior felony" does not indicate that a conviction under a comparable statute from another jurisdiction may be considered a "listed prior felony" for purposes of MCL 769.12(1)(a). Defendant had no convictions under Michigan law identified as listed prior felonies under MCL 769.12(6)(a). Therefore, defendant was not subject to the 25-year minimum sentence of imprisonment mandated under MCL 769.12(1)(a) under such circumstances. However, even though the 25-year minimum sentence did not apply to defendant, the plea bargain was not illusory. Defendant received considerable benefit for his plea. In exchange for defendant's plea, the prosecutor reduced defendant's habitual-offender status to third-offense habitual offender and agreed not to charge him in connection with a second bank robbery committed a month before the bank robbery at issue in this case. In light of the benefit defendant received from the plea bargain, the plea agreement was not illusory and withdrawal was not warranted on this basis.

4. A defendant is entitled to withdraw his or her plea when he or she pleaded guilty in reliance on a judge's preliminary sentencing evaluation and his or her sentence later exceeded the preliminary evaluation. Defendant claimed that the trial court failed to sentence him to a more lenient sentence that the trial court had announced at the initial *Cobbs* evaluation.[1] However, although defendant asserted that the trial court stated that his maximum sentence would be 20 years of imprisonment, the trial court actually indicated that a 20-year minimum sentence would be appropriate. Because defendant's minimum sentences totaled 20 years (15 years for his convictions of armed robbery, bank robbery, and conspiracy to commit armed robbery and bank robbery, plus 5 years for the purported subsequent felony-firearm conviction) in accordance with the trial court's preliminary evaluation, defendant was not entitled to withdraw his guilty plea on this basis.

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

5. The effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. A defendant must prove that counsel's representation fell short of an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. Defendant first contended that his counsel was ineffective for failing to recognize that he was not subject to sentencing enhancement for a second conviction of felony-firearm. Because defendant was granted relief for this issue, his ineffective-assistance-of-counsel argument was moot and further analysis of this issue was unnecessary. Defendant's argument that counsel was ineffective for allowing him to accept an illusory plea agreement lacked merit in light of the benefit defendant received from the bargain. Defendant's claims that counsel was ineffective for failing to provide him with discovery, pressuring him into pleading guilty, and failing to review the presentence investigation report with him were not supported by the record, and defendant did not show how these purported errors affected the outcome of the proceedings. Consequently, defendant did not show that he was deprived of the effective assistance of counsel.

Order denying defendant's motion to withdraw his guilty plea vacated and case remanded.

1. CRIMINAL LAW — GUILTY PLEAS — SENTENCE ENHANCEMENT FOR PRIOR CONVICTIONS OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY — PRIOR CONVICTIONS IN FOREIGN JURISDICTIONS.

In order to support a mandatory sentence of five years, a prior conviction of possessing a firearm during the commission of a felony (felony-firearm) must have been under MCL 750.227b(1); a prior conviction obtained under a similar federal statute may not be used to support sentence enhancement under MCL 750.227b(1).

2. CRIMINAL LAW — GUILTY PLEAS — HABITUAL OFFENDER SENTENCE ENHANCEMENT FOR LISTED PRIOR FELONIES — PRIOR CONVICTIONS IN FOREIGN JURISDICTIONS.

A previous conviction in a different jurisdiction, even if it would be a conviction for a listed offense had the conviction been obtained in Michigan, does not qualify as a "listed prior felony" for purposes of habitual-offender sentence enhancement under MCL 769.12(1)(a); rather, the phrase "listed prior felony" is statutorily defined by MCL 769.12(6)(a) to mean a violation or attempted violation of the Michigan statutory provisions specified in MCL 769.12(6)(a)(*i*) to (*v*).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

Edward D. Pointer-Bey, *in propria persona*, and *Carl Cristoph* for defendant.

Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. Defendant pleaded guilty to armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a; bank robbery, MCL 750.531; conspiracy to commit bank robbery, MCL 750.531 and MCL 750.157a; two counts of assault with a dangerous weapon (felonious assault), MCL 750.82; possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b; and being a felon in possession of a firearm (felon-in-possession), MCL 750.224f. Defendant now appeals by delayed leave granted.[1] Because there were errors in the plea proceedings that would entitle defendant to have his plea set aside, we vacate the trial court's orders denying defendant's motions to withdraw his plea, and we remand for proceedings consistent with this opinion and with MCR 6.310(C).

Defendant's convictions arise from his actions on February 20, 2015, when he and two co-conspirators robbed a credit union in Marysville, Michigan. The prosecutor charged defendant with eight counts: (1) armed robbery, (2) conspiracy to commit armed robbery, (3) bank robbery, (4) conspiracy to commit bank robbery, (5) felonious assault, (6) felony-firearm, (7) a

[1] *People v Pointerbey*, unpublished order of the Court of Appeals, entered July 11, 2016 (Docket No. 333234).

second count of felonious assault, and (8) felon-in-possession. The prosecutor and defendant entered into a plea agreement, and defendant pleaded guilty as charged on September 21, 2015.

At the plea hearing, the prosecutor placed the terms of the agreement on the record, explaining that, in exchange for defendant's plea, the prosecutor agreed not to charge defendant with another bank robbery committed on January 20, 2015. Additionally, in terms of sentencing, the prosecutor agreed to reduce defendant's habitual offender status from fourth-offense (which would have required a 25-year mandatory minimum sentence under MCL 769.12(1)(a)) to third-offense. Following the prosecutor's recitation of the agreement, the trial court stated on the record that "a 20 year minimum sentence would be appropriate . . . ." Defendant, on the record, pleaded guilty and then provided a factual basis for his plea.

After defendant pleaded guilty, he filed a motion to withdraw his plea, which the trial court denied. The trial court then sentenced defendant as a third-offense habitual offender, MCL 769.11, to 15 to 45 years' imprisonment for the convictions of armed robbery, conspiracy to commit armed robbery, bank robbery, and conspiracy to commit bank robbery, 4 to 8 years' imprisonment for each felonious-assault conviction, 5 to 10 years' imprisonment for the felon-in-possession conviction, and 5 years' imprisonment, to be served consecutively, for the felony-firearm, second offense, conviction. Following his sentencing, defendant filed another motion to withdraw his plea, which the trial court again denied. Defendant now appeals by delayed leave granted.

I. MOTIONS TO WITHDRAW PLEA

On appeal, defendant first submits that the trial court abused its discretion by denying his motions to

withdraw his plea. Specifically, defendant contends that the plea proceedings were defective because (1) he was not informed of the sentencing consequences related to his convictions of felonious assault and felon-in-possession, (2) there was no factual basis for his felony-firearm conviction because he had not previously been convicted under MCL 750.227b, (3) his plea was illusory because he was not subject to a 25-year mandatory minimum as a fourth-offense habitual offender, and (4) the trial court made promises of leniency at the plea hearing that were not fulfilled insofar as the trial court failed to sentence him in accordance with the initial *Cobbs*[2] evaluation.

Defendant preserved his claims of error by filing motions to withdraw his plea in the trial court. See MCR 6.310(D). We review for an abuse of discretion a trial court's ruling on a motion to withdraw a plea. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (quotation marks and citation omitted). This Court reviews de novo underlying questions of law and for clear error the trial court's factual findings. *People v Martinez*, 307 Mich App 641, 646-647; 861 NW2d 905 (2014).

"There is no absolute right to withdraw a guilty plea once the trial court has accepted it." *People v Al-Shara*, 311 Mich App 560, 567; 876 NW2d 826 (2015) (quotation marks and citation omitted). However, a defendant may move to have his or her plea set aside on the basis of an error in the plea proceedings. MCR 6.310(B)(1) (after acceptance and before sentencing) and MCR 6.310(C) (after sentencing). To succeed on

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

such a motion after sentencing, the defendant "must demonstrate a defect in the plea-taking process." *Brown*, 492 Mich at 693.

"Guilty- and no-contest-plea proceedings are governed by MCR 6.302." *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). Under MCR 6.302, to be valid, a plea must be "understanding, voluntary, and accurate." *Brown*, 492 Mich at 688-689. To ensure that a guilty plea is accurate, the trial court must establish a factual basis for the plea. MCR 6.302(D); *People v Plumaj*, 284 Mich App 645, 648 n 2; 773 NW2d 763 (2009). "In order for a plea to be voluntary and understanding, the defendant must be fully aware of the direct consequences of the plea." *People v Blanton*, 317 Mich App 107, 118; 894 NW2d 613 (2016) (quotation marks and citation omitted). "The penalty to be imposed is the most obvious direct consequence of a conviction." *Id*. (quotation marks, citation, and brackets omitted). Therefore, MCR 6.302(B)(2) requires the trial court to advise a defendant, prior to the defendant's entering a plea, of "the maximum possible sentence for the offense and any mandatory minimum sentence required by law . . . ." *Brown*, 492 Mich at 689.

A. SENTENCES FOR FELONIOUS ASSAULT AND FELON-IN-POSSESSION

Given the requirements of MCR 6.302, we conclude that defendant's guilty plea was not understandingly entered because defendant was not informed of the maximum sentence for felon-in-possession. At defendant's sentencing, the prosecutor informed the trial court of defendant's plea agreement, stating that defendant

> will be pleading guilty as charged to Count One, which is robbery armed, with maximum penalty is [sic] life or any

> term of years; Count Two, conspiracy to commit robbery armed, also life offense or any term of years; Count Three, bank robbery, life offense or any term of years; Count Four, conspiracy to commit bank robbery, life offense or any term of years; Count Five, which is assault with a dangerous weapon or felonious assault . . . ; Count Six, weapon felony firearm, second offense, which is mandatory five year consecutive; Count Seven, assault with a dangerous weapon felonious assault, . . . which is a four year maximum penalty and Count Eight, which is weapon firearm, possession by a felon.

In providing this explanation of defendant's maximum sentences, the prosecution failed to state the maximum sentences for Count 5, felonious assault, and Count 8, felon-in-possession. The prosecutor did advise defendant, in relation to Count 7, that felonious assault carried a maximum penalty of 4 years. But even if this should be understood to apply equally to Count 5, the fact remains that defendant was not informed of the maximum possible sentence for felon-in-possession. That omission rendered defendant's plea proceeding defective. *Brown*, 492 Mich at 694; *Blanton*, 317 Mich App at 120. Consequently, defendant was entitled to withdraw his plea in its entirety, *Blanton*, 317 Mich App at 126, and the trial court's failure to allow defendant to do so constituted an abuse of discretion. This matter must therefore be remanded to the trial court, where defendant shall be given "the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea" pursuant to MCR 6.310(C).

B. FELONY-FIREARM

Next, in terms of the accuracy of defendant's plea, defendant contends that there was no factual basis for his felony-firearm conviction because, although he was

sentenced as if it was his second felony-firearm offense, he did not have a prior conviction under MCL 750.227b. Contrary to defendant's framing of the matter, this issue does not concern the accuracy of his plea. A conviction under MCL 750.227b "requires proof beyond a reasonable doubt that a defendant carried a firearm during the commission or attempted commission of a felony *and nothing more*." *People v Miles*, 454 Mich 90, 99; 559 NW2d 299 (1997) (emphasis added). Consequently, defendant's plea was accurate because defendant admitted at the plea hearing that he possessed a gun during the bank robbery, and this provided a factual basis for his felony-firearm conviction. See MCR 6.302(D)(1).

Whether defendant "was a first-, second-, or third-time offender under the felony-firearm act affects only the duration of the defendant's sentence." *Miles*, 454 Mich at 100. In other words, a prior conviction under MCL 750.227b is not an element of felony-firearm; instead, it is relevant to determining whether defendant should be subject to a sentencing enhancement. See *Miles*, 454 Mich at 99. Because a prior conviction is not an element of felony-firearm, any error relating to defendant's lack of a prior conviction under MCL 750.227b does not affect the accuracy of defendant's felony-firearm plea.

Nevertheless, we agree with defendant's substantive arguments regarding MCL 750.227b, and we find that defendant is entitled to relief on appeal. In particular, defendant contends that he should not have been sentenced as a second offender under MCL 750.227b because he did not have a prior conviction under MCL 750.227b. In comparison, the prosecutor contends that defendant should be sentenced as a second offender because he has a prior conviction under a federal statute similar to MCL 750.227b.

With regard to the sentencing enhancement for a second offense, MCL 750.227b(1), the felony-firearm statute, provides:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony and shall be punished by imprisonment for 2 years. Upon a second conviction *under this subsection*, the person shall be punished by imprisonment for 5 years. [Emphasis added.]

Logic dictates that to have a "*second* conviction under this subsection," there must have been a prior conviction. See *People v Alexander*, 422 Mich 932 (1985). And the phrase "this subsection" clearly refers to MCL 750.227b(1). Contrary to the prosecutor's argument on appeal, the statute gives no indication that convictions under statutes from other jurisdictions should be deemed convictions under "this subsection," and we will not add such a provision to the statute. See *People v Carruthers*, 301 Mich App 590, 604; 837 NW2d 16 (2013). As written, the plain language of the statute unambiguously requires a defendant to have been previously convicted of felony-firearm under MCL 750.227b(1) before the defendant can be subjected to a mandatory five-year prison term as a second offender.

Here, in the felony information, the prosecution stated that defendant had been convicted under MCL 750.227b on or about June 3, 1993. However, according to the presentence investigation report (PSIR), defendant has never been convicted of felony-firearm under MCL 750.227b(1). Rather, defendant was convicted in *federal* court of using a firearm to commit a violent crime, a violation of 18 USC 924(c)(1)(A), in the United States District Court for the Eastern District of Wisconsin. Because this federal conviction was not obtained under MCL 750.227b(1), the federal conviction

could not be used to enhance defendant's mandatory consecutive sentence for felony-firearm to a 5-year term of imprisonment for a second offense. Given that defendant was given misinformation regarding the mandatory minimum sentence he faced for felony-firearm, the plea proceedings were defective under MCR 6.302(B)(2). See *Brown*, 492 Mich at 694; *Blanton*, 317 Mich App at 120.

Moreover, given that defendant's felony-firearm sentence was invalid, defendant is entitled to correction of this invalid sentence.[3] "A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts." *Miles*, 454 Mich at 96. As discussed, there is no statutory basis for a 5-year sentence in this case because defendant is not a second offender under MCL 750.227b(1). Instead, he should have faced only a 2-year term under MCL 750.227b(1). Because the sentence imposed exceeded the statutory limit set forth in MCL 750.227b(1), it is invalid and must be corrected.

C. HABITUAL OFFENDER

Defendant additionally asserts that his plea bargain was illusory because, contrary to the prosecutor's representations, he was not subject to a 25-year minimum

[3] Although defendant did not title his motion in the trial court as one for resentencing or as one to correct an invalid sentence under MCR 6.429, he plainly argued that he was not subject to enhanced sentencing as a second offender under MCL 750.227b. To ignore this meritorious sentencing argument based on defendant's label for his timely motion would exalt form over substance. *People v Lloyd*, 284 Mich App 703, 706 n 1; 774 NW2d 347 (2009).

term of imprisonment under MCL 769.12(1)(a) as a fourth-offense habitual offender. While there is merit to defendant's assertion that he did not face a 25-year minimum term of imprisonment, in our judgment this does not render defendant's plea illusory because the record is clear that he received many benefits in exchange for his plea.

A criminal defendant may be entitled to withdraw his or her guilty plea if the bargain on which the guilty plea was based was illusory, i.e., the defendant received no benefit from the agreement. *People v Harris*, 224 Mich App 130, 132; 568 NW2d 149 (1997). In this case, one of the purported benefits of the plea bargain was the prosecutor's agreement to take the 25-year mandatory minimum for fourth-offense habitual offenders under MCL 769.12(1)(a) "off the table." However, defendant contends that his plea was illusory because MCL 769.12(1)(a) was inapplicable to this case, so the agreement to forgo pursuit of this 25-year mandatory minimum had no value. See *People v Bonoite*, 112 Mich App 167, 169; 315 NW2d 884 (1982) ("[I]f defendant's plea was induced by a promise to forego [sic] habitual offender proceedings when no such proceeding would be warranted, the plea bargain was illusory.").

Relevant to defendant's argument, MCL 769.12 states:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, *whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state*, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:

> (a) If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, *and 1 or more of the prior felony convictions are listed prior felonies*, the court shall sentence the person to imprisonment for not less than 25 years. Not more than 1 conviction arising out of the same transaction shall be considered a prior felony conviction for the purposes of this subsection only. [Emphasis added.]

The phrase "listed prior felony" is statutorily defined by MCL 769.12(6)(a) to mean "violation or attempted violation" of the Michigan statutory provisions specified in MCL 769.12(6)(a)(*i*) to (*v*). In listing these specific Michigan statutory provisions, MCL 769.12(6)(a) contains no indication that convictions under comparable statutes from other jurisdictions should be considered "listed prior felonies" for purposes of MCL 769.12(1)(a), and we will not add such a provision to the statute. See *Carruthers*, 301 Mich App at 604.

We recognize that, as emphasized by the prosecutor, MCL 769.12(1) indicates that an individual is subject to MCL 769.12 if the person commits a subsequent felony in Michigan when that person has been convicted of any combination of three or more felonies or attempts to commit felonies, whether the prior convictions occurred in Michigan "or would have been for felonies or attempts to commit felonies in this state if obtained in this state . . . ." However, we are not persuaded that this general instruction applies to the determination of "listed prior felonies" for purposes of MCL 769.12(1)(a). As used in MCL 769.12(1)(a), "prior felony convictions" are distinguished from "*listed* prior felonies," and the phrase "listed prior felony" is given a specific statutory definition that does not encompass convictions arising under federal statutes or the statutes of other states. This specific definition of "listed

prior felonies" for purposes of MCL 769.12(1)(a) controls over the more general instruction that felonies from other jurisdictions should be considered under MCL 769.12(1). *People v Meeks*, 293 Mich App 115, 118; 808 NW2d 825 (2011) ("[W]hen a specific statutory provision differs from a related general one, the specific one controls.").

In this case, defendant has no convictions under the Michigan statutes identified as "listed prior felonies" under MCL 769.12(6)(a). The prosecution asserts that defendant has a federal conviction for armed bank robbery under 18 USC 2113(a) that is comparable to armed robbery under MCL 750.529, a "listed prior felony" under MCL 769.12(6)(a)(*iii*). However, as discussed, "listed prior felonies" are limited to those detailed in MCL 769.12(6)(a)(*i*) to (*v*), and a conviction under 18 USC 2113(a) is not included in these provisions. Thus, defendant's armed bank robbery conviction cannot be considered. Consequently, defendant was not subject to a 25-year minimum term of imprisonment under MCL 769.12(1)(a) because he does not have a "listed prior felony."

The prosecutor's offer to take the 25-year minimum term of imprisonment "off the table" in exchange for defendant's plea was based on a misunderstanding of the law. It provided defendant with no actual benefit because he was not subject to MCL 769.12(1)(a).[4] Nevertheless, it is clear that defendant received considerable benefit for his plea, and we are not persuaded by his assertion that the bargain was illusory. For instance, while MCL 769.12(1)(a) did not apply, defen-

[4] To the extent that defendant was misinformed that he faced a 25-year mandatory minimum sentence, the plea proceedings also failed to comply with MCR 6.302(B)(2). See *Brown*, 492 Mich at 694; *Blanton*, 317 Mich App at 120.

dant concedes that he was nevertheless a fourth-offense habitual offender subject to MCL 769.12(1)(b). In exchange for his plea, the prosecutor agreed to reduce defendant's habitual offender status to third-offense habitual offender, MCL 769.11. Moreover, the prosecutor also agreed not to charge defendant in connection with a second bank robbery committed on January 20, 2015. Given these facts, "[d]efendant may not have received as many benefits as he thought he would be receiving for his plea, but he did receive many benefits for the plea," and we cannot conclude that his bargain was illusory. *People v Thompson*, 101 Mich App 428, 430; 300 NW2d 585 (1980). See also *People v Kidd*, 121 Mich App 92, 96-97; 328 NW2d 394 (1982).

D. *COBBS* EVALUATION

Next, defendant argues that he is entitled to withdraw his guilty plea because the trial court sentenced him in excess of the preliminary sentence evaluation. If a defendant pleads guilty in reliance on a judge's preliminary sentencing evaluation and his or her sentence later exceeds the preliminary evaluation, the defendant may withdraw his or her guilty plea. *Cobbs*, 443 Mich at 283. However, in this case, defendant's sentence did not exceed the trial court's preliminary sentence evaluation. Before defendant entered his guilty plea, the trial judge noted:

> I have discussed with all the parties involved here what may be considered to be a reasonable minimum sentence in this case as well as the others, and with regard to [defendant] I am satisfied that a 20 year minimum sentence would be appropriate and notwithstanding the offenses that carry mandatory minimums and however they are calculated and the minimum sentence that I think probably under full consideration understanding the max in this case would be 20 years.

While defendant claims he understood that his maximum sentence would be 20 years of imprisonment, when the trial court's remarks are read as a whole, it is plain that the trial court indicated that a 20-year minimum sentence would be appropriate. Consistently with this preliminary evaluation, defendant was sentenced to a minimum of 20 years' imprisonment. Of his concurrent sentences, his longest minimum was 15 years, which combined with the consecutive five years' imprisonment for felony-firearm, totals a minimum of 20 years. Because the trial court sentenced defendant in accordance with the preliminary evaluation, defendant is not entitled to withdraw his guilty plea on that basis. See *Cobbs*, 443 Mich at 283.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, in defendant's brief on appeal, as well as in his Standard 4 brief on appeal, defendant advances several claims of ineffective assistance of counsel. No factual record has been created with respect to defendant's claims, meaning that our review is limited to mistakes apparent on the record. *People v Solloway*, 316 Mich App 174, 188; 891 NW2d 255 (2016). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). When claiming ineffective assistance of counsel, it is defendant's burden to prove "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citation omit-

ted). Defendant also bears the burden of establishing the factual predicate for his claim. *Id*.

First, defendant contends that counsel provided ineffective assistance by failing to recognize that defendant was not subject to sentencing enhancement for felony-firearm under MCL 750.227b(1) and by failing to ensure that defendant was correctly advised of all the sentencing consequences as required by MCR 6.302(B)(2) and (C)(3). Given that we have already granted defendant relief in connection with these issues, his ineffective assistance of counsel arguments in this regard are moot, and we need not consider them. See *People v Jones*, 317 Mich App 416, 431-432; 894 NW2d 723 (2016).

Second, in his brief on appeal, defendant argues that defense counsel was ineffective for allowing defendant to enter into an illusory plea agreement. However, as discussed, defendant's plea agreement was not illusory. Therefore, his ineffective assistance claim in this regard also lacks merit. See *Douglas*, 496 Mich at 592.

Finally, defendant argues that defense counsel was deficient for failing to provide defendant with discovery, for pressuring defendant into pleading guilty, and for failing to review the PSIR with defendant. These claims are not supported by the record. Defendant's assertion that he was pressured into pleading guilty is wholly belied by his statements at the plea hearing, during which he testified that he was offering his guilty plea freely and voluntarily, that no one had threatened or coerced him into accepting the plea agreement, and that his plea was not made under duress. See *People v White*, 307 Mich App 425, 432; 862 NW2d 1 (2014). There is also no indication that counsel failed to provide discovery to defendant or failed to review the PSIR with him; and, in any event, defen-

dant does not explain how such purported failings affected the outcome of the plea proceedings.[5] Defendant has not shown that he was deprived of the effective assistance of counsel. See *Solloway*, 316 Mich App at 188.

III. CONCLUSION

In sum, the plea proceedings were defective insofar as defendant was not informed of the sentencing consequences for felon-in-possession and he was misadvised with regard to the mandatory minimum he faced for felony-firearm under MCL 750.227b(1). Although defendant's plea bargain was not illusory, defendant was also misinformed that he faced a 25-year mandatory minimum under MCL 769.12(1)(a). Given these deficiencies, defendant should be given an opportunity to withdraw his guilty plea under MCR 6.310(C).

We vacate the trial court's order denying defendant's motion to withdraw his guilty plea, and we remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

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[5] To the extent that defendant requests a remand to develop an evidentiary record, this Court has twice denied this request. *People v Pointerbey*, unpublished order of the Court of Appeals, entered December 20, 2016 (Docket No. 333234); *People v Pointerbey*, unpublished order of the Court of Appeals, entered May 10, 2017 (Docket No. 333234). Those decisions are now the law of the case. *White*, 307 Mich App at 428-429. In any event, we see no need for further factual development. Defendant's request for an evidentiary hearing is again denied.

RUSSELL v CITY OF DETROIT

Docket No. 332934. Submitted October 3, 2017, at Detroit. Decided October 10, 2017, at 9:20 a.m. Leave to appeal denied 501 Mich 1061.

Lawrence Russell brought an action in the Wayne Circuit Court against the city of Detroit, asserting that the city was responsible for injuries Russell suffered when he crashed his motorcycle in July 2014 after allegedly driving over a pothole in a city road. In October 2014, plaintiff sent notice of his injuries and the location of the asserted defect in the road to the city. Plaintiff asserted that the pothole defect was located at the intersection of two roads in the city and that the large pothole was adjacent to a manhole cover in the middle of the street. Plaintiff's attorney mailed the notice on plaintiff's behalf. The city moved for summary disposition under MCR 2.116(C)(7), arguing that the city was entitled to summary disposition under MCL 691.1404(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., because plaintiff's notice was deficient under the statute and because the notice was served by plaintiff's attorney rather than by plaintiff. The court, John A. Murphy, J., denied the city's motion. Defendant appealed.

The Court of Appeals *held*:

1. Under the GTLA, governmental agencies are generally immune from tort liability when engaged in a governmental function. For purposes of the highway exception to governmental immunity, MCL 691.1402(1), a person who is injured by reason of a governmental agency failing to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel is required under MCL 691.1404(1) to timely serve notice on the governmental agency that has jurisdiction over the roadway of the injury sustained, the exact location and nature of the defect, and the names of known witnesses. Notice need not be provided in any particular form, and it is sufficient if it is timely and contains the requisite information. The information provided in the notice need only be understandable and sufficient to bring the important facts to the governmental agency's attention. A court judges the sufficiency of the notice on the entire notice and the facts contained therein.

Reading the notice as a whole, plaintiff's identification of the exact location and nature of the defect was sufficient for purposes of MCL 691.1404(1).

2. MCL 691.1404(1) requires an injured person to serve notice on the governmental agency. The requirement is met when the notice identifies the injured person and conveys that the notice is by the injured person's attorney or agent on behalf of the injured person. It is well settled that an individual may serve notice by using an agent, including an attorney acting on behalf of his or her client. The absence of specific language in MCL 691.1404(1) that would allow an attorney to serve notice on behalf of an adult injured person is not evidence that the Legislature intended to require personal service by that injured person. The MCL 691.1404(3) inclusion of language allowing a parent, attorney, next friend, or legally appointed guardian to serve notice on behalf of an injured person under the age of 18 years is a reflection of the legal realties governing minors in that a minor generally lacks the capacity to sue, to serve process, to retain an attorney, or to empower an agent to act on his or her behalf. The Legislature addressed those concerns in MCL 691.1404(3) by granting certain persons the power to serve notice on the injured minor's behalf. But those concerns do not apply to competent adults under MCL 691.1404(1) because competent adults are able to engage agents or take other actions to serve notice. In this case, the notice sent by plaintiff's attorney on plaintiff's behalf was sufficient for purposes of MCL 691.1404(1) because the notice clearly identified plaintiff as the injured person and stated that the notice was by plaintiff's attorney on behalf of plaintiff, the injured person. Plaintiff complied with the MCL 691.1404(1) service-of-notice requirement when his attorney arranged for service of the notice; plaintiff was not required under the statute to personally serve the notice. Finally, plaintiff was not required under MCL 600.1404(1) to sign or verify the notice before an officer who is authorized to administer oaths, and the city's reliance on *Fairley v Dep't of Corrections*, 497 Mich 290 (2015)—which analyzed a different statute with that requirement—was therefore misplaced. Accordingly, the trial court correctly denied the city's motion for summary disposition.

Affirmed.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — SERVICE OF NOTICE — SERVICE BY INJURED PERSON'S ATTORNEY OR AGENT.

For purposes of MCL 691.1402(1)—the highway exception to governmental immunity—a person who is injured by reason of a

governmental agency failing to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel is required under MCL 691.1404(1) to timely serve notice on the governmental agency that has jurisdiction over the roadway of the injury sustained, the exact location and nature of the defect, and the names of known witnesses; service of notice by an attorney or agent on behalf of the injured person is sufficient under the statute; MCL 691.1404(1) does not require the injured person to personally serve the notice in person or to personally mail the notice by certified mail, return receipt requested (MCL 691.1401 *et seq*.).

Lipton Law (by *Marc Lipton* and *Chris Camper*) for plaintiff.

Sheri L. Whyte for defendant.

Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. In this action related to an injury arising from a purportedly defective city street, defendant, the city of Detroit (the City), sought summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiff, Lawrence Russell, had failed to provide notice in compliance with the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The trial court denied the City's motion, and the City now appeals as of right. Because plaintiff provided notice to the City as required by MCL 691.1404(1), we affirm.

According to plaintiff's complaint, on July 20, 2014, he fractured his leg after he drove his motorcycle through a pothole, lost control, and then crashed. In October 2014, plaintiff's attorney sent the City notice of plaintiff's injury and the defect in the roadway. On March 6, 2015, plaintiff filed his complaint in this case. Thereafter, the City moved for summary disposition, asserting that the complaint should be dismissed be-

cause plaintiff had failed to provide notice to the City as required by MCL 691.1404(1). Specifically, the City argued that plaintiff's notice was deficient for purposes of MCL 691.1401(1) because (1) the notice failed to specify the exact location and exact nature of the defect, and (2) the notice was served by plaintiff's attorney rather than by plaintiff. The trial court rejected these arguments. The City now appeals as of right.

On appeal, the City argues that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(7) because plaintiff failed to provide notice as required by MCL 691.1404(1). In particular, as in the trial court, the City argues that plaintiff failed to provide notice of the exact location and nature of the defect. Additionally, the City contends that plaintiff was required to personally serve notice on the City, meaning that service by plaintiff's attorney was insufficient to comply with MCL 691.1404(1).

I. STANDARDS OF REVIEW

"This Court reviews motions for summary disposition under MCR 2.116(C)(7) de novo." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). The applicability of governmental immunity and its statutory exceptions are reviewed de novo. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). "Questions of statutory interpretation are also reviewed de novo." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

II. EXACT LOCATION AND NATURE OF THE DEFECT

The City first argues that the location and nature of the defect were not adequately described in the notice provided by plaintiff. The City contends that plaintiff merely provided the location of an intersection, which encompasses a broad area and was not sufficient to identify the "exact location" where plaintiff's injury occurred. With regard to the nature of the defect, the City maintains that plaintiff also failed to sufficiently describe the nature of the alleged defect.

Under the GTLA, "governmental agencies are immune from tort liability when engaged in a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). See also MCL 691.1407(1). "[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki*, 463 Mich at 158. One such exception is the highway exception codified at MCL 691.1402(1). MCL 691.1402(1) provides that "[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." If a governmental agency fails to do so, "[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*.

However, as a prerequisite to recovering damages under the highway exception, the injured person must serve notice on the governmental agency pursuant to MCL 691.1404(1), which states:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

"MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect." *Rowland*, 477 Mich at 219. Consequently, the statute "must be enforced as written." *Id*. "Failure to provide adequate notice under this statute is fatal to a plaintiff's claim against a government agency." *McLean v Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013).

Under the plain language of MCL 691.1404(1), "a claimant must provide, within 120 days from the time of injury, notice to the governmental agency that (1) specifies the exact location and nature of the defect, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses." *Burise v Pontiac*, 282 Mich App 646, 653; 766 NW2d 311 (2009). "The notice need not be provided in a particular form. It is sufficient if it is timely and contains the requisite information." *Plunkett v Dep't of Transp*, 286 Mich App 168, 176; 779 NW2d 263 (2009). Further, the information provided in the notice "need only be understandable and sufficient to bring the important facts to the governmental entity's attention." *Id*. The sufficiency of the notice is judged on the entire notice and all the facts stated therein. *Rule v Bay City*, 12 Mich App 503, 508; 163 NW2d 254 (1968). "Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects." *McLean*, 302 Mich App at 75 (citation and quotation marks omitted).

Nevertheless, the injured person must give notice of "the exact location"; and the provision of incorrect information, such as an incorrect address, will not be excused if the error is not corrected within the notice period. *Jakupovic v Hamtramck*, 489 Mich 939 (2011); *Thurman v Pontiac*, 295 Mich App 381, 385-386; 819 NW2d 90 (2012). Absent clarifying information, a description may also be considered too vague or imprecise to give notice of the "exact location." For example, a description was deficient when it referred to a defective sidewalk at an intersection without specifying on which of the four corners of the intersection the alleged defect was located. *Thurman*, 295 Mich App at 385-386, discussing *Dempsey v Detroit*, 4 Mich App 150, 151-152; 144 NW2d 684 (1966). Likewise, a description of a defect "near" an address, which failed to specify that the defect was actually 40 yards away on the south side of the road, was insufficient to identify the place of injury. *Thurman*, 295 Mich App at 385, discussing *Smith v City of Warren*, 11 Mich App 449, 452-453; 161 NW2d 412 (1968).

In this case, the notice that plaintiff's counsel sent to the City contained the following information regarding the location and the nature of the defect:

> Location of Defect: Intersection of Selden St and Aretha Street, Detroit Michigan. See attached photos.
>
> Nature of the Defect: A large pothole, adjacent to a manhole cover in the middle of the street.

By reading the section labeled "Location of Defect" in isolation, the City contends that, as in *Smith* and *Dempsey*, plaintiff's description of the location is insufficient because it refers generally to an intersection without the details necessary to locate the defect. However, in considering the notice, we consider all the facts stated therein and construe the location in con-

nection with the description of the defect. See *Rule*, 12 Mich App at 508. In other words, unlike the City, we will not read plaintiff's description of the "Location of Defect" without also considering plaintiff's description of the "Nature of the Defect." See *McLean*, 302 Mich App at 75; *Plunkett*, 286 Mich App at 176-177.

When these sections of plaintiff's notice are read together, it is clear that plaintiff's identification of the location was sufficient. Plaintiff did not just refer to an intersection. Instead, after identifying a particular intersection in Detroit, plaintiff then more specifically directed the City's attention to "a manhole cover in the middle of the street," adjacent to which was a "large pothole." The directions to the "middle of the street" and the use of the manhole cover as a landmark, when coupled with the identification of the intersection, were sufficient to enable the City to find the location of the pothole in question from the notice provided.[1] Stated differently, reading the notice as a whole, plaintiff's notice regarding the location of the defect was "understandable and sufficient to bring the important facts to the governmental entity's attention." *Plunkett*, 286 Mich App at 176. Therefore, plaintiff's description of the exact location satisfied MCL 691.1404(1).

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[1] The lower court record also contains photographs of the location. The City contends that, although plaintiff's written notice refers to attached photographs, plaintiff failed to actually include these photographs with his notice. In the trial court, the City supported this factual assertion with an affidavit from an employee in the City's law office who is responsible for opening mail and who averred that no photographs were attached to plaintiff's notice. The City also contends that, even if the photographs are considered, they simply show a general area and do not aid plaintiff's description of the location of the defect. We need not reach these issues. Plaintiff had no obligation to provide photographs. And whether the City received plaintiff's photographs is immaterial because, as discussed, plaintiff's written description of the location—with or without the photographs—was sufficient to comply with MCL 691.1404(1).

With regard to the nature of the defect, plaintiff described a "large pothole, adjacent to a manhole cover." In disputing the adequacy of this description, the City cites an unpublished case in which the plaintiff's description of the defect was found inadequate because the description provided in the notice was "significantly different" than the true nature of the defect insofar as the plaintiff identified the defect as "too much crack filler" when the defect actually consisted of "rutting" in the road. *Karwacki v Dep't of Transp*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2013 (Docket No. 308772), pp 5-6. As an unpublished opinion, *Karwacki* is not precedentially binding. MCR 7.215(C)(1); *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 42 n 10; 761 NW2d 151 (2008). In any event, we fail to see the similarities between *Karwacki* and the present case. Plaintiff identified the defect as a "large pothole," and there is no indication that the description was inaccurate. Further, the word "pothole" is an understandable term, clearly conveying the nature of the defect to anyone who has ever driven on the roads in Michigan. Moreover, when plaintiff's description of the defect as a "large pothole" is read in conjunction with the description of the location of the defect, i.e., a "large pothole *adjacent* to a manhole cover in the middle of the street" at a particular intersection, plaintiff's notice clearly brought the defect in question to the City's attention. Cf. *Plunkett*, 286 Mich App at 178-179, 179 n 25. Overall, plaintiff's description of the exact location and nature of the defect was sufficient to comply with MCL 691.1404(1).

III. SERVICE BY THE INJURED PERSON

Next, the City argues that plaintiff violated MCL 691.1404(1) by having his attorney mail notice to the

City, rather than plaintiff sending the written notice himself. In particular, the City notes that MCL 691.1404(1) states that "the injured person . . . shall serve a notice on the governmental agency . . . ." In comparison, under MCL 691.1404(3), if an injured person is under the age of 18 years, "notice may be filed by a parent, attorney, next friend or legally appointed guardian." The City asserts that, because MCL 691.1404(1) does not specifically allow for service through an attorney, an injured person over 18 must personally serve notice.

Resolution of this issue requires statutory interpretation. When engaging in statutory interpretation, "our goal is to give effect to the intent of the Legislature by focusing on the statute's plain language." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 134; 860 NW2d 51 (2014). "When construing statutory language, we must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 S Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

Relevant to the City's argument, MCL 691.1404 states, in part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. . . .
>
> (3) If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability.

Clearly, MCL 691.1404 sets forth various requirements for providing compliant notice to the governmental agency.

> The statute specifies who must serve the notice ("the injured person"), on whom the notice must be served ("any individual . . . who may lawfully be served with civil process directed against the . . . governmental agency"), what information the notice must contain ("the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant"), and the manner in which the notice must be served ("either personally, or by certified mail, return receipt requested"). Although the statute does not explicitly so provide, it patently implies that these elements of the required notice must be in writing. [*Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 81; 782 NW2d 514 (2010).][2]

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[2] *Ward* involved MCL 691.1406, the notice provision applicable to persons injured by a dangerous and defective condition in a public building. However, the language in MCL 691.1406 mirrors the pertinent language in MCL 691.1404.

Moreover, the use of the term "shall" in MCL 691.1404 makes plain that this notice requirement is mandatory. See *In re Duke Estate*, 312 Mich App 574, 584; 887 NW2d 1 (2015). Thus, there can be no question that, as the injured person, plaintiff was required to serve notice on the City. The real issue in this case is whether an attorney or other agent may serve the notice on behalf of the injured person.

Contrary to the City's argument, we do not read the statute as requiring an injured person to personally send the notice by certified mail or to appear in person to personally serve the notice. Rather, we are persuaded that an injured person can serve a governmental agency under MCL 691.1404(1) by using an agent, such as attorney. To begin with, our statutes and court rules are replete with provisions similar to the language in MCL 691.1404(1) insofar as they require an individual to "serve" documents.[3] Yet, it has never been an expectation in this state that the service would be

[3] MCR 2.307(A)(2) ("A party desiring to take a deposition on written questions shall serve them on every other party with a notice . . . ."); MCR 2.622(B)(4) ("The party filing an objection [to the appointment of a receiver] must serve it on all parties . . . ."); MCR 3.101(F)(1) ("The plaintiff shall serve the writ of garnishment . . . ."); MCR 3.210(B)(4)(a) ("A party moving for default judgment must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party . . . ."); MCR 6.507(B) ("Whenever a party submits items to expand the record, the party shall serve copies of the items to the opposing party."); MCR 7.121(C)(2)(d) ("The appellant shall serve the claim of appeal on all parties."); MCL 14.254(c) ("[I]f such will creates or purports to create a charitable trust, the petitioner shall serve notice upon the attorney general, charitable trust division, of the pendency of the proceedings . . . ."); MCL 400.610a(2) ("At the time of filing the complaint, the person shall serve a copy of the complaint on the attorney general . . . ."); MCL 445.814(2) ("The attorney general shall serve notice upon the defendant at least 48 hours before the filing of the action."); MCL 600.4061(1) ("A plaintiff shall serve garnishment process issued from a court in Michigan against the state of Michigan

personally carried out by the individual identified in the court rule or the statute. To the contrary, service is often done by someone else, such as a process server. *Nuculovic v Hill*, 287 Mich App 58, 67; 783 NW2d 124 (2010). See also MCR 2.103(A) ("Process in civil actions may be served by any legally competent adult who is not a party or an officer of a corporate party."). Indeed, in numerous cases involving notice under MCL 691.1404(1), the notice in question was sent, not by the injured person personally, but by the plaintiff's attorney. See, e.g., *McLean*, 302 Mich App at 71 ("[P]laintiff's attorney sent a letter addressed to 'the City Manager or Mayor's Office of defendant.' "); *Plunkett*, 286 Mich App at 175 (considering notice letter sent by attorneys " 'on behalf of our clients' ").[4] In other words, caselaw demonstrates that an individual may serve notice via an agent, including, specifically, an attorney. In contrast, the City has failed to cite a single case in which it has been determined that, in order to serve notice, the serving party was required to personally hand deliver or personally mail the document. Such a nonsensical proposition has no basis in the law of this state.

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upon the state treasurer . . . ."); MCL 750.50(3) ("The prosecuting attorney shall serve a true copy of the summons and complaint upon the defendant.").

[4] See also *Thomas v Flint*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 2017 (Docket No. 331054), p 1 ("[P]laintiff's attorney sent defendant notice of injuries sustained by plaintiff . . . ."); *Heiser v Flint*, unpublished per curiam opinion of the Court of Appeals, issued October 6, 2015 (Docket No. 321812), p 1 ("[P]laintiff's attorneys sent a letter to the City Attorney's Office via certified mail . . . ."); *Barnosky v Wyandotte*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2013 (Docket No. 310311), p 1 ("[P]laintiff's counsel sent a notice of her injury and claim to defendant via certified mail."). Cf. *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 387; 565 NW2d 924 (1997) (concluding that a personal representative could provide notice under MCL 691.1404 following the injured person's death).

Moreover, the City's argument ignores established agency principles. "Agents have the implied power to carry out all acts necessary in executing [the principal's] expressly conferred authority." *Slocum v Littlefield Pub Sch Bd of Ed*, 127 Mich App 183, 194; 338 NW2d 907 (1983) (citation and quotation marks omitted; alteration in original). The legal relationship between attorneys and their clients is one example of an agency relationship. *Uniprop, Inc v Morganroth*, 260 Mich App 442, 446; 678 NW2d 638 (2004). Indeed, " '[a]ttorney' is an ancient English word, and signifie[s] one that is set in the turn, stead, or place of another." *Fletcher v Fractional No 5 Sch Dist Bd of Ed*, 323 Mich 343, 348; 35 NW2d 177 (1948) (quotation marks and citation omitted). In other words, when an agent or attorney undertakes actions on behalf of the principal within the scope of his or her authority, the agent has "stepped into the shoes of the principal." *PM One, Ltd v Dep't of Treasury*, 240 Mich App 255, 266-267; 611 NW2d 318 (2000). This authority to act on behalf of a principal may include the ability to undertake acts necessary to ensure service and to provide notice. See, e.g., *Cady v Fair Plain Literary Ass'n*, 135 Mich 295, 297; 97 NW 680 (1903) ("The action of the attorney in directing the service was within the scope of his authority."); *Slocum*, 127 Mich App at 194-195 (holding that the letter sent by the board of education's attorney was sufficient to provide the required notice to the State Tenure Commission). Given the legal relationship between agents and principals, and, in particular, between attorneys and their clients, it follows that an injured person may serve a governmental agency through the acts of an agent, including an attorney.

When the notice is sent by an attorney or agent acting at the injured person's behest, to comply with MCL 691.1404(1), that information should be con-

tained in the notice itself. That is, MCL 691.1404(1) plainly states that an "injured person" shall serve notice. To satisfy this provision, the notice should identify the injured person and convey that the notice is being given on the injured person's behalf. For example, in this case, the notice stated:

> Please be advised that I am providing you notice *on behalf of* MR. LAWRENCE RUSSELL, of an injury caused by a defect in the highway that rendered the travelled portion of the roadway not reasonably safe and convenient for public travel. In accordance with [the] statute, the following information identifies the location and nature of the defect, the injury sustained and the names of witnesses known to Mr. Russell . . . . [Emphasis added.]

This language made clear that plaintiff was the injured person and that, as the injured person in this case, he was providing notice to the City through his attorney. This service of notice through plaintiff's attorney was sufficient to satisfy MCL 691.1404(1).

In contrast to this conclusion, the City emphasizes that MCL 691.1404(3) contains language allowing notice to be "filed by a parent, attorney, next friend or legally appointed guardian" if the injured person is under 18 years of age. Because no reference to an "attorney" appears in MCL 691.1404(1), the City asserts an adult injured person cannot serve notice via an attorney. "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 840 NW2d 743 (2013) (quotation marks and citation omitted). However, we are not persuaded that the drafters of the statute excluded the word "attorney" from the MCL 691.1404(1) language in an attempt to

require personal service by an adult injured person. Instead, the inclusion of language relating to parents, attorneys, guardians, and next friends in MCL 691.1404(3) is a reflection of the legal realities governing minors. That is, the "special nature and characteristics of children" may reasonably require " 'special rules' " for minors. See *Dep't of Civil Rights v Beznos Corp*, 421 Mich 110, 121; 365 NW2d 82 (1984). In this regard, minors generally lack capacity to sue in their own name. *Earls v Herrick*, 107 Mich App 657, 662; 309 NW2d 694 (1981), citing GCR 1963, 201.5(1). See also *Moorhouse v Ambassador Ins Co, Inc*, 147 Mich App 412, 419, n 1; 383 NW2d 219 (1985); MCR 2.116(C)(7); MCR 2.201(E). Minors cannot serve process, see MCR 2.103(A), retain attorneys, *Ryan v Ryan*, 260 Mich App 315, 323 n 6; 677 NW2d 899 (2004), or empower agents to act on their behalf, *Woodman v Kera LLC*, 486 Mich 228, 239; 785 NW2d 1 (2010) (opinion by YOUNG, J.). In this context, given the general limitations on a minor's ability to act or to engage someone to act as an agent, it was necessary for the Legislature to specify in MCL 691.1404(3) how someone under 18 could serve notice on a governmental agency within the requisite 180-day period. See *Brown v New Baltimore*, unpublished per curiam opinion of the Court of Appeals, issued October 11, 2011 (Docket No. 298809), pp 2-3. These same concerns do not apply under MCL 691.1404(1) to competent adults, who are able to engage agents or otherwise undertake the actions necessary to serve notice. We are not persuaded by the City's argument that a comparison of MCL 691.1404(1) and MCL 691.1404(3) necessitates personal service by an injured adult.

Finally, the City also argues that personal service by the injured person should be required in light of the Michigan Supreme Court's decision in *Fairley v Dep't*

of Corrections, 497 Mich 290, 297; 871 NW2d 129 (2015). We disagree. In *Fairley*, the Court considered MCL 600.6431(1), which states:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, *which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths*. [Emphasis added.]

Relevant to this provision, in *Fairley*, the plaintiff did not sign or verify the notice; rather, the plaintiff's attorney signed the document. *Fairley*, 497 Mich at 294. Because the plaintiff in *Fairley* failed to personally sign the notice of intent, the Court determined that her notice was insufficient and dismissed her claim. *Id*. at 299-300.

Fairley is inapplicable to the facts of this case. Quite simply, *Fairley* involved a different statute that contains different notice language and different requirements. The statute at issue in *Fairley* includes very specific activities that have to be completed "by the claimant." MCL 600.6431(1). Specifically, the claimant is required to sign and verify the notice before an officer who is authorized to administer oaths. *Id*. In this context, "verification" by the claimant involves "[a] formal declaration made in the presence of an authorized officer, such as a notary public . . . whereby one swears to the truth of the statements in the document." *Black's Law Dictionary* (10th ed). See also *Fairley*, 497 Mich at 299 (approvingly quoting the defendant's statement that the notice required by MCL 600.6431

must " 'bear an indication that the signature was signed and sworn to before an officer authorized to administer oaths' ").[5]

In contrast, MCL 691.1404(1) does not require an injured person to sign or verify the notice before an officer who is authorized to administer oaths.[6] Instead, all that is required by MCL 691.1404(1) is that the injured person serve the notice on the governmental agency. MCL 691.1404(2) contains more specific instructions regarding how service may be accomplished; but it does not state that the injured person must personally serve the notice upon any individual who may lawfully be served, "either personally, or by certified mail, return receipt requested . . . ." Instead, considering MCL 691.1404 as a whole, the injured person is given broad responsibility to serve notice; and, as discussed, this directive to serve the governmental agency is fully satisfied when an injured person en-

[5] Requiring the claimant in particular to sign and verify the notice serves to promote truthfulness and to deter "trumped-up" claims. See *Merrifield v Paw Paw*, 274 Mich 550, 554; 265 NW 461 (1936); *Kelley v Flint*, 251 Mich 691, 695; 232 NW 407 (1930). Further, by requiring verification by the claimant—i.e., the individual with personal knowledge of the facts stated in the document—the statute ensures that the government is provided with information on which it may intelligently act. See *Kelley*, 251 Mich at 695. See also *McCahan v Brennan*, 492 Mich 730, 744; 822 NW2d 747 (2012) ("[N]otice provisions are enacted by the Legislature in order to provide the state with the opportunity to investigate and evaluate claims, to reduce the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed."). No such similar purposes would be furthered by requiring the injured person to personally serve notice under MCL 691.1404(1).

[6] Indeed, the City's proposed service requirement under MCL 691.1404(1) would allow a plaintiff's attorney to draft and sign the notice, but it would then require the plaintiff to undertake the ministerial task of serving the document. We are not persuaded that such an absurd result is required by the statute's plain language.

gages an agent to hand deliver the notice or to mail it via certified mail, return receipt requested.

In sum, under the plain language of the statute, the injured person must serve the governmental agency. But this service requirement does not require the injured person to physically appear in the governmental office or to personally go to the post office to mail a certified letter. Instead, the injured person may serve the governmental agency by arranging for service by an attorney or other agent. Because plaintiff's attorney served notice on plaintiff's behalf, plaintiff complied with the MCL 691.1404(1) notice requirement.

Affirmed.

SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

O'LEARY v O'LEARY

Docket No. 333519. Submitted October 3, 2017, at Detroit. Decided October 10, 2017, at 9:25 a.m.

Kristopher O'Leary filed a motion in the Lenawee Circuit Court in 2015 to enforce a provision in the 2003 judgment of divorce ending his marriage to Christine O'Leary. The judgment provided that Kristopher and Christine would continue to own their marital home as tenants in common until it was sold. The judgment further provided that when the home sold, the parties would share equally the resulting indebtedness or profit. The home sold in 2009, but the sale did not cover the balance owing on the loan. From 2009 to 2015, Kristopher paid toward the outstanding balance on the loan. Christine paid nothing. In 2015, Kristopher moved to enforce the judgment of divorce, requesting that the court order each party to pay half the deficiency and order Christine to pay him the amount he had paid in excess of his half. Christine moved for summary disposition under MCR 2.116(C)(7). She asserted that Kristopher's motion to enforce the judgment of divorce was time-barred by MCL 600.5809(3) because it was filed more than 10 years after the judgment of divorce entered in 2003. Kristopher responded that his claim to enforce the judgment of divorce was timely because his claim did not accrue until the home sold in 2009. In the alternative, Kristopher asserted that Christine's 2009 motion to enforce the judgment of divorce to collect from Kristopher half the loan and lot payments Christine made after she moved out of the home and before it sold had renewed the judgment, making his claim timely. The court, Margaret M. S. Noe, J., granted Christine's motion for summary disposition, concluding that Kristopher's motion was time-barred by MCL 600.5809(3). Kristopher appealed by delayed leave granted.

The Court of Appeals *held*:

The statute of limitations governing a claim related to a property settlement contained in a judgment of divorce is found in MCL 600.5809. MCL 600.5809(1) provides that an action to enforce a noncontractual money obligation cannot be brought until after the claim accrues. After the claim has accrued, MCL 600.5809(3) sets forth the period of time within which the action

must be brought. MCL 600.5827 provides further guidance about when a claim accrues: a claim accrues when the wrong on which the claim is based occurs, without regard to when the damage results. Kristopher's claim did not accrue when the judgment of divorce was entered in 2003, and the period of limitations did not begin to run then. In this case, Kristopher's claim accrued when the home sold and Christine failed to pay her half of the outstanding indebtedness on the home loan. When a judgment provides for payment at some future point—as did the judgment here—the period of limitations begins to run when the payment required by the judgment becomes due. The indebtedness resulting from the sale of the home that the parties were to share equally did not arise until the home sold in 2009. Therefore, Kristopher's claim to enforce the judgment did not accrue until that time. Because Kristopher's claim did not accrue until 2009, it was timely when he filed it in 2015. The trial court erred by granting summary disposition to Christine, the ruling had to be reversed, and the case had to be remanded for consideration of the merits of Kristopher's motion to enforce the parties' judgment of divorce.

Reversed and remanded for further proceedings.

STATUTES — STATUTES OF LIMITATIONS — LIMITATIONS PERIODS — ACCRUAL OF CLAIMS — ACTIONS TO ENFORCE NONCONTRACTUAL MONEY OBLIGATIONS — DIVORCE JUDGMENTS.

The statutory period of limitations governing a motion to enforce a noncontractual money obligation does not begin to run until the claim accrues; when a divorce judgment calls for the payment of a debt at some future time, the claim for collecting the debt accrues at the time payment is due (MCL 600.5809; MCL 600.5827).

Speaker Law Firm, PLLC (by *Sandra J. Lake* and *Liisa R. Speaker*) for Kristopher S. O'Leary.

Ready, Heller & Ready, PLLC (by *Michael Heller* and *Jessica M. Paladino*) for Christine A. O'Leary.

Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. In this action to enforce a judgment of divorce, the trial court granted summary disposition to

defendant under MCR 2.116(C)(7) based on the conclusion that plaintiff's claim was time-barred by MCL 600.5809(3). Plaintiff filed a delayed application for leave to appeal, which we granted.[1] Because plaintiff's claim accrued when the marital home sold in 2009, his 2015 motion to enforce the terms of the judgment of divorce was not time-barred. Consequently, we reverse the dismissal of plaintiff's claim and remand for further proceedings.

The parties married in 1996, and their judgment of divorce entered on July 24, 2003. At the time of their divorce, the parties owned a mobile home together in Adrian, Michigan. With regard to this marital home, the judgment of divorce stated:

> IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff and Defendant shall continue to own the marital home . . . as tenants in common. The house is to be continuously offered for sale until sold. Defendant shall make the house and lot payments as long as she resides in the home. At such time as Defendant moves or the house is sold, the indebtedness or profit shall be shared equally.

Defendant moved out of the home in September 2007. On October 7, 2009, following a motion by defendant to enforce the judgment of divorce, the trial court entered an order against plaintiff, requiring him to pay defendant the sum of $5,927, which represented plaintiff's share of the mobile home and lot rental payments for the period after defendant vacated the property. In this order, the trial court also stated that "all other orders not in direct conflict herein shall remain in full force and effect."

The mobile home eventually sold on October 21, 2009, but the sale did not cover the balance owing on

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[1] *O'Leary v O'Leary*, unpublished order of the Court of Appeals, entered October 12, 2016 (Docket No. 333519).

the loan. After the sale, the parties had a deficiency of $37,998.35. According to plaintiff, between the time of the sale and January 2015, he paid $24,543.24 toward the outstanding balance on the loan, while defendant paid nothing.

On May 4, 2015, plaintiff moved to enforce the judgment of divorce. In particular, plaintiff argued that under the terms of the judgment of divorce, defendant bore equal responsibility for the outstanding indebtedness on the loan balance following the sale of the property. Plaintiff requested an order specifying that defendant and plaintiff were each responsible for $18,999.17. He also sought payment from defendant for the amount he had paid in excess of his liability, an amount totaling $5,544.06.

Defendant filed an answer to plaintiff's motion, and she also moved for summary disposition. Defendant asserted that plaintiff's motion to enforce the judgment of divorce was time-barred by the 10-year period of limitations provided in MCL 600.5809(3) because the judgment of divorce entered in 2003 and plaintiff did not bring his motion to enforce the judgment until 2015. According to defendant, plaintiff should have sought to extend the divorce judgment by seeking a new judgment or decree under MCL 600.5809(3) within the 10-year limitations period, but plaintiff failed to do so. In response to defendant's motion for summary disposition, plaintiff argued that his claim against defendant for half of the indebtedness on the home accrued when the home sold in 2009, meaning that the 10-year period of limitations would not expire until 2019 and that his claim was timely filed in 2015. Alternatively, plaintiff contended that the motion to enforce the judgment filed by defendant in 2009 "effectively reset the clock on the statute of limitations" such

that plaintiff's claim in 2015 was timely under the "renewed" judgment of divorce.

Following a hearing, the trial court granted summary disposition to defendant, concluding that plaintiff's claim was time-barred by the 10-year limitations period set forth in MCL 600.5809(3) because the judgment of divorce entered in 2003 and plaintiff did not seek to enforce the judgment until 2015. Plaintiff then filed a delayed application for leave to appeal in this Court, which we granted.

The only issue before us is whether plaintiff's motion to enforce the judgment of divorce was timely. The parties agree that plaintiff's claim is subject to the 10-year period of limitations set forth in MCL 600.5809(3), but they disagree about when the limitations period began to run. Plaintiff argues that his claim accrued, and thus the limitations period began to run, when the home sold in 2009, making his motion to enforce the judgment in 2015 timely. In contrast, defendant contends that the limitations period began to run when the divorce judgment was rendered in 2003 and that, in the absence of an action for a new judgment, the limitations period expired in 2013, meaning that plaintiff's claim in 2015 was untimely.

We review de novo a trial court's decision on a motion for summary disposition. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). If a claim is time-barred, summary disposition is properly granted under MCR 2.116(C)(7). *Prins v Mich State Police*, 291 Mich App 586, 589; 805 NW2d 619 (2011). When the underlying facts are not disputed, whether a claim is time-barred by a statute of limitations is a question of law that this Court reviews de novo. *Titan Ins Co v Farmers Ins Exch*, 241 Mich App 258, 260; 615 NW2d 774 (2000).

Likewise, we also review de novo questions of statutory interpretation. *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 620; 739 NW2d 132 (2007). Statutory interpretation begins with the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "We read the statutory language in context and as a whole, considering the plain and ordinary meaning of every word." *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011). "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver*, 490 Mich at 247.

Statutes of limitations are contained in Chapter 58 of the Revised Judicature Act, MCL 600.5801 *et seq*. *Peabody v DiMeglio*, 306 Mich App 397, 404; 856 NW2d 245 (2014). At issue in this case is the statute of limitations governing the enforcement of a judgment as set forth in MCL 600.5809, which states:

> (1) A person shall not bring or maintain an action to enforce a noncontractual money obligation unless, *after the claim first accrued* to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by this section.
>
> * * *
>
> (3) Except as provided in subsection (4),[2] *the period of limitations is 10 years* for an action founded upon a judgment or decree rendered in a court of record of this state, or in a court of record of the United States or of another state of the United States, *from the time of the rendition of the judgment or decree*. . . . Within the applicable period of limitations prescribed by this subsection, an action may be brought upon the judgment or decree for

[2] Subsection (4) concerns actions to enforce support orders under the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*.

> a new judgment or decree. The new judgment or decree is subject to this subsection. [Emphasis added.]

In terms of when a claim accrues, under MCL 600.5827:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sections *the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results*. [Emphasis added.]

Relying on these provisions, this Court has previously determined that claims relating to a property settlement contained in a judgment of divorce, including claims relating to the disposition of real property, are subject to the 10-year period of limitations set forth in MCL 600.5809(3). See *Peabody*, 306 Mich App at 406; *Gabler v Woditsch*, 143 Mich App 709, 711; 372 NW2d 647 (1985). Further, on facts analogous to the situation presented in this case, we have also concluded that the 10-year period of limitations for a claim relating to a property settlement in a judgment of divorce begins to run at the time the claim accrues and that the claim accrues when the money owing under the property settlement comes due. For example, in *Gabler*, the parties' 1968 judgment of divorce provided that the wife would receive the marital home, that she would pay the husband for his half of the equity in the house, and that the balance of this payment to the husband would come due when the parties' third eldest child turned 18 on July 27, 1975. *Gabler*, 143 Mich App at 710. On these facts, this Court held that the husband's cause of action to enforce this provision accrued when the balance came due in 1975 and that his complaint, filed in June 1983, was timely filed within

the applicable 10-year period of limitations in MCL 600.5809(3). *Gabler*, 143 Mich App at 711. Likewise, in *Peabody*, the parties divorced in 1995, and their judgment of divorce contained a provision stating that if a house belonging to the parties was sold, all net proceeds would be divided equally between the parties. *Peabody*, 306 Mich App at 401. The property sold in 2004, and we concluded that the wife's cause of action accrued in 2004, "when the property was sold and the [husband] failed to pay [the wife] half of the proceeds." *Id*. at 407. Thus, we determined that the wife's complaint in 2012 was timely under MCL 600.5809(3). *Peabody*, 306 Mich App at 407.

Following the reasoning of *Peabody* and *Gabler*, plaintiff's claim in this case was timely filed. Although the judgment of divorce entered in 2003, plaintiff's claim did not accrue until 2009 when the home sold and defendant failed to pay her half of the outstanding indebtedness on the home loan. Because the claim accrued in 2009, plaintiff's motion in 2015 to enforce the judgment was timely filed within the 10-year period of limitations in MCL 600.5809(3). See *Peabody*, 306 Mich App at 407; *Gabler*, 143 Mich App at 711.

In contrast to this conclusion, defendant emphasizes that MCL 600.5809(3) states that "*the period of limitations is 10 years* for an action founded upon a judgment or decree rendered in a court of record of this state . . . *from the time of the rendition of the judgment or decree*." (Emphasis added.) Thus, in defendant's view, the period of limitations began to run in 2003, and it expired in 2013. According to defendant, under MCL 600.5809(3), plaintiff should have brought an action on the judgment for a "new judgment," and because he did not do so before 2013, his claim in 2015 was untimely.

Defendant's arguments are unpersuasive. First of all, her arguments are contrary to our application of MCL 600.5809(3) in both *Peabody* and *Gabler*. Second, defendant's construction of the statute fails to read MCL 600.5809 as a whole. While MCL 600.5809(3) indicates that the limitations period is 10 years "from the time of the rendition of the judgment," MCL 600.5809(1) makes plain that a person cannot bring a claim to enforce an noncontractual money obligation until *after* the claim accrues. There is potentially some tension between these provisions; but, when they are read together, it is apparent that until the claim accrues as specified in MCL 600.5809(1), there can be no "action founded upon a judgment or decree" within the meaning of MCL 600.5809(3). Thus, the limitations period in MCL 600.5809(3) cannot begin to run until the claim accrues. In other words, when a judgment provides for payment at some future point, the period of limitations under MCL 600.5809(3), read in conjunction with MCL 600.5809(1), begins to run when the payment required by the judgment comes due. See *Rybinski v Rybinski*, 333 Mich 592, 596; 53 NW2d 386 (1952). Likewise, it was not necessary for plaintiff to seek a renewed judgment under MCL 600.5809(3) because, as we have discussed, until the home sold in 2009, there was no money owing to plaintiff, the period of limitations had not begun to run, and there was no reason to renew the judgment. Defendant's arguments are without merit.

In sum, the 10-year period of limitations did not begin to run until the home sold in 2009, meaning that plaintiff's motion in 2015 to enforce the judgment was timely. *Peabody*, 306 Mich App at 407; *Gabler*, 143 Mich App at 711. Consequently, we reverse the trial court's grant of summary disposition to defendant

under MCR 2.116(C)(7), and we remand for consideration of the merits of plaintiff's motion to enforce the judgment.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

GURSKI v MOTORISTS MUTUAL INSURANCE COMPANY

Docket No. 332118. Submitted October 3, 2017, at Detroit. Decided October 17, 2017, at 9:00 a.m.

David Gurski brought an action in the Wayne Circuit Court, seeking to recover personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., from Motorists Mutual Insurance Company, Farm Bureau Insurance Company, and the Michigan Automobile Insurance Placement Facility (MAIPF) following an accident at plaintiff's auto repair shop that involved a Jeep sliding into gear and running over plaintiff's leg, causing injury to plaintiff. The Jeep's owner was Andy Frazier (Mr. Frazier). Mr. Frazier's business, Frazier Construction, LLC, had an insurance policy with Farm Bureau that listed Frazier Construction as the "named insured" and elsewhere listed Mr. Frazier as a "designated insured." The policy listed three vehicles, and while two of the vehicles had PIP coverage, the Jeep did not. Motorists Mutual, which had issued a no-fault policy to plaintiff's business, denied the claim because plaintiff was not a named insured under its policy; Farm Bureau denied coverage because the policy did not provide PIP benefits for the Jeep; and MAIPF refused to assign plaintiff's claim to an insurer because it determined that Farm Bureau was liable for providing coverage. Plaintiff then brought the instant action. After receiving competing motions for summary disposition from the parties, the court, Lita M. Popke, J., issued an order denying Farm Bureau's motion, partially granting plaintiff's motion, and granting MAIPF's motion. MAIPF was dismissed as a party. The court found that Farm Bureau was obligated to pay PIP benefits to plaintiff under both the express language of Farm Bureau's policy and statutorily under MCL 500.3115(1) (providing, in relevant part, that a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim PIP benefits from insurers of owners or registrants of motor vehicles involved in the accident) because Mr. Frazier was a "designated insured" under the policy, and therefore Farm Bureau was the insurer of the owner of the vehicle that was involved in the accident. Farm Bureau moved for reconsideration, and the court denied the motion. Farm Bureau moved for leave to appeal, which the Court of Appeals, TALBOT,

C.J., and RIORDAN, J. (STEPHENS, J., dissenting), granted in an unpublished order, entered August 9, 2016.

The Court of Appeals *held*:

1. The trial court erroneously concluded that plaintiff was owed PIP benefits under the express terms of the insurance policy. Farm Bureau's insurance policy provided coverage when a charge was shown in the "Premium Summary" column, and in that column, plaintiff's policy listed PIP premiums for a trailer and for a truck, but plaintiff's policy did not list any premiums for the Jeep. Therefore, plaintiff's policy did not provide any coverage for PIP benefits related to the Jeep. Additionally, the trial court's reliance on the Michigan Personal Injury Protection endorsement as allowing PIP coverage for the Jeep was misplaced because while the Jeep was listed in plaintiff's policy, it was listed only for comprehensive coverage and did not have any PIP coverage. Therefore, the Jeep was not a "covered auto" for purposes of PIP benefits under the endorsement. The trial court erred when it held that plaintiff was entitled to PIP benefits under the express language of the policy.

2. The trial court also erroneously concluded that plaintiff was owed PIP benefits under MCL 500.3115(1). MCL 500.3115(1) provides, in relevant part, that a person suffering accidental bodily injury while not an occupant of a motor vehicle shall first claim PIP benefits from insurers of owners or registrants of motor vehicles involved in the accident. The reference in MCL 500.3115(1)(a) to "[i]nsurers of owners" cannot be read in a vacuum; reading the statute as a whole, the reference to "[i]nsurers" in MCL 500.3115(1)(a) is in the context of insurers who provide PIP coverage because the use of "[i]nsurers" in Subdivision (a) is a reference to the previously mentioned "insurers" from which the injured person is seeking PIP benefits. Additionally, caselaw interpreting this provision has provided that it is the insurer of *the owner or registrant* of the motor vehicle involved in the accident that is liable for payment of PIP benefits; MCL 500.3115(1) does not mandate that the vehicle involved in the accident be insured by the insurer of the owner before an injured person can seek benefits. Accordingly, in this case, the fact that the Jeep was not covered by a PIP policy was not relevant; rather, what was relevant was whether the Jeep's owner, Mr. Frazier, was insured for PIP benefits elsewhere. The trial court failed to fully appreciate the fact that the named insured on the policy was Frazier Construction, not Mr. Frazier the individual. Additionally, while Mr. Frazier was listed elsewhere in the policy as a designated insured, that designation only provided Mr. Frazier

with liability coverage, not PIP coverage. Therefore, the insured under the policy for purposes of PIP coverage was Frazier Construction, not Mr. Frazier. Accordingly, Farm Bureau could not be considered an insurer of the owner of the vehicle that was involved in the accident for purposes of MCL 500.3115(1).

Reversed and remanded for entry of summary disposition in favor of Farm Bureau.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — PERSONS SUFFERING ACCIDENTAL BODILY INJURY WHILE NOT AN OCCUPANT OF A MOTOR VEHICLE — INSURERS OF OWNERS OR REGISTRANTS OF MOTOR VEHICLES INVOLVED IN THE ACCIDENT.

MCL 500.3115(1) provides, in relevant part, that a person suffering accidental bodily injury while not an occupant of a motor vehicle shall first claim personal protection insurance (PIP) benefits from insurers of owners or registrants of motor vehicles involved in the accident; the reference in MCL 500.3115(1)(a) to "[i]nsurers of owners" cannot be read in a vacuum; reading MCL 500.3115(1) as a whole, the reference to "[i]nsurers" in MCL 500.3115(1)(a) is in the context of insurers who provide PIP coverage because the use of "[i]nsurers" in Subdivision (a) is a reference to the previously mentioned "insurers" from which the injured person is seeking PIP benefits.

Kopka Pinkus Dolin, PLC (by *Mark L. Dolin* and *Donald A. Winningham*) for Farm Bureau Insurance Company.

Anselmi Mierzejewski Ruth & Sowle, PC (by *Christopher A. Lawicki* and *Jonathan W. Hayes*) for Michigan Automobile Insurance Placement Facility.

Before: SAAD, P.J., and CAVANAGH and CAMERON, JJ.

SAAD, P.J. In this no-fault priority case, defendant Farm Bureau Insurance Company (Farm Bureau) appeals the trial court's order that denied its motion for summary disposition. For the reasons provided below, we reverse and remand for entry of summary disposition in favor of Farm Bureau.

I. NATURE OF THE CASE

This case arises from an accident involving a vehicle and plaintiff. Plaintiff was working outside the vehicle when the vehicle slipped into gear and injured him. Plaintiff thereafter sought the recovery of personal protection insurance (PIP) benefits under Michigan's no-fault act, MCL 500.3101 *et seq*. The resolution of this case depends on the proper interpretation of an insurance policy issued by Farm Bureau, which insured the vehicle for comprehensive coverage, and a portion of the no-fault act.

The trial court incorrectly ruled that because plaintiff qualified as an "insured" under the policy and because the vehicle was a "covered auto" on the policy given that it was listed on the policy for comprehensive coverage, plaintiff could recover PIP benefits from Farm Bureau. However, and most importantly, because the vehicle was not a "covered auto" for the purposes of PIP benefits, plaintiff cannot rely on the insurance policy to recover those benefits from Farm Bureau. In other words, the policy undoubtedly expanded on who typically is considered an "insured" to include plaintiff, but that specific expansion did not alter the actual coverage provided by the policy. Here, the policy clearly did not provide PIP coverage for the vehicle, which means that plaintiff cannot recover PIP benefits on the basis of the terms of the policy that Farm Bureau issued.

The trial court also ruled that MCL 500.3115(1) of the no-fault act requires Farm Bureau to provide PIP benefits to plaintiff regardless of the coverage listed in the policy. MCL 500.3115(1) can indeed require an insurer to provide PIP benefits although that insurer did not provide PIP coverage for the vehicle involved in the accident. However, in order to recover under

this provision, the owner of the vehicle involved in the accident must have PIP coverage from some source. Here, the owner of the vehicle did not have PIP coverage (through Farm Bureau or otherwise). While Farm Bureau's policy provided PIP coverage to other vehicles, it cannot be said that the *owner* was covered. The named insured on the policy was a company, and the owner was named as a "designated insured" in Farm Bureau's policy *solely* for purposes of liability insurance, not PIP coverage. Therefore, Farm Bureau is not a PIP insurer of the owner of the vehicle that was involved in the accident. Consequently, MCL 500.3115(1) does not allow plaintiff to recover PIP benefits from Farm Bureau.

Accordingly, the trial court erred when it ruled that Farm Bureau was liable for paying PIP benefits to plaintiff. We reverse and instruct the court to grant summary disposition in favor of Farm Bureau.

II. BASIC FACTS

The underlying facts are undisputed. Plaintiff is the owner of Gurski Auto Repair Shop and Services. On June 24, 2013, plaintiff was injured while working on a 1993 Jeep Wrangler at his shop. When plaintiff tried to jump-start the Jeep's battery, the Jeep somehow slid into gear and ran over his leg.

The owner of the Jeep is Andy Frazier (Mr. Frazier). Mr. Frazier's business, Frazier Construction, LLC, had an insurance policy with Farm Bureau. On that policy, it listed Frazier Construction as the "named insured." However, elsewhere in the policy, it listed Mr. Frazier as a "designated insured." The endorsement related to the "designated insured" provides, in pertinent part:

> Each person or organization shown in the Additional Interest Schedule as a Designated Insured is an "insured" for LIABILITY COVERAGE, but only to the extent that person or organization qualifies as an "insured" under the WHO IS AN INSURED provision contained in Section II of the Coverage Form.
>
> We will pay the damages for which the Designated Insured becomes legally liable only if the damages arise out of the negligence of the Named Insured.

The policy listed three different vehicles: a 2011 trailer, the 1993 Jeep that was involved in the accident, and a 2004 Ford F250 truck. However, while the Ford F250 and trailer had PIP coverage, the Jeep did not.[1] Under the "Michigan Personal Injury Protection" section of the policy, it states in pertinent part:

> We will pay personal injury protection benefits to or for an "insured" who sustains "bodily injury" caused by an "accident" and resulting from the ownership, maintenance, or use of an "auto" as an "auto."

And under "WHO IS AN INSURED," the policy states:

> **1.** You or any "family member".
>
> **2.** Anyone else who sustains "bodily injury":
>
> * * *
>
> **c.** While not occupying any "auto" as a result of an "accident" involving a covered "auto".

The policy also included a section, titled "Elimination of Mandatory Coverages," which states:

> In accordance with the named Insured's request, coverages mandatory under Michigan's No-Fault Auto Insur-

[1] Because of the Jeep's poor condition, it was not able to be driven; thus, pursuant to MCL 500.3101(1), Mr. Frazier opted to remove all but comprehensive coverage for the vehicle.

> ance Law have been eliminated from a vehicle(s) covered by this policy. The company shall not be liable for loss, damage, and/or liability caused while such a vehicle(s) is moved or operated.

Plaintiff attempted to recover PIP benefits through all three defendants. Defendant Motorists Mutual, who had issued a no-fault policy to plaintiff's business, denied the claim because plaintiff was not a named insured under its policy. Defendant Farm Bureau denied coverage because the policy does not provide PIP benefits for the Jeep. And defendant Michigan Automobile Insurance Placement Facility (MAIPF) refused to assign plaintiff's claim to an insurer because it determined that Farm Bureau was liable for providing coverage. Plaintiff thereafter filed suit.

MAIPF moved for summary disposition and argued that it should be dismissed from the case because coverage is available under the Farm Bureau policy. Farm Bureau argued that it cannot be liable for PIP benefits because it is not an insurer of the owner of the Jeep for purposes of no-fault benefits.

After receiving competing motions for summary disposition from the various parties, the trial court issued its order, which denied Farm Bureau's motion and partially granted plaintiff's motion.[2] The court found that Farm Bureau was obligated to cover plaintiff's PIP benefits and explained:

> The [Michigan Personal Injury Protection] Endorsement further defines an "Insured" as "anyone who sustains bodily injury . . . while not occupying any 'auto' as a result of an 'accident' involving a covered auto." The declarations page lists the Jeep as a "covered auto". The Plaintiff, David Gurski, was injured while not occupying the Jeep.

[2] The court also granted defendant Motorists Mutual's motion and dismissed it as a party. This decision is not part of this appeal.

> As a result of the express policy language in the Endorsement, David Gurski is entitled to the PIP coverages outlined in the Endorsement.

The trial court also found that aside from the express policy language, Farm Bureau was obligated to provide the coverage under MCL 500.3115(1), which states:

> Except as provided in subsection (1) of section 3114, a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) Insurers of owners or registrants of motor vehicles involved in the accident.
>
> (b) Insurers of operators of motor vehicles involved in the accident.

The court relied on *Pioneer State Mut Ins Co v Titan Ins Co*, 252 Mich App 330; 652 NW2d 469 (2002), and observed that the owner of the vehicle involved in the accident was Mr. Frazier and that he was a designated insured under the Farm Bureau policy. The court opined that, as a result, Farm Bureau is the insurer of the owner of the vehicle that was involved in the accident. The court expressly stated that it did not need to address Farm Bureau's argument that it did not provide PIP coverage for the Jeep.

Farm Bureau moved for reconsideration and argued that the policy clearly did not provide PIP coverage for the Jeep. Farm Bureau also argued that MCL 500.3115 could not be used to provide plaintiff with PIP benefits because Mr. Frazier, while named as a designated insured, had no personal no-fault coverage. Instead, Mr. Frazier was only covered under the policy's liability coverage for negligence. Farm Bureau further argued that any reliance on *Pioneer* is misplaced because, unlike in *Pioneer*, there is no match between the

owner of the vehicle (Mr. Frazier) and the named insured on the PIP policy (Frazier Construction).

The trial court later denied Farm Bureau's motion for reconsideration.

III. STANDARDS OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *McLean v City of Dearborn*, 302 Mich App 68, 72; 836 NW2d 916 (2013). When reviewing a motion under MCR 2.116(C)(10), this Court "must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). The motion is properly granted if (1) there is no genuine issue related to any material fact and (2) the moving party is entitled to judgment as a matter of law. *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75; 854 NW2d 521 (2014).

The construction and interpretation of an insurance contract is a preliminary question of law that we review de novo. *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140-141; 655 NW2d 260 (2002). Likewise, we also review a trial court's interpretation and construction of a statute de novo. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 529; 660 NW2d 384 (2003).

IV. ANALYSIS

The trial court determined that Farm Bureau was liable for paying PIP benefits to plaintiff under two theories: under the express language of the policy and statutorily under MCL 500.3115(1).

A. TERMS OF THE POLICY

The trial court erroneously concluded that plaintiff was owed PIP benefits under the express terms of the insurance policy.

When interpreting an insurance contract, "[w]e look at the language of the insurance policy and interpret its terms in accordance with the principles of contract construction." *Allstate Ins*, 253 Mich App at 141. The primary rule in contract interpretation is to ascertain the parties' intent. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). Unambiguous contractual language is to be construed according to its plain meaning. *Shay*, 487 Mich at 660. And "[c]lear and specific exclusionary provisions must be given effect, but are strictly construed against the insurer and in favor of the insured." *Hastings Mut Ins*, 286 Mich App at 292.

The insurance policy provides, in pertinent part, as follows:

> **ITEM TWO Schedule of Coverages and Covered Autos**
>
> This policy provides only those coverages where a charge is shown in the Premium Summary column, below. Each of these coverages will apply only to those "autos" shown as covered "autos". "Autos" are shown as covered "autos" for a particular coverage by the entry, next to the name of the Business Auto Coverage, of one or more of the symbols from the COVERED AUTO Section of the Business Auto Coverage Form.

Under the "Premium Summary" column, the policy lists $115.00 in premiums for Personal Injury Protec-

tion. Thus, the policy does provide PIP coverage, but as the second sentence in Item Two provides, the PIP coverage only applies to those vehicles that are shown as covered vehicles for PIP coverage. Under the Business Auto Coverage Form, it states that if a "7" symbol appears next to the coverage in Item Two, then only those vehicles described in Item Three "for which a premium charge is shown" are covered for that particular coverage. Here, a "7" symbol does appear next to the Personal Injury Protection entry in Item Two. Therefore, whether an individual vehicle has PIP coverage is determined by whether there are any premiums listed for that coverage under Item Three of the policy. Under Item Three, while there are PIP premiums listed for both the trailer ($10) and the Ford F250 ($105), there is no premium listed for the Jeep. Thus, it is abundantly clear that the policy does not provide any coverage for PIP benefits related to the Jeep.[3]

The trial court's reliance on the Michigan Personal Injury Protection endorsement as allowing or "reviving"[4] PIP coverage for the Jeep is misplaced. Under the Michigan Personal Injury Protection endorsement, it states, in pertinent part:

> **A. COVERAGE**
>
> We will pay personal injury protection benefits to or for an "insured" who sustains "bodily injury" caused by an "accident" and resulting from the ownership, maintenance, or use of an "auto" as an "auto". . . .
>
> * * *

[3] As reinforcement to what has already been stated, Item Three contains the following language: "Coverage provided for each Covered Auto is limited to the specific coverages and liability limits for which a premium is shown."

[4] In its order denying Farm Bureau's motion for reconsideration, the trial court stated that "even if the policy itself excludes PIP coverage through the Jeep, the PIP Endorsement brings PIP coverage back in."

B. WHO IS AN INSURED

1. You or any "family member".

2. Anyone else who sustains "bodily injury":

* * *

c. While not occupying any "auto" as a result of an "accident" involving a covered "auto".

The trial court is correct that plaintiff suffered a bodily injury while not occupying the Jeep. However, the court erred when it cursorily stated, "The declarations page lists the Jeep as a 'covered auto.' " While the Jeep is listed in the policy, it was listed only for comprehensive coverage and did not have any PIP coverage. Therefore, it was not a "covered auto" for purposes of PIP benefits. Importantly, nothing in the language of this endorsement changed the underlying scope of the coverage. Instead, it merely allows others that normally would not have been able to claim PIP benefits (due to not being a named insured) to do so as an insured *under the existing policy*. Accordingly, the trial court erred when it held that plaintiff was entitled to PIP benefits under the express language of the policy.

B. MCL 500.3115(1)

The trial court also incorrectly concluded that plaintiff was entitled to PIP benefits pursuant to MCL 500.3115(1). "The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013) (citation omitted). When doing so, courts are to "giv[e] each and

every word its plain and ordinary meaning unless otherwise defined." *Id*. (quotation marks and citation omitted). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

MCL 500.3115(1) provides as follows:

> Except as provided in subsection (1) of section 3114, a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) Insurers of owners or registrants of motor vehicles involved in the accident.
>
> (b) Insurers of operators of motor vehicles involved in the accident.

As the trial court noted, this Court has interpreted this provision before. In *Pioneer*, 252 Mich App at 336, this Court stated:

> This statutory language clearly states that the insurer of *the owner or registrant* of the motor vehicle involved in the accident is liable for payment of personal protection insurance benefits. . . . Stated another way, the statute does not mandate that the vehicle involved in the accident must have been insured by the insurer of the owner before an injured person can seek benefits. [Emphasis added.]

In *Pioneer*, a pedestrian was injured by a vehicle that was owned by John Miller, Sr. *Id*. at 332. While Miller did not insure the vehicle, he had PIP coverage through two other vehicles he owned. *Id*. Accordingly, the Court held that the insurer for those two other vehicles was liable under MCL 500.3115(1) for providing PIP benefits to the injured pedestrian. *Id*. at 337. The Court noted that holding the insurer liable in this

instance was consistent with the Legislature's "intent that *persons* rather than *vehicles* be insured against loss." *Id*. at 336-337 (emphasis added), citing *Detroit Auto Inter-Ins Exch v Home Ins Co*, 428 Mich 43, 49; 405 NW2d 85 (1987), *Lee v Detroit Auto Inter-Ins Exch*, 412 Mich 505, 516; 315 NW2d 413 (1982), and *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 725-730; 635 NW2d 52 (2001).

Thus, the fact that the Jeep here was not covered by a PIP policy is not relevant. What is relevant is whether the Jeep's owner, Mr. Frazier, was insured for PIP benefits elsewhere. Contrary to the trial court's determination, we hold that Farm Bureau's policy did not provide PIP coverage to Mr. Frazier. The trial court relied on the fact that Farm Bureau's policy provided PIP coverage to the Ford F250—though true, the court failed to fully appreciate the fact that the named insured on that policy was Frazier Construction, not Mr. Frazier the individual. Mr. Frazier was named elsewhere in the policy as a "designated insured," but upon closer examination, this designation only provided Mr. Frazier with liability coverage. The endorsement that names Mr. Frazier as a "designated insured" states:

> Each person or organization shown in the Additional Interest Schedule as a Designated Insured is an "insured" for LIABILITY COVERAGE . . . .
>
> We will pay the damages for which the Designated Insured becomes legally liable only if the damages arise out of the negligence of the Named Insured.

Thus, it is clear that because Mr. Frazier is only named as a designated insured for purposes of liability coverage,[5] the policy did not provide any PIP coverage to Mr.

[5] We reject MAIPF's argument that the language is not exclusive and should be read to provide liability coverage without precluding other

Frazier. Rather, the insured for PIP benefits is Frazier Construction. Cf. *Dawley v Hall*, 319 Mich App 490, 497; 902 NW2d 435 (2017) (recognizing that an "LLC is a separate and distinct legal entity from that of its . . . members"). Accordingly, Farm Bureau cannot be considered an insurer of the owner of the vehicle that was involved in the accident for purposes of MCL 500.3115(1).

We recognize that, technically, through the liability coverage it provided, Farm Bureau is an insurer of Mr. Frazier. However, we find that MCL 500.3115(1)(a)'s reference to "[i]nsurers of owners" cannot be read in a vacuum. Indeed, when reading the statute as a whole, as we must, *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), it is clear that MCL 500.3115(1)(a)'s reference to "[i]nsurers" is in the context of insurers *who provide PIP coverage*. MCL 500.3115(1) states, in relevant part, that

> a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim *personal protection*

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coverages. While there may be some doubt if one solely relies upon this "designated insured" provision, elsewhere, the "Additional Interest Schedule" in the policy states:

> The following have an interest in the Indicated Covered Auto:
>
> [Chase Auto Finance]
>
> The following have an interest in the Liability Coverage provided by this policy:
>
> [Andy Frazier]

It is important to note that under this "Additional Interest Schedule," it does not mention any additional interests except for Indicated Covered Auto and Liability Coverage. The omission of other interests, such as personal injury protection, is an indication that no other interests were contemplated. Cf. *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998) (stating that "the expression of one thing is the exclusion of another").

> *insurance benefits from insurers* in the following order of priority:
>
> (a) Insurers of owners or registrants of motor vehicles involved in the accident.

Thus, Subdivision (a)'s use of "[i]nsurers" is a reference to the previously mentioned "insurers," from which the injured person is seeking personal protection insurance benefits. Hence, the insurers that are contemplated in the legislative scheme are those that are providing PIP coverage. And here, Farm Bureau does not provide any PIP coverage to Mr. Frazier and therefore is not an "insurer" of Mr. Frazier for the purposes of MCL 500.3115.[6]

Reversed and remanded for entry of summary disposition in favor of Farm Bureau and other proceedings consistent with this opinion. We do not retain jurisdiction. Farm Bureau, as the prevailing party, may tax costs pursuant to MCR 7.219.

CAVANAGH and CAMERON, JJ., concurred with SAAD, P.J.

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[6] If no such limitation were read into the statute, then an injured person could claim PIP benefits from *any* insurer of the owner of the vehicle involved in the accident, regardless of what type of insurance the insurer provides. For example, without requiring the insurer to provide PIP coverage to the vehicle's owner, an injured person could then recover PIP benefits from the owner's life insurance company because that company nonetheless "insures" the owner of the vehicle that was involved in the accident. Such a construction is not consistent with the manifest intent of the Legislature.

PAQUIN v CITY OF ST IGNACE

Docket No. 334350. Submitted October 3, 2017, at Marquette. Decided October 19, 2017, at 9:00 a.m. Leave to appeal sought.

Plaintiff, Fred Paquin, filed a complaint for declaratory relief against defendant, the city of St. Ignace, in the Mackinac Circuit Court, seeking a determination regarding the applicability of Const 1963, art 11, § 8, to a person convicted of a crime based on that person's conduct as an employee of a federally recognized Indian tribe. Plaintiff, who had served as chief of police for the tribal police department of the Sault Ste. Marie Tribe of Chippewa Indians and as an elected member of the tribe's board of directors, pleaded guilty in 2010 to conspiracy to defraud the United States by dishonest means in violation of 18 USC 371 for his involvement in the misuse of federal funds granted to the tribal police department. After serving his prison sentence, plaintiff sought to run for a position on defendant's city council in the November 2013 election. On August 13, 2013, the Attorney General issued an opinion concluding that Const 1963, art 11, § 8, applies to a person convicted of a crime based on that person's conduct as a governmental employee or elected official of a federally recognized Indian tribe, therefore making that person ineligible for election or appointment to any state or local elective office in Michigan. Relying on the Attorney General's opinion, defendant's city manager informed plaintiff in 2013 and again in 2015 that he was ineligible to run for city council. Plaintiff filed the instant suit, asserting that he was eligible to run for defendant's city council because he was not convicted while holding an elective office or position of employment in a "local, state, or federal government" under Const 1963, art 11, § 8. Plaintiff moved for summary disposition, arguing that the Attorney General cited no legal authority for its determination that the plain language of "local, state, or federal government" included a federally recognized Indian tribe. The Attorney General moved to submit an amicus curiae brief and to participate in oral argument in support of defendant, which the trial court granted. The court, William W. Carmody, J., denied plaintiff's motion, declared him ineligible to run for city council, and dismissed his complaint with prejudice, holding that plaintiff fell under the prohibition of Const

1963, art 11, § 8, as a citizen of Michigan, regardless of his status as a member of a sovereign tribal nation. Plaintiff appealed.

The Court of Appeals *held*:

Article 11, § 8, of Michigan's 1963 Constitution provides, in pertinent part, that a person is ineligible for election or appointment to any state or local elective office of this state and ineligible to hold a position in public employment in this state that is policymaking or that has discretionary authority over public assets if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government. In this case, the only question was whether plaintiff's position with the Sault Ste. Marie Tribe of Chippewa Indians constituted an "elective office or position of employment in local, state, or federal government." Plaintiff's tribe is a domestic dependent nation that exercises inherent sovereign authority, and plaintiff served as an elected official in the tribe's local government. Authority from a variety of contexts—including federal circuit court opinions, Michigan Attorney General opinions, Michigan statutes, and the Michigan Administrative Code—supported the proposition that Michigan views Indian tribes as units of local government with authority to execute local governmental functions. Additionally, Article 11, § 8, contains no language stating that the local governmental entity must be a political subdivision of the state of Michigan. Therefore, the tribe constituted a local government, and plaintiff's employment with the tribe constituted employment in "local, state, or federal government" for purposes of Const 1963, art 11, § 8. This holding did not diminish or undermine the tribe's inherent sovereign authority because the constitutional provision was being used to assess the qualification of a potential candidate for a position on the city council of a Michigan municipality, not a position in the tribe. Because the members of various Indian tribes are citizens of the United States and citizens of the state within which they reside, plaintiff was acting in his capacity as a Michigan citizen rather than as a member of the tribe when seeking to run for an elective position in a Michigan city. Accordingly, plaintiff was subject to the same laws as other Michigan citizens when seeking to run for an office in a Michigan municipality. The trial court properly dismissed plaintiff's complaint because the text of Const 1963, art 11, § 8, made plaintiff ineligible to run for a position on defendant's city council.

Affirmed.

CONSTITUTIONAL LAW — INDIAN TRIBES — ELIGIBILITY FOR STATE OR LOCAL ELECTIVE OFFICE — WORDS AND PHRASES — EMPLOYMENT IN "LOCAL, STATE, OR FEDERAL GOVERNMENT."

Article 11, § 8, of Michigan's 1963 Constitution provides, in pertinent part, that a person is ineligible for election or appointment to any state or local elective office of this state and ineligible to hold a position in public employment in this state that is policymaking or that has discretionary authority over public assets if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government; a person's position of employment with a federally recognized sovereign Indian tribe constitutes employment in "local, state, or federal government" for purposes of Const 1963, art 11, § 8.

Patrick, Kwiatkowski & Hesselink, PLLC (by *Joseph P. Kwiatkowski*) for Fred Paquin.

Evashevski Law Office (by *Tom H. Evashevski*) for the city of St. Ignace.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Heather S. Meingast*, Assistant Attorney General, for the Attorney General.

Before: K. F. KELLY, P.J., and BECKERING and RIORDAN, JJ.

PER CURIAM. Plaintiff, Fred Paquin, appeals as of right an order of the Mackinac Circuit Court denying his motion for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact, and moving party entitled to judgment as a matter of law), declaring him ineligible to run for city council in defendant, the city of St. Ignace, and dismissing his complaint for declaratory relief with prejudice. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The pertinent facts are not in dispute. On January 19, 2010, the United States Attorney's Office filed an indictment against plaintiff and his daughter in the United States District Court for the Western District of Michigan, Northern Division. Among the 19 counts, plaintiff was charged with conspiracy to defraud the United States by dishonest means in violation of 18 USC 371. The actions prompting the federal indictment occurred while plaintiff was serving as the chief of police for the Law Enforcement Department (the tribal police department) of the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe), a federally recognized Indian tribe, and serving as an elected member of the Tribe's Board of Directors, the Tribe's governing body. On July 22, 2010, plaintiff signed a plea agreement, in which he pleaded guilty to conspiracy to defraud the United States by dishonest means. As the factual basis for his plea, plaintiff admitted to engaging in a conspiracy involving the misuse of federal funds granted to the tribal police department. On December 20, 2010, plaintiff was sentenced to imprisonment for one year and one day.

After serving his prison sentence, plaintiff sought to run for a position on defendant's city council in the November 2013 general election. On August 15, 2013, the Attorney General issued an opinion concluding that Const 1963, art 11, § 8, "applies to a person convicted of a crime based on that person's conduct as a governmental employee or elected official of a federally recognized Indian Tribe." OAG, 2013-2014, No. 7273, p 30, at 30 (August 15, 2013). Const 1963, art 11, § 8, provides:

> A person is ineligible for election or appointment to any state or local elective office of this state and ineligible to

> hold a position in public employment in this state that is policy-making or that has discretionary authority over public assets if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government. This requirement is in addition to any other qualification required under this constitution or by law.
>
> The legislature shall prescribe by law for the implementation of this section.

The Attorney General concluded that Const 1963, art 11, § 8, applies to convictions related to a person's elective office or position of employment in the Tribe's government. Accordingly, plaintiff was "ineligible for election or appointment to any state or local elective office of this State and ineligible to hold a position in public employment in this State that is policy-making or has discretionary authority over public assets." OAG, 2013-2014, No. 7273, at 36.

Relying on the Attorney General's opinion, defendant's city manager informed plaintiff in 2013 and again in 2015 that he could not run for city council. On June 26, 2015, plaintiff filed a complaint for declaratory relief against defendant, seeking a determination regarding the applicability of Const 1963, art 11, § 8, to "a person convicted of a crime based on that person's conduct as an employee of a federally recognized Indian Tribe." Plaintiff asserted, in relevant part, that he was eligible to run for defendant's city council because he was not convicted while holding an elective office or a position of employment in a local, state, or federal government. Defendant filed an answer denying that plaintiff was entitled to declaratory relief.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that defendant admitted that the only authority it relied on in denying his eligibility was the Attorney General's opinion and that the opinion was flawed "not only in the authority cited within it but within its reasoning for the application of Article 11, Section 8 of the Michigan Constitution." In particular, plaintiff asserted that the Attorney General had cited "no legal authority for its determination that the plain language of local, state or federal government somehow includes a federally recognized sovereign Indian Tribe."

The Attorney General moved to submit an amicus curiae brief and to participate in oral argument in support of defendant, and the trial court granted the motion.[1] In the amicus curiae brief, the Attorney General argued that plaintiff's positions with the Tribe constituted elective or employment positions within local government.

Following oral argument, the trial court took plaintiff's motion for summary disposition under advisement. In a three-page order entered July 29, 2016, the trial court denied plaintiff's motion for summary disposition, declared him ineligible to run for city council, and dismissed his complaint with prejudice. In short, the trial court found persuasive the arguments and rationale proffered by the Attorney General that plaintiff fell under the prohibition of Const 1963, art 11, § 8, as a citizen of Michigan, regardless of his status as a member of the sovereign tribal nation.

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[1] Although the Attorney General filed an amicus curiae brief in the trial court, the Attorney General has been granted the status of an intervening appellee by this Court. See *Paquin v City of St Ignace*, unpublished order of the Court of Appeals, entered February 21, 2017 (Docket No. 334350).

II. ANALYSIS

The issue before this Court on appeal is whether plaintiff's employment[2] with a federally recognized sovereign Indian tribe constituted employment in "local, state, or federal government" for purposes of Const 1963, art 11, § 8. This is an issue of first impression involving the interpretation of a constitutional provision.

A. STANDARDS OF REVIEW

The proper interpretation of a constitutional provision is a question of law, which appellate courts review de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). "[T]he primary objective of constitutional interpretation . . . is to faithfully give meaning to the intent of those who enacted the law. This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification." *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 67-68; 748 NW2d 524 (2008). That is, this Court attempts to ascertain "the common understanding of the provision, that meaning which reasonable minds, the great mass of the people themselves, would give it." *People v Nash*, 418 Mich 196, 209; 341 NW2d 439 (1983) (opinion by BRICKLEY, J.) (quotation marks and citation omitted). When constitutional terms are undefined, it is appropriate to consult dictionary definitions to determine meaning. See *Nat'l Pride at Work, Inc*, 481 Mich at 69, 75-77.

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[2] In this instance, plaintiff was employed by the Tribe as the chief of police and held an elective office as a member of the Tribe's board of directors. The analysis for either position is the same, and it is undisputed that his conviction related to his official capacity as both an employee and a governmental official.

A trial court's summary disposition decision is also reviewed de novo. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558; 737 NW2d 476 (2007). Plaintiff moved for summary disposition under MCR 2.116(C)(10).

> 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. 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. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

B. CONST 1963, ART 11, § 8

As previously stated, the text of Const 1963, art 11, § 8, renders a person ineligible for "election or appointment to any state or local elective office of this state" and ineligible to hold certain positions of public employment in this state if,

> within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government.[3]

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[3] Plaintiff has waived any argument regarding the self-executing nature of § 8. In any event, we agree with the analysis of the Attorney General in OAG, 2013-2014, No. 7273, at 31-32, that the provision is self-executing because it "supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may

In the present case, it is undisputed that plaintiff is or was seeking to run for a position on defendant's city council, i.e., a "local elective office of this state." It is also undisputed that plaintiff was convicted of a felony within the immediately preceding 20 years involving fraud; in 2010, he was convicted by guilty plea of conspiracy to defraud the United States by dishonest means, 18 USC 371. Finally, it is undisputed that plaintiff's conviction related to his official capacities as the police chief of the tribal police department and an elected member of the Tribe's board of directors, the Tribe's governing body. Plaintiff concedes these points on appeal. Therefore, the only question is whether plaintiff's position with the Tribe constituted an "elective office or position of employment in *local, state, or federal government*," thereby disqualifying plaintiff from running for defendant's city council. Const 1963, art 11, § 8 (emphasis added).

We agree with the Attorney General and the trial court that the Tribe qualifies as a "local government" under the plain meaning of the text of Const 1963, art 11, § 8. Because the constitutional provision does not define the term "local government," it is appropriate to consult a dictionary definition to determine the plain meaning of the phrase at the time of ratification.[4] See

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be enforced[.]" *Thompson v Secretary of State*, 192 Mich 512, 520; 159 NW 65 (1916) (quotation marks and citation omitted). Section 8 identifies the types of offices that are unavailable, the types of felonies and period within which convictions for these felonies will be considered, and the circumstances that will trigger application of the section. In addition, implementing legislation is generally unnecessary to give effect to a prohibition. See *Beecher v Baldy*, 7 Mich 488, 500 (1859). Section 8 expressly prohibits or disqualifies certain felons from holding elective or appointed office in Michigan. Therefore, its effectiveness does not depend on implementing legislation. *Id*.

[4] As noted by the Attorney General in its brief on appeal, § 8 was added to the Michigan Constitution pursuant to Article 12, § 1, which

Nat'l Pride at Work, Inc, 481 Mich at 69, 75-77. *Merriam-Webster's Collegiate Dictionary* (2007), p 730, defines "local government" as: "1. the government of a specific local area constituting a major political unit (as a nation or a state); *also* : the body of persons constituting such a government." The word "local" means, in relevant part, "of, relating to, or characteristic of a particular place : not general or widespread." *Id*. The relevant definition of "government" is "the body of persons that constitutes the governing authority of a political unit or organization[.]" *Id*. at 541.

It is beyond dispute that the Sault Tribe of Chippewa Indians is a sovereign political community, or unit.

> Indian tribes are distinct, independent political communities, retaining their original natural rights *in matters of local self-government*. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations. They have power to make their own substantive law in internal matters and to enforce that law in their own forums. [*Santa Clara Pueblo v Martinez*, 436 US 49, 55-56; 98 S Ct 1670; 56 L Ed 2d 106 (1978) (emphasis added; quotation marks and citations omitted).]

Although "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," *id*. at 56, "unless and until Congress acts, the tribes retain their historic sovereign authority," *Michigan v Bay Mills Indian Community*, 572 US 782, 788; 134 S Ct 2024; 188 L Ed 2d 1071 (2014) (quotation marks and citation omitted). The fact that the Tribe is subject to plenary control by Congress does not preclude the

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provides for constitutional amendments by legislative proposal and statewide vote. Const 1963, art 12, § 1. Section 8 became effective on December 18, 2010.

determination that the Tribe is a "domestic dependent nation[]" exercising "inherent sovereign authority." *Id*. (quotation marks and citation omitted).

Further, authority from a variety of contexts supports the proposition that Michigan clearly views Indian tribes as units of local government with authority to execute local governmental functions. See, for example, *McDonald v Means*, 309 F3d 530, 539 (CA 9, 2002) (noting that a federal regulation made clear that the administration and maintenance of Indian reservation roads and bridges are essentially functions of the local government, which was an Indian tribe with respect to the road at issue in *McDonald*);[5] OAG, 2003-2004, No. 7134, p 44, at 46 (May 21, 2003) (quoting the above analysis in *McDonald* and stating that *McDonald* equated local government with tribal government); MCL 333.13704(1) (defining a "municipality" to include Indian tribes for the purpose of an environmental law); Executive Order No. 2002-5 (defining "local units of government" to include federally recognized Indian tribes in an executive order reorganizing the executive branch of Michigan); Mich Admin Code, R 29.2163(h) (defining "local government" to include Indian tribes with respect to the regulation of underground storage tanks).[6]

In addition, it is also undisputed in the present case that the Board of Directors is the governing body of the Tribe and that plaintiff served as an elected member of that board. Thus, to the extent that the Tribe is an

[5] Lower federal court opinions are not binding on this Court, but such opinions may be considered persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[6] But see MCL 18.1115(5), a provision of the Management and Budget Act, MCL 18.1101 *et seq*., defining "unit of local government" to include only political subdivisions of the state of Michigan.

"independent political communit[y], retaining [its] original natural rights in matters of local self-government," *Santa Clara Pueblo*, 436 US at 55, and plaintiff was an elected member of the Tribe's governing body, plaintiff served as an elected official in a local government. (Quotation marks and citation omitted.) Const 1963, art 11, § 8, has no language stating that the local governmental entity must be a political subdivision of the state of Michigan. Moreover, as chief of police in the tribal police department, plaintiff also held a position of employment in local government. *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 671; 635 NW2d 36 (2001) (" 'It is indisputable that law enforcement is a primary function of local government . . . .' "), quoting *Coursey v Greater Niles Twp Publishing Corp*, 40 Ill 2d 257, 265; 239 NE2d 837 (1968); see also *Royal v Ecorse Police & Fire Comm*, 345 Mich 214, 219; 75 NW2d 841 (1956) (noting that the control of a police department was a function of a local governmental entity).

In light of the foregoing, we hold that the Tribe constitutes a local government and that plaintiff's employment with the Tribe constituted employment in "local, state, or federal government" for purposes of Const 1963, art 11, § 8. This holding does not diminish or undermine the Tribe's inherent sovereign authority. "[S]tate laws are generally not applicable to tribal Indians on an Indian reservation except where Congress has explicitly provided that state law shall apply." *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 132; 574 NW2d 706 (1997). In the instant case, no one is seeking to prohibit plaintiff from running for a position in the Tribe or otherwise to interfere in the Tribe's regulation of its internal matters. Instead, Const 1963, art 11, § 8, is being applied to prohibit plaintiff from running for a position on defendant's city

council. In other words, the constitutional provision is being used to assess the qualification of a potential candidate for a position on the city council of a Michigan municipality, not a position in the Tribe. "The members of the various Indian tribes are citizens of the United States and citizens of the state within which they reside." *Mich United Conservation Clubs v Anthony*, 90 Mich App 99, 109; 280 NW2d 883 (1979) (citations omitted). In seeking to run for an elective position in a Michigan city, plaintiff was acting in his capacity as a Michigan citizen rather than a member of the Tribe. As a Michigan citizen, plaintiff is subject to the same laws as other Michigan citizens when seeking to run for an office in a Michigan municipality. See generally *Mescalero Apache Tribe v Jones*, 411 US 145, 148-149; 93 S Ct 1267; 36 L Ed 2d 114 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

III. CONCLUSION

We conclude that plaintiff's position of employment with the Tribe constituted employment in "local, state, or federal government." Therefore, the trial court properly dismissed plaintiff's complaint because the text of Const 1963, art 11, § 8, makes plaintiff ineligible to run for a position on defendant's city council.

Affirmed.

K. F. KELLY, P.J., and BECKERING and RIORDAN, JJ., concurred.

VAYDA v LAKE COUNTY

Docket No. 333495. Submitted October 11, 2017, at Lansing. Decided October 19, 2017, at 9:05 a.m.

Charles Vayda, a military veteran, filed a complaint in the Lake Circuit Court against Lake County for terminating his employment as a Lake County sheriff's deputy after he was elected and sworn in to the Lake County Board of Commissioners. Prior to Vayda's complaint, the board of commissioners had filed for a declaratory ruling on whether Vayda could serve both as a county commissioner and a sheriff's deputy, claiming that holding both positions violated MCL 15.182 and MCL 15.183 of the incompatible public offices act, MCL 15.181 *et seq*., as well as MCL 46.30a of the county boards of commissioners act, MCL 46.1 *et seq*. The court issued a declaratory ruling that Vayda could not simultaneously be both a commissioner and a deputy, and the sheriff sent Vayda a termination letter. After he was terminated, Vayda filed the instant complaint, alleging that Lake County had violated his rights under the veterans preference act (VPA), MCL 35.401 *et seq*., by terminating his employment without notice and a hearing as required by MCL 35.402 of the VPA. Vayda moved for summary disposition, and Lake County responded with a motion for summary disposition. The court, Susan Kasley Sniegowski, J., granted Vayda's motion and directed the Lake County Prosecuting Attorney to hold the required hearing. The court denied Lake County's motion for summary disposition. Lake County appealed.

The Court of Appeals *held*:

The VPA grants veterans a preference in employment and retention in public service positions. Under MCL 35.402 of the VPA, a veteran is entitled to notice and a hearing before the veteran's employer may remove him or her from a position in public employment. An employer's failure to comply with the procedural requirements of the VPA could give rise to a due-process claim. In addition, the failure to provide notice and a hearing as required by the VPA is a misdemeanor under MCL 35.403. On the other hand, Vayda and the sheriff would have been criminally culpable under MCL 46.30a(4) of the county boards of commissioners act for any period of time Vayda worked as a

sheriff's deputy once he became a member of the board of commissioners. Whether the notice and hearing requirements of MCL 35.402 applied to Vayda depended on whether he was "removed" from his employment as a sheriff's deputy. Vayda was not entitled to notice and a hearing under the VPA before his employment was terminated because his termination was not the equivalent of being "removed" from employment. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "remove," in relevant part, as "to get rid of" or "eliminate." The trial court erred by granting summary disposition in favor of Vayda because Vayda's employer did not "remove" him from his position as a sheriff's deputy; *Vayda* removed *himself* from that position by his voluntary action of assuming a position on the board of commissioners. The VPA is designed only to protect a qualifying veteran employed in the public sector from having the veteran's employer take adverse employment action against the veteran; the VPA is not designed to impose arduous notice and hearing procedures on an employer any time a veteran makes a voluntary career move. Vayda's own voluntary actions made him ineligible to continue his employment as a sheriff's deputy, and consequently, Vayda was not entitled to notice and a hearing.

Reversed and remanded for entry of order granting Lake County's motion for summary disposition.

EMPLOYMENT — VETERANS — REMOVAL FROM PUBLIC EMPLOYMENT POSITION — NOTICE AND HEARING.

MCL 35.402 of the veterans preference act (VPA), MCL 35.401 *et seq*., entitles a qualifying veteran to notice and a hearing before the veteran's public employer may remove the veteran from a public employment position; a qualifying veteran is not "removed" from his or her public employment position for purposes of the VPA when the veteran is terminated from that position after voluntarily accepting another position in violation of the incompatible public offices act, MCL 15.181 *et seq*.

The Mastromarco Firm (by *Russell C. Babcock*) for Charles Vayda.

Abbott Nicholson, PC (by *John R. McGlinchey* and *Kristen L. Baiardi*) for Lake County.

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

GADOLA, J. This case requires us to reconcile provisions set forth by MCL 46.30a of the county boards of commissioners act (CBCA), MCL 46.1 *et seq*., and MCL 35.402 of the veterans preference act (VPA), MCL 35.401 *et seq*. The issue on appeal is whether plaintiff, Charles Vayda, was entitled to notice and a hearing under the VPA before the termination of his employment with the Lake County Sheriff's Office after he became a member of the Lake County Board of Commissioners (the Board). We hold that the conclusion of plaintiff's employment as a sheriff's deputy did not trigger the notice and hearing requirements of the VPA because plaintiff made himself ineligible for continued employment with the sheriff's office by accepting a position on the Board. We therefore reverse the trial court's order granting plaintiff's motion for summary disposition and remand for entry of an order granting the motion for summary disposition filed by defendant, the County of Lake (the County).

I. BACKGROUND OF THE CASE

Plaintiff is a military veteran who was employed by the County as a sheriff's deputy from 1991 until the circumstances giving rise to this case. After plaintiff was elected to the Board in November 2014, the Board filed a lawsuit seeking a declaratory ruling regarding whether plaintiff could simultaneously hold both the position of county commissioner and the position of sheriff's deputy. The Board asked the court to enter a declaratory judgment stating that plaintiff "must resign either his position as a deputy in the Sheriff's Office or his position as a member of the Lake County Board of Commissioners" because holding both positions violated Michigan's incompatible public offices act (IPOA), MCL 15.181 *et seq*., and MCL 46.30a of the

CBCA. Plaintiff responded to the Board's request for a declaratory judgment, alleging that on January 2, 2015, the day he was sworn in as a county commissioner, Lake County Sheriff Robert Hilts met with him and asked him to resign from his position as a sheriff's deputy. Plaintiff refused to resign, and Sheriff Hilts placed him on unpaid administrative leave pending the outcome of the Board's lawsuit.

The circuit court ruled that inherent conflicts of interest existed between the county commissioner and sheriff's deputy positions and that, under MCL 46.30a of the CBCA and MCL 15.182 and MCL 15.183 of the IPOA, plaintiff "[could not] hold both positions simultaneously." Plaintiff maintained, however, that the circuit court did not specify from which position he must resign. After the circuit court issued its opinion and order, Sheriff Hilts sent plaintiff a letter stating that his employment as a sheriff's deputy had been terminated.[1]

Plaintiff then filed his complaint in the instant action, alleging that the County violated his rights

[1] Plaintiff alleged in his complaint that Sheriff Hilts sent the letter "on the same day," March 10, 2015, that the circuit court issued its ruling on the Board's request for a declaratory judgment. In its answer, the County alleged that "Sheriff Hilts terminated Plaintiff's employment on March 12, 2015 by letter," or two days after the circuit court issued its ruling. Plaintiff contends that he should have been given more time to decide which position he would like to keep, but according to the County, plaintiff had two days after the circuit court issued its ruling to make a decision before Sheriff Hilts took any action. In any event, as discussed in more detail in this opinion, once the circuit court issued its ruling, plaintiff became ineligible to hold both positions simultaneously and subjected both himself and Sheriff Hilts to criminal culpability for *any* period, whether two hours or two days, of continued employment as a sheriff's deputy. See MCL 46.30a(4). Therefore, if plaintiff had a preference to remain a sheriff's deputy and vacate his position as a county commissioner, he was obligated to make that election immediately upon the circuit court's ruling, which he failed to do.

under MCL 35.402 of the VPA by failing to provide him with notice and a hearing before terminating his employment as a sheriff's deputy. Plaintiff asserted that the County should have allowed him to choose which position he would like to maintain because the circuit court did not direct his withdrawal from one position over the other. Plaintiff claimed that he informed Sheriff Hilts that he would step down from his role as a county commissioner because he wanted to remain a sheriff's deputy.

Plaintiff alleged that, after the conclusion of his employment as a sheriff's deputy, he sent a letter to Lake County's prosecuting attorney, Craig R. Cooper, requesting a VPA hearing, but that the County refused his request. Plaintiff said he received a letter from Cooper, dated June 24, 2015, which stated that the "issues presented under the [VPA] have already been decided based on the doctrine of Res Judicata." Plaintiff argued, however, that res judicata did not apply because the circuit court did not address in its declaratory ruling which position plaintiff was required to give up. Plaintiff asked the court to issue an order of superintending control compelling the County to hold a VPA hearing. He also asked the court to issue an order to show cause regarding why the County denied plaintiff his rights under the VPA.

Thereafter, plaintiff filed a motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim), and the County filed a responding motion for summary disposition under MCR 2.116(C)(7) (claim barred by prior judgment), MCR 2.116(C)(8), and MCR 2.116(C)(10) (no genuine issue of material fact). Following a hearing, the trial court granted plaintiff's motion for summary disposition and denied the County's motion. In support of its decision, the court offered the following analysis:

> The Veteran's Preference Act requires that a qualifying veteran is entitled to a hearing pursuant to MCL §35.402. Plaintiff is a qualifying veteran. The statute plainly requires a hearing prior to termination of employment. Plaintiff was not afforded a hearing even after he made a written request for a hearing. There is no authority presented to the Court by defendant which would authorize the Prosecuting Attorney to deny the hearing. In essence the decision was made by the Prosecuting Attorney without hearing all the facts. That decision violates the express terms of the VPA. The Court remands this issue to the Prosecuting Attorney as the entity required to hold the hearing. . . .
>
> Defendant's Motion for Summary Disposition alleges that the claims by plaintiff are barred by res judicata and collateral estoppel and constitute an impermissible collateral attack on this Court's prior judgment. Defendant argues that plaintiff's request for a VPA hearing was "fully and finally determined when this Court held that he could not serve simultaneously as a deputy sheriff and County Commissioner." The Court disagrees with this position. The legal opinion that plaintiff could not hold both positions is distinct from the facts and circumstances of his termination. Those facts are currently in dispute. That dispute could be heard at a VPA hearing. The relief requested in the prior lawsuit by the current defendant was a declaration that [plaintiff] could not hold both positions and that [plaintiff] then chose [sic] which position he would continue. The facts as alleged demonstrate there is a question of fact regarding whether he was given that opportunity. There is nothing in the prior opinion of this Court that says that [plaintiff] should have been terminated from the Sheriff's office. . . . Consistent with the Court's prior ruling, it would have been appropriate for the County to give plaintiff a reasonable amount of time to decide which position he would continue. This was the specific relief requested by the County Board of Commissioners and granted in the prior case. Whether or not [plaintiff] was given an opportunity to chose [sic] is a factual question to be determined at a VPA hearing. This

> action does not constitute a collateral attack on the prior Order of the Court because the prior Order did not in any manner dictate that [plaintiff] should be terminated from the Sheriff's Department. However, if there is a question regarding clarification of the prior Order, that question should be raised in the prior case, not this one.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Although the trial court did not specify under which subrule it granted plaintiff's motion, it appears that the court confined its analysis to information set forth by the parties in their pleadings alone, so we will treat the motion as having been granted under MCR 2.116(C)(9).[2] MCR 2.116(G)(5). When deciding a motion under MCR 2.116(C)(9), a trial court considers the pleadings alone, accepting as true all well-pleaded allegations, to assess the sufficiency of a defendant's defenses. *Abela v Gen Motors Corp*, 257 Mich App 513,

[2] Plaintiff moved for summary disposition under MCR 2.116(C)(8), but this subrule only entitles a movant to summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." As the defendant in the action, the County was not asserting any claim against plaintiff; rather, it is clear from plaintiff's motion that he was challenging the sufficiency of the defenses asserted by the County in its responsive pleadings. MCR 2.116(C) states that a movant must specify the grounds on which a motion for summary disposition is based, but "exact technical compliance . . . is not required." *Mollett v City of Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992). Considering the substance of the County's responsive motion for summary disposition and its arguments at the hearing on the parties' motions, we are satisfied that plaintiff's motion and arguments were sufficiently clear to allow the County to understand and fully respond to the issues before the court. See *Moy v Detroit Receiving Hosp*, 169 Mich App 600, 605; 426 NW2d 722 (1988) (rejecting a challenge to an order granting summary disposition on the basis that the movants failed to identify the specific subrule under which they sought summary disposition).

517; 669 NW2d 271 (2003). "Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id*. at 518 (quotation marks and citation omitted).

This case also implicates questions of statutory interpretation, which we review de novo. *Bukowski v Detroit*, 478 Mich 268, 273; 732 NW2d 75 (2007).

III. ANALYSIS

"The VPA was enacted for the purpose of discharging, in a measure, the debt of gratitude the public owes to veterans who have served in the armed services in time of war, by granting them a preference in original employment and retention thereof in public service." *Sherrod v Detroit*, 244 Mich App 516, 523; 625 NW2d 437 (2001) (quotation marks and citation omitted). The VPA "entitles a veteran to notice and a hearing before his employer may take any action against him with respect to his employment" and "converts at-will public employment positions into ones that are terminable only for just cause." *Id*. Because the conversion of at-will public employment into just-cause employment gives a veteran a property interest in continuing such employment once it is secured, failure to comply with the procedural requirements of the VPA may support a due-process claim. *Id*. Further, failing to provide notice and a hearing in violation of the VPA subjects the offender to criminal prosecution. *Jackson v Detroit Police Chief*, 201 Mich App 173, 177; 506 NW2d 251 (1993); MCL 35.403.

Also at issue in this case is MCL 46.30a of the CBCA, which states, in part, the following:

> (1) A member of the county board of commissioners of any county shall not be eligible to receive, or shall not receive, an appointment from, or be employed by an officer, board, committee, or other authority of that county except as otherwise provided by law.
>
> (2) In case of an appointment or employment made in violation of this section, both the person making the appointment or employment and the person appointed or employed shall be liable for moneys paid to the person as salary, wages, or compensation in connection with the appointment or employment. In case the appointment or employment is made by a committee or board, a member of the committee or board at the time the appointment was made or contract of employment entered into shall be liable. An action for the recovery of salary, wages, or compensation paid in connection with any appointment or employment made in contravention of this section, may be maintained by a taxpayer of the county. The moneys recovered in the action shall be deposited in the county treasury to the credit of the general fund.
>
> (3) The prosecuting attorney of the county, upon the request of the taxpayer, shall prosecute the action in the taxpayer's behalf.
>
> (4) A member of the county board of commissioners accepting an appointment or employment in violation of this section is guilty of a misdemeanor, punishable by a fine of not more than $100.00 or imprisonment for not more than 90 days, or both. An officer or other official, or a member of a board or committee making an appointment or employment in violation of this section is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or a fine of not more than $100.00, or both.

The issue in this case is whether plaintiff was entitled to notice and a hearing under the VPA before the conclusion of his employment as a sheriff's deputy after he accepted a position on the Board. In the Board's previous lawsuit, the circuit court held that plaintiff could not hold both positions simultaneously

without violating MCL 46.30a of the CBCA and MCL 15.182 and MCL 15.183 of the IPOA. Neither party has challenged this determination. In the instant action, plaintiff asserts that he was nonetheless entitled to notice and a hearing under the VPA before the conclusion of his employment as a sheriff's deputy and that the County should have given him an opportunity to choose which position he would vacate. In contrast, the County argues that plaintiff was not entitled to the protections of the VPA because he made himself ineligible for continued employment as a sheriff's deputy by accepting a position on the Board.

MCL 46.30a(1) of the CBCA makes clear that a member of any county board of commissioners "shall not . . . be employed by an . . . authority of that county except as otherwise provided by law." MCL 46.30a(2) states that in the case of "employment made in violation of [MCL 46.30a], both the person making the . . . employment and the person . . . employed shall be liable for moneys paid to the person as salary, wages, or compensation in connection with the . . . employment." More important is the fact that MCL 46.30a(4) states that "[a] member of the county board of commissioners accepting . . . employment in violation of this section" and "[a]n officer or other official . . . making an . . . employment in violation of this section is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or a fine of not more than $100.00, or both."

In this case, then, MCL 46.30a(2) would make both plaintiff (as the employee) and Sheriff Hilts (as the county authority employing plaintiff) liable for any salary or compensation paid in connection with plaintiff's continued employment as a sheriff's deputy after he became a member of the Board. The circuit court's

declaratory ruling in the Board's previous lawsuit was consistent with this application of MCL 46.30a(2) to the instant facts. In addition, MCL 46.30a(4) would make both plaintiff and Sheriff Hilts *criminally culpable* for any period that plaintiff remained a sheriff's deputy with the County in violation of the CBCA.

In spite of this fact, plaintiff argues that he was entitled to notice and a hearing under the VPA before his employment as a sheriff's deputy ceased. The relevant statutory provision of the VPA, MCL 35.402, states, in pertinent part, the following:

> *No veteran . . . holding* an office or *employment in any public department* or public works *of* the state or *any county*, city or township or village of the state, except heads of departments, members of commissions,[3] and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, *shall be removed* or suspended, or shall, without his consent, be transferred *from such* office or *employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of*

[3] We note that this Court has previously stated that the "only veterans employed by state and local governments who are not protected by the VPA are department heads, members of commissions and boards, heads of institutions appointed by the governor, officers appointed by a city's mayor under the city's charter, and first deputies of such people." *Jackson*, 201 Mich App at 175. Neither party suggests that this exception could exclude plaintiff from protection under the VPA. Even assuming plaintiff is a member of a commission as contemplated by the exception in MCL 35.402, it is clear from reading the statute as a whole that the exception only applies when a veteran challenges his or her removal, suspension, or transfer "from such office or employment"—for example, if plaintiff, as a county commissioner, was hypothetically removed from the Board and challenged his removal. The exception is therefore inapplicable to this case in which plaintiff, a county commissioner, is challenging his termination from a separate public employment position with the County.

> *intoxication, conviction of felony, or incompetency; and such veteran shall not be removed*, transferred or suspended *for any cause above enumerated from any* office or *employment, except after a full hearing* before the governor of the state if a state employee, or *before the prosecuting attorney if a county employee* . . . . [Emphasis added.]

As a condition precedent to removal, the statute further states that a veteran "shall be entitled to a notice in writing stating the cause or causes of removal . . . at least 15 days prior to the hearing . . . ." *Id*.

In our opinion, whether the notice and hearing requirements of MCL 35.402 apply to plaintiff depends on whether plaintiff was "removed"[4] from his employment as a sheriff's deputy. When the meaning of statutory language is clear, judicial construction is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). We give every word or phrase of a statute its plain and ordinary meaning unless a statutory term has a special, technical meaning or is defined by the statute itself. *Casco Twp v Secretary of State*, 472 Mich 566, 593 & n 44; 701 NW2d 102 (2005); MCL 8.3. Statutory provisions cannot be read in isolation, but must be read in context, giving meaning and effect to the act as a whole. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).

The VPA does not define the word "removed," and in the absence of a statutory definition or a special, technical meaning, we may consult a dictionary to ascertain the plain and ordinary meaning of a statutory term. See *Koontz v Ameritech Servs, Inc*, 466 Mich

[4] It is apparent from the record that plaintiff's employment as a sheriff's deputy ended shortly after the circuit court issued its declaratory ruling in the Board's previous lawsuit. Therefore, plaintiff was clearly not "suspended" or "transferred" for purposes of MCL 35.402.

304, 312; 645 NW2d 34 (2002). *Merriam-Webster's Collegiate Dictionary* (11th ed) contains several definitions of the word "remove," which include "to change the location, position, station, or residence of" and "to get rid of: ELIMINATE." Although the conclusion of plaintiff's employment as a sheriff's deputy could be said to constitute a change of his employment position, this change was effectuated by plaintiff's own voluntary conduct of running for, and ultimately accepting, a position on the Board. In our opinion, the notice and hearing requirements of MCL 35.402 were not triggered in this instance because plaintiff made himself ineligible for continued employment as a sheriff's deputy by accepting a position on the Board; his employer did not "remove" him from his employment. Indeed, plaintiff removed himself from employment by his voluntary action of assuming a position on the Board, particularly in the face of the trial court's prior ruling against him in the Board's declaratory action and the mandatory language of the CBCA.

Admittedly, the verb "removed" as it is used in MCL 35.402 is written in the passive voice—the verb is not paired with a specific subject or actor who must do the removing. Consequently, the language of the statute does not indicate that any particular person must perform the specified action. See *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53-56; 893 NW2d 322 (2017) (interpreting the notice provision of MCL 500.3145(1) as focusing on the content of the notice rather than on the person providing the notice); *Fields v Suburban Mobility Auth*, 311 Mich App 231, 243-244; 874 NW2d 715 (2015) (SHAPIRO, J., concurring) ("The operative phrase requiring provision of the notice is written in the passive voice, i.e., it does not require that any particular person provide the written notice, only that it be provided within 60 days . . . ."). Consid-

ering the statutory term "removed" in context, however, makes clear that the VPA was designed only to provide some protection to a qualifying veteran employed in the public sector whose employer has taken adverse action against the veteran; the VPA was not designed to impose arduous notice requirements and hearing procedures whenever a veteran makes a voluntary career move. See *Sherrod*, 244 Mich App at 523 (explaining that the VPA "entitles a veteran to notice and a hearing before *his employer* may take any action against him with respect to his employment") (emphasis added); *Cleveland Bd of Ed v Loudermill*, 470 US 532, 542-543; 105 S Ct 1487; 84 L Ed 2d 494 (1985) (explaining that once a state legislature confers a property interest in public employment, *an employer* may not deprive the employee of that interest absent appropriate procedural safeguards). The procedural safeguards of the VPA were not triggered in this case because the conclusion of plaintiff's employment as a sheriff's deputy was effectuated by his voluntary decision to accept an incompatible position on the Board, which made him ineligible for continued employment as a sheriff's deputy. See MCL 15.182. Sheriff Hilts had no need to terminate plaintiff's employment because plaintiff rendered himself ineligible for continued employment once he took the oath of office as a county commissioner. MCL 46.30a. The trial court therefore erred by concluding that plaintiff was entitled to a VPA hearing and by granting his motion for summary disposition.

Further, to the extent plaintiff argues that he should have been given a reasonable amount of time after the circuit court issued its ruling on the Board's request for a declaratory judgment to decide which position he would keep and from which he would resign, we conclude that any such argument lacks merit. In light

of the circuit court's declaratory ruling, plaintiff made himself ineligible for continued employment as a sheriff's deputy at the moment he became a member of the Board, and plaintiff would have rendered both himself and Sheriff Hilts criminally culpable if the employment had continued. See MCL 46.30a(4). The County was not obligated to subject itself to criminal liability for any period of time while plaintiff attempted to maintain his illegal and incompatible positions.

IV. CONCLUSION

Plaintiff was not entitled to the procedural protections of the VPA because the conclusion of his employment as a sheriff's deputy was effectuated by his voluntary acceptance of an incompatible position on the Board, which made him ineligible for continued employment as a sheriff's deputy. The trial court therefore erred by concluding that plaintiff was entitled to a VPA hearing and by granting his motion for summary disposition for that reason. Because plaintiff was not entitled to the protections provided by the VPA, the trial court should have granted the County's motion for summary disposition regarding plaintiff's claims.[5]

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[5] The County raises numerous other arguments regarding why the trial court should have granted its motion for summary disposition. Although it is not essential that we address these alternative arguments, having concluded that summary disposition in favor of the County should have been granted for the reasons already stated in this opinion, we take a moment to do so. First, we disagree with the County that plaintiff's claims were barred by the doctrines of res judicata and collateral estoppel. Whether the manner of plaintiff's termination from his employment as a sheriff's deputy violated the procedural requirements of the VPA was not litigated in the Board's previous lawsuit, nor could it have been, because plaintiff's employment did not end until after the circuit court issued its declaratory ruling in the case. See *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004) (explaining that, among other things, res judicata requires that the matter in the second

Reversed and remanded for entry of an order granting summary disposition in favor of the County. We do not retain jurisdiction.

BOONSTRA, P.J., and METER, J., concurred with GADOLA, J.

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case was or could have been resolved in the first); *Monat v State Farm Ins Co*, 469 Mich 679, 683; 677 NW2d 843 (2004) (explaining that application of collateral estoppel requires that "a question of fact essential to the judgment must have been actually litigated and determined by a valid final judgment" to preclude its relitigation) (quotation marks and citation omitted). We also disagree with the County that plaintiff's claim that he was entitled to a VPA hearing is moot because the only remedy available under the VPA is reinstatement to the prior employment and possible back pay, which is prohibited by the CBCA in this case. This Court has held that the immediate remedy for failure to hold a hearing when one was required under the VPA is the provision of the hearing to which the employee was entitled. *Jackson*, 201 Mich App at 177; *Valentine v Redford Twp Supervisor*, 371 Mich 138, 147; 123 NW2d 227 (1963). We would agree, however, that plaintiff was not entitled to an order of superintending control. The distinction between actions for mandamus and for superintending control often goes unrecognized. *Choe v Flint Charter Twp*, 240 Mich App 662, 665-667; 615 NW2d 739 (2000). Although both serve as vehicles for compelling the performance of a clear legal duty, an order of superintending control is directed to lower courts or tribunals while a writ of mandamus is directed to public officials. MCR 3.302(A); MCR 3.305(A)(1). See also *Jones v Dep't of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003). In this case, plaintiff's action is based on the theory that the Lake County prosecutor, not a lower court or tribunal, failed to perform a clear legal duty to afford him a hearing under the VPA. Plaintiff has failed to demonstrate entitlement to such a hearing for the reasons already stated in this opinion, but regardless, the appropriate remedy would have been to seek a writ of mandamus, rather than an order of superintending control.

THE MEISNER LAW GROUP, PC v WESTON DOWNS CONDOMINIUM ASSOCIATION

Docket No. 332815. Submitted September 12, 2017, at Detroit. Decided October 24, 2017, at 9:00 a.m. Leave to appeal denied 503 Mich ___.

The Meisner Law Group, PC, filed an action in the Oakland Circuit Court against Weston Downs Condominium Association, asserting claims of quantum meruit or unjust enrichment, breach of a general retention agreement (GRA), and misrepresentation in connection with legal services that plaintiff asserted it had provided for defendant. In 2013, plaintiff and defendant, through defendant's representative Robert Meisner, entered into a GRA under which defendant retained plaintiff to provide general legal services at specified rates; the GRA provided that a separate fee agreement would be established for work performed by plaintiff on any major claim against or in behalf of defendant. In May 2015, plaintiff advised defendant regarding potential legal claims defendant had against the developer of the condominiums and drafted documents necessary to amend defendant's bylaws. Defendant paid plaintiff for those services in accordance with the terms of the GRA. In anticipation of a lawsuit against the developer, i.e., a major claim, plaintiff sent defendant a proposed fee agreement that included lower hourly rates than those set forth in the GRA, a retainer requirement, and a contingency-fee arrangement in which plaintiff would receive a percentage of any benefit realized by defendant from litigation against the developer. Although defendant did not sign the proposed agreement, in June 2015, plaintiff replied to additional legal questions posed by defendant regarding potential claims against the developer; plaintiff did not send a bill for those services as requested by defendant. Plaintiff later questioned defendant about whether defendant intended to pursue the discussed claims against the developer. After defendant did not respond, Meisner accused defendant of pursuing those claims on its own and demanded compensation for the fair value of plaintiff's services. Defendant thereafter informed plaintiff that it would not pursue any claims against the developer and indicated that it would not retain plaintiff in the future to provide legal services. Plaintiff alleged in its complaint that defendant had used plaintiff's legal advice to

leverage a settlement with the developer, but plaintiff did not produce evidence of a settlement. In conjunction with its motion for summary disposition, defendant submitted an affidavit in which the developer's manager averred that no litigation had ever existed between defendant and the developer and that defendant had not asserted any claims against the developer since the date on which defendant had signed the GRA. The court, Wendy Lynn Potts, J., granted defendant's motion for summary disposition under MCR 2.116(C)(4), reasoning that it lacked subject-matter jurisdiction over the complaint because there was no evidence that plaintiff's claims might exceed the $25,000 jurisdictional requirement. The circuit court granted defendant attorney fees after finding that plaintiff's claims were frivolous but deferred calculation of those fees until a later hearing. Plaintiff appealed.

The Court of Appeals *held*:

1. MCR 2.116(C)(4) permits a trial court to dismiss a complaint when the court lacks jurisdiction of the subject matter. When deciding a motion under Subrule (C)(4), the court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether the affidavits or other proofs establish that there was no genuine issue of material fact concerning provable damages. Under MCL 600.605, circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except when exclusive jurisdiction is given in the Constitution or by statute to another court or when the circuit courts are denied jurisdiction by Michigan's Constitution or statute. In contrast, MCL 600.8301(1) provides that district courts in Michigan have exclusive jurisdiction in civil matters when the amount in controversy does not exceed $25,000. In circuit courts, summary disposition under MCR 2.116(C)(4) is appropriate when documentary evidence submitted to the court undisputedly establishes that the plaintiff cannot prove its claim of damages exceeding the $25,000 jurisdictional floor. The jurisdiction of a court is determined by the amount demanded in the plaintiff's pleadings, not by the sum actually recovered. Accordingly, circuit courts retain subject-matter jurisdiction over civil claims when a plaintiff claims damages in excess of the jurisdictional amount but the verdict is less than that amount. A court does not retain subject-matter jurisdiction over a case when a party commits fraud on a court by pleading allegations in bad faith; bad faith exists when a plaintiff claims damages in the pleadings that are unjustifiable because they could not be proved. Consequently, bad faith exists when a

party asserts damages in excess of $25,000 but the affidavits, depositions, admissions, and other documentary evidence establishes without dispute that the asserted amount could not be proved. In this case, undisputed evidence established that plaintiff's claims for unpaid legal services could not be proved to exceed $25,000 under theories of quantum meruit, unjust enrichment, or fraudulent misrepresentation, the jurisdictional minimum for circuit courts. It was also undisputed that defendant never signed the major-claims fee agreement, never pursued claims against the developer, and never entered into a settlement with the developer; defendant therefore never unjustly or fraudulently received a benefit from the legal services provided by plaintiff. Plaintiff's speculation that defendant used information provided by plaintiff to leverage a settlement with the developer was insufficient to create a question of disputed fact to survive the summary disposition motion. The circuit court correctly dismissed plaintiff's claim because the asserted damages were below the court's $25,000 jurisdictional floor; instead, the district court had subject-matter jurisdiction over the claim under MCL 600.8302(1). Because plaintiff failed to present independent evidence that further discovery would uncover evidence to contradict that submitted by defendant, the court did not prematurely grant summary disposition.

2. Quantum meruit is an equitable doctrine in that the law implies a contract to prevent unjust enrichment if the defendant has been unjustly or inequitably enriched at the plaintiff's expense. Under MCL 600.8302(1), in addition to the civil jurisdiction provided in MCL 600.5704 and MCL 600.8301, district courts have equitable jurisdiction and authority concurrent with that of circuit courts in the matters and to the extent provided by MCL 600.8302. Under MCL 600.8302, district courts also have jurisdiction over certain specified equitable claims—actions brought under MCL 600.8401 *et seq*., MCL 600.5701 *et seq*., MCL 600.3101 *et seq*., MCL 600. 3301 *et seq*., or MCL 600.3801 *et seq*.—even when the amount in controversy exceeds the MCL 600.8301 district court jurisdictional limit of $25,000. MCL 600.8302 grants additional jurisdiction to district courts that is concurrent with that of circuit courts; the statute does not limit the grant of equitable jurisdiction in district courts to only those matters specified in MCL 600.8302, and it does not limit the grant of jurisdiction provided by other statutory provisions, including that provided by MCL 600.8301. The specific jurisdictional grant found in MCL 600.8302 takes precedence over the more general MCL 600.8301 grant of jurisdiction. However, civil actions that are not specified in MCL 600.8302 are controlled, when no other

jurisdiction statute applies, by the MCL 600.8301(1) $25,000 jurisdictional limit for district courts. In this case, although plaintiff asserted an equitable claim, it only sought legal relief in the form of money damages; accordingly, the district court—not the circuit court—had exclusive jurisdiction over plaintiff's contract and quasi-contract claims because the undisputed evidence established that the amount in controversy did not exceed $25,000.

3. MCL 600.8315 provides that district courts do not have jurisdiction in actions for injunctions, divorce, or actions that are historically equitable in nature except as otherwise provided by law. In this case, plaintiff's complaint sounded primarily in contract and sought legal relief—not equitable relief—in the form of money damages. Accordingly, the MCL 600.8315 phrase "equitable in nature" did not take precedence over the section's phrase "otherwise provided by law"; for that reason, the MCL 600.8301(1) grant of exclusive jurisdiction to the district court over civil actions in which the amount in controversy did not exceed $25,000 applied, and the circuit court did not have jurisdiction in this case because the undisputed evidence established that the amount in controversy did not exceed $25,000.

4. MCR 2.114(E), MCR 2.625(A)(2), and MCL 600.2591(1) authorize and require courts to sanction an attorney or a party that files a frivolous action or defense. These frivolous-claim-or-defense provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed; the reasonableness of the attorney's inquiry is determined by an objective standard, not the attorney's subjective good faith. In addition, a circuit court has inherent power to impose sanctions on litigants appearing before it regardless of whether the court also rules that it lacks subject-matter jurisdiction over a complaint. Whether a claim is frivolous for purposes of MCR 2.114(E) and MCL 600.2591 depends on the circumstances at the time the claim was asserted. Under MCL 600.2591(3)(a), a party's claim is frivolous when (1) the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party and (2) the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true or the party's legal position was devoid of arguable legal merit. In this case, the circuit court did not clearly err by implicitly finding that plaintiff's legal position was devoid of arguable merit because evidence established that defendant did not initiate claims against or enter into a settlement with the developer and the

amount in controversy did not exceed $25,000; plaintiff did not sufficiently investigate and research the factual bases underlying its claims. Although the circuit court did not specify under which MCL 600.2591(3)(a) subparagraph it determined plaintiff's complaint to be frivolous, the circuit court did not clearly err by finding that plaintiff's claims were frivolous and by awarding defendant its attorney fees, subject to a reasonableness hearing.

Judgment affirmed and case remanded to determine a reasonable attorney fees award.

COURTS — DISTRICT COURTS — JURISDICTION — MCL 600.8302 GRANT OF ADDITIONAL JURISDICTION — JURISDICTION CONCURRENT WITH THAT OF CIRCUIT COURTS.

MCL 600.8302 grants additional jurisdiction to district courts that is concurrent with that of circuit courts; the statute does not limit the grant of equitable jurisdiction to only those matters specified in MCL 600.8302—actions brought under MCL 600.8401 *et seq*., MCL 600.5701 *et seq*., MCL 600.3101 *et seq*., MCL 600. 3301 *et seq*., or MCL 600.3801 *et seq*.—and it does not limit the grant of jurisdiction provided by other statutory provisions, including that provided to district courts by MCL 600.8301; the MCL 600.8302 grant of jurisdiction over specific actions takes precedence over the more general MCL 600.8301 grant of jurisdiction over civil matters when the amount in controversy does not exceed $25,000; civil actions that are not specified in MCL 600.8302 are controlled, when no other jurisdiction statute applies, by the MCL 600.8301(1) $25,000 jurisdictional limit for district courts; a district court has jurisdiction over an unjust-enrichment claim when the plaintiff only seeks legal relief in the form of money damages and the amount in controversy does not exceed $25,000.

The Meisner Law Group, PC (by *Robert M. Meisner* and *Daniel P. Feinberg*) for plaintiff.

Secrest Wardle (by *Sidney A. Klingler* and *John L. Weston*) for defendant.

Before: BECKERING, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM. Plaintiff, the Meisner Law Group, PC, brought this action for attorney fees in circuit court,

asserting that "[t]he amount in controversy exceeds $25,000." Plaintiff alleged three theories for relief: (1) quantum meruit or unjust enrichment under an unexecuted, proposed contingent-fee agreement, (2) breach of an existing written retainer contract, and (3) that defendant misrepresented that it would fairly compensate plaintiff for the work plaintiff would perform. The circuit court entered an order on February 24, 2016, granting defendant, Weston Downs Condominium Association's motion for summary disposition under MCR 2.116(C)(4). The court found that neither plaintiff's complaint nor the evidence that plaintiff submitted created a question of fact that plaintiff's claims might exceed $25,000. The circuit court also determined that plaintiff's claims were frivolous, ruling that it would award defendant its attorney fees in an amount to be determined at a later hearing.[1] The circuit court entered an order denying plaintiff's motion for reconsideration. Plaintiff now appeals by right. We affirm.

I. SUMMARY OF UNDERLYING FACTS

On May 24, 2013, plaintiff and defendant entered into a general retention agreement (GRA), whereby defendant retained plaintiff as legal counsel to provide legal services within an hourly rate range for attorneys and within a lesser hourly rate range for the law firm's other employees. The GRA provided that plaintiff would send defendant statements containing "[a]n itemized description of services rendered" and that defendant would pay the statements within 15 days of receiving them. The GRA further provided that defen-

[1] Defendant filed statements regarding attorney fees from two law firms in the amount of $16,615.50 and $5,945.00, to which plaintiff filed objections. The circuit court has not yet conducted a hearing to determine the amount of the attorney-fee sanction.

dant would be given 15 days of notice regarding any change in the hourly rates stated in the agreement and that "[e]xcept for the change in the hourly rates and flat fees, the terms and conditions of this retention agreement shall remain in effect, unless superseded by another fee agreement." The GRA contemplated that a separate agreement regarding fees might be required for work on a "major claim," providing:

> The rates quoted in this letter are with respect to general work performed on behalf of the Association. Should a major claim in behalf of or against the Association arise, a separate fee agreement would be established.

On May 13, 2015, defendant sought plaintiff's counsel regarding its concerns that the developer of the condominiums, Mondrian Properties Weston Downs, LLC, had sold or transferred the last three remaining condominium units to its three principal members, who intended to use the units as rental properties. Defendant sought to amend the association's bylaws and other documents to limit or prevent rentals and to review potential claims defendant may have against the developer regarding ownership of the units and liability for association fees. Plaintiff provided advice regarding potential legal claims against the developer and drafted the necessary documents to amend the association's bylaws. Defendant paid plaintiff's invoices for these services under the GRA in the amount of $5,667.

Believing that the matters regarding the developer concerned a "major claim," plaintiff, through Robert Meisner, wrote an e-mail to defendant's president on May 15, 2015, "enclosing a proposed fee agreement for consideration by the Board of Directors exclusively in regard to the Developer suit." This transmittal letter asked defendant's board to review the proposal "at

your earliest convenience and presuming it is satisfactory, please have it signed and return it to me together with the initial retainer so that we can begin obtaining experts and otherwise preparing the claim." A second letter of the same date that contained the proposed retainer agreement began by stating that "[t]his letter will serve to set forth this firm's fee arrangement and proposal in connection with our representation of Weston Downs Condominium Association regarding the prosecution of a claim and/or commencement of a lawsuit against those persons or entities responsible. . . ." The proposed retainer agreement specified hourly rates that were slightly less than those in the GRA and, in addition to the hourly rates, provided:

> [T]he Association shall pay the following contingency fee with respect to the litigation: fifteen (15%) percent of the value of all . . . benefits of any kind realized, paid to, and/or received by the Association . . . whether by way of settlement, agreement, case evaluation award, arbitration award, judgment, alternative dispute resolution, or otherwise . . . .

The proposed retainer agreement also stated that "[i]f the contents of this Agreement are satisfactory to the Board of Directors, please have two (2) representatives authorized by the Board of Directors date and sign the Agreement on behalf of the Association in the spaces provided below as well as the representative claimant . . . ." The next paragraph of the proposed retainer agreement stated, "The effective date of this Agreement shall be upon a receipt of this signed agreement by the Board of Directors of the Association, and receipt of a retainer in the amount of $5,000." It is undisputed that defendant's board never authorized the proposed agreement, authorized board members never signed the proposed agreement, and defendant never paid plaintiff the required $5,000 retainer.

In an e-mail exchange between defendant's board member, Rick Bonus, and one of plaintiff's attorneys, Dan Feinberg, on June 1, 2015, defendant posed nine additional legal questions concerning potential claims the Association may have against the developer. Feinberg responded with answers to the questions posed in an e-mail of June 4, 2015. It is undisputed that although defendant's representatives repeatedly invited plaintiff to invoice defendant for these services so that they could be paid, plaintiff never did so. It is also undisputed that the work to prepare the June 4, 2015 e-mail was the last legal service plaintiff performed for defendant.

Through June and July 2015, representatives of plaintiff queried defendant's representatives concerning the status of defendant's intent regarding potential claims against the developer. Defendant's representatives responded that the Board was still considering its options. Plaintiff responded in a letter of June 11, 2015 by its principal, Robert Meisner, stating that defendant had taken plaintiff's valuable advice and proceeded on its own. Meisner noted that although defendant had not signed the proposed retainer agreement, plaintiff expected that it would be compensated for the "fair value" of its services. Meisner wrote an e-mail on August 7, 2015, to one of defendant's board members requesting clarification of defendant's position. Meisner stated that if he received no response within 7 days, he would assume that defendant no longer desired plaintiff's services, and that plaintiff would "notify the developer that we retain an attorney's lien on any [recovery and] . . . we are entitled to the fair value of our services."

Defendant's Board responded to the August 7, 2015 e-mail of Meisner in an August 11, 2015 letter signed

by all three Board members, which stated, in pertinent part: "[P]lease be advised that the Board of Directors is not contemplating any legal action at this time against the developer and therefore no longer wishes your firm to provide any future services. Furthermore, as you note in your email, the Association has no[t] signed [the] engagement letter with your firm with respect to any such litigation."

Plaintiff responded in an August 18, 2015, letter by Meisner to the Board's president, Rose Ann Schmitt. Meisner expressed his shock at defendant's "lack of good faith" and accused defendant's Board of "using our work-product without our knowledge or consent to obtain substantial benefits for the Association." Meisner also "advised that unless you provide this firm with full disclosure as to what has transpired between the Association and the Developer since our email to the Board of June 4, 2015, we will have no choice but to not only file an attorney's lien, but to institute litigation to seek the information through the discovery process . . . ." Meisner also threatened that plaintiff would "consider proceeding against [Schmitt] personally for what I consider to be a fraud on this firm."

On September 18, 2015, plaintiff filed its three-count complaint against defendant in the Oakland Circuit Court. As noted, plaintiff's complaint alleged (1) quantum meruit or unjust enrichment, (2) breach of the GRA, and (3) misrepresentation that defendant would compensate plaintiff for the "fair value" of its work. The essence of plaintiff's unjust-enrichment claim is stated in Paragraph 16, "The Board accepted the benefits of the [plaintiff's] advice, and, on information and belief, used this special advice and information to leverage a settlement with the developer." Plaintiff never produced any evidence of a "settlement" between defendant and the developer.

Defendant responded to plaintiff's original complaint on October 19, 2015, with a motion for summary disposition under MCR 2.116(C)(4), (8), and (10), and for sanctions pursuant to MCR 2.114(E) and (F), MCR 2.625(A)(2), and MCL 600.2591. Thereafter, plaintiff filed, on November 2, 2015, a first amended complaint with minor editorial changes from the original complaint. Defendant filed a response to the amended complaint, noting that nothing in the amended complaint "remedied the misdeeds that warrant the imposition of sanctions against [plaintiff] pursuant to MCR 2.114(E) and (F), MCR 2.625(A)(2), and MCL 600.2591," so defendant stood on its previously filed motion for summary disposition. That motion, with respect to MCR 2.116(C)(4), asserted that plaintiff "has not produced and cannot produce any evidence to support its vacant claim that the 'amount in controversy exceeds $25,000.' "

The hearing on defendant's motion for summary disposition occurred on February 24, 2016. At the hearing, defendant was permitted to file an affidavit by Joseph Maniaci, a manager of the developer. Maniaci averred that no litigation had ever existed between defendant and the developer and that defendant had asserted no claims against the developer since May 24, 2013.[2] Otherwise, both parties stood on their written submissions. The circuit court dismissed plaintiff's complaint without prejudice on the basis that plaintiff's claim could not exceed $25,000. The court ruled that neither plaintiff's complaint nor any evidence that plaintiff had submitted created a question of fact that plaintiff's claims might exceed $25,000. The circuit court also determined that plaintiff's claims were frivo-

[2] May 24, 2013, is the date on which defendant signed the GRA with plaintiff.

lous and ruled that it would determine an award of attorney fees at a later hearing. No further hearings were held in the circuit court. Plaintiff appeals by right.

II. AMOUNT IN CONTROVERSY

A. PRESERVATION

Plaintiff preserved this issue for appellate review by presenting it to the circuit court, which addressed and decided the issue.[3] *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).

B. STANDARD OF REVIEW

This Court reviews de novo "a trial court's decision to grant or deny summary disposition." *Cairns v East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). "Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are also reviewed de novo." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185,

[3] Although the circuit court did not address defendant's arguments for summary disposition under MCR 2.116(C)(8) and (C)(10), defendant presents them as alternative grounds to affirm the circuit court. An appellee, like defendant, without filing a cross-appeal, may "urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court or tribunal." *Boardman v Dep't of State Police*, 243 Mich App 351, 358; 622 NW2d 97 (2000), citing *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). But while alternative grounds to affirm may be considered, affirming the circuit court on the alternative grounds asserted would grant defendant more relief than defendant obtained in the circuit court. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 683; 854 NW2d 489 (2014) ("An appellee may urge an alternative ground for affirmance without filing a cross-appeal, but an appellee may not obtain a decision more favorable than that rendered below without filing a cross-appeal."). For that reason, we decline to address defendant's alternative arguments.

205; 631 NW2d 733 (2001). Similarly, issues of statutory interpretation are questions of law that are reviewed de novo on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 393; 651 NW2d 756 (2002). A trial court is duty-bound to recognize the limits of its subject-matter jurisdiction, and it must dismiss an action when subject-matter jurisdiction is not present. *Id*. at 399. See also *Cairns*, 275 Mich App at 107.

MCR 2.116(C)(4) permits a trial court to dismiss a complaint when "[t]he court lacks jurisdiction of the subject matter." A motion under Subrule (C)(4) may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(2). When affidavits, depositions, admissions, or other documentary evidence are submitted with a motion under MCR 2.116(C)(4), they "must be considered by the court." MCR 2.116(G)(5). So, when reviewing a motion for summary disposition brought under MCR 2.116(C)(4) that asserts the court lacks subject-matter jurisdiction, the court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. *Summer v Southfield Bd of Ed*, 310 Mich App 660, 668; 874 NW2d 150 (2015); *Manning v Amerman*, 229 Mich App 608, 610; 582 NW2d 539 (1998).

C. ANALYSIS

In this civil action in which the undisputed facts show that the amount in controversy could not exceed $25,000, the circuit court properly granted summary disposition under MCR 2.116(C)(4) because it lacked subject-matter jurisdiction, which lay exclusively with

the district court. MCL 600.605; MCL 600.8301(1); *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 560; 840 NW2d 375 (2013) ("District courts in Michigan have exclusive jurisdiction over civil matters where the amount in controversy does not exceed $25,000."); *Bowie v Arder*, 441 Mich 23, 50; 490 NW2d 568 (1992) (explaining that "circuit courts do not have jurisdiction in matters in which jurisdiction is given exclusively by constitutional provision or by statute to another court"). Consequently, we affirm the circuit court.

Michigan's Constitution provides, in pertinent part, that "judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, . . . and courts of limited jurisdiction that the legislature may establish . . . ." Const 1963, art 6, § 1. Under this authority, the Legislature enacted MCL 600.605[4] and MCL 600.8301(1),[5] which plainly combine, when no other jurisdictional statute applies, to deprive the circuit court of jurisdiction over civil actions "when the amount in controversy does not exceed $25,000.00." MCL 600.8301(1). Our Supreme Court has explained, "Although circuit courts are courts of general jurisdiction, with original jurisdiction to hear and determine all civil claims and remedies, circuit courts do not have jurisdiction in matters in which jurisdiction is given

[4] "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state."

[5] "The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00."

exclusively by constitutional provision or by statute to another court." *Bowie*, 441 Mich at 50.

But Michigan's judiciary has long held that the circuit court is not deprived of subject-matter jurisdiction when a plaintiff claims damages in excess of the jurisdictional amount but the judge or jury returns a verdict of an amount less than the jurisdictional limit. See, e.g., *Fox v Martin*, 287 Mich 147, 151; 283 NW 9 (1938) ("Jurisdiction does not depend upon the facts, but upon the allegations."); *Zimmerman v Miller*, 206 Mich 599, 604-605; 173 NW 364 (1919) (stating that the "jurisdiction of the court is determined by the amount demanded in the plaintiff's pleadings, not by the sum actually recoverable or that found by the judge or jury on the trial"); *Inkster v Carver*, 16 Mich 484, 487 (1868) (stating that the only practical rule is "that the damages claimed in the declaration or process, and not the amount found by the court or jury upon trial, must be the test of jurisdiction"); *Strong v Daniels*, 3 Mich 466, 471 (1855) (holding "that jurisdiction must be determined from the record, and, where it depends on amount, by the sum claimed in the declaration or writ").

In *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211; 884 NW2d 238 (2016), our Supreme Court considered the reverse scenario of the present case: a plaintiff filed a complaint in district court, seeking damages " 'not in excess of $25,000,' " but discovery and proofs at trial revealed actual damages were far in excess of $25,000. *Id*. at 214. The district court permitted the case to go to the jury, which returned a verdict for the plaintiff of $85,000. The district court entered a remitted judgment of $25,000, plus interest.[6] The circuit

[6] The Court in *Strong*, 3 Mich at 472-473, opined: "It is well settled in actions commenced before a justice of the peace, that the test of

court reversed that order, finding that the district court lacked jurisdiction, and this Court affirmed. *Id*. at 214-215, citing *Moody v Home Owners Ins Co*, 304 Mich App 415, 430; 849 NW2d 31 (2014). Our Supreme Court reversed, holding that the district court had jurisdiction because "in its subject-matter jurisdiction inquiry, a district court determines the amount in controversy using the prayer for relief set forth in the plaintiff's pleadings, calculated exclusive of fees, costs, and interest." *Hodge*, 499 Mich at 223-224. The Court reasoned that the court below had made "no findings . . . of bad faith in the pleadings," so "[e]ven though [the plaintiff's] proofs exceeded [the district court's jurisdictional limit], the prayer for relief controls when determining the amount in controversy and the limit of awardable damages." *Id*. at 224. Therefore, "the district court had subject-matter jurisdiction over the plaintiff's claim." *Id*.

Does the *Hodge* rule—courts determine the "amount in controversy" solely by the prayer for relief in the plaintiff's pleadings—apply to this case, in which plaintiff pleaded that the "amount in controversy exceeds $25,000" but the circuit court determined, on the basis of the documentary evidence that the parties submitted on defendant's motion for summary disposition under MCR 2.116(C)(4), that the undisputed facts showed the amount in controversy could not exceed $25,000? Stated otherwise, the first question is whether "the amount in controversy" of a civil action filed in the circuit court is determined, for purposes of subject-matter jurisdiction, solely on the basis of the amount claimed in the complaint. According to the

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jurisdiction is the sum demanded in the writ or declaration, and the justice will not be ousted of his jurisdiction by the jury returning a verdict, or by proof of damages beyond his jurisdiction. In such case the excess may be remitted, and judgment rendered for the balance."

authority set forth in the "Standard of Review section of this opinion," the answer is no. The Michigan Court Rules of 1985 require a circuit court, when its jurisdiction is challenged with a motion brought under MCR 2.116(C)(4), to consider the "affidavits, depositions, admissions, or other documentary evidence" that the parties may submit "to support or oppose the grounds asserted in the motion." MCR 2.116(G)(2). See also MCR 2.116(G)(5); *Moody*, 304 Mich App at 437. So, when reviewing a motion under MCR 2.116(C)(4) that asserts the court lacks subject-matter jurisdiction, the circuit court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there is no genuine issue of material fact concerning provable damages. See *Summer*, 310 Mich App at 668.

Additionally, as already noted, the *Hodge* rule does not apply when a party's pleadings are made in bad faith. *Hodge*, 499 Mich at 221-224. The majority in *Hodge* did not expand on what constitutes "bad faith," but it did note that "a court will not retain subject-matter jurisdiction over a case 'when . . . fraud upon the court is apparent' from allegations pleaded in bad faith." *Id*. at 222 n 31, quoting *Fix v Sissung*, 83 Mich 561, 563; 47 NW 340 (1890). "In *Fix*, this Court dismissed the plaintiff's suit as being brought in bad faith because the amount claimed was 'unjustifiable' and could not be proved." *Hodge*, 499 Mich at 222 n 31, discussing *Fix*, 83 Mich at 563. Accordingly, "bad faith" is not a plaintiff's subjective ill will. Instead, bad faith exists when a plaintiff's claim to damages in the pleadings are "unjustifiable" because they "could not be proved." *Hodge*, 499 Mich at 222 n 31. The "bad faith" found in *Fix* and endorsed in *Hodge* mirrors the requirements of MCR 2.116(C)(4), (G)(2), and (G)(5).

Although a plaintiff may claim damages in excess of $25,000, when the documentary evidence submitted to the circuit court shows by undisputed facts that the plaintiff's claim to damages exceeding the jurisdictional amount cannot be proved, summary disposition under MCR 2.116(C)(4) is proper. See *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138-139; 796 NW2d 94 (2010); *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 176; 756 NW2d 483 (2008); MCR 2.116(I)(1) ("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, the court shall render judgment without delay.").

Hodge is further distinguished from the present case because it addressed the limited jurisdiction of the district court, in which damages may not be obtained in excess of its limited jurisdiction of $25,000. *Hodge*, 499 Mich at 216 & n 13. "The district court, therefore, may not award damages in excess of that amount." *Id*. at 216-217. In other words, a plaintiff pleading a case of damages for $25,000 or less who proves and obtains a verdict for more than $25,000 would still be limited to awardable damages of not more than the district court's jurisdictional limit of $25,000. *Id*. at 224. The *Hodge* Court suggested this result "should deter fully-informed plaintiffs from too-readily seeking to litigate a more valuable claim in district court." *Id*. at 223. But the Court also declined to address "whether a fully-informed plaintiff acts in bad faith by filing a claim in district court, thereby limiting his own recovery to $25,000." *Id*. at 222 n 31. Thus, *Hodge* permits a fully informed plaintiff as a matter of tactical advantage to limit recovery of a claim worth more than $25,000 by filing it in the district court. Although the *Hodge* Court premised its decision by applying longstanding

common-law practice to the legislative phrase "amount in controversy," *id*. at 221, it plainly only decided when a district court has jurisdiction under MCL 600.8301(1). The circuit court's jurisdiction on a motion under MCR 2.116(C)(4) must be determined in accordance with the Michigan Court Rules and longstanding caselaw. When there is a complaint that asserts damages in excess of $25,000 but the "affidavits, depositions, admissions, or other documentary evidence," MCR 2.116(G)(2), show without dispute that that amount "could not be proved," *Hodge*, 499 Mich at 222 n 31, the complaint would essentially be one pleaded in bad faith.

In this case, the circuit court correctly ruled on the basis of the documentary evidence submitted that plaintiff could not prove, or more accurately could not create a question of fact, that its claim for compensation for legal services under any of the theories advanced could exceed the $25,000 jurisdictional limit of the circuit court. The undisputed evidence showed that plaintiff had performed legal research and answered certain questions posed by defendant's representative. The questions were posed on June 1, 2015, in an e-mail and answered by one of plaintiff's attorneys in an e-mail on June 4, 2015. It is undisputed that when these legal services were rendered, there was a written agreement (the GRA) between plaintiff and defendant providing for a top hourly attorney rate of $325. Although defendant requested that plaintiff send an invoice for these services so that defendant could pay plaintiff for the work performed, plaintiff never did. Looking at these facts in a light most favorable to plaintiff, we note that if these legal services required 32 hours of attorney time at $325 per hour, the total amount due would be $10,400. If this amount were increased by 50% for any support staff services and for winding up plaintiff's legal representa-

tion of defendant, the total expense would still be under $16,000. In sum, the undisputed evidence showed that plaintiff's claim for unpaid legal services under any theory "could not be proved" to exceed $25,000. *Hodge*, 499 Mich at 222 n 31.

Plaintiff argues that its claim for the "fair value" for its services would be in excess of $25,000 by relying on a proposed "major claims" retainer agreement that contained both hourly rates less than the GRA and a contingent fee based on any judgment or settlement that defendant might obtain. It is undisputed the proposed hybrid retainer agreement with the contingent fee clause never became effective because no authorized representatives of defendant's governing board ever signed it, nor did defendant pay a required retainer fee. Nevertheless, plaintiff argues that the unexecuted contingent-fee agreement would be an appropriate measure of the value of its services under both plaintiff's quantum meruit or unjust enrichment theory and its claim that defendant misrepresented that it would fairly compensate plaintiff. These theories contemplate that plaintiff be compensated for the benefit plaintiff's legal work conferred on defendant. "The essential elements of [an unjust enrichment] claim are (1) receipt of a benefit by the defendant from the plaintiff, and (2) which benefit it is inequitable that the defendant retain." *B & M Die Co v Ford Motor Co*, 167 Mich App 176, 181; 421 NW2d 620 (1988). "Quantum meruit is an equitable doctrine that prevents a client's unjust enrichment while compensating an attorney for only those benefits actually generated by the attorney's work." *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 399; 837 NW2d 439 (2013).[7]

[7] In *Island Lake*, *id*. at 386, a similar hybrid compensation agreement was entered, and plaintiff represented a client in litigation for 18

The undisputed facts do not support plaintiff's claim that defendant received a valuable settlement on the basis of plaintiff's advice, i.e., that defendant received a benefit that it would be unjust to retain. The contingent-fee agreement was proposed to pursue claims against the condominium developer and would have been invoked if litigation had been initiated or a claim made and a judgment, award, or settlement entered. But the undisputed facts show that none of these events occurred. Defendant's August 11, 2015 letter to plaintiff informed plaintiff that defendant did not intend to pursue legal action against the developer. The affidavit of the developer's manager averred that no litigation had ever existed between defendant and the developer and that defendant had asserted no claims against the developer since the GRA was executed. Accordingly, there was no evidence to support a claim that defendant unjustly or fraudulently received a benefit on the basis of legal services plaintiff provided. So the undisputed evidence showed that plaintiff's claim for unpaid legal services under a theory of quantum meruit or unjust enrichment or fraudulent misrepresentation "could not be proved" to exceed $25,000. *Hodge*, 499 Mich at 222 n 31.

Instead of producing evidence of a settlement between defendant and the developer, plaintiff only presents speculation that one occurred based on plaintiff's

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months before being discharged; the litigation was eventually settled. The plaintiff brought a declaratory action, contesting Meisner's charging lien. *Id*. This Court held, on the basis of the unambiguous contract language, that "Meisner is entitled to a contingent share of Island Lake's recovery . . . by applying quantum meruit principles and cannot exceed 12 percent of the total recovery . . . ." *Id*. at 387. *Island Lake* is inapposite here because the undisputed documentary evidence shows that the contingent-fee contract never became effective, no claim or litigation was initiated, and there is no evidence a settlement was ever entered between defendant and the developer.

characterization that defendant was being "astonishingly secretive and unresponsive" to plaintiff's several requests for information during June and July 2015. From this speculation, plaintiff inferred that defendant had entered into a valuable settlement with the developer that was procured on the basis of the legal advice plaintiff had provided. But "[a] party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995). Plaintiff offers only speculation that defendant used its legal advice to "leverage a settlement" with the developer, and that conjecture is insufficient to create a question of disputed fact sufficient to survive a motion for summary disposition. See *Yoost v Caspari*, 295 Mich App 209, 227-228; 813 NW2d 783 (2012) (holding that speculation was insufficient to demonstrate the facts necessary to establish limited personal jurisdiction); *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536, 546; 362 NW2d 823 (1984) ("Calculation of lost profits cannot be based solely on conjecture and speculation."). The mere possibility that a claim might be supported by evidence at trial is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Plaintiff also argues that he did not have a chance to prove his claim because summary disposition was granted before discovery occurred. In general, summary disposition is premature if granted before discovery on a disputed issue is complete. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). But a party must show that further discovery presents a fair likelihood of uncovering factual support for

the party's position. *Liparoto Constr Co, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). Indeed, a party claiming that summary disposition is premature must "identify[] a disputed issue and support[] that issue with independent evidence." *Froling Trust*, 283 Mich App at 292, citing *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). In this case, both of the participants of the alleged settlement assert that litigation was not initiated; a claim was not made, and no settlement exists. Plaintiff offers no independent evidence that further discovery would uncover evidence to contradict that submitted by defendant. *Froling Trust*, 283 Mich App at 292. Consequently, plaintiff has not shown a fair likelihood that further discovery could enable plaintiff to establish a question of fact concerning a settlement to which it believes it is entitled to a portion of as "fair compensation" for its legal work. *Liparoto Constr Co*, 284 Mich App at 33-34. The circuit court did not prematurely grant summary disposition.

Plaintiff also argues that its claim is supported because this instance is the second time that defendant had sought and obtained significant legal advice regarding major claims against the developer and afterward become "uncommunicative." Although plaintiff alleged that a similar incident occurred in 2013–2014, plaintiff presented no evidence to support the claim. A circuit court's review is limited to the evidence that is presented to the court at the time the motion was decided. See *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). Similarly, a party may not expand the record on appeal, *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005), and this Court's review is

limited to the trial court record, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

In summary, the undisputed evidence showed that plaintiff's claim for unpaid legal services under any theory "could not be proved" to exceed $25,000. *Hodge*, 499 Mich at 222 n 31. The circuit court properly granted summary disposition under MCR 2.116(C)(4) because it lacked subject-matter jurisdiction, which lay exclusively with the district court. MCL 600.605; MCL 600.8301(1); *Bowie*, 441 Mich at 50; *Clohset*, 302 Mich App at 560.

III. EQUITABLE IN NATURE

Plaintiff also argues that regardless of the amount in controversy, the circuit court had jurisdiction of its complaint because its claims were equitable in nature. Plaintiff argues that under MCL 600.8302 and MCL 600.8315, the district court did not have jurisdiction; therefore, jurisdiction lay in the circuit court as the court of general jurisdiction that has jurisdiction in equitable matters except as limited by Michigan's Constitution or by statute. See MCL 600.601(1)(b); MCL 600.605; *Bowie*, 441 Mich at 37-38. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

Plaintiff did not preserve this issue for appellate review by presenting it to and obtaining a ruling from the circuit court. *Walters*, 481 Mich at 387-388.

Whether a court has subject-matter jurisdiction presents a question of law that is reviewed de novo. *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 564; 884 NW2d 799 (2015). Questions of statutory interpretation are also reviewed de novo. *Id*.

B. ANALYSIS

This issue is one of first impression. Must a claim of quantum meruit be brought in circuit court because it is "equitable in nature"? See MCL 600.8315. We conclude that because plaintiff sought only legal relief—money damages—the district court "has exclusive jurisdiction" of this civil action where "the amount in controversy does not exceed $25,000.00." MCL 600.8301(1); MCL 600.605.

Plaintiff argues that its quantum meruit claim is "equitable in nature" and therefore must be brought in the circuit court because the district court lacks general equitable jurisdiction. This Court has opined that "while a claim for contract damages is legal in nature, a claim of quantum meruit is equitable in nature." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 199; 729 NW2d 898 (2006). The Court also noted that when a contract for labor is breached, the aggrieved party may sue for damages on the contract or ignore the contract and assert unjust enrichment as the proper remedy. *Id*. For quantum meruit or unjust enrichment to apply, there must not be an express contract between the parties covering the same subject matter. *Id*. at 194. Equitable principles apply because "the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id*. at 195. Although plaintiff's theory of recovery rests on equitable principles of unjust enrichment, plaintiff's complaint sought only legal relief of money damages. In other contexts, the relief sought by a plaintiff determines its procedural rights. See, e.g., *Anzaldua v Band*, 457 Mich 530, 539 n 6; 578 NW2d 306 (1998), and *B & M Die Co*, 167 Mich App at 184, which both held that a party seeking only equitable relief has no

right to a trial by a jury except when coupled with a claim for legal relief in the form of money damages.

Plaintiff first argues that under MCL 600.8302, the district court does not have equitable jurisdiction of its quantum meruit claim. Plaintiff contends that MCL 600.8302 limits the district court's equitable jurisdiction to cases brought under Chapter 84[8] (small claims), MCL 600.8401 *et seq*.; Chapter 57 (summary proceedings), MCL 600.5701 *et seq*.; Chapter 31 (foreclosure of land contracts), MCL 600.3101 *et seq*.; Chapter 33 (partition of lands), MCL 600.3301 *et seq*.; or Chapter 38 (public nuisances), MCL 600.3801 *et seq*. Because none of these grants of equitable jurisdiction applies to plaintiff's unjust-enrichment claim, plaintiff reasons that its equitable unjust-enrichment claim must come within the circuit court's general jurisdiction under MCL 600.605, which includes "all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court . . . ." This conclusion, plaintiff contends, is supported by MCL 600.8302, which provides that district courts *only* have equitable jurisdiction to the limited extent permitted in that section.

Defendant correctly argues that plaintiff misreads MCL 600.8302(1). The statute provides, in pertinent part, "In *addition* to the civil jurisdiction provided in sections 5704 and 8301, the district court has equitable jurisdiction and authority concurrent with that of the circuit court in the matters and to the extent provided by this section." *Id*. (emphasis added). By its plain terms, § 8302 is a grant of *additional* jurisdiction to the district court that is concurrent with that of the circuit court. The statute specifically delineates this grant—

[8] The chapters discussed by plaintiff are contained within the Revised Judicature Act, MCL 600.101 *et seq*.

"the extent provided by this section"—but nowhere limits the grant of jurisdiction provided by other statutory provisions, including § 8301. If a claim specified in § 8302 is brought in the district court, this Court has held that the district court has jurisdiction even when the amount in controversy exceeds the jurisdictional "amount in controversy" limitation of § 8301. See *Clohset*, 302 Mich App at 560-563 (holding that the specific jurisdictional grant in MCL 600.8302(1) and (3) takes precedence over the more general jurisdictional grant found in MCL 600.8301(1)); see also *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 395-396; 554 NW2d 345 (1996). Contrary to plaintiff's argument, MCL 600.8302 does not provide that equitable matters not listed in the statute may not be brought in the district court and that therefore the circuit court must have jurisdiction. Rather, civil actions not within the ambit of § 8302 are controlled, when no other jurisdiction statute or constitutional provision applies, by the jurisdictional amount stated in MCL 600.8301(1).

Plaintiff's other argument, raised for the first time in its reply brief, is more problematic. Plaintiff cites MCL 600.8315, which provides, in pertinent part, "The district court shall not have jurisdiction in actions for injunctions, divorce or actions which are historically equitable in nature, except as otherwise provided by law." Plaintiff argues that because its claim is "equitable in nature," plaintiff was prohibited by § 8315 from filing its quantum meruit claim in the district court; therefore, it was required to file it in the circuit court. Plaintiff cites *Paley v Coca Cola Co*, 389 Mich 583; 209 NW2d 232 (1973), in support of its argument. *Paley* was a split decision by an evenly divided Court that affirmed this Court's holding permitting a class action to proceed in circuit court, although none of the individual plaintiffs satisfied the

jurisdictional limitation of that court.[9] In the lead opinion, Justice WILLIAMS reasoned that because class actions are historically equitable in nature, the § 8315 exclusion of "actions which are historically equitable in nature" from the jurisdiction of the district court meant that the Legislature intended class actions to be brought in the circuit court. *Paley*, 389 Mich at 590-592 (opinion by WILLIAMS, J.). Justice WILLIAMS also approvingly quoted from this Court's opinion: " '[I]rrespective of the amount in controversy, a cause sounding primarily in equity must be brought in the circuit court.' " *Id*. at 594, quoting *Paley v Coca Cola Co*, 39 Mich App 379, 383; 197 NW2d 478 (1972), aff'd 389 Mich 583 (1973).

Justice WILLIAMS's lead opinion, however, is not binding precedent because it did not represent a majority opinion of the Court. See *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976) ("[D]ecisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding . . . under the doctrine of *stare decisis*."). Moreover, plaintiff's complaint sounds primarily in contract and seeks legal relief in the form of a money judgment. Plaintiff asserts that it is entitled to money damages under equitable principles related to unjust enrichment but does not seek equitable relief. So plaintiff's complaint does not sound primarily in equity or seek equitable relief; instead, the complaint is primarily a legal claim, and the phrase "equitable in nature" should not take precedence over the phrase "otherwise provided by law" in MCL 600.8315. As to the latter, the district court has "exclusive jurisdiction in civil actions

[9] This Court subsequently held that individual plaintiffs may not aggregate their claims to satisfy the jurisdictional minimum of the circuit court. *Boyd v Nelson Credit Ctrs, Inc*, 132 Mich App 774, 780-781; 348 NW2d 25 (1984).

when the amount in controversy does not exceed $25,000." MCL 600.8301(1). As discussed, plaintiff's complaint comes within this exclusive jurisdiction.

In sum, because plaintiff sought only legal relief—money damages—the district court "has exclusive jurisdiction" of plaintiff's civil action involving contract and quasi-contract claims because the undisputed evidence shows that "the amount in controversy does not exceed $25,000.00." MCL 600.8301(1); MCL 600.605. The circuit court properly granted defendant summary disposition under MCR 2.116(C)(4).

IV. FRIVOLOUS CLAIM

A. STANDARD OF REVIEW

"A trial court's findings with regard to whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous." *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

B. ANALYSIS

Plaintiff's first argument—that the circuit court could take no action other than to dismiss the complaint after finding that it lacked subject-matter jurisdiction—is contrary to Supreme Court precedent. See *Fix*, 83 Mich at 563 (affirming the circuit court's dismissal of a complaint for lack of subject-matter jurisdiction and holding that the circuit court "was right in dismissing the case, with costs"). Further,

MCR 2.114(E), MCR 2.625(A)(2), and MCL 600.2591(1) not only authorize but require a court to sanction an attorney or party that files a frivolous action or defense. Additionally, a circuit court has inherent authority to impose sanctions on litigants appearing before it regardless of whether the court also rules that it lacks jurisdiction over a complaint. See *Maldonado v Ford Motor Co*, 476 Mich 372, 375-376, 719 NW2d 809 (2006); *Baynesan v Wayne State Univ*, 316 Mich App 643, 651, 655, 894 NW2d 102 (2016). "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997).

"Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case." *Kitchen*, 465 Mich at 662. MCL 600.2591(3)(a) defines the term "frivolous" as follows:

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

The frivolous-claim-or-defense provisions of the Michigan Court Rules and MCL 600.2591 "impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). The reasonableness of the attorney's inquiry is determined by an objective standard, not the attorney's subjective good faith. *Id*. The purpose of imposing

sanctions for asserting a frivolous action or defense is to deter parties and their attorneys from filing documents or asserting claims or defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose. *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005) (quotation marks and citation omitted). A court must determine whether a claim or defense is frivolous on the basis of the circumstances at the time it was asserted. *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008).

In ruling that plaintiff's action was frivolous, the circuit court did not specify under which MCL 600.2591(3)(a) subparagraph it based this finding. The circuit court ruled:

> [T]he matter is before the Court on a request for sanctions and whether—for filing a frivolous complaint. In this case plaintiff filed a case based on an unsigned agreement. The Court reviewed the file. There was a letter from the Association saying they didn't wish to proceed. Then this case was brought, a very serious case requesting fees with no amount and no billing ever having been made. And, there's been no proof, in fact there's an affidavit to the contrary that there was never any litigation that began to which the plaintiff even under—if they—the agreement had been signed a fee would have been earned.

While the circuit court did not specify which MCL 600.2591(3)(a) subparagraph it found applicable, it is clear from the court's comments that it made no specific mention that plaintiff acted with an improper purpose under § 2591(3)(a)(*i*). Rather, the circuit court explicitly and implicitly found that plaintiff "had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591(3)(a)(*ii*). This finding, in turn, implicates

§ 2591(3)(a)(*iii*), which applies when "[t]he party's legal position was devoid of arguable legal merit." " 'A claim is devoid of arguable legal merit if it is not sufficiently grounded in law or fact[.]' " *Ford Motor Co v Dep't of Treasury*, 313 Mich App 572, 589; 884 NW2d 587 (2015) (alteration in original), quoting *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 369; 844 NW2d 143 (2013).

The circuit court did not clearly err in its findings because they have sufficient evidentiary support; this Court is not left with a definite and firm conviction that a mistake has been made. *Kitchen*, 465 Mich at 661-662. The evidence supports that plaintiff based its claims on an unexecuted retainer agreement, which the undisputed facts showed would not have yielded a contingent fee even if effective because defendant did not initiate litigation or a claim against the developer. Defendant advised plaintiff by letter before this lawsuit was filed that it did not intend on pursuing claims against the developer. While the developer's affidavit stating that defendant had not initiated a claim or litigation against it was made after the lawsuit was filed, the facts averred could have been confirmed by contacting the clerk of the pertinent court or making direct inquiry of the developer. Accordingly, there was no basis in fact to support plaintiff's speculative belief that defendant had benefited unjustly from plaintiff's legal advice and reached a valuable settlement with the developer, which was the foundation of plaintiff's claims of quantum meruit, unjust enrichment, and fraudulent misrepresentation. And plaintiff's last claim—based on an assertion that defendant sought legal advice for which it never intended to pay—is totally unsupported by the facts in that defendant repeatedly requested a bill for services rendered in June 2015 so that it could pay for those services, but

plaintiff refused to send defendant an invoice for the services it had performed. This evidence supports the conclusion that plaintiff did not sufficiently investigate and research the factual bases of its claims. *BJ's & Sons Constr*, 266 Mich App at 405. And even if plaintiff's principal had a subjective good-faith belief in the viability of the claims, an objective assessment of the facts known and reasonably knowable, *Harkins*, 257 Mich App at 576, shows that plaintiff "had no reasonable basis to believe that the facts underlying that party's legal position were in fact true," MCL 600.2591(3)(a)(*ii*). The circuit court did not clearly err by finding that plaintiff's claims were frivolous and awarding defendant its attorney fees, subject to a reasonableness hearing. *Kitchen*, 465 Mich at 661-662; *Ford Motor Co*, 313 Mich App at 589-590.

We therefore affirm the circuit court's finding that plaintiff's claims were frivolous and remand the case for a hearing regarding a reasonable attorney fees award. See *Vittiglio v Vittiglio*, 297 Mich App 391, 408-410; 824 NW2d 591 (2012); *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171-172; 712 NW2d 731 (2005).

V. CONCLUSION

The undisputed evidence showed that plaintiff's claim for unpaid legal services under any theory "could not be proved" to exceed $25,000. So the circuit court properly granted summary disposition under MCR 2.116(C)(4) because it lacked subject-matter jurisdiction which lay exclusively with the district court. MCL 600.605; MCL 600.8301(1).

Plaintiff's complaint does not sound primarily in equity or seek equitable relief; the complaint is primarily a legal claim, and the phrase "equitable in nature"

should not take precedence over the phrase "otherwise provided by law" in MCL 600.8315. Because plaintiff sought only legal relief—money damages—the district court "has exclusive jurisdiction" of plaintiff's civil action involving its contract and quasi-contract theories because the undisputed evidence showed that "the amount in controversy does not exceed $25,000.00." MCL 600.8301(1); MCL 600.605. The circuit court properly granted defendant summary disposition. MCR 2.116(C)(4).

We affirm the circuit court's finding that plaintiff's claims were frivolous and remand the case for a hearing regarding a reasonable attorney fees award.

We affirm and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, as the prevailing party, may tax its costs under MCR 7.219(F).

BECKERING, P.J., and MARKEY and RIORDAN, JJ., concurred.

KOSTADINOVSKI v HARRINGTON

Docket No. 333034. Submitted October 10, 2017, at Detroit. Decided October 24, 2017, at 9:05 a.m. Leave to appeal sought.

Plaintiffs, Drago and Blaga Kostadinovski, brought a medical malpractice action in the Macomb Circuit Court against Steven D. Harrington, M.D. (the doctor) and Advanced Cardiothoracic Surgeons, PLLC, alleging multiple theories with respect to how the doctor breached the standard of care throughout the course of Drago's mitral-valve-repair surgery in December 2011, during which Drago suffered a stroke. Plaintiffs timely served defendants with a notice of intent to file a claim (NOI), timely filed a complaint, and timely filed an affidavit of merit. After nearly two years of litigation and the close of discovery, plaintiffs' experts could no longer endorse any of the malpractice theories and associated causation claims, determining, purportedly on the basis of information gleaned from discovery, that the doctor had instead breached the standard of care by failing to adequately monitor Drago's hypotension and to transfuse him. Defendants moved for summary disposition, arguing that the negligence theories set forth in the NOI, affidavit of merit, and complaint could not be validated. Plaintiffs agreed to the dismissal of the existing negligence allegations and complaint, but sought to file an amended complaint that included allegations regarding Drago's hypotensive state and the failure to adequately transfuse him. While the trial court, Kathryn A. Viviano, J., believed that any amendment would generally relate back to the filing date of the original complaint, the court ruled that an amendment would be futile, considering that the existing NOI would be rendered obsolete because it did not include the current malpractice theory. The denial of plaintiffs' motion to amend the complaint and the dismissal of the original complaint effectively ended plaintiffs' lawsuit. Plaintiffs appealed, challenging the denial of their motion to amend the complaint, and defendants cross-appealed, arguing that, aside from futility, amendment of the complaint should not be permitted because plaintiffs unduly delayed raising the new negligence theory and because such a late amendment would prejudice defendants.

The Court of Appeals *held*:

MCL 600.2301 provides that the court in which any action or proceeding is pending has the power to amend any process, pleading, or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. MCL 600.2301 further provides that the court, at every stage of the action or proceeding, shall disregard any error or defect in the proceedings that does not affect the substantial rights of the parties. In this case, the question was whether the Supreme Court's application of MCL 600.2301 in *Bush v Shabahang*, 484 Mich 156 (2009)—in which the Supreme Court held that alleged defects in an NOI may be cured pursuant to MCL 600.2301 when the substantial rights of the parties are not affected, when disregard or amendment of the defect is in the furtherance of justice, and when a party has made a good-faith attempt to comply with the NOI content requirements listed in MCL 600.2912b—governed the approach to be applied in the context of the procedural circumstances of the instant case. *Bush* controlled the analysis in this case: if MCL 600.2301 is implicated and potentially applicable to save a medical malpractice action when an NOI is defective because of a failure to include negligence or causation theories required by MCL 600.2912b(4)—as was the case in *Bush*—then, by analogy, MCL 600.2301 must likewise be implicated and potentially applicable when an NOI is deemed defective because it no longer includes the negligence or causation theories required by MCL 600.2912b(4) and alleged in the complaint because of a postcomplaint change in the theories being advanced by a plaintiff as a result of information gleaned from discovery. This holding was factually and legally distinguishable from the Supreme Court's holding in *Driver v Naini*, 490 Mich 239 (2011), that a plaintiff is not entitled to amend an original NOI to add nonparty defendants so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations. In this case, the NOI was timely served on defendants, as was the complaint; the amended NOI did not entail adding a new party; and this case concerned the content requirements of MCL 600.2912b(4). Accordingly, the trial court—as opposed to automatically disallowing plaintiffs to amend their complaint because of the NOI conundrum that would be created—was required to assess whether the NOI defect could be disregarded or cured by an amendment of the NOI under MCL 600.2301 in the context of futility analysis. The trial court was instructed to conduct this analysis on remand.

Reversed and remanded for further proceedings under MCL 600.2301.

ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE A CLAIM — DEFECTIVE NOTICE OF INTENT — POSTCOMPLAINT CHANGE IN MALPRACTICE THEORIES FOLLOWING DISCOVERY.

MCL 600.2301 provides that the court in which any action or proceeding is pending has the power to amend any process, pleading, or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein; MCL 600.2301 further provides that the court, at every stage of the action or proceeding, shall disregard any error or defect in the proceedings that does not affect the substantial rights of the parties; MCL 600.2301 is implicated and potentially applicable when a notice of intent to file a medical malpractice claim (NOI) is deemed defective because the NOI no longer includes the negligence or causation theories required by MCL 600.2912b(4) and alleged in the complaint due to a postcomplaint change in the theories being advanced by a plaintiff as a result of information gleaned from discovery.

Mark Granzotto, PC (by *Mark Granzotto*) and *Morgan & Meyers PLC* (by *Jeffrey T. Meyers* and *Timothy M. Takala*) for Drago and Blaga Kostadinovski.

Collins Einhorn Farrell PC (by *Noreen L. Slank* and *Michael J. Cook*) for Steven D. Harrington, M.D., and Advanced Cardiothoracic Surgeons, PLLC.

Before: BORRELLO, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

MURPHY, J. Plaintiffs, Drago Kostadinovski and Blaga Kostadinovski, husband and wife, appeal as of right the trial court's order denying their motion to file an amended medical malpractice complaint after the court had earlier granted summary disposition in favor of defendants, Steven D. Harrington, M.D. (the doctor) and Advanced Cardiothoracic Surgeons, PLLC, on plaintiffs' original complaint. Mr. Kostadinovski suf-

fered a stroke during the course of a mitral-valve-repair (MVR) surgery performed by the doctor in December 2011. Plaintiffs timely served defendants with a notice of intent to file a claim (NOI), MCL 600.2912b, and later timely filed a complaint for medical malpractice against defendants, along with the necessary affidavit of merit, MCL 600.2912d. In the NOI, affidavit of merit, and the complaint, plaintiffs set forth multiple theories with respect to how the doctor allegedly breached the standard of care in connection with the surgery. After nearly two years of litigation and the close of discovery, plaintiffs' experts effectively disavowed and could no longer endorse the previously identified negligence or breach-of-care theories and the associated causation claims, determining now, purportedly on the basis of information gleaned from discovery, that the doctor had instead breached the standard of care by failing to adequately monitor Mr. Kostadinovski's hypotension (low blood pressure) and transfuse him, resulting in the stroke. Plaintiffs agreed to the dismissal of the existing negligence allegations and complaint, but sought to file an amended complaint that included allegations regarding Mr. Kostadinovski's hypotensive state and the failure to adequately transfuse him. While the trial court believed that any amendment would generally relate back to the filing date of the original complaint, the court ruled that an amendment would be futile, considering that the existing NOI would be rendered obsolete because it did not include the current malpractice theory. And, absent the mandatory NOI, a medical malpractice action could not be sustained. The denial of plaintiffs' motion to amend the complaint, in conjunction with the dismissal of the original complaint, effectively ended plaintiffs' lawsuit. On appeal, plaintiffs challenge the denial of their motion to amend the complaint. Defendants cross-appeal, arguing that,

aside from futility, amendment of the complaint should not be permitted because plaintiffs unduly delayed raising the new negligence theory and because such a late amendment would prejudice defendants. On the strength of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), we hold that the trial court—as opposed to automatically disallowing plaintiffs to amend their complaint because of the NOI conundrum that would be created—was required to assess whether the NOI defect could be disregarded or cured by an amendment of the NOI under MCL 600.2301 in the context of futility analysis. Accordingly, we reverse and remand for further proceedings under MCL 600.2301.

I. BACKGROUND

On December 9, 2013, plaintiffs served defendants with the NOI, asserting that on December 14, 2011, the doctor had performed robotic-assisted MVR surgery on Mr. Kostadinovski and that, as subsequently determined, Mr. Kostadinovski suffered a stroke during the course of the procedure. The NOI listed six specific theories with respect to the manner in which the doctor allegedly breached the applicable standard of care relative to the surgery and preparation for the surgery, along with identifying related causation claims.[1] On June 4, 2014, an expert for plaintiffs executed an affidavit of merit that listed the same six negligence theories outlined in the NOI in regard to the alleged breaches of the standard of care. On June 5, 2014, plaintiffs filed their medical malpractice complaint against defendants, along with the affidavit of merit, alleging that the doctor breached the standard of care in the six ways identified in the NOI and affidavit of

[1] A seventh nonspecific allegation indicated that the doctor had "failed to adhere to any and all additional requirements of the standard of care as may be revealed through the discovery process."

merit. The causation claims were also identical in all three legal documents. In resolving this appeal, it is unnecessary for us to discuss the particular nature of these negligence and causation theories.

On March 21, 2016, defendants filed a motion for summary disposition, arguing that, as revealed during discovery, plaintiffs' expert witnesses could not validate or support the six negligence theories set forth in the NOI, affidavit of merit, and complaint. On that same date, March 21, 2016, plaintiffs filed a motion to amend their complaint. Plaintiffs asserted that discovery had recently been completed and that discovery showed that Mr. Kostadinovski "was in a hypotensive state during the operation and was not adequately transfused." According to plaintiffs, this evidence was previously unknown and only came to light following the deposition of the perfusionist, the continuing deposition of the doctor, and the depositions of plaintiffs' retained experts. Plaintiffs sought to amend the complaint to allege negligence against the doctor "for failing to adequately monitor Mr. Kostadinovski's hypotension during the operation and failing to transfuse the patient so as to maintain the patient's blood pressure." On March 28, 2016, a hearing was held on plaintiffs' motion to amend the complaint, and the trial court decided to take the matter under advisement. On April 25, 2016, a hearing was conducted on defendants' motion for summary disposition, at which time plaintiffs agreed to the dismissal of their original complaint, given that their theories of negligence now lacked expert support, as did the causation claims that had been linked to the defunct negligence theories.[2] Plaintiffs' motion to amend the complaint remained pending.

[2] By order dated April 25, 2016, the trial court indicated that plaintiffs' allegations of negligence and causation as stated in the NOI, complaint, and affidavit of merit were dismissed with prejudice.

On April 29, 2016, the trial court issued a written opinion and order denying plaintiffs' motion to amend the complaint. The court initially ruled, under MCR 2.118(D), that because the proposed amendment of plaintiffs' complaint arose from the same transactional setting as that covered by the original complaint, any amendment would relate back to the date that the original complaint was filed for purposes of the period of limitations. However, after citing language in MCR 2.118 and associated caselaw regarding principles governing the amendment of pleadings, along with MCL 600.2912b on notices of intent, the trial court ruled:

> The Court finds that plaintiffs' NOI did not set forth the minimal requirements to provide notice of the claim of breach of the standard of care with regard to the failure to monitor hypotension levels during the operation and the failure to transfuse the patient [as] a potential cause of injury as required by MCL 600.2912b. Accordingly, defendants were not given the opportunity to engage in any type of settlement negotiation with regard to the hypotension and transfusion claims because they were not given notice of the existence of any such claims. Even if plaintiffs had included these new allegations in their original complaint, defendants lacked the requisite notice mandated by MCL 600.2912b because they were not raised in the NOI.
>
> Plaintiffs' failure to adhere to the statutory mandates renders the new allegations contained in the proposed amended complaint futile, as these new allegations of medical malpractice must fail as a matter of law. Therefore, plaintiffs' motion to amend is properly denied. [Citations omitted.]

Plaintiffs appeal as of right.

II. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's ruling on a motion for leave to file an amended

pleading. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). "Thus, we defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). "A trial court . . . necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). We review de novo matters of statutory construction, as well as questions of law in general. *Wells Fargo Bank, NA v SBC IV REO, LLC*, 318 Mich App 72, 89-90; 896 NW2d 821 (2016).

B. AMENDMENT OF PLEADINGS — BASIC PRINCIPLES

A pleading may be amended once as a matter of course if done so within a limited period; otherwise, "a party may amend a pleading only by leave of the court or by written consent of the adverse party." MCR 2.118(A)(1) and (2). Plaintiffs were no longer entitled to amend their complaint as of right, necessitating their motion to amend the complaint. MCR 2.118(A)(2) provides that "[l]eave shall be freely given when justice so requires." Therefore, a motion to amend should ordinarily be granted. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). A court must give a particularized reason for denying leave to amend a pleading, and acceptable reasons for denial include undue delay, bad faith or dilatory motive by the party seeking leave, repeated failures to cure deficiencies after previously allowed amendments, undue prejudice to the nonmoving party, and futility. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007); *Wormsbacher*, 284 Mich App at 8. The amendment of a pleading is properly deemed futile when, regardless of

the substantive merits of the proposed amended pleading, the amendment is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998); *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

With respect to the question whether an amendment of a pleading relates back to the date that the original pleading was filed, MCR 2.118(D) provides:

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit.

In *Doyle v Hutzel Hosp*, 241 Mich App 206, 218-219; 615 NW2d 759 (2000), this Court analyzed MCR 2.118(D) and the caselaw regarding the amendment of pleadings, holding:

> When placed in context against a backdrop providing that leave to amend pleadings must be freely granted, MCR 2.118(A)(2), the principle to be gleaned from these cases is the necessity for a broadly focused inquiry regarding whether the allegations in the original and amended pleadings stem from the same general "conduct, transaction, or occurrence." The temporal setting of the allegations is not, in and of itself, the determinative or paramount factor in resolving the propriety of an amendment of the pleadings, and undue focus on temporal differences clouds the requisite broader analysis.

It does not matter whether the proposed amendment introduces new facts, a different cause of action, or a new theory, so long as the amendment springs from the same transactional setting as that pleaded originally. *Id*. at 215.

C. MEDICAL MALPRACTICE ACTIONS — NOTICE OF INTENT TO FILE A CLAIM

The focus of the trial court's ruling and the arguments of the parties concern the NOI and the fact that plaintiffs' proposed amended complaint set forth a negligence or breach-of-care theory that was not recited in the NOI. MCL 600.2912b provides, in pertinent part:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
>
> * * *
>
> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.
>
> * * *

> (6) After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

In *Bush*, 484 Mich at 174, our Supreme Court noted the legislative intent behind MCL 600.2912b, observing:

> The stated purpose of § 2912b was to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs. [Citation, quotation marks, and ellipsis omitted.]

D. DISCUSSION AND HOLDING

Our analysis today entails the question whether the *Bush* Court's application of MCL 600.2301 in a case involving a defective NOI governs the approach to be applied in the context of the procedural circumstances present in the instant case, or whether two published opinions from this Court that arguably lend some support for defendants' position are controlling. MCL 600.2301 provides in full:

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

In *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 479-482; 679 NW2d 98 (2004), the plaintiff served an

NOI on the defendants, claiming medical malpractice in the performance of a mediastinoscopy, and the plaintiff later filed a complaint against the defendants, along with two supporting affidavits of merit. The *Gulley-Reaves* panel summarized the defendants' response as follows:

> Defendants filed a motion for summary disposition challenging plaintiff's compliance with the statutory requirements for providing presuit notice of intent to file a medical-malpractice action. Specifically, defendants asserted that the notice of intent alleged malpractice with respect to the surgical procedure only. Upon the filing of the medical-malpractice complaint, defendants learned that plaintiff was also challenging the administration of the anesthesia during the surgical procedure. The notice of intent allegedly did not comply with the statutory requirements because it did not advise of the claimed wrongdoing with regard to the anesthesia. That is, it did not allege a breach of the standard of care and proximate cause based on anesthesia given during the surgical procedure. [*Id*. at 482-483.][3]

The *Gulley-Reaves* panel agreed that the NOI was defective because it "did not set forth the minimal requirements to identify that the anesthesia was a potential cause of plaintiff's injury" and because the NOI "was silent with regard to any breach of the standard of care during the administration of anesthesia." *Id*. at 487. This Court held that the trial court erred by denying the defendants' motion for summary disposition, given that the "[p]laintiff failed to provide notice of the claim of breach of the standard of care with regard to the administration of anesthesia as required by" the NOI statute. *Id*. at 490. The opinion

[3] The plaintiff's affidavits of merit and complaint in *Gulley-Reaves* did reveal a malpractice claim based on the faulty administration of anesthesia. *Gulley-Reaves*, 260 Mich App at 481-482.

did not include any discussion whatsoever of MCL 600.2301, and the *Bush* opinion was still five years on the horizon.

In *Bush*, a case involving claims of medical malpractice arising out of surgery to repair an aortic aneurysm, the NOI, among other alleged defects, purportedly failed to identify the particular actions taken by physician assistants and the nursing staff that breached the standard of care, failed to state how the hiring and training practices of one of the defendants breached the standard of care, and failed to set forth some necessary theories of causation. *Bush*, 484 Mich at 161-162, 179-180. The *Bush* Court rejected the proposition that mandatory dismissal of a medical malpractice action is the sole remedy for a defective NOI or violation of MCL 600.2912b. *Id*. at 170-181. Next, the Court, focusing on the alleged NOI defects, held:

> We agree with the Court of Appeals that these omissions do constitute defects in the NOI. However, we disagree with the Court of Appeals regarding the appropriate remedy. We are not persuaded that the defects . . . warrant dismissal of a claim. These types of defects fall squarely within the ambit of § 2301 and should be disregarded or cured by amendment. It would not be in the furtherance of justice to dismiss a claim where the plaintiff has made a good-faith attempt to comply with the content requirement of § 2912b. A dismissal would only be warranted if the party fails to make a good-faith attempt to comply with the content requirements. Accordingly, we hold that the alleged defects can be cured pursuant to § 2301 because the substantial rights of the parties are not affected, and "disregard" or "amendment" of the defect is in the furtherance of justice when a party has made a good-faith attempt to comply with the content provisions of § 2912b. [*Id*. at 180-181.]

After *Bush* was decided, this Court issued an opinion in *Decker v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010). In *Decker*, the plaintiff, by his next friend, filed a medical malpractice action that was predicated on an alleged failure to properly monitor the plaintiff's glucose level; the plaintiff was diagnosed "with cerebral palsy from an early anoxic (lack of oxygen) brain injury." *Id*. at 670-671. After serving his NOI on the defendants and filing his complaint with supporting affidavits of merit, the plaintiff sought leave to file an amended complaint in order to allege 17 specific ways in which the defendants breached the applicable standards of care. *Id*. at 671. This Court summarized the plaintiff's argument in favor of allowing the amended complaint:

> Plaintiff argued that the amendment was proper because (1) discovery remained open and experts had not been deposed, (2) the amendment merely clarified allegations and issues and was made possible after particular information was learned through the discovery process, (3) the clarifications ultimately relate back to the underlying lynch pin of this entire case which is that they did not appropriately monitor and maintain this baby's glucose level, and (4) defendants would not be prejudiced by the amendment. [*Id*. (quotation marks and brackets omitted).]

The trial court granted the request to file an amended complaint and subsequently denied various motions for summary disposition filed by the defendants, with this Court granting and consolidating multiple applications for leave to appeal pursued by the defendants. *Id*. at 671-674.

The defendants in *Decker* argued that the plaintiff's amended complaint had asserted new theories of medical malpractice that were not contained in the NOI; therefore, amendment of the complaint should not have been allowed or the amended complaint should

have been summarily dismissed pursuant to *Gulley-Reaves*. *Decker*, 287 Mich App at 679-682. The *Decker* panel found that the plaintiff, while providing some details and clarification, had not actually alleged any new negligence or causation claims in the amended complaint that were not already encompassed by the claims in the NOI, so the purpose of the notice requirement was realized. *Id*. at 677-682. The Court observed that "[t]his is not a case where, as in *Gulley-Reaves*, the plaintiff set forth a totally new and different potential cause of injury in an amended complaint compared to the potential cause of injury set forth in her NOI, e.g., the manner in which a particular surgical procedure was performed compared to the manner in which anesthesia was administered during the surgery." *Id*. at 680-681. This statement by the *Decker* panel might lead one to believe at first glance that, when a totally new breach-of-care or causation theory actually is pursued, as in the instant case, summary dismissal or disallowance of an amended complaint would be appropriate.

We conclude that *Bush* controls our analysis. If MCL 600.2301 is implicated and potentially applicable to save a medical malpractice action when an NOI is defective because of a failure to include negligence or causation theories required by MCL 600.2912b(4), then, by analogy, MCL 600.2301 must likewise be implicated and potentially applicable when an NOI is deemed defective because it no longer includes the negligence or causation theories required by MCL 600.2912b(4) and alleged in the complaint due to a postcomplaint change in the theories being advanced by a plaintiff as a result of information gleaned from discovery. There is no sound or valid reason that the principles from *Bush* should not be applied here. Indeed, as a general observation, the factual circum-

stances are even more compelling for the invocation of MCL 600.2301 when an NOI is not defective from the outset but becomes defective because discovery has shed new light on the case and given rise to a new liability theory.[4]

Assuming that *Gulley-Reaves* supports defendants' position here, it was issued prior to *Bush*, and the Court did not entertain an argument under MCL 600.2301. Second, the Court in *Decker* also did not entertain an argument under MCL 600.2301, nor would it have been necessary for the panel to have even reached an argument under MCL 600.2301, given the nature of its ruling that no new claims were asserted in the amended complaint that were not already accounted for in the NOI. The *Decker* Court simply distinguished *Gulley-Reaves*, and we can only speculate whether it would have applied the *Bush* § 2301 analysis had it determined that new claims were being raised, or whether it would have applied the *Gulley-Reaves* opinion and dismissed the case.[5] Ultimately, *Decker* did not address the effect of *Bush* and MCL 600.2301 on a case involving new theories of negligence and causation that differed from those identified in the NOI. Moreover, *Bush* is controlling Supreme Court precedent, trumping decisions by this Court. See MCR 7.215(J)(1).[6]

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[4] We note that plaintiffs contemplated such a possibility when they included language in the NOI that the doctor failed to adhere to the standard of care in additional ways that might be revealed through discovery. See note 1 of this opinion.

[5] The *Decker* panel was aware of *Bush*, considering that it cited *Bush* with respect to explaining the purpose of an NOI. *Decker*, 287 Mich App at 675-676.

[6] Plaintiffs argue that MCL 600.2912b simply requires the service of an NOI before suit is filed and that once this is accomplished through the service of a proper and compliant NOI, *as judged at the time suit is*

We do find it necessary to address *Driver v Naini*, 490 Mich 239, 243; 802 NW2d 311 (2011), wherein our Supreme Court held "that a plaintiff is not entitled to amend an original NOI *to add nonparty defendants* so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations . . . ." (Emphasis added.) The *Driver* Court rejected the plaintiff's argument that he should be allowed to amend his original NOI pursuant to *Bush* and MCL 600.2301. *Id*. at 251-259. The Court in *Driver* explained:

> *Bush* is inapplicable to the present circumstances. At the outset we note that the holding in *Bush* that a defective yet timely NOI could toll the statute of limitations simply does not apply here because CCA [the nonparty defendant] never received a timely, albeit defective, NOI. More importantly, and contrary to the dissent's analysis, the facts at issue do not trigger application of MCL 600.2301. . . . By its plain language, MCL 600.2301 only applies to actions or proceedings that are *pending*. Here, plaintiff failed to commence an action against CCA before the six-month discovery period expired, and his claim was therefore barred by the statute of limitations. An action is not pending if it cannot be commenced . . . . In *Bush*, however, this Court explained that an NOI is part of a medical malpractice proceeding. The Court explained that, since an NOI must be given before a medical malpractice claim can be filed, the service of an NOI is a part of a medical malpractice proceeding. As a result, MCL

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filed and by the language in the original complaint, the requirements of the statute have been satisfied, absent the need to revisit the NOI even if a new theory of negligence or causation is later developed that was not included in the NOI and that forms the basis of an amended complaint. If this were the law, the entire analysis in *Decker* would have been completely unnecessary because a proper and compliant NOI had been served on the defendants, as judged on the date the original complaint was filed and by the language in that complaint. Moreover, the approach suggested by plaintiffs would undermine the legislative intent and purpose behind MCL 600.2912b.

> 600.2301 applies to the NOI process. Although plaintiff gave CCA an NOI, he could not file a medical malpractice claim against CCA because the six-month discovery period had already expired. Service of the NOI on CCA could not, then, have been part of any proceeding against CCA because plaintiff's claim was already time-barred when he sent the NOI. A proceeding cannot be pending if it was time-barred at the outset. Therefore, MCL 600.2301 is inapplicable because there was no action or proceeding pending against CCA in this case. [*Driver*, 490 Mich at 253-254 (citations, quotation marks, brackets, and emphasis omitted).]

The *Driver* Court later emphasized that the *Bush* opinion concerned "the *content* requirements of MCL 600.2912b(4)." *Id*. at 257.

In the instant case, the NOI was timely served on defendants, as was the complaint; an amended NOI would not entail adding a new party; and we, like the *Bush* Court, are concerned with the content requirements of MCL 600.2912b(4). Therefore, *Driver* is factually and legally distinguishable, and MCL 600.2301 can be considered.

For purposes of guidance on remand, we provide the following direction. The trial court is to engage in an analysis under MCL 600.2301 to determine whether amendment of the NOI or disregard of the prospective NOI defect would be appropriate.[7] If the trial court concludes that amendment or disregard of the defect would not be proper under MCL 600.2301, the court's prior futility analysis relative to plaintiff's motion to amend the complaint shall stand and the motion to amend the complaint shall be denied, ending the case, subject, of course, to appeal on the § 2301 analysis. If

[7] We conclude that it would not be proper for us to conduct the analysis under MCL 600.2301 in the first instance; that, at least initially, is the trial court's role, which we shall not intrude upon.

the trial court determines that MCL 600.2301 supports amendment of the NOI or disregard of the NOI defect, thereby negating the court's prior futility analysis, amendment of the complaint shall be allowed, with one caveat. Aside from futility, defendants had proffered additional reasons why amendment of the complaint should not be allowed, i.e., undue delay and undue prejudice, see *Miller*, 477 Mich at 105, which were not reached by the trial court and are repeated by defendants in their appellate brief as alternative bases to affirm. The trial court shall entertain those arguments if the court rules in plaintiffs' favor on MCL 600.2301.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiffs are awarded taxable costs under MCR 7.219.

BORRELLO, P.J., and RONAYNE KRAUSE, J., concurred with MURPHY, J.

RAY v SWAGER (ON REMAND)

Docket No. 322766. Submitted August 23, 2017, at Lansing. Decided October 24, 2017, at 9:10 a.m. Leave to appeal denied 501 Mich 1087.

Michael A. Ray and Jacqueline M. Ray, acting as coconservators for their minor child, Kersch Ray, filed an action in the Washtenaw Circuit Court against Eric Swager, Scott A. Platt, and others, alleging in part that Swager, the coach of Kersch's cross-country team, was liable for injuries suffered by Kersch. Kersch was struck by an automobile driven by Platt when Kersch was running across an intersection with his teammates during an early morning cross-country team practice. Plaintiffs alleged that Swager, who was running with the team, had instructed the runners to cross the road even though the "Do Not Walk" symbol was illuminated. Swager moved for summary disposition under MCR 2.116(C)(7), arguing that as a governmental employee he was entitled to immunity from liability under MCL 691.1407(2) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The circuit court, Carol A. Kuhnke, J., denied Swager's motion, concluding that whether Swager's actions were grossly negligent and whether he was the proximate cause of Kersch's injuries were questions of fact for the jury to decide. Swager appealed. In an unpublished per curiam opinion, issued October 15, 2015 (Docket No. 322766), the Court of Appeals, BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ., reversed and remanded the case to the circuit court for entry of summary disposition in favor of Swager. The Court of Appeals reasoned that Swager was immune from liability under MCL 691.1407(2) because reasonable minds could not conclude that Swager was the proximate cause of Kersch's injuries; rather, Platt's presence in the roadway and Kersch's own actions were the immediate and direct causes of Kersch's injuries, and being struck by a moving vehicle was the most proximate cause of Kersch's injuries. Plaintiffs sought leave to appeal. The Supreme Court heard oral argument on whether to grant plaintiffs' application for leave to appeal or take other action. 499 Mich 988 (2016). In lieu of granting leave to appeal, the Supreme Court ultimately issued an opinion vacating the Court of Appeals' opinion and remanding the case to the Court of Appeals for reconsideration in light of the

Supreme Court's clarification of the method for determining *the* proximate cause of a plaintiff's injuries. 501 Mich 52 (2017). In a majority opinion by Justice VIVIANO, joined by Justices MCCORMACK, BERNSTEIN, and LARSEN, the Supreme Court held that the phrase "proximate cause" refers to legal causation, which is distinct and separate from factual causation. Noting that there must be a prerequisite determination that a government actor was grossly negligent before proximate cause could be decided, the Supreme Court emphasized that determining proximate cause does not require a court to weigh factual, or but-for, causes and that the Court of Appeals erred by doing so. According to the Supreme Court, when a defendant's conduct is a factual cause of the plaintiff's injuries, a court must assess the foreseeability of the consequences of the defendant's conduct and the legal responsibility of all the relevant actors to determine whether the conduct of a government actor, or some other person, is the proximate cause of a plaintiff's injuries—that is, the most immediate, efficient, and direct cause of the plaintiff's injuries. *Dean v Childs*, 474 Mich 914 (2005), was overruled, and the portion of *Beals v Michigan*, 497 Mich 363, 375 (2015), that relied on the order in *Dean* was disavowed. Justice WILDER, joined by Chief Justice MARKMAN and Justice ZAHRA, dissented, disagreeing with the majority's directive that determining the proximate cause of a plaintiff's injuries did not require weighing the factual causes of the plaintiff's injuries and asserting that identifying *the* proximate cause in a case must be determined by analysis of both factual and legal causation.

On remand, the Court of Appeals *held*:

MCL 691.1407(2) provides broad immunity from tort liability to a government employee when (1) the government employee is acting or reasonably believes he or she is acting within the scope of his or her authority, (2) the governmental agency is engaged in the exercise or discharge of a governmental function, and (3) the government employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. The framework for determining proximate cause established by our Supreme Court in this case first requires a determination of whether a defendant's gross negligence was a cause in fact of the plaintiff's injuries. When there are multiple proximate causes involved, a court must determine which one of those proximate causes is *the* proximate cause of the plaintiff's injuries. If a defendant's gross negligence was a factual cause, the analysis continues to whether the defendant's conduct was a proximate, that is, legal, cause by addressing the foreseeability of the consequences of the defendant's conduct and the defendant's legal

responsibility for those consequences. The analysis must also determine whether there were other proximate causes of the plaintiff's injuries. This requires consideration of whether any other human actor was negligent because only a human actor's negligence can be a proximate cause. Nonhuman and natural forces may be relevant to the question of foreseeability and intervening causes, but nonhuman and natural factors can never be considered the proximate cause of a plaintiff's injuries for purposes of the GTLA. When all the proximate causes have been identified, the question becomes whether the defendant's grossly negligent conduct was *the* proximate cause of the plaintiff's injuries. This requires consideration of the defendant's conduct and whether the conduct was, or could have been, the one most immediate, efficient, and direct cause of the plaintiff's injuries. The relevant inquiry is not whether the defendant's conduct was the immediate factual cause of the injury but whether, weighing the legal responsibilities of the actors involved, the government actor could be considered the proximate cause. In this case, material questions of factual dispute prevented the Court from assessing Swager's, Kersch's, and Platt's respective and alleged negligent conduct, weighing the actors' competing legal responsibilities, determining the proximate cause of Kersch's injuries, and resolving Swager's claim to governmental immunity as a matter of law. Given the material factual disputes, Swager was not entitled to summary disposition under the GTLA.

Trial court's order denying Swager's motion for summary disposition affirmed, and case remanded for further proceedings.

BOONSTRA, P.J., concurring, wrote separately to suggest further clarification by the Supreme Court of the roles that factual and legal causation play when analyzing whether a defendant's conduct was the proximate cause of a plaintiff's injuries under the GTLA. Judge BOONSTRA expressed concern that parts of the Supreme Court majority's opinion in this case could lead to confusion, including the majority opinion's decision not to provide guidance for determining which proximate cause is *the* proximate cause for purposes of the GTLA. The clarification announced by the Supreme Court must be refined in order for lower courts to effectively implement the analytical framework introduced in *Ray*.

Johnson Law, PLC (by *Christopher P. Desmond* and *Ven R. Johnson*) for Kersch Ray.

Giarmarco, Mullins & Horton, PC (by *Timothy J. Mullins* and *John L. Miller*) for Eric Swager.

ON REMAND

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

PER CURIAM. This case is before us on remand from the Michigan Supreme Court. Previously, defendant Eric Swager appealed in this Court as of right, asserting that the trial court erred by denying his motion for summary disposition on governmental immunity grounds under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. In our prior opinion, we reversed the trial court's decision and remanded for entry of summary disposition in Swager's favor on the basis of our conclusion that reasonable minds could not conclude that Swager was "the proximate cause" of plaintiff Kersch Ray's injuries. *Ray v Swager*, unpublished per curiam opinion of the Court of Appeals, issued October 15, 2015 (Docket No. 322766). Ray sought leave to appeal in the Michigan Supreme Court, and the Michigan Supreme Court, after hearing oral argument on the application, announced a new framework to clarify the process for determining "the proximate cause" in the context of the GTLA. See *Ray v Swager*, 501 Mich 52, 64-65; 903 NW2d 366 (2017). The Supreme Court vacated our decision and remanded for reconsideration in light of its decision. *Id*. at 83. On remand, because issues of material fact remain that preclude summary disposition, we affirm the trial court's denial of Swager's motion for summary disposition, and we remand to the trial court for further proceedings.

On September 2, 2011, 13-year-old Ray was struck by an automobile driven by Scott Platt. The accident occurred at the intersection of Freer Road and Old US-12 while Ray was running with the Chelsea High School cross-country team. Swager—the team's coach—

was running with the team that morning. As the team approached the intersection in question, they encountered a "red hand" on the pedestrian signal, indicating that pedestrians should not cross the road. See MCL 257.613(2)(b). Although the eyewitness accounts vary, there is evidence that Swager said something to the effect of "let's go," and the team crossed the street. Ray, who was in the back of the group, ran into the road, and he was hit by a car driven by Platt.

Following the accident, Ray filed the instant lawsuit. Swager moved for summary disposition on governmental-immunity grounds, asserting that he was entitled to immunity as a governmental employee under MCL 691.1407(2) because he had not been "grossly negligent" and because his conduct was not "the proximate cause" of plaintiff's injuries. The trial court denied Swager's motion, concluding that the case was "fact laden." Swager then appealed as of right in this Court, and we reversed the decision of the trial court and remanded for entry of summary disposition in favor of Swager. Specifically, we concluded that Swager's verbal remarks could not reasonably be considered the proximate cause of Ray's injuries within the meaning of the GTLA, considering the other more immediate and direct causes of Ray's injuries, including Ray's own conduct of running into the street and the fact that Ray was hit by a car driven by Platt.

The Michigan Supreme Court vacated our decision and remanded for reconsideration under a framework that clarifies "the role that factual and legal causation play when analyzing whether a defendant's conduct was 'the proximate cause' of a plaintiff's injuries under the GTLA." *Ray*, 501 Mich at 64-65. The analysis under this framework begins with determining whether the defendant's gross negligence was a cause

in fact of the plaintiff's injuries. *Id*. at 65. Provided that a defendant's gross negligence was a factual cause, the court must then consider whether the defendant was a proximate—i.e., legal—cause by addressing foreseeability and whether the defendant may be held legally responsible for his or her conduct. *Id*. at 65, 74. In addition to considering the defendant's conduct, it must also be decided whether there were other proximate causes of the injury. *Id*. at 65, 74-76. Determining if there were other proximate causes requires consideration of whether any other human actor was negligent because "only a human actor's breach of a duty can be a proximate cause." *Id*. at 72. "Nonhuman and natural forces" may bear on the question of foreseeability and intervening causes for purposes of analyzing proximate cause, but they can never be considered the proximate cause of a plaintiff's injuries for purposes of the GTLA. *Id*.

Once the various proximate causes have been determined, the question then becomes whether, taking all possible proximate causes into account, the government actor's gross negligence was *the* proximate cause of injury. *Id*. at 83. This requires "considering defendant's actions alongside any other potential proximate causes to determine whether defendant's actions were, or could have been, 'the one most immediate, efficient, and direct cause' of the injuries." *Id*. at 76. The relevant inquiry is not whether the defendant's conduct was the immediate factual cause of injury, but whether, weighing the legal responsibilities of the actors involved, the government actor could be considered "the proximate cause." *Id*. at 71-72.

Considering this standard in the context of the current case, we conclude that there are material questions of factual dispute that prevent us from

assessing the actors' respective negligence, weighing their competing legal responsibilities, determining the proximate cause of Ray's injuries, and resolving Swager's claim to governmental immunity as a matter of law.[1] In particular, from the record before us, it appears that there are three persons whose conduct could potentially be considered a proximate cause—Swager, Ray, and Platt. See *id*. at 64-65. However, the record before us is not uncontested with regard to the facts and circumstances surrounding the actions taken by these individuals. Instead, there are numerous accounts of the accident in the record before us, and these accounts differ widely in terms of the configuration of the group of runners, precisely what Swager said, and to whom he said it.

In our previous opinion, we concluded that these factual disputes were not material because, even if Ray heard Swager, Swager's verbal remarks were simply too remote to be considered the one most immediate, efficient, and direct cause of Ray's injuries given that Ray ultimately ran into the street under his own power and was then struck by a car driven by Platt. *Ray*, unpub op at 3-4. However, under the standard set forth by the Supreme Court, these factual disputes now preclude summary disposition. For instance, one of the main points of factual contention is how far Ray trailed the group of runners. Ray's location relative to the rest of the group bears on whether he even heard Swager, whether Swager's instruction applied to Ray, whether Ray had a duty to independently evaluate the safety of the road before crossing, and whether Ray

[1] See *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003) ("If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law.").

could be considered negligent in relying on Swager's remark. Whether Swager's instruction applied to Ray—and how far Ray trailed the group—is also material to determining whether Swager was grossly negligent[2] in giving this instruction and whether it was foreseeable that Ray would follow Swager into the road without looking. Aside from the actions of Swager and Ray, there are also factual disputes regarding Platt's conduct, including debate about whether he accelerated as he approached the yellow traffic light despite the presence of numerous runners in the area. In short, given the myriad variables affecting the actors' respective negligence and legal responsibility, and in light of the factual disputes relating to these issues, we cannot conclude as a matter of law that Swager was not grossly negligent and that this gross negligence did not constitute the proximate cause of Ray's injuries. See MCL 691.1407(2)(c). Consequently, Swager was not entitled to summary disposition based on immunity granted by the GTLA. See *Poppen*, 256 Mich App at 354. Therefore, we affirm the circuit court order denying Swager's motion for summary disposition.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

SAAD and HOEKSTRA, JJ., concurred.

BOONSTRA, P.J. (*concurring*). I concur with the majority opinion, but write separately to emphasize the following additional points.

First, courts must be ever vigilant to decide cases on the basis of legal merits, not emotion. This case pres-

[2] " 'Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a).

ents an incident that by any measure was nothing short of tragic, and one young man and his family will suffer a lifetime of consequences that the rest of us can at best only imagine. In the face of such tragedy, judges should be appropriately sympathetic. Human empathy survives the donning of a black robe. That said, it is equally true (though perhaps less understood) that in a world of pure legal issues—such as the world of an appellate court whose charge is to assess whether legal error occurred in a lower court—even sympathetic judges must set emotion aside and dispassionately decide the legal issues presented without bias or favor toward any party. Appeals to emotion, while understandable, belong elsewhere.[1]

Second, I am compelled to suggest that this Court and the trial courts of this state would benefit from further articulation of the framework that the Supreme Court outlined in its recent decision in this case. See *Ray v Swager*, 501 Mich 52; 903 NW2d 366 (2017).[2] While the Majority indicated that its decision was intended to "clarif[y] the role that factual and legal

[1] In other words, appellate courts should be mindful of Justice Holmes's observation made over a century ago:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. [*Northern Securities Co v United States*, 193 US 197, 400-401; 24 S Ct 436; 48 L Ed 679 (1904) (Holmes, J., dissenting).]

[2] Four Justices joined the majority opinion. Three Justices joined the dissenting opinion. To avoid confusion, I will refer to the majority opinion as "the Majority" or "the Court" and to the dissenting opinion as "the Dissent."

causation play when analyzing whether a defendant's conduct was 'the proximate cause' of a plaintiff's injuries under the [governmental tort liability act (GTLA), MCL 691.1401 *et seq*.]," *id*. at 64-65, I am convinced that I am far from alone in scratching my head as I attempt to envision how that framework will (and indeed how it can) be applied in the trial courts of this state.[3] Indeed, in my view, the Dissent was appropriately concerned that the approach of the Majority "will almost inevitably result in jurisprudential confusion and upset in lower courts." *Id*. at 97 n 25 (WILDER, J., dissenting). While I appreciate that the Majority did not share the Dissent's concern, *id*. at 71 n 43 (opinion of the Court), the Majority also expressly "decline[d] to address how a court ought to decide, in a case in which there is more than one proximate cause, whether the defendant's conduct is '*the* proximate cause.' " *Id*. at 66 n 26.

Why do I envision *Ray* resulting in confusion below? Because, respectfully, the Majority did not, in my judgment, achieve the well-intentioned clarity that it sought. It did appropriately recognize that longstanding confusion has existed in the caselaw of this state (and elsewhere) because courts have at various times given the term "proximate cause" two entirely distinct (and inconsistent) meanings.[4] Such confusion

[3] While the view of the Majority prevailed and its opinion therefore represents precedent that binds the lower courts, I would suggest that the very nature of the Court's 4–3 split on this issue and the manner in which the Majority and the Dissent seem to talk past each other without really joining issue, confirm that confusion will continue to reign, and that it will continue to rain down on the lower courts until the legal framework is further clarified.

[4] See, e.g., *Ray*, 501 Mich at 63 (opinion of the Court) ("We recognize that our own decisions have not always been perfectly clear on this topic given that we have used 'proximate cause' both as a broader term referring to factual causation and legal causation together and as a

indeed merits clarification. To some extent, the Majority (as well as the Dissent) achieved some clarification on that score simply by acknowledging and addressing the past discordant uses of the term "proximate cause."[5]

However, I would respectfully suggest that we have not yet achieved clarity with regard to the meaning of "the proximate cause" in the GTLA. See MCL 691.1407(2)(c). The Majority and the Dissent seem to agree that the dispositive issue is what the Legislature intended when, in 1986, it adopted a "narrow exception" to the "broad immunity" that is afforded to governmental actors for the consequences of any "gross negligence," see, e.g., *Ray*, 501 Mich at 81 (opinion of the Court); *id*. at 94 (WILDER, J., dissenting), and therefore what the Legislature intended when it limited the liability flowing from that narrow exception to "conduct . . . that is *the proximate cause* of the injury or damage," MCL 691.1407(2)(c) (emphasis added). But the Majority and the Dissent disagree about what the Legislature in fact intended by the term "the proximate cause."

Resolving that dispute is obviously above my pay grade. I will therefore endeavor only to point out some of the problems that I foresee as the lower courts attempt to follow the Supreme Court's new framework.

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narrower term referring only to legal causation."); *id*. at 71 ("We recognize that our caselaw is not without its blemishes."). See also *id*. at 90 n 8 (WILDER, J., dissenting) (noting "the confusion wrought by the duality of meaning we have varyingly ascribed in our negligence jurisprudence to the phrase 'proximate cause' ").

[5] Indeed, the Dissent suggests that "[b]ecause of the confusion wrought by the duality of meaning [of] 'proximate cause,' it would arguably be a best practice to discontinue the use of that phrase entirely." *Id*. at 90 n 8 (WILDER, J., dissenting). There may be wisdom in that. But, for now, we remain trapped in a "proximate cause" world.

In defining "proximate cause" as "legal causation," (thus abandoning the alternative description of "proximate cause"—as encompassing *both* factual causation *and* legal causation together—that the Court recognized it had sometimes employed in earlier decisions), the Court noted that "[proximate cause] 'involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.' " *Ray*, 501 Mich at 63 (opinion of the Court), quoting *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Further, the Court stated:

> [P]roximate cause, that is, legal causation, . . . requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the victim. A proper legal causation inquiry considers whether an actor should be held legally responsible for his or her conduct, which requires determining whether the actor's breach of a duty to the plaintiff was a proximate cause of the plaintiff's injury. [*Ray*, 501 Mich at 65 (opinion of the Court) (citation omitted).]

At the outset, I foresee confusion arising from what I believe will be perceived as a circularity of reasoning in the latter sentence of this quotation. Specifically, the Court seems to be saying that whether conduct is a "proximate cause" is to be determined by assessing whether the actor "should be legally held responsible," but that one determines whether an actor should be held legally responsible by assessing whether his conduct was a "proximate cause." This statement strikes me as the equivalent of the tautological equation "If A, then B. If B, then A." Its meaning and the reasoning in support of it appear unclear. What is a lower court to do?

I also see confusion arising from the Court's decision not to provide guidance for how to determine which of

potentially multiple proximate causes is "*the* proximate cause" under the GTLA. The Court repeatedly reendorsed its earlier definition of "the proximate cause" as " 'the one most immediate, efficient, and direct cause' " of the injury. See *id*. at 59, 65, 76, 83, quoting *Robinson v Detroit*, 462 Mich 439, 446, 462; 613 NW2d 307 (2000). However, as noted, the Court declined to address how a determination of "the proximate cause" should be made; instead, the Court stated, "For today, it is enough to clarify that only another *legal* cause can be more proximate than the defendant's conduct." *Ray*, 501 Mich at 66 n 26 (opinion of the Court). At the same time, the Court stated that while a cause necessarily must be a "factual cause" before it can be a "proximate cause" (meaning legal cause), " 'the proximate cause' is not determined by weighing factual causes." *Id*. at 66. Further, "[d]etermining proximate cause under the GTLA, or elsewhere, does not entail the weighing of factual causes but instead assesses the legal responsibility of the actors involved." *Id*. at 71-72. Still further, the Court found error in this Court's "attempt[] to discern whether any of the other factual causes was a more direct cause of plaintiff's injury than defendant's actions." *Id*. at 74. Rather, the Court stated:

> Determining whether an actor's conduct was "the proximate cause" under the GTLA does not involve a weighing of factual causes. Instead, so long as the defendant is *a* factual cause of the plaintiff's injuries, then the court should address legal causation by assessing foreseeability and whether the defendant's conduct was *the* proximate cause. [*Id*.]

I glean from this that lower courts are being directed, in assessing "the proximate cause," to ignore from a *factual* standpoint whether a cause is " 'the one most immediate, efficient, and direct cause' " of the injury,

in favor of assessing from a foreseeability standpoint whether a cause is " 'the one most immediate, efficient, and direct cause' " of the injury. *Id*. at 59, 65, 76, 83, quoting *Robinson*, 462 Mich at 446, 462. What this means is, to me, far from clear. It appears to mean that courts must compare *legal* causes, not *factual* causes (notwithstanding that, as the Court explained, a cause must be a factual cause before it can be a legal cause). And a legal cause appears to be one from which it was foreseeable that injury could result, in which case it would be appropriate to hold the actor legally responsible for his or her conduct. But where there are multiple such legal causes, what is the basis of the comparison? Is it, for example, "from which of the legal causes was it most foreseeable that injury would result?" If so, how is a court to make such a determination? Is it simply a subjective assessment of which actor one feels should most be held legally responsible? And how does foreseeability, or relative foreseeability (if such can be determined), or a subjective assessment of the most responsible actor, translate into a test that supposedly inquires into whether a cause is " 'the one most immediate, efficient, and direct cause' " of the injury? *Ray*, 501 Mich at 59, 65, 76, 83 (opinion of the Court), quoting *Robinson*, 462 Mich at 446, 462. Do not those descriptors by their very nature require a factual assessment?

I also foresee confusion arising from the Court's statement that "before an actor can be a proximate cause, there must be the prerequisite determination that the actor was negligent—that is, that the actor breached a duty." *Ray*, 501 Mich at 74 (opinion of the Court). The Court made this assertion without citing any authority. Does this mean that all factual disputes regarding negligence must be resolved before courts can

even consider issues of proximate cause? Does this mean, practically speaking, that issues of proximate cause generally cannot be decided before trial? Does this run counter to the intent of the GTLA " 'to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity' " by treating government tortfeasors differently from private ones? *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 410; 716 NW2d 236 (2006), quoting *Mack v Detroit*, 467 Mich 186, 203 n 18; 649 NW2d 47 (2002).

Does this also mean that for every injury, someone must have been negligent? What if there were intervening (albeit factual) causes that were more immediate, efficient, and direct, see *Ray*, 501 Mich at 59, 65, 76, 83 (opinion of the Court), but that were not the result of negligence? Must those causes now be ignored in favor of assigning liability to a less immediate, efficient, and direct cause that did involve negligence? I note that the Court, in declaring that "nonhuman and natural forces, such as a fire, cannot be considered 'the proximate cause' of a plaintiff's injuries for the purposes of the GTLA," *id*. at 72, also stated that "these forces bear on the question of foreseeability, in that they may constitute superseding causes that relieve the actor of liability if the intervening force was not reasonably foreseeable," *id*. But the Court did not appear to acknowledge any corresponding relief of liability when there is a superseding cause by a nonnegligent human actor. See *id*. (stating that "only a human actor's breach of a duty can be a proximate cause" but discussing only "nonhuman and natural forces" as superseding causes).[6] Was it the Court's

[6] Cf. 2 Restatement Torts, 2d, § 440, p 465 (defining "superseding cause" as "an act of a *third person or other force* which by its intervention

intent to exclude such a possibility? Would that mean that whenever there is an injury, someone must be held accountable, so that even when there is an intervening nonnegligent human cause that may be the "most immediate, efficient, and direct cause of the injury," we must look beyond it to assign liability to a negligent human actor (even though the negligent actor's conduct may have been a less immediate, efficient, and direct cause)?

I also foresee confusion arising from the Court's introduction of a new but undefined term: "potential proximate cause." Specifically, the Court directed that determining whether a defendant's actions are *the* proximate cause "would require considering [the] defendant's actions alongside any other potential proximate causes to determine whether [the] defendant's actions were, or could have been, 'the one most immediate, efficient, and direct cause' of the injuries." *Id*. at 76, quoting *Robinson*, 462 Mich at 446. But what is a "*potential* proximate cause"? Does the Court mean "*a* proximate cause" that is potentially "*the* proximate cause"? Does the Court mean a *factual* cause, given that the Court stated that "factual causation is a condition precedent to proximate cause," *Ray*, 501 Mich at 78-79 (opinion of the Court), that "one's conduct cannot be *a* or *the* 'proximate cause' of a plaintiff's injury without also being a factual cause thereof," *id*. at 79, but also that "just because something is a factual cause of an injury does not mean it is *a* or *the* 'proximate cause' thereof," *id*.? Yet the Court also said that "[d]etermining whether an actor's conduct was

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prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about") (emphasis added); see also 2 Restatement Torts, 2d, § 442A, comment *a*, p 469 (noting that an intervening force may be "a force of nature, or the act of a human being, or of an animal").

'the proximate cause' under the GTLA does not involve a weighing of factual causes." *Id*. at 74. What precisely, then, does one weigh when weighing *potential* proximate causes?

For all these reasons and more, I fear that the Court's opinion raises more questions than it answers. And I fear that the result may be that trial courts will throw up their hands and simply allow everything to proceed to trial, even when circumstances may not warrant a trial. Perhaps it is, in part, for this reason that the Dissent characterizes the Majority as having "massively expand[ed] the exception to governmental immunity provided by MCL 691.1407(2)(c)." *Id*. at 100 (WILDER, J., dissenting).

Finally, for the reasons stated, and because it is evident that the courts, including the Justices of our Supreme Court, are unable to agree regarding the intent of the Legislature in this regard, I implore the Legislature to state its intent expressly. It is the Legislature that created the "narrow exception" to the "broad immunity" afforded to governmental actors under MCL 691.1407(2)(c) when they engage in grossly negligent conduct. And it is the Legislature that can avert further and prolonged judicial wrangling over legislative intent, and further confusion in the trial courts, by restating its intent clearly and explicitly (and perhaps, as the Dissent suggests, without referring to the much-maligned term "proximate cause").

CANDLER v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN

Docket No. 332998. Submitted October 4, 2017, at Detroit. Decided October 24, 2017, at 9:15 a.m.

Kalvin Candler brought an action in the Wayne Circuit Court against Farm Bureau Mutual Insurance Company of Michigan to recover personal protection insurance (PIP) benefits he alleged were owed for replacement-care or attendant-care services after he was struck and injured by a hit-and-run driver. Plaintiff had initially made a claim for PIP benefits through the Michigan Assigned Claims Plan (MACP), which is maintained by the Michigan Automobile Insurance Placement Facility (MAIPF). The claim was supported by three calendars apparently signed by plaintiff's brother stating that plaintiff's brother had provided replacement services for plaintiff in August, September, and October 2015. However, during discovery, it was revealed that plaintiff's girlfriend, not defendant's brother, had provided the services during those months and that plaintiff had signed his brother's name to the calendars. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiff's false statements precluded him from recovering any PIP benefits under MCL 500.3173a(2). The court, Patricia Perez Fresard, J., denied the motion, and defendant appealed by leave granted.

The Court of Appeals *held*:

1. A person commits a fraudulent insurance act under MCL 500.3173a(2) when the person presents or causes to be presented an oral or written statement, the statement is part of or in support of a claim for no-fault benefits, the claim for benefits was submitted to the MAIPF, the person knew that the statement contained false information, and the statement concerned a fact or thing material to the claim. Under MCL 500.3173a(1), the MAIPF must make an initial determination of a claimant's eligibility for benefits under the MACP and must deny an obviously ineligible claim. MCL 500.3173a(2) provides, in part, that a person who presents or causes to be presented an oral or written statement as part of or in support of a claim to the MAIPF for payment or another benefit knowing that the statement

contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act. MCL 500.3173a(2) further states that a claim that contains or is supported by a fraudulent insurance act as described in MCL 500.3173a(2) is ineligible for payment or benefits under the MACP. In order to qualify as part of a fraudulent insurance act under MCL 500.3173a(2), the false statement merely must have been presented as part of or in support of a claim to the MAIPF for payment or another benefit, because the prepositional phrase "to the MAIPF" modifies the antecedent noun "claim," not "statement"; accordingly, the bar to receiving PIP benefits applies even if the false statement was made to an insurance company rather than to the MAIPF.

2. The trial court erred by denying defendant's motion for summary disposition because there was no genuine issue that a fraudulent insurance act, as defined by MCL 500.3173a(2), was committed when the August, September, and October 2015 calendars were submitted in support of a claim to the MAIPF for replacement services that were never provided. There was no dispute that plaintiff submitted a claim to the MAIPF to recover no-fault benefits after being injured in a motor vehicle accident or that a false statement was presented to defendant in support of plaintiff's claim. While the MAIPF ultimately assigned the claim to defendant, the claim itself was nonetheless being processed through the MAIPF. Therefore, plaintiff's claim for no-fault benefits was a claim to the MAIPF, not to defendant. Accordingly, the fact that plaintiff was dealing with defendant at the time the false statements were presented was not determinative. Further, in light of the evidence, no reasonable jury could have concluded that plaintiff was not aware that he was submitting false information that was material to his claim for no-fault benefits.

Reversed and remanded for further proceedings.

Judge CAMERON, dissenting, would have held that a false statement made not to the MAIPF, but instead to one of its servicing insurers, does not serve as a bar from receiving PIP benefits because the plain language of MCL 500.3173a(2) reflects the Legislature's intent that false statements made as part of or in support of a claim must be presented to the MAIPF before a person may be found ineligible for PIP benefits. Judge CAMERON also stated that a claim made to a servicing insurer was not the same as a claim presented to the MAIPF, which MCL 500.3171(9)(a), a provision of the no-fault act, recognizes as a distinct entity from its participating insurers. Judge CAMERON noted that if plaintiff's false statement in support of his claim had

been presented to the MAIPF by defendant, plaintiff would have been ineligible for benefits under MCL 500.3173a(2); however, because the record reflected that defendant identified the falsity of the statements and did not seek reimbursement from the MAIPF in connection with plaintiff's claim for attendant care and replacement services, a false statement was not presented or caused to be presented to the MAIPF.

1. INSURANCE — PERSONAL PROTECTION INSURANCE — MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY — MICHIGAN ASSIGNED CLAIMS PLAN — FRAUD.

Under MCL 500.3173a(2), a person who presents or causes to be presented an oral or written statement as part of or in support of a claim to the Michigan Automobile Insurance Placement Facility (MAIPF) for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act; a claim that contains or is supported by a fraudulent insurance act is ineligible for payment or benefits under the Michigan Assigned Claims Plan; a person commits a fraudulent insurance act under this provision when the person presents or causes to be presented an oral or written statement, the statement is part of or in support of a claim for no-fault benefits, the claim for benefits was submitted to the MAIPF, the person knew that the statement contained false information, and the statement concerned a fact or thing material to the claim.

2. INSURANCE — PERSONAL PROTECTION INSURANCE — MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY — MICHIGAN ASSIGNED CLAIMS PLAN — FRAUD.

In order to qualify as part of a fraudulent insurance act under MCL 500.3173a(2), a false statement must have been presented as part of or in support of a claim to the Michigan Automobile Insurance Placement Facility (MAIPF) for payment or another benefit; the bar to receiving benefits under MCL 500.3173a(2) applies even if the false statement was made to an insurance company rather than to the MAIPF.

Douglas S. Dovitz, PC (by *Douglas S. Dovitz*) and *Steven A. Hicks* for plaintiff.

Garan Lucow Miller, PC (by *Sarah Nadeau*) for defendant.

Before: SAAD, P.J., and CAVANAGH and CAMERON, JJ.

SAAD, P.J. In this action to recover personal protection insurance (PIP) benefits, defendant appeals the trial court's denial of its motion for summary disposition.[1] In this case of first impression, we are asked to provide the proper interpretation of MCL 500.3173a(2), which imposes consequences for supplying false information "in support of a claim to the Michigan automobile insurance placement facility." Because plaintiff knowingly made false and material statements that were used to support a claim which was submitted to the Michigan automobile insurance placement facility (MAIPF), a fraudulent insurance act was committed, and plaintiff is precluded from recovering on his claim. Accordingly, we reverse the denial of defendant's motion for summary disposition.

I. BASIC FACTS

On September 12, 2014, plaintiff was struck by a hit-and-run driver. Because plaintiff was uninsured at the time of the accident, and because the driver of the other vehicle could not be identified, plaintiff made a claim for PIP benefits through the Michigan Assigned Claims Plan (MACP), which is maintained by the MAIPF.[2] The MAIPF assigned defendant to handle plaintiff's claims in accordance with the provisions of the Michigan no-fault act, MCL 500.3101 *et seq*.

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[1] We granted leave to appeal in *Candler v Farm Bureau Mut Ins Co of Mich*, unpublished order of the Court of Appeals, entered September 22, 2016 (Docket No. 332998). Intervening plaintiff, Pain Center USA, PLLC, is not a party to this appeal.

[2] Under MCL 500.3171(2), the MAIPF has the responsibility to "adopt and maintain an assigned claims plan." See also *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 170 n 5; 909 NW2d 38 (2017); *Bronson Health Care Group, Inc v Titan Ins Co*, 314 Mich App 577, 580 n 2; 887 NW2d 205 (2016).

While defendant paid over $150,000 in PIP benefits to plaintiff, it refused to pay other PIP benefits, including any for attendant or replacement-care services. Among the documentation submitted to defendant in support of a claim for PIP benefits were replacement-services calendars for the months of August, September, and October 2015. The calendars purportedly were signed by Andrew Candler, plaintiff's brother, and showed that Andrew provided care to plaintiff during these three months. However, during discovery, it was learned that Andrew last provided services to plaintiff in July 2015. After this time, plaintiff moved from Rochester to Detroit to live with his girlfriend, who took over providing replacement services for plaintiff. Plaintiff's counsel at the trial court conceded that plaintiff had signed his brother's name to these calendars.[3]

Plaintiff filed the instant suit to recover the owed PIP benefits. Defendant moved for summary disposition and argued that MCL 500.3173a(2) precluded plaintiff from recovering any PIP benefits because of the false statements that were provided. After accepting supplemental briefs from the parties, the trial court denied defendant's motion.

II. STANDARDS OF REVIEW

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), but because the resolution of the motion required consideration of evidence outside the pleadings, we will treat the motion as having been decided under MCR 2.116(C)(10). See

[3] There was another calendar from February 2015, which ostensibly showed that Andrew provided more hours of service than he actually performed. But because defendant's position is that *any* false statement provided to it negates all of plaintiff's claims for PIP benefits, we will focus on the more blatant situation involving the forged signatures for the August, September, and October 2015 calendars.

Travis v Dreis & Krump Mfg Co, 453 Mich 149, 183-184; 551 NW2d 132 (1996). We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under this court rule "tests the factual sufficiency of the complaint." *Id*. at 120. "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. (citation omitted). The motion is properly granted "if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

Resolution of this issue also involves questions of statutory interpretation, which are questions of law that we review de novo. *Szpak v Inyang*, 290 Mich App 711, 713; 803 NW2d 904 (2010).

III. ANALYSIS

Defendant argues that the trial court erred when it denied defendant's motion for summary disposition because MCL 500.3173a(2) dictates a different result. We agree.

The goal in interpreting statutes is to give effect to the intent of the Legislature. *Titan Ins Co v Farmers Ins Exch*, 241 Mich App 258, 261; 615 NW2d 774 (2000). "In determining the intent of the Legislature, this Court must first look to the language of the statute." *Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009). "If the language is clear and unambiguous, we assume the Legislature intended its plain meaning, and the statute is enforced as written."

Wesche v Mecosta Co Rd Comm, 267 Mich App 274, 279; 705 NW2d 136 (2005).

MCL 500.3173a provides as follows:

> (1) The Michigan automobile insurance placement facility shall make an initial determination of a claimant's eligibility for benefits under the assigned claims plan and shall deny an obviously ineligible claim. The claimant shall be notified promptly in writing of the denial and the reasons for the denial.
>
> (2) A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under [MCL 500.4503] that is subject to the penalties imposed under [MCL 500.4511]. *A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan*. [Emphasis added.]

Defendant asserts that the emphasized portion of the statutory language means that, because of the forged signatures on the August, September, and October 2015 calendars and the corresponding false claims that Andrew performed services during those months, plaintiff is ineligible to receive any PIP benefits. Plaintiff argues that the first sentence of Subsection (2) shows that this later-mentioned prohibition only applies when the false statement was made *to the MAIPF*. Consequently, plaintiff asserts that because the false statements were presented to defendant and not the MAIPF, this statute does not act as a bar to the recovery of PIP benefits.[4]

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[4] Defendant also argues that because the statute uses the term "claim" and does not refer to any "application," it shows that plaintiff's

We disagree with plaintiff's view. The first sentence of Subsection (2) states, "A person who presents or causes to be presented an oral or written statement . . . as part of or *in support of a claim to the* [*MAIPF*] for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act . . . ." MCL 500.3173a(2). Accordingly, in order to qualify as part of a fraudulent insurance act under this subsection, the false statement merely must have been presented "as part of or in support of a claim to the [MAIPF] for payment or another benefit." Contrary to plaintiff's suggestion, the prepositional phrase "to the [MAIPF]" modifies the antecedent noun "claim," not "statement." Therefore, a person commits a fraudulent insurance act under this statute when (1) the

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view is not supported because only *applications* are submitted to the MAIPF. Defendant avers that if the Legislature had intended to cover situations in which a claimant made false statements to the MAIPF in an application, then it would have used the term "application." Defendant refers us to MCL 500.4503, in which the Legislature used both the term "application" and the term "claims"; however, the word "application" in MCL 500.4503 is used in the context of an "application for the issuance of an insurance policy." MCL 500.4503(a) and (b). An application for an insurance policy is not the same as a claim for benefits. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "claim" as "a demand for something due or believed to be due").

Accordingly, while there is a reason to use the terms "claim" and "application" in MCL 500.4503, there is no reason to use both terms in MCL 500.3173a because the request/application to the MAIPF is nevertheless a *claim* for owed benefits. The MACP Plan of Operations, § 5.1.A, states that "[a] claim for personal protection insurance benefits under the Plan must be made on an application prescribed by the MAIPF." MACP, *Plan of Operations*, available at <http://www.michacp.org/documents/MACP-Plan-of-Ops-Final.pdf> [https://perma.cc/5EPN-C7DW]. Hence, although the initial document to the MAIPF is called an application, it nevertheless is a claim for benefits, and the Legislature's failure to use the term "application" in MCL 500.3173a is neither surprising nor determinative.

person presents or causes to be presented an oral or written statement, (2) the statement is part of or in support of a claim for no-fault benefits, and (3) the claim for benefits was submitted to the MAIPF.[5] Further, (4) the person must have known that the statement contained false information, and (5) the statement concerned a fact or thing material to the claim. Importantly, MCL 500.3173a(2) does not require that any particular recipient have received the false statement in order for the act to qualify as a fraudulent insurance act, as long as the statement was used "as part of or in support of a claim to the [MAIPF]."[6]

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[5] The dissent insists that we are reading more into the statute than what it says when we state that a claim must have been submitted to the MAIPF. But as we have discussed, the phrase "a claim to the MAIPF" makes it clear that the claim at issue must have been submitted to the MAIPF. The dissent seems to ignore the fact that plaintiff's "claim" for replacement-care services benefits is part of—and not separate from—the claim that he submitted to the MAIPF, as evidenced by the dissent's statement that a request for particular benefits is a "new" claim that is separate from the "prior" claim that was made to the MAIPF. The fact that the statute could have been drafted differently to achieve the same result is not a compelling reason to ignore the meaning of the, arguably, unartfully drafted language. Further, the fact that the Legislature ultimately did not pass the proposed modification to the statute in 2015 HB 4224 as passed by the Senate on June 9, 2016, could simply mean that it thought that any revision was not necessary because the existing language provided the same safeguards against the type of fraud that the proposed revision attempted to address. Of course, we are cognizant that any attempt to glean legislative intent from legislative history, let alone a proposed amendment that never was enacted, is a difficult proposition at best. See, e.g., *In re Complaint of Mich Cable Telecom Ass'n*, 241 Mich App 344, 371-372; 615 NW2d 255 (2000); Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), pp 31-32.

[6] We note that this Court's opinion in *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014), is not relevant to our case. While the Court in *Bahri* held that a claimant's fraudulent acts can bar the recovery of all PIP benefits, *id*. at 426, the ruling was predicated on the interpretation and application of an insurance policy contract that

With this understanding, we hold that there is no genuine issue regarding the fact that a fraudulent insurance act, as defined by MCL 500.3173a(2), was committed when the August, September, and October 2015 calendars were submitted in support of a claim to the MAIPF for replacement services that were never provided. There is no dispute that plaintiff submitted a claim to the MAIPF to recover no-fault benefits after being injured in a motor vehicle accident. There also is no question that a false statement was presented to defendant in support of plaintiff's claim. While the MAIPF ultimately assigned the claim to defendant, the claim itself was nonetheless being processed through the MAIPF. Indeed, the MACP's Plan of Operations provides that servicing insurers, such as defendant, "act on behalf of the MAIPF." MACP Plan of Operations, § 6.A.1. Therefore, plaintiff's claim for no-fault benefits is a claim to the MAIPF—not to defendant. Accordingly, the fact that plaintiff was dealing with defendant at the time the false statements were presented is not determinative.

Further, plaintiff knew that the statement contained false information, which concerned a fact or thing material to the claim. Here, the evidence shows that plaintiff knew that the calendars he submitted for the months of August, September, and October 2015 were not correct. Plaintiff's counsel conceded at the trial court that plaintiff had signed or forged Andrew's name to the calendars. Further, during this three-month period, plaintiff knew that he moved to Detroit to be with his girlfriend, who then supplied the replacement services that Andrew previously supplied. No reasonable jury could conclude that plaintiff, de-

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contained a fraud exclusion, *id*. at 423-424. Here, *Bahri* does not govern because there is no policy to apply, let alone a fraud exclusion in a policy.

spite the presence of any head injury, was not aware that he was submitting false information that was material to his claim for no-fault benefits. See *Quinto v Cross & Peters Co*, 451 Mich 358, 367; 547 NW2d 314 (1996) (stating that to create a genuine issue of material fact and defeat a motion for summary disposition under MCR 2.116(C)(10), there must be sufficient evidence to permit a reasonable jury to find in the nonmoving party's favor).

Additionally, the last sentence of MCL 500.3173a(2) provides that "[a] claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan." Because there is no genuine issue of material fact that plaintiff's claim for benefits was supported by a fraudulent insurance act, the claim is thereby ineligible for payment under the MACP.[7] As a result, the trial court erred when it ruled that defendant was not entitled to summary disposition.

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

CAVANAGH, J., concurred with SAAD, P.J.

CAMERON, J. (*dissenting*). Under MCL 500.3173a(2) of the Michigan no-fault act, a person who knowingly presents or causes to be presented a false statement that is part of or in support of a claim to the Michigan automobile insurance placement facility (Facility) is ineligible for payment and barred from receiving ben-

[7] We decline to address the position that defendant advocated at the trial court that, in addition to plaintiff being ineligible to receive future PIP benefits, plaintiff must also reimburse defendant for any benefits it previously paid. On appeal, defendant does not present this argument. Indeed, in its brief on appeal, defendant asserts that it "is entitled to deny any further payment of PIP benefits to plaintiff."

efits under the assigned claims plan. This case raises the issue of whether a false statement made not to the Facility, but instead to one of its servicing insurers, similarly serves as a bar from receiving personal protection insurance (PIP) benefits. Because I disagree with the majority's construction of the statute, I respectfully dissent.

When construing a statute, we are required to "discern and give effect to the intent of the Legislature," and in determining legislative intent, we "must first look to the language of the statute." *Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009). "Plain and unambiguous language in a statute must be enforced as written, and a forced construction or implication will not be upheld." *Vulic v Dep't of Treasury*, 321 Mich App 471, 477; 909 NW2d 487 (2017). "As far as possible, effect should be given to every phrase, clause, and word in the statute." *Shabahang*, 484 Mich at 167 (quotation marks and citations omitted). Furthermore, this Court must read the statute as a whole, and while individual words and phrases are important, they "should be read in context of the entire legislative scheme." *Id*.

MCL 500.3173a states:

> (1) The Michigan automobile insurance placement facility shall make an initial determination of a claimant's eligibility for benefits under the assigned claims plan and shall deny an obviously ineligible claim. The claimant shall be notified promptly in writing of the denial and the reasons for the denial.
>
> (2) A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing

> material to the claim commits a fraudulent insurance act under [MCL 500.4503] that is subject to the penalties imposed under [MCL 500.4511]. A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.

The dispute over legislative intent arises from whether fraudulent statements in connection with a claim for PIP benefits must be presented to the Facility for ineligibility under MCL 500.3173a(2) to apply. The majority construes the statute to require the withholding of benefits whenever a false statement is presented to a servicing insurer simply because an initial (albeit nonfraudulent) claim was presented to the Facility. Under the majority's reading of the statute, plaintiff is barred from receiving any benefits because he presented a false statement in support of a claim for no-fault benefits to Farm Bureau, a servicing insurer. The majority reaches its result by construing the phrase "to the Facility" to modify only the word "claim." Thus, through statutory interpretation, the majority concludes that false statements in support of a claim do not have to be presented to the Facility. I disagree.

The plain language of MCL 500.3173a(2) reflects the Legislature's intent that false statements made as part of or in support of a claim must be presented to the Facility before a person may be found ineligible for PIP benefits. A person is ineligible for payment or benefits under the assigned claims plan when one "presents or causes to be presented an oral or written statement . . . as part of or in support of a claim to [the Facility] for payment . . . ." Contrary to the majority opinion's position, "as part of or in support of" is a conjunctive phrase reflecting the Legislature's intent that false statements have a specific relationship to a claim presented

to the Facility before exclusion under MCL 500.3173a(2) is triggered. The Legislature could have made false statements to assigned member insurers, like Farm Bureau, a basis for denial of benefits and eligibility but has not yet done so.[1] A statute must be enforced as written, and we should not rely on a forced construction of the statute to obtain a particular outcome. *Vulic*, 321 Mich App at 477.

In the majority's view, only a *prior* claim for benefits presented to the Facility is required for a subsequent false statement to qualify under MCL 500.3173a(2). In an effort to provide clarity, the majority sets forth the elements that a complaining party must show before MCL 500.3173a(2) is applicable. A person commits a fraudulent insurance act when "(1) the person presents or causes to be presented an oral or written statement, (2) the statement is part of or in support of a claim for no-fault benefits, . . . (3) the claim for benefits *was submitted* to the [Facility] . . . , (4) the person must have known that the statement contained false information, and (5) the statement concerned a fact or thing material to the claim." (Emphasis added.) But the third requirement, that a claim for benefits "was submitted" to the Facility, is not found in the statute. The

[1] See 2015 HB 4224 as passed by the Senate on June 9, 2016, in which our Legislature sought to amend MCL 500.3173a(2) to address this very issue:

> A person who presents or causes to be presented an oral or written statement . . . in support of a claim to the [Facility] **OR TO AN INSURER ASSIGNED A CLAIM BY THE MICHIGAN AUTOMOBILE PLACEMENT FACILITY** for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act . . . . A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment ~~or~~ **OF ANY** benefits under the assigned claims plan.

majority enhances the statutory language by adding a component: that as long as a prior claim was made to the Facility, any new claim supported by a false statement is barred regardless of where the claim is presented. However, every person who is assigned an insurer under the assigned claims plan made an initial claim to the Facility because it is the Facility that first receives a claim for eligibility and, if approved, assigns the person to a servicing insurer. Recognizing a new condition that a claim "was submitted" to the Facility, therefore, is superfluous and, more importantly, not found in the plain language of the statute.

A provision more consistent with the majority's reading of the statute would state, "A person who presents or causes to be presented an oral or written statement *or* a claim to the Michigan automobile insurance placement facility for payment or benefits knowing that the statement or claim contains false information is subject to the penalties imposed under section 4511." Under this provision, the recipient of a false statement is irrelevant, as argued by the majority. This is not the language the Legislature adopted, however. We simply should not read into a statute something that is not there.

I likewise disagree with the majority that a claim made to a servicing insurer is the same as a claim presented to the Facility. The no-fault act recognizes the Facility as a distinct entity from the participating insurers. Under MCL 500.3171(9)(a), the Facility is an entity created under Chapter 33, MCL 500.3301 *et seq*., and Chapter 33 defines the "Facility" as the "automobile insurance placement facility created pursuant to this chapter," MCL 500.3303(c). However, a "[p]articipating member" is specifically defined as "an insurer who is required by this chapter to be a member of the

facility . . . ." MCL 500.3303(d). By the language of these provisions, a participating member is a separate entity from the Facility, and to conclude that the Legislature only included the Facility in MCL 500.3173a, but nonetheless intended to mean both the Facility and its participating members, goes beyond the plain language of the statute and disregards the terms' distinctions under Chapters 31 and 33.

It is unnecessary to make a strained construction of the statute. The Legislature has already provided different language to exclude persons who make false statements made as part of or in support of a claim to a servicing insurer. MCL 500.3173a(2) denies PIP benefits to a person who "presents or *causes to be presented*" a false statement as part of or in support of a claim to the Facility for payment. (Emphasis added.) When a servicing insurer receives a false statement related to a claim and then seeks reimbursement for that claim from the Facility, then the person making the claim has *caused to be presented* a false statement in support of a claim to the Facility. If plaintiff's false statement in support of his claim had been presented to the Facility by Farm Bureau, plaintiff would be ineligible for benefits under the statute.[2]

In this case, however, the record reflects that Farm Bureau identified the falsity of the statements and did not seek reimbursement from the Facility in connection with plaintiff's claim for attendant care and replacement services. Therefore, a false statement was not presented or caused to be presented to the Facility, and I respectfully dissent.

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[2] In other contexts, the language "caused to be presented" has been given broad application. See, e.g., the Medicaid False Claim Act under MCL 400.607(1) and (2) and the False Claims Act under 31 USC 3729.