MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

March 19, 2009 to May 14, 2009

DANILO ANSELMO
REPORTER OF DECISIONS

VOLUME 283
FIRST EDITION

WEST®
A Thomson Reuters business

2010

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COURT OF APPEALS

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CHRISTOPHER M. MURRAY, Grosse Pointe Farms	2015

Judges

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SUPREME COURT

Term Expires
January 1 of

Chief Justice

MARILYN KELLY, Bloomfield Hills ..... 2013[1]

Justices

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[1] From January 8, 2009.

[2] From January 1, 2009.

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COURT OF APPEALS CASES

SHAW v CITY OF ECORSE

Docket Nos. 279997 and 280693. Submitted March 11, 2009, at Detroit. Decided March 19, 2009, at 9:00 a.m.

Robert Shaw brought an action in the Wayne Circuit Court against the city of Ecorse, alleging age discrimination and breach of contract as a result of his removal from employment as the chief of police. John Bedo, after being added as a coplaintiff, brought a claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., alleging that he was demoted from the rank of captain in the fire department and faced other disciplinary actions after he testified under subpoena on behalf of a former fire chief who brought an action against the defendant for racial discrimination and breach of contract. The court, Gershwin A. Drain, J., granted summary disposition in favor of the defendant regarding Bedo's claim. A jury returned a verdict in favor of Shaw, and the court, after denying the defendant's motion for a new trial or remittitur, entered a judgment for Shaw. Both Bedo and the defendant appealed, and their appeals were consolidated.

The Court of Appeals *held*:

1. The trial court erred in granting the defendant's motion for summary disposition of Bedo's WPA claim. The trial court erred in determining that Bedo was not engaged in activity protected under the WPA when he testified under subpoena at a court proceeding. Neither MCL 15.362 nor the interpretation of that statute in *Henry v Detroit*, 234 Mich App 405 (1999), requires a type 2 whistleblower (e.g., an employee who is requested by a public body to participate in a court action) to report or testify regarding a violation or suspected violation of a law, regulation, or rule in order to be protected by the WPA. A material question of fact exists regarding whether there is a causal connection between the protected activity and the adverse employment action and, therefore, summary disposition was erroneously granted in favor of the defendant. That order must be reversed and the case involving Bedo must be remanded for further proceedings.

2. The evidence supports the amount of the jury's award of noneconomic damages in favor of Shaw. The trial court did not err by denying the motion for remittitur with regard to the award.

3. The jury's interpretation of the relevant contract language was reasonable in light of the evidence presented by Shaw. Remittitur of the jury's award of pension benefits to Shaw was not warranted.

4. The testimonies of two individuals who sought employment as the deputy chief of police and that indicated that their age was a determining factor in the decision to not employ them was not unfairly prejudicial or misleading. The trial court did not abuse its discretion by admitting the testimony.

Order granting summary disposition of Bedo's claim in favor of the defendant reversed and case remanded for further proceedings; order granting judgment in favor of Shaw and denying motion for a new trial or remittitur affirmed.

MASTER AND SERVANT — WHISTLEBLOWERS' PROTECTION ACT.

The Whistleblowers' Protection Act provides protection for two types of whistleblowers, first, those who report, or are about to report, violations of a law, regulation, or rule of a public body, and, second, those who are requested by a public body to participate in an investigation held by that public body or in a court action; the second type of whistleblower is not required to report or testify regarding a violation or suspected violation of a law, regulation, or rule in order to be protected by the provisions of the act (MCL 15.362).

Amos E. Williams and *Thomas E. Kuhn* for the plaintiffs.

Cummings, McClorey, Davis & Acho, PLC (by *Ethan Vinson* and *Joseph Nimako*), for the defendant.

Before: DONOFRIO, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM. These consolidated appeals arise out of plaintiffs' claims of adverse employment actions. In Docket No. 279997, plaintiff John Bedo appeals by leave granted the trial court order granting defendant, city of Ecorse, summary disposition with regard to his claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. In Docket No. 280693, defendant appeals as of right the jury verdict in favor of plaintiff Robert

Shaw on his claims of age discrimination and breach of contract and the trial court's order denying its motion for a new trial or remittitur. In Docket No. 279997, we reverse and remand for further proceedings. In Docket No. 280693, we affirm.

I. FACTUAL BACKGROUND

A. FACTS IN DOCKET NO. 279997

Bedo worked for the city of Ecorse Fire Department from 1973 to 2006. In the 1990s, he was promoted to fire captain, and in 2003 and 2004 he temporarily served as fire chief. In mid-2004, he returned to his position as fire captain. On June 9, 2006, Fire Chief Ronald French issued a command reducing the number of firefighters required to be on duty. Later that day, Bedo objected to the command in a department report, stating, "Per your Directive dated 6/9/06, I believe both Mayor Salisbury and Interim Chief French [have] jeopardized our Citizens' and Firefighters' safety. In the event of either the Citizens', Firefighters', or my injury or death, caused by these actions, I will hold you both responsible."

On June 13, 2006, Bedo testified in a case initiated by former Fire Chief Ronald Lammers against defendant in which racial discrimination and breach of contract were alleged. Both Bedo and Fire Captain Arthur Andring were subpoenaed to testify on behalf of Lammers. On June 20, 2006, the jury returned a verdict in favor of Lammers and awarded him $600,000. According to Bedo and Andring, immediately after the trial, Fire Chief French and the former president of the firefighters' union told them that they were "in trouble" and that defendant would "go after them" because of their testimonies in the Lammers case.

On June 23, 2006, Mayor Larry Salisbury filed departmental charges against Bedo, including: (1) conduct unbecoming an officer; (2) insubordination; (3) failing to follow a chain of command; (4) dissuading firefighters from performing their duties; and (5) criticism/ridicule. Police Chief George Anthony conducted disciplinary hearings on the charges on June 30, 2006, July 6, 2006, and July 14, 2006. The evidence presented at the hearings focused on the department report Bedo had submitted to Fire Chief French, but a substantial portion of the evidence suggested that Bedo was responsible for the death of a firefighter in the early 1990s.

According to Bedo, he was "forced to retire" in late July 2006 because of the "stress created by the mayor's actions after [he] testified for the Plaintiff against the City of Ecorse in [the] Lammers trial." Defendant denied Bedo's requests for a "cash out," his pension, and to transfer pension plans. On July 21, 2006, Bedo filed suit against defendant, raising a claim under the WPA. Bedo claimed that defendant brought the departmental charges against him, subjected him to the disciplinary hearings, forced him to retire, and withheld his benefits because of his testimony at the Lammers trial.

On August 15, 2006, Police Chief Anthony submitted his findings to Mayor Salisbury. On the basis of the evidence presented at the disciplinary hearings, he upheld four out of the five charges filed against Bedo and issued this decision: "Captain John Bedo should not be assigned to any command or supervisory level position. I direct that Captain John Bedo be immediately demoted from the rank of captain to firefighter. In addition, I further direct that Captain Bedo undergo a physical and psychological examination to determine his continued fitness for duty."

B. FACTS IN DOCKET NO. 280693

Shaw was born on March 18, 1938. He worked for the city of Ecorse Police Department from 1968 to 2004. He became deputy chief in 1999. In 2001, when Shaw was 63 years old, defendant appointed him as police chief. In June 2004, John Clark, an attorney working on a contractual basis for defendant, sent a letter to Mayor Salisbury and the city council stating that under the city charter, "[a]ny Fireman or Policeman who attains the age of sixty (60) years shall be retired and pensioned as herein provided," that pursuant to that provision, Shaw should be "considered retired effective immediately," and that any further contractual relationship with Shaw would be in violation of the charter. Shaw responded to the letter, stating that he had no intention of retiring as police chief before August 2005 and that he disagreed with Clark's reading of the charter. Shaw explained, "Mr. Clark's opinion ignores the fact that you hired me [on a contractual basis] when I was over age 60. I believe that I will have claims against the City if I am wrongfully removed from my position."

On August 2, 2004, the city council voted to relieve Shaw of his duties as police chief. The resolution stated that pursuant to the city charter, Shaw had been serving on a month-to-month basis since November 2001 and that he served "at the pleasure of the Mayor and council." Council members Brenda Banks, Nathaniel Elem, Gerald Strassner, and Arnold Lackey voted to remove Shaw. Councilwoman Julie Cox voted against removing him. Councilwoman Theresa Peguese was not present for the vote.

Later on August 2, Shaw received a telephone call from a coworker informing him that the city council had voted to remove him from his position. At the time, Shaw was in Nebraska for his grandson's brain surgery.

More than two weeks later, on August 20, 2004, Shaw wrote the mayor and city council a letter, stating the following:

> It has been brought to my attention that I have been removed from my position as Chief of Police with the city of Ecorse even though I have received no official written or verbal notice to this effect. If this is indeed the fact, I am hereby requesting that I begin receiving my retirement benefits immediately. Since it is not my choice to retire at this time, I make this request under protest.

Shaw subsequently requested "back pay," a "cash out" of leave already accrued, and a pension plan transfer. Defendant offered at least two pension plans to its employees: the City Charter Pension Plan (Charter plan) and the MERS (Municipal Employees Retirement System) plan. Retirees were entitled to 65 percent of their final average compensation (FAC) under the Charter plan and 80 percent of their FAC under the MERS Plan, based on a 36-month period selected by the retiree. Shaw was a member of the Charter plan at the time of his retirement and requested to be transferred to the MERS plan. He believed he could make such a transfer under defendant's agreement with the Police Officers Association of Michigan (the POAM contract). Defendant initially denied all of Shaw's requests. In April 2005, several months after Shaw gave his notice of retirement, the board of trustees for the city retirement system adopted a resolution stating that Shaw was entitled to 50 percent of his FAC based on the period of its choosing. According to Shaw, he did not receive any pension benefits until May 2005.

C. PROCEDURAL HISTORY

In September 2005, Shaw filed suit against defendant, alleging age discrimination and breach of con-

tract, among other claims. In July 2006, Bedo was added to Shaw's second amended complaint as a coplaintiff, raising his claim under the WPA. Thereafter, defendant moved for summary disposition of both plaintiffs' claims. The trial court denied defendant's motion with regard to Shaw's claims, but reserved ruling on Bedo's claims.

Shaw's case proceeded to trial in June 2007. The jury returned a verdict in favor of Shaw. Defendant subsequently moved for a new trial or remittitur. The trial court denied the motion. In August 2007, the trial court heard additional oral arguments on defendant's motion for summary disposition of Bedo's claims and granted the motion.

II. BEDO'S WPA CLAIM

Bedo argues that the trial court erred in granting defendant summary disposition with regard to his WPA claim. We agree.

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record 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). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden, supra* at 120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. The interpretation and application of a statute involve questions of law that this Court reviews de novo on appeal. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

Bedo brought his whistleblower claim under MCL 15.362, which states:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

"To establish a prima facie case under this statute, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). If a plaintiff is successful in establishing a prima facie case under the WPA, the burden shifts to the defendant to establish a legitimate business reason for the adverse employment action. *Roulston v Tender-care (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). Once the defendant produces such evidence, the plaintiff has the burden to establish that the employer's proffered reasons were a mere pretext for the adverse employment action. *Id*. at 281.

In this case, the trial court found that Bedo failed to establish a prima facie case under the WPA because he was not engaged in protected activity. The trial court stated:

> This case is a Whistleblower's case or at least the one claim, and essentially the Whistleblower's Act provides any employer–or an employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, locations, or

> privileges of employment because the employee or a person acting on behalf of the employee reports or is about to report verbally or in writing a violation or suspected violation of law or a regulation or rule promulgated pursuant to law of the state. And it says reporting should be to a public body or something like that and in a court.
>
> And I really, as I read over Mr. Bedo's testimony, he talked about a lot of political stuff, but I don't really recall seeing him or reading that he reported some kind of violation of the law against that current administration . . . .
>
> Well, I think the plaintiff's only cited [*Henry v Detroit*, 234 Mich App 405; 594 NW2d 107 (1999)] and I read that over, and [it] is a lot different from this particular case . . . .
>
> * * *
>
> So really in [*Henry*], you really do have some Whistleblower activities that he testified to in a court proceeding . . . .
>
> And I really, frankly speaking, in reading over Bedo's testimony during the trial don't see that he did anything close to this in terms of Whistleblowing activity. And the issue in [*Henry*] seemed to surround what was a court proceeding under the statute as a case being a public body [sic] and that kind of thing.
>
> I just don't see the Whistleblower activity here on the part of Bedo. He came in, just testified to what was going on. I don't think he clearly established any violation of the law or suspected violation of the law. And so for that reason, even though he was disciplined later, I just don't see that there's a prima facie case of Whistleblower activity, so I am accordingly going to grant the motion for summary disposition with regard to Mr. Bedo. And that's the court's ruling.

Conversely, Bedo argues that he was engaged in protected activity when he testified under subpoena at a court proceeding where defendant's conduct was at

issue. We agree. In *Henry*, *supra*, this Court interpreted and applied the language of MCL 15.362, stating, in part:

> The plain language of the statute provides protection for two types of "whistleblowers": (1) those who report, or are about to report, violations of law, regulation, or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action. See *Chandler v Dowell Schlumberger, Inc*, 214 Mich App 111, 125; 542 NW2d 310 (1995) (D.E. SHELTON, J., dissenting), aff'd 456 Mich 395; 572 NW2d 210 (1998); Ruga & Kopka, Wrongful Discharge and Employment Discrimination, § 2.24, p 50. On the basis of the plain language of the WPA, we interpret a type 1 whistleblower to be one who, on his own initiative, takes it upon himself to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation. In other words, we see type 1 whistleblowers as initiators, as opposed to type 2 whistleblowers who participate in a previously initiated investigation or hearing at the behest of a public body. If a plaintiff falls under either category, then that plaintiff is engaged in a "protected activity" for purposes of presenting a prima facie case. [*Henry*, *supra* at 409-410.]

"As indicated, a type 2 whistleblower is an employee who is 'requested by a public body to participate in . . . a court action.' " *Id*. at 412, quoting MCL 15.362. The WPA defines "public body" to include "[t]he judiciary and any member or employee of the judiciary." MCL 15.361(d)(*vi*). The *Henry* Court found that an employee who provides deposition testimony under subpoena in a court action where his employer's conduct is at issue meets the definition of a type 2 whistleblower. *Henry*, *supra* at 413. The Court explained:

> In the case at bar, by giving a deposition in a civil case, plaintiff clearly participated in a 'court action.' . . .

> [D]eposition testimony is part of the trial or discovery process in civil litigation and is governed by the Michigan Court Rules. See generally MCR 2.300. . . . MCR 2.305(A), entitled "Subpoena for Taking Deposition," also provides that a party may subpoena another to give deposition testimony after suit has been commenced. A subpoena is a court-ordered command for the person to whom it is directed to attend and give testimony. MCR 2.306(3). Thus, a deponent who (a) is an employee of the entity whose conduct is at issue, (b) has provided testimony by a deposition and, thereby, has "participated in a court proceeding", and (c) would be subject to a court-ordered subpoena to compel his attendance in any event, meets the definition of a type 2 whistleblower. Specifically, in the instant case, plaintiff . . . had no choice but to give deposition testimony in the Lessnau case. Consequently, we are constrained to conclude that providing testimony in Lessnau's civil case, which involved both plaintiff's and Lessnau's employer and was pending in a state circuit court, meets the requirements for a type 2 whistleblower who "is requested by a public body to participate in a . . . court action." Indeed, as a deponent, plaintiff's attendance and testimony were compelled, which is certainly a higher standard than requested. We therefore find plaintiff's testimony to be an activity protected by the WPA. [*Henry*, *supra* at 412-413.]

Contrary to the trial court's findings in this case and defendant's argument on appeal, neither the plain language of MCL 15.362 nor this Court's interpretation of the statute in *Henry* requires a type 2 whistleblower to report or testify regarding a violation or suspected violation of a law, regulation, or rule.[1] Although the

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[1] Defendant argues that a federal district court case, *Johnson v Lapeer Co*, 2006 US Dist LEXIS 76182, an unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 11, 2006 (Docket No. 04-74659), supports its argument that a type 2 whistleblower must testify about a violation of a law, regulation, or rule. But, *Johnson* is not binding on this Court and it does not stand for the proposition argued by defendant. Furthermore, its reasoning has since

plaintiff in *Henry* did, in fact, testify regarding an alleged violation of departmental rules by the defendants, such testimony is not required to qualify a person as a type 2 whistleblower under MCL 15.362. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature, and the first criterion in determining intent is the specific language of the statute. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). Provisions not included in the statute by the Legislature should not be included by the courts. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). The trial court clearly imposed on Bedo a requirement not included in MCL 15.362.

Recently, in *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569; 753 NW2d 265 (2008), this Court addressed whether the plain language of MCL 15.362 limits claims to those where the employee is reporting, about to report, or testifying about the conduct of his or her employer. In that case, an at-will employee had cooperated in the prosecution of a coowner of his employer for assaulting one of his coworkers after working hours. *Id*. at 571. The employee's employment was terminated, and he sued his employer for allegedly retaliating against him for his cooperation in the criminal investigation. *Id*. at 572. Reading the plain and unambiguous language of MCL 15.362, this Court concluded that the "statute is not limited to violations by employers," and stated, in part:

> [T]he plain language of the statute is not limited to violations by employers. . . . The language in the WPA is unambiguous: an employee need only be requested by a public body to participate in *an* investigation, hearing,

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been rendered invalid by *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569; 753 NW2d 265 (2008), discussed later in this opinion.

> inquiry, or court action (or, under the first part of the statute, report or be about to report *a* violation of law). There is absolutely nothing, express or implied, in the plain wording of the statute that limits its applicability to violations of law *by the employer* or to investigations *involving the employer*. [*Kimmelman, supra* at 574-575 (citations omitted; emphasis in original).]

Footnote 2 of *Kimmelman* states, in part:

> The Legislature intended the WPA to serve a vitally important and far-reaching goal: protection of the public by protecting *all* employees who have knowledge that is relevant to the protection of the public from some abuse or violation of law and who, for whatever reason, might fear that their employers would not wish them to divulge that information or otherwise participate in a public investigation. The Legislature clearly intended to maximize employees' involvement by removing as much doubt as possible regarding whether those employees will face negative consequences. Moreover, the Legislature clearly did not intend the WPA to protect the public *only* from violations of law or abuses by employers, but rather from violations of law or abuses *in general*. [*Id*. at 574 n 2 (emphasis in original).]

In this case, former Fire Chief Lammers filed suit against defendant for racial discrimination and breach of contract. Bedo was subpoenaed and testified on behalf of Lammers. In other words, Bedo testified under subpoena, i.e., at the request of a public body, at a court proceeding. Accordingly, we find that Bedo was engaged in activity protected by the WPA as a type 2 whistleblower. Furthermore, although Bedo may not have testified about a specific violation of law, regulation, or rule committed by defendant, Lammers's attorney stated in his affidavit that Bedo's testimony directly contradicted that of several defense witnesses and substantiated many of Lammers's claims. Bedo testified, among other things, that he heard city council members say that they wanted to "get rid of Lammers," that the

city council hired people for positions in the fire department who were not qualified for their positions, that both he and Lammers had been mistreated by the city council, and that he heard a city council member refer to the fire department as being "lily white."

Defendant further argues that Bedo was not engaged in protected activity because his testimony did not relate to a matter of public concern. Defendant is correct that the underlying purpose of the WPA is the protection of the public. *Henry*, *supra* at 409. But, as this Court stated in *Henry*, "[t]he act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses." *Id*. (quotation marks and citations omitted). In this case, Bedo's testimony helped bring to light discriminatory acts committed by city officials, a matter that is certainly of public concern. Cf. *Id*. at 413 n 1.

Alternatively, defendant argues that even if Bedo was engaged in protected activity, he failed to establish a causal connection between the protected activity and the adverse employment action. The trial court did not address this issue, and we conclude that a material question of fact exists with regard to causation.

A plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence. Direct evidence is that which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 132-133; 666 NW2d 186 (2003). To establish

causation using circumstantial evidence, the "circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Speculation or mere conjecture "is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id*. (quotation marks and citation omitted). In other words, the evidence presented will be sufficient to create a triable issue of fact if the jury could reasonably infer from the evidence that the employer's actions were motivated by retaliation. See *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 661; 653 NW2d 625 (2002).

In this case, Bedo claims that defendant brought departmental charges against him, subjected him to disciplinary hearings, forced his retirement, and withheld his retirement benefits because of his testimony at the Lammers trial. A jury returned a verdict in favor of Lammers on June 20, 2006. Three days later, on June 23, 2006, Mayor Salisbury filed the charges against Bedo. A temporal connection between protected activity and an adverse employment action does not, in and of itself, establish a causal connection, *West*, *supra* at 186, but it is evidence of causation, see, e.g., *Henry*, *supra* at 414. In addition to the "temporal connection," Bedo presented evidence that immediately after the Lammers trial, both he and Andring were told by Fire Chief French and the former president of the firefighters' union that they were "in trouble" and that defendant would "go after them" because of their testimonies. Bedo also presented evidence that defendant's disciplinary actions against him were unusual. He presented the affidavit of union president Scott Douglas stating that the "mayor's action in setting a hearing on John Bedo was unprecedented," and that Bedo's "response to the

order that threatened the safety of firefighters was appropriate and certainly not something that should have provoked the response it did." Bedo testified that to his knowledge, no other firefighter had ever been subjected to a "mayor's hearing" or denied a request to "cash out."

Defendant claims that disciplinary actions were taken against Bedo because of his June 9, 2006, departmental report about firefighter and citizen safety. Bedo claims that defendant's response to his report was unprecedented and completely disproportionate, and that the report was a mere pretext for disciplining him. He claims that defendant's actions were done in retaliation for his testimony at the Lammers trial and he presented circumstantial evidence in support of his claim. We find that the evidence presented by Bedo, viewed in the light most favorable to him, created a material question of fact regarding the cause of the adverse employment action.

In sum, we hold that Bedo engaged in activity protected under the WPA, that a material question of fact exists regarding causation, and therefore, that the trial court erred in granting defendant summary disposition.

III. SHAW'S AWARD OF NONECONOMIC DAMAGES

Defendant argues that the trial court abused its discretion by denying its motion for a new trial or remittitur of the jury's award of noneconomic damages to Shaw. We disagree.

A new trial may be granted when excessive or inadequate damages apparently influenced by passion or prejudice were awarded or when the verdict was clearly or grossly inadequate or excessive. MCR 2.611(A)(1)(c), (d); MCL 600.6098(2)(b)(*iv*), (*v*); *McManamon v Redford Charter Twp*, 273 Mich App 131, 139; 730 NW2d

757 (2006). If, however, the reviewing court determines that the only trial error is the inadequacy or excessiveness of the verdict, it may deny a motion for a new trial on the condition that, within 14 days, the nonmoving party consent in writing to the entry of a judgment in the amount determined by the court to be the lowest or highest amount the evidence will support. MCR 2.611(E)(1); *Burtka v Allied Integrated Diagnostic Services, Inc*, 175 Mich App 777, 780; 438 NW2d 342 (1989); see also MCL 600.6098(2)(d).

In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. *Diamond v Witherspoon*, 265 Mich App 673, 693; 696 NW2d 770 (2005). This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented, such as whether the award was influenced by bias or prejudice or whether the award was comparable to those in similar cases. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989); *Diamond*, *supra* at 694. The power of remittitur should be exercised with restraint. *Hines v Grand Trunk W R Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985). If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed. *Palenkas*, *supra* at 532-533. A trial court's decision regarding remittitur is reviewed for an abuse of discretion. *Id*. at 533. We review all the evidence in the light most favorable to the nonmoving party. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003).

In this case, the jury awarded Shaw $1.5 million in past noneconomic damages and $250,000 in future noneconomic damages. In denying defendant's request

for remittitur, the trial court stated that there was considerable evidence presented at trial about the emotional damage Shaw suffered as a result of being relieved of his duties and that, considering the evidence presented, the court could not conclude that the award was excessive. On appeal, defendant does not assert that any improper methods were used at trial and admits that Shaw suffered at least some mental anguish and humiliation as a result of its actions. Nonetheless, defendant argues that the amount of the jury's award was unsupported by the evidence. We disagree.

Shaw testified that he felt embarrassed, humiliated, and betrayed by defendant's actions. Shaw's wife, Maureen Garza-Shaw, testified that before he was removed from his position as police chief, Shaw "lived and breathed" his job, was extremely active in the community, and loved Red Wings hockey, bowling, and other sports. When Shaw first learned that he had been removed, he and Maureen were in a hospital in Nebraska where their grandson had just undergone brain surgery. Shaw slid against the wall, hit the floor, and said, "They just fired me." Thereafter, Shaw became depressed, withdrawn, and lost interest in almost everything, including sports and family activities. Shaw's stepdaughter, Debra Petraska, similarly testified that Shaw loved his job and never complained about it. After he was removed from his position, Shaw became abnormally quiet, withdrawn, and depressed. He refused to participate in many of the things he previously enjoyed, such as traveling, watching sports, playing on his bowling league, community events, and even family barbecues.

Dr. Gerald Shiener performed a clinical psychiatric examination of Shaw and testified on his behalf. The doctor testified that after his removal, Shaw felt frus-

trated, embarrassed, and irritable. Shaw felt that his reputation in the community had been ruined, suffered sleeplessness, loss of appetite and sex drive, had bowel problems, and could not enjoy any of his previous activities. Dr. Shiener determined that Shaw was not fit for duty, diagnosed him with depression with features of posttraumatic stress disorder, and recommended that he undergo counseling.

Although Dr. Jeffrey Kezlarian's testimony suggested that Shaw was not depressed and suffered very little emotional damage from defendant's actions, with the exception of some initial embarrassment, the testimony of Shaw, his wife, his stepdaughter, and Dr. Shiener suggested otherwise. Considering that Shaw was removed from his office as police chief when he was 66 years old, after serving on the city police department almost his entire career, with little warning or explanation and while his grandson was having brain surgery, and that he suffered through months of defendant's refusal to pay his retirement benefits, we hold that the jury's award of noneconomic damages for mental and emotional harm was supported by the evidence.

Defendant further argues that the amount of noneconomic damages awarded in this case far exceeds the amounts awarded in comparable cases. Defendant listed nine cases that it claims are comparable to this case. However, most of defendant's examples are deficient. In the first case defendant cites, *Wilson v Gen Motors Corp*, 183 Mich App 21, 40; 454 NW2d 405 (1990), this Court held that the trial court did not abuse its discretion in reducing the jury's award of $750,000 for mental anguish to $375,000. But, the Court specifically stated that the plaintiff had only presented evidence of her own subjective feelings and that the amount of the award stemmed from the jury's desire to

punish the defendant. *Id*. Also of note is the fact that *Wilson* is a 1990 case. In another case cited by defendant, *Clopp v Atlantic Co*, 2002 US Dist LEXIS 18898, an unpublished opinion of the United States District Court for the District of New Jersey, issued October 7, 2002 (Docket No. 00-1103), the court remitted the damages awarded from $300,000 to $75,000, but specifically noted that the plaintiffs did not suffer loss of employment and that some of the emotional distress indicated in testimony could not be attributed to the defendants. Moreover, the final five cases cited by defendant, with awards ranging from $17,825 to $250,000, are trial court judgments that provide absolutely no explanation for the amount of damages awarded.

Shaw also listed several "comparable" cases in his brief on appeal. In *Diamond*, *supra*, and *Olsen v Toyota Technical Ctr*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2002 (Docket No. 229543), this Court affirmed the trial court's decisions to deny remittitur. The Court upheld a jury award of $2,625,000 to the three plaintiffs in *Diamond* for depression and anxiety, and an award of $5 million to the plaintiff in *Olsen* for emotional distress. Like the final five cases cited by defendant, the two trial court judgments cited by Shaw, with awards of over $2 million, offer no explanation for the amount of the awards.

Given the wide range of awards in the cases cited by the parties and the evidence Shaw presented at trial regarding the emotional and mental anguish he suffered because of defendant's actions, we hold that the trial court properly denied defendant's request for remittitur. Defendant argues that the noneconomic damages awarded Shaw were so extreme that they were

meant to be punitive or exemplary. But, because the evidence presented at trial supported the amount of the jury's award, defendant cannot establish that the award was meant as punishment. The trial court, having heard the testimony and seen the evidence as well as the jury's reactions, was in the best position to evaluate the credibility of the evidence and make an informed decision, and we afford its decision due deference. *Palenkas*, *supra* at 534.

IV. SHAW'S AWARD OF PENSION BENEFITS

Defendant next argues that we should remand for remittitur of the jury's award of pension benefits, because the jury wrongfully concluded that Shaw was entitled to transfer to the MERS plan and receive 80 percent of his FAC. We disagree.

At trial, Shaw presented evidence about two of the pension plans available to defendant's employees: the MERS plan and the Charter plan. During closing arguments, Shaw's attorney argued that Shaw was entitled to transfer to the MERS plan under § 53.18 of the POAM contract, even after he had retired, and that as a member of the MERS plan, he would be entitled to 80 percent of his FAC. A copy of the POAM contract was provided for the jury's review. When the jury returned its verdict, the foreperson specifically stated that the jury determined that Shaw was entitled to 80 percent of his FAC and calculated his award of pension benefits accordingly.

Defendant now asserts that Shaw could not transfer to the MERS plan after he had retired under a proper interpretation of the POAM contract and he was therefore entitled to 65 percent of his FAC. At trial, defendant argued that Shaw was entitled to only 50 percent of his FAC, and failed to raise any argument about the

proper interpretation of the POAM contract. Nor did defendant raise the argument in its motion for a new trial or remittitur. Therefore, this issue is unpreserved for appellate review. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 315-316; 660 NW2d 351 (2003). Further, any challenge to the sufficiency of the evidence in a civil case is waived by a party's failure to raise the issue in a timely motion at trial. *Napier v Jacobs*, 429 Mich 222, 238; 414 NW2d 862 (1987). By failing to challenge the sufficiency of the evidence regarding the pension benefits awarded in its motion for a new trial or remittitur, defendant has effectively waived the issue. Nonetheless, we will briefly address the merits of the claim.

If a contract's language is clear, its construction is a question of law that is subject to review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). But interpretation of an ambiguous contract is a question of fact that must be decided by a jury. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). A contract is ambiguous if the words may reasonably be understood in different ways or the provisions irreconcilably conflict with each other. *Id*. at 467.

At trial, the parties stipulated that Shaw was a third-party beneficiary of the POAM contract. Section 53.18 of the contract provides: "Employees may elect to transfer to MERS Pension Plan B-3 . . . and earn benefits accordingly under that plan, as modified herein, and have all past employee contributions to the Ecorse Police & Fire pension plan refunded to employees by the Ecorse Police & Fire Pension System."

Defendant asserts that § 53.18 does not apply to Shaw because he was not a current or active employee when he attempted a pension plan transfer. On the other hand, Shaw asserts that the meaning of the term

"employees" in § 53.18 is ambiguous and the proper interpretation of the term was for the jury to decide. We agree with Shaw. As Shaw has pointed out, throughout the POAM contract, the term "employees" is used in a general sense, encompassing *all* employees–both active and retired. For example, § 53.26(H) of the contract states that in order to modify an MERS Plan, the employee "must be an active employee as of the date of the window" for modifications. Although § 53.26(H) is not at issue in this case, it demonstrates that the drafter of the POAM contract used phrases such as "active employee" when a section of the contract was intended to apply only to certain employees. Likewise, § 53.27 of the contract refers to benefits for both "transferred active employees" and "transferred retired employees," indicating that the drafter of the contract used modifiers such as "active" and "retired" to differentiate between different types of employees. Thus, the term "employees" in § 53.18, standing alone without a modifier, could be interpreted to mean either an active employee or a retired employee, or both. Because the term is equally susceptible to more than one meaning, its meaning is ambiguous and is for the jury to determine. *Klapp*, *supra* at 470.

Further, we note that § 53.18 makes no reference to a specific time frame for transferring pension plans. Other sections of the contract include references to a time frame, such as § 53.14(B), which states that "Before the effective date of the member's retirement or conversion from a disability retirement . . . , but not thereafter, a member may elect to receive his or her benefit . . . ." The drafter of the contract did not include such a provision in the section at issue.

Although it seems a bit unusual that an employee would be permitted to transfer pension plans after

retirement, "ambiguities are to be construed against the drafter of the contract." *Klapp*, *supra* at 470. We conclude that the meaning of the term "employees" in § 53.18 was a question properly submitted to the jury and that the jury's interpretation of the term was reasonable in light of the evidence presented. Remittitur of the jury's award of pension benefits is not warranted.

V. ADMISSION OF TESTIMONY ABOUT THE DEPUTY CHIEF POSITION

Finally, defendant argues that the trial court abused its discretion in admitting the testimonies of James Francisco and Willie Tolbert, Jr., about the deputy chief position because they were irrelevant and unfairly prejudicial. Again, we disagree.

At trial, Francisco testified that in the summer of 2004, he applied for the deputy chief position in the city of Ecorse Police Department. He underwent a series of oral interviews in late July 2004, conducted by three separate groups. The first group consisted of three city council members, including Cox and Elem. Before the interview started, Cox asked Francisco how old he was. When Francisco said that he was 60 years old, Elem stood up and said, "You're too old for the job, you'll just be wasting our time." According to Francisco, Elem left the room to obtain legal advice and, when he returned, said, "We'll go ahead and interview you, but I don't think it'll do any good." During the interview, Cox said, "It's too bad you're not 59." Francisco was not selected for the position. Tolbert testified that he also applied for the deputy chief position, but was never interviewed. When Tolbert questioned Elem about the interviews, Elem said that Tolbert was "too old" and gave him a copy of the city charter provision stating that policemen must be less than 60 years old. At the time, Tolbert was 63 years old.

Defendant argues that Elem's statements to Francisco and Tolbert that they were too old for the deputy chief position were irrelevant and unfairly prejudicial. We review preserved challenges to the admission or exclusion of evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). Statements that are made outside the immediate adverse action context, generally referred to as "stray remarks," and that the plaintiff alleges to be direct evidence of bias, must be examined for relevancy using the following four factors: "(1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?" *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001). If the "stray remarks" are determined to be relevant, their probative value must be weighed against the risk of unfair prejudice. *Id*. at 302-303; MRE 403.

Elem's statements about Francisco and Tolbert's ages were relevant to establishing that age was a determining factor in Shaw's removal as police chief. To prevail on a claim of age discrimination, a plaintiff must establish that age was a determining factor in the adverse employment action. *Meagher v Wayne State Univ*, 222 Mich App 700, 709-710; 565 NW2d 401 (1997). Although the official "decision maker" in this case was the city council as a whole, Elem was a council member and voted to remove Shaw as police chief. In fact, Elem testified at trial that he asked the mayor's secretary to draft a resolution removing Shaw from his position and that he made the motion for the removal at

the next city council meeting. Clearly, Elem was an active participant in the decision making process, not an "uninvolved agent." Elem's statements to Francisco and Tolbert contradicted his testimony at trial that he did not believe Clark's letter about the age provision in the city charter and that he never based employment decisions on age. Elem unambiguously informed both Francisco and Tolbert, on separate occasions, that they did not qualify for the deputy chief position because of their ages and used the city charter as a justification. Further, Elem made these "stray remarks" within two weeks of the council's decision to remove Shaw.

Defendant argues that Elem's statements were irrelevant because they related to the deputy chief position, not the police chief position. But, there is a logical and important connection between the two positions. Not only were both positions at a senior level in the city police department, but the same group of people–the city council–decided who would fill them. In that way, this case is distinguishable from the case cited by defendant, *Schrand v Fed Pacific Electric Co*, 851 F2d 152, 156 (CA 6, 1988), where the "stray remarks" at issue were made by a person uninvolved in the defendant's decision to terminate the plaintiff's employment and there was no logical or reasonable connection between the remarks and the plaintiff's termination.

Additionally, we conclude that the challenged evidence was not unfairly prejudicial or misleading. Pursuant to MRE 403, 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 . . . ." "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Waknin v Chamberlain*,

467 Mich 329, 334 n 3; 653 NW2d 176 (2002) (quotation marks and citation omitted). Elem's statements about Francisco and Tolbert's ages were highly relevant to an issue of consequence at trial, as indicated above. Further, while the evidence was damaging to defendant's case, there is no indication in the record that the jury gave it preemptive weight or was mislead by it in any way. Therefore, defendant has failed to establish that the evidence should have been excluded under MRE 403.

Finally, even if there had been an abuse of discretion, in light of all the evidence presented at trial, defendant cannot establish that the outcome of the case would have been any different but for the admission of the evidence. Error warranting reversal may not be predicated on an evidentiary ruling unless a substantial right is affected. MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Defendant removed Shaw as police chief when he was 66 years old and immediately replaced him with a younger man. Shortly before his removal, a city attorney drafted a letter stating that, under the city charter, Shaw should be "considered retired effective immediately" because of his age. Three council members testified that one of the reasons they voted to remove Shaw was that during their campaigns they promised to terminate his employment. But, the other council members testified that they recalled no such promises being made. Two council members testified that when they voted to remove Shaw, they believed that he wanted to retire or had already quit. But, there is absolutely no evidence in the record supporting such assertions. Further, at least two council members stated that Shaw was removed because of his age. In August 2004, Strassner told a newspaper reporter that Shaw was removed because he was over 60 years old. At trial, Strassner claimed that

he had lied to the reporter. Cox, who voted against releasing Shaw, testified that she believed his employment was terminated because of his age. This evidence was more than sufficient to support the jury's finding of age discrimination.

In Docket No. 279997, we reverse and remand for further proceedings consistent with this opinion. In Docket No. 280693, we affirm. We do not retain jurisdiction.

MERICKA v DEPARTMENT OF COMMUNITY HEALTH

Docket No. 280596. Submitted March 4, 2009, at Detroit. Decided March 19, 2009, at 9:05 a.m.

The St. Clair Circuit Court, Daniel J. Kelly, J., affirmed a decision of a Department of Human Services hearing referee that the petitioner, Georgette Mericka, did not have a developmental disability, as that term is defined in MCL 330.1100a(21), and that the petitioner therefore was not entitled to Medicaid supports and services provided through the respondent, the Department of Community Health, and the intervening respondent, St. Clair County Community Mental Health. The petitioner sought leave to appeal, which the Court of Appeals denied in an unpublished order, entered April 3, 2008 (Docket No. 280596). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 482 Mich 996 (2008).

The Court of Appeals *held*:

The trial court and the hearing referee both erred by determining that the petitioner did not have a functional limitation of the major life activity of "[c]apacity for independent living," MCL 330.1100a(21)(a)(*iv*)(F), because she has the mental capacity for living independently, even though she does not have the physical capacity to live independently. The Legislature did not limit an individual who is physically, but not mentally, incapable of living independently from being considered as having a substantial functional limitation on his or her capacity for independent living. There is no dispute that the petitioner has substantial functional limitations in the areas of self-care and mobility, MCL 330.1100a(21)(a)(*iv*)(A) and (D). Therefore, because of her limitations in the capacity for independent living, she has substantial functional limitations in three areas of major life activity and is properly considered to have developmental disability under MCL 330.1100a(21). The petitioner is entitled to the benefits sought. The order of the trial court must be reversed.

Reversed.

MENTAL HEALTH — DEVELOPMENTAL DISABILITIES — WORDS AND PHRASES — CAPACITY FOR INDEPENDENT LIVING.

A person may be found to have a substantial functional limitation in

> the area of major life activity concerning the capacity for independent living, for purposes of determining whether the person has a developmental disability, if the person is not physically able to live independently even though the person is mentally capable of living independently (MCL 330.1100a[21][a][*iv*][F]).

Hill Devendorf, P.C. (by *John D. Adair*), for Georgette Mericka.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Morris J. Klau*, Assistant Attorney General, for the Department of Community Health.

Frederick F. Swegles for St. Clair County Community Mental Health.

Amicus Curiae:

Veena Rao for the Michigan Protection and Advocacy Service, Inc.

Before: JANSEN, P.J., and BORRELLO and STEPHENS, JJ.

BORRELLO, J. Petitioner, Georgette Mericka, appeals the trial court's order affirming a decision of a hearing referee of the administrative tribunal for the Department of Human Services that she did not have a developmental disability under MCL 330.1100a(21) and denying her specialty supports and services. We originally denied petitioner leave to appeal.[1] Thereafter, petitioner sought leave to appeal in the Michigan Supreme Court; in lieu of granting leave to appeal, the Supreme Court remanded the matter to this Court "for consideration as on leave granted." *Mericka v Dep't of Community Health*, 482 Mich 996 (2008). For the reasons set forth in this opinion, we reverse.

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[1] *Mericka v Dep't of Community Health*, unpublished order of the Court of Appeals, entered April 3, 2008 (Docket No. 280596).

I. FACTS AND PROCEDURAL HISTORY

Petitioner is a female who is almost 50 years old. She was diagnosed at age 21 with Multifocal Motor Neuropathy (MMN). MMN is a progressive condition for which there is no cure; it is characterized by muscle weakness, muscle wasting, and muscle twitching and cramping. The most current information in the lower court record indicates that petitioner is married and shares a home with her mother and her husband. She is completely dependent on others for assistance with self-care, transfers, repositioning, and mobility. She also requires assistance with tasks such as blowing her nose or wiping away a tear. However, she can occasionally feed herself and drink from a straw when someone else sets it up for her.

It is undisputed that petitioner is mentally and intellectually sound. She is her own guardian and is capable of making her own decisions. She is mentally, but not physically, able to complete all activities of daily living. She earned a Bachelor of Arts degree and works part-time as the director of resource development at the Blue Water Center for Independent Living. Because of her MMN, however, petitioner requires aides and assistive technology to enable her to do her job, and she lacks the stamina to work full-time.

Respondent Michigan Department of Community Health (DCH) operates the "Medicaid Managed Specialty Supports and Services 1915(b)/(c) Waiver Program"[2] to provide supports and services for individuals

[2] The § 1915(b) specialty and supports and services program is relevant to the facts of this case and is explained in the order of the hearing referee of the Department of Human Resources as follows:

> The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Admin-

with developmental disabilities. Petitioner applied to

istrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

"Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services."

42 CFR 430.0

"The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program."

42 CFR 430.10

Section 1915(b) of the Social Security Act provides:

"The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection (s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State. . . [.]"

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS), the Department of Community Health (Department) operates a section 1915(b) Medicaid Managed Specialty Services and Supports program waiver in conjunction with a section 1915(c) Habilitation and Supports Waiver.

* * *

receive benefits as a developmentally disabled person from intervening respondent St. Clair County Community Mental Health (CMH), through its contract agency Thumb Mental Health Alliance. The CMH in turn contracts with the DCH to provide mental health services. The Thumb Mental Health Alliance determined that petitioner was developmentally disabled under MCL 330.1100a(21), and she began receiving § 1915(b) specialty supports and services. She received such benefits for approximately 1½ years.

In April 2006, Dr. Tom Seilheimer, a psychologist with the CMH, performed a second opinion review of petitioner's file to determine her eligibility to receive § 1915(b) specialty supports and services. Dr. Seilheimer determined that petitioner had substantial functional limitations in the areas of self-care and mobility, MCL 330.1100a(21)(a)(*iv*)(A) and (D), but that she had no substantial functional limitations in the areas of receptive and expressive language, learning, self-direction, capacity for independent living, and economic self-sufficiency, MCL 330.1100a(21)(a)(*iv*)(B), (C), (E), (F), and (G). Because he determined that petitioner only had substantial functional limitations in two of the seven areas of major life activity listed in MCL 330.1100a(21)(a)(*iv*), and the statute requires substantial functional limitations in three areas to qualify as a developmental disability, Dr. Seilheimer concluded that petitioner was not developmentally disabled and had been receiving § 1915(b) specialty supports and services in error.

The Department's contract with CMH requires CMH to provide State Medicaid Plan services through the Medicaid Prepaid Specialty Mental Heath and Substance Abuse Services combination 1915(b)/(c) waiver to Medicaid beneficiaries who meet the eligibility requirements for Medicaid specialized ambulatory mental health/developmental disability services. [Order of Reconsideration, Department of Human Services hearing referee Martin D. Snider, December 14, 2006, pp 2-3.]

Petitioner filed a timely request for review of the CMH's decision in the administrative tribunal for the DCH. Following a hearing, hearing referee Stephen B. Goldstein reversed the CMH's determination that petitioner was not developmentally disabled and was not eligible for § 1915(b) specialty supports and services. According to Goldstein, petitioner's physical impairments resulted in a substantial functional limitation on her capacity for independent living. Because the parties agreed that she satisfied MCL 330.1100a(21)(a)(*iv*)(A) (self-care) and (D) (mobility), Goldstein ruled that petitioner was developmentally disabled and was eligible for continued § 1915(b) specialty supports and services. In light of his determination that petitioner had substantial functional limitations in three areas of major life activity listed in MCL 330.1100a(21)(a)(*iv*), Goldstein did not address whether petitioner was economically self-sufficient under MCL 330.1100a(21)(a)(*iv*)(G).

Thereafter, the CMH requested and was granted reconsideration of hearing referee Goldstein's ruling by the administrative tribunal for the Department of Human Services. On reconsideration, hearing referee Martin D. Snider reversed Goldstein's decision that petitioner was developmentally disabled and was eligible for continued § 1915(b) specialty supports and services. According to Snider, there was sufficient evidence that petitioner possessed the capacity for independent living. Furthermore, Snider ruled that there was sufficient evidence that petitioner did not have a substantial functional limitation in the area of economic self-sufficiency. Thus, Snider ruled that Goldstein erred in determining that petitioner had a developmental disability and was eligible to receive specialty supports and services.

Petitioner appealed Snider's decision to the St. Clair Circuit Court. The circuit court stated that "[d]evelop-

mental disabilities are disabilities of intellect or behavior" and ruled that Snider's decision that petitioner possessed the capacity for independent living was both lawful and supported by competent, material, and substantial evidence. The trial court further stated that Snider's determination that petitioner did not have a substantial functional limitation in the area of economic self-sufficiency was also supported by competent, material, and substantial evidence. Thus, the circuit court affirmed Snider's decision that petitioner was ineligible to receive § 1915(b) specialty supports and services because she is not developmentally disabled.

II. ANALYSIS

A. STANDARD OF REVIEW

The circuit court reviewed the decision of the administrative tribunal for the Department of Human Services. Judicial review of decisions, findings, rulings, and orders of an administrative officer includes, "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." Const 1963, art 6, § 28. Judicial review of an administrative agency's decision regarding a matter of law is limited to determining whether the decision was authorized by law. *Id.* *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003).

This Court's review of a circuit court's review of an administrative decision is "to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is

essentially a clearly erroneous standard of review." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005). The circuit court's legal conclusions are reviewed de novo and its findings of fact are reviewed for clear error. *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 152; 725 NW2d 56 (2006). "Great deference is accorded to the circuit court's review of the [administrative] agency's factual findings"; however, "substantially less deference, if any, is accorded to the circuit court's determinations on matters of law." *Romulus*, *supra* at 62.

This appeal involves an issue of statutory interpretation. If an administrative agency or trial court interprets a statute, such a determination is a question of law subject to review de novo. *DaimlerChrysler Services North America LLC v Dep't of Treasury*, 271 Mich App 625, 631; 723 NW2d 569 (2006).

B. MCL 330.1100a(21)

Petitioner argues that hearing referee Snider erred in determining that she was not entitled to § 1915(b) specialty supports and services and that the circuit court erred in affirming Snider's decision. Whether petitioner is entitled to receive such support depends on whether she has a developmental disability under MCL 330.1100a(21), which provides, in relevant part:

> "Developmental disability" means . . . :
>
> (a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:
>
> (*i*) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
>
> (*ii*) Is manifested before the individual is 22 years old.
>
> (*iii*) Is likely to continue indefinitely.

(*iv*) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(*v*) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

The parties agree that petitioner has substantial functional limitations in the areas of self-care and mobility, and that she does not have substantial functional limitations in the areas of receptive and expressive language, learning, and self-direction. Because petitioner must have substantial functional limitations in three or more areas of major life activity to qualify as developmentally disabled under the statute, she must also have a substantial functional limitation in either the area of capacity for independent living or economic self-sufficiency. Both the circuit court and hearing referee Snider determined that petitioner possessed the capacity for independent living because she was mentally capable of living independently. Thus, we must determine whether petitioner, who is mentally, but not physically, able to live independently, has a substantial functional limitation in the area of capacity for independent living. Resolving this issue requires this Court to construe the phrase "[c]apacity for independent living" in MCL 330.1100a(21)(a)(*iv*)(F).

The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Courts must give effect to every word, phrase, or clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Provisions must be read in the context of the entire statute so as to produce a harmonious result. *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

In affirming hearing referee Snider's determination that petitioner possessed the "capacity for independent living" notwithstanding her physical inability to live independently, the trial court essentially imposed a limitation or restriction on the phrase "capacity for independent living" that is not included in the statute itself. The circuit court's and Snider's interpretation of the phrase "capacity for independent living" in MCL 330.1100a(21)(a)(*iv*)(F) precludes an individual who is mentally, but not physically, able to live independently from possessing a substantial functional limitation in the "capacity for independent living" area of major life activity. The error in such a construction is that the Legislature did not so limit the phrase "capacity for independent living." The word "mental" or "intellectual" does not appear before the provision "capacity for independent living." The Legislature could have imposed such a limitation, but it did not do so. In construing a statute, this Court will not read anything into clear statutory language that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *City of Warren v Detroit*, 261 Mich App 165, 169; 680 NW2d 57 (2004). If the Legislature had intended to preclude an individual who is physically, but not mentally, incapable of living independently from

being considered as having a substantial functional limitation on his or her "capacity for independent living," it would have explicitly so indicated by including the term "mental" or "intellectual" before the phrase "capacity for independent living." We decline to read such a limitation into the statute when the Legislature did not include it in the statute itself.[3]

The fact that the Legislature referred to both "mental and physical impairments" in MCL 330.1100a(21)(a)(*i*) provides further support for the conclusion that an individual who lacks *either* the mental *or* physical capacity for independent living has a substantial functional limitation under MCL 330.1100a(21)(a)(*iv*)(F). The Legislature's reference to "mental and physical impairments" in MCL 330.1100a(21)(a)(*i*) shows that the Legislature was cognizant of, and considered the distinction between, mental and physical impairments or capacities. The omission of language from one part of a statute that is included in another part should be construed as intentional. *Thompson v Thompson*, 261 Mich App 353, 361 n 2; 683 NW2d 250 (2004). The fact that the Legislature chose not to limit the word "capacity" in MCL 330.1100a(21)(a)(*iv*)(F) by inserting the word "mental" before it, when the Legislature clearly recognized the distinction between mental and physical impairments earlier in the statute, is further evidence that the Legislature did not intend to limit a person's capacity to live independently to the person's mental capacity for independent living.

Further support for the conclusion that "capacity for independent living" is not limited to an individual's

[3] We observe that the testimony of Dr. Tom Seilheimer regarding his definition or interpretation of the phrase "capacity for independent living" is irrelevant to our construction of MCL 330.1100a(21)(a)(*iv*)(F). This Court's responsibility in interpreting a statute is to examine and give effect to the language used by the Legislature without regard to our own opinions or the opinions of any other individuals.

mental capacity to live independently is found in the dictionary definition of the term "capacity." The Legislature did not define the phrase "capacity for independent living" or expressly state whether the phrase encompassed only an individual's mental or physical capacity for independent living. We give undefined terms their ordinary meanings. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). Furthermore, we may consult a dictionary to construe the meaning of an undefined term. *Id.* *Merriam-Webster's Online Dictionary* (2009) defines "capacity" as "an individual's mental or physical ability[.]" In light of this dictionary definition of the term "capacity," it is reasonable to construe the phrase "capacity for independent living" to include an individual's mental or physical capacity for independent living.

In sum, we find that the circuit court erred in construing the phrase "capacity for independent living" as being limited to an individual's mental capacity to live independently. Such a narrow construction of the phrase is not supported by the plain language of the statute or the dictionary definition of the word "capacity." Because the parties agree that petitioner possesses substantial functional limitations in two other areas of major life activities listed in MCL 330.1100a(21)(a)(*iv*), petitioner is developmentally disabled under MCL 330.1100a(21) and is therefore entitled to § 1915(b) supports and services.

Reversed.

In re ANJOSKI

Docket No. 283406. Submitted December 10, 2008, at Detroit. Decided March 19, 2009, at 9:10 a.m.

Amy Kane brought a paternity action against Timothy Anjoski in the Wayne Circuit Court, Family Division, regarding a minor child born out of wedlock. The defendant admitted paternity and a judgment of filiation was entered granting the plaintiff sole legal and physical custody and providing parenting time for the defendant. Following the defendant's motion for a change of custody, both parties were awarded joint legal custody, while physical custody remained with the plaintiff and parenting time was granted to the defendant. The defendant again moved for a change of custody, alleging, in part, that the plaintiff used illegal drugs and failed to provide the child with proper clothing and hygiene. Following hearings and further motions, the defendant was awarded temporary sole physical custody and the parties were awarded joint legal custody. A guardian ad litem was also appointed for the child. The guardian ad litem testified that the child was in an established custodial environment with the defendant and that he had concerns regarding the plaintiff's use of drugs. He recommended that physical custody of the child remain with the defendant. The parties consented to the recommendation, and the court entered an order granting the defendant sole physical custody and joint legal custody to the parties. The defendant thereafter died and his widow, Lisa Anjoski, who had not become the child's guardian or otherwise establish any legal connection to the child, filed a complaint for custody, but dismissed it when the court, Kathleen M. McCarthy, J., determined that Lisa did not have standing. The plaintiff, citing the defendant's death as a change of circumstances, moved for a change of custody. The court denied the motion, stating that although the court recognized the presumption provided in MCL 722.25 (that it is in the child's best interests to be placed with the parent), it did not want to disrupt the child's established custodial environment until an evidentiary hearing regarding the plaintiff's parental fitness could be conducted. The plaintiff moved for rehearing, and Lisa filed a motion to intervene. Following a hearing, the court reappointed the child's guardian ad litem, directing him to assess the situation, and

determined that the established custodial environment should not be changed until a hearing regarding the best interests of the child was held. The court denied Lisa's motion to intervene, but noted that the court could place the child with a third party if, following the best interests hearing, it determined that such an action would be in the child's best interests. The court entered a supplemental order keeping the child with Lisa pending the evidentiary hearing to determine the plaintiff's parental fitness. The plaintiff appealed the supplemental order.

The Court of Appeals *held*:

1. The trial court properly determined that Lisa is a third party who does not have standing to initiate a custody dispute or intervene in the paternity action. Neither of the circumstances provided in MCL 722.26b and MCL 722.26c(1)(b) that allow third parties standing applies in this case.

2. The trial court did not commit clear legal error requiring reversal or abuse its discretion by permitting the child to remain with Lisa under the circumstances of this case.

3. The parental presumption established in MCL 722.25 generally prevails over the presumption provided in MCL 722.27(1)(c) in favor of maintaining a child's established custodial environment. However, in custody disputes between an unfit parent and a third-party custodian, the unfit parent, although entitled to some deference, is not entitled to the parental presumption. When, as in this case, there is evidence on the record that raises serious concerns regarding the parent's current ability to care for the safety and welfare of the child and suggests that the parent is unfit, the trial court must first make a preliminary finding of parental fitness before proceeding further. Once this preliminary finding is made, the court may proceed to determine the proper burden of persuasion to be applied at the best interests hearing. During these preliminary steps, the child need not be taken from an established custodial environment and returned to the allegedly unfit noncustodial parent.

4. It was appropriate under the facts of this case for the trial court to maintain the status quo while it made its preliminary findings, including first determining the plaintiff's parental fitness, next determining which burden of persuasion would be applicable, and finally conducting the evidentiary hearing regarding the child's best interests.

5. The focus of a parental fitness inquiry must be on a parent's abilities relative to the child's needs. A parent should be deemed unfit only after an inquiry shows, by a preponderance of the

evidence, that the parent is, in fact, currently unfit. A finding of parental unfitness may be reviewed at a later time.

6. A third party who lacks standing may not initiate a custody dispute. However, once a custody dispute is properly initiated, it is within the court's authority to award custody of the child to a third party pursuant to MCL 722.27(1)(a). The phrase "to others" in MCL 722.27(1)(a) does not mean "to others with standing."

7. The plaintiff was not denied her constitutional right to the care, custody, and control of the child under the facts of this case.

Affirmed and remanded for further proceedings.

1. PARENT AND CHILD — CHILD CUSTODY — BEST INTERESTS OF CHILD — PRESUMPTION IN FAVOR OF CUSTODY BY PARENTS — PRESUMPTION FAVORING MAINTAINING ESTABLISHED CUSTODIAL ENVIRONMENT — PARENTAL FITNESS.

The presumption that it is in the best interest of a child whose custody is disputed by a parent and an agency or a third party to award custody to the parent generally prevails over the presumption in favor of maintaining a child's established custodial environment; the parental preference presumption is only afforded to fit parents; a court does not abuse its discretion in maintaining a child's established custodial environment with a third party while the court makes preliminary findings regarding the parental fitness of a noncustodial parent, determines which burden of persuasion is applicable, and conducts the evidentiary hearing regarding the child's best interests (MCL 722.25, 722.27[1][c]).

2. PARENT AND CHILD — CHILD CUSTODY — THIRD PARTIES IN CHILD CUSTODY DISPUTES — WORDS AND PHRASES — AWARDING CUSTODY TO OTHERS.

A third party who lacks standing may not initiate a child custody dispute; once a child custody dispute is properly initiated, a court may award custody to a third party; the phrase "to others" in the statute providing that in a custody dispute the court may award custody of the child to one or more of the parties involved or to others does not mean "to others with standing" (MCL 722.27[1][a]).

Free Legal Aid Clinic, Inc. (by *Nathan A. White)*, for Amy Kane.

Michigan Children's Law Center (by *Frederick H. Gruber*), Guardian Ad Litem for the minor child.

Before: SERVITTO, P.J., and OWENS and K. F. KELLY, JJ.

K. F. KELLY, J. Plaintiff appeals as of right a supplemental order of the family division of the circuit court permitting the minor child of the parties to remain in the established custodial environment of defendant's home with defendant's widow, Lisa Anjoski (Lisa), pending an evidentiary hearing. We affirm. This matter requires us to address (1) whether a third party with no legal connection to the child at issue has standing to initiate a child custody dispute, (2) whether a trial court, in recognition of parents' fundamental liberty interest in childrearing and the parental presumption under MCL 722.25, must immediately return the child to a noncustodial parent upon the death of a custodial parent when the record contains legitimate allegations that the noncustodial parent is unfit, and (3) whether a trial court has the authority to award custody to a third party without standing pursuant to MCL 722.27(1)(a). We hold that a third party lacks standing if it does not meet one of the statutory standing requirements in the Child Custody Act, MCL 722.21 *et seq*. We further hold that a trial court, in considering a motion to modify a custody order in situations where sufficient legitimate and compelling indicia exist on the record indicating that a noncustodial parent is currently unfit, must first make a finding of parental fitness before determining the burden of persuasion to be applied and conducting an evidentiary hearing. Lastly, we hold that the plain language of MCL 722.27(1)(a) permits a trial court to award custody to a third party who lacks standing.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant conceived a child out of wedlock. The minor child was born in 2003. Plaintiff

initiated a paternity suit against defendant, who admitted paternity in November 2004. The judgment of filiation indicated that plaintiff would maintain sole legal and physical custody of the minor child and provided parenting time for defendant. Defendant then moved for a change of custody in December 2005. Consequently, the trial court amended the custody award in May 2006, awarding plaintiff and defendant joint legal custody, with physical custody remaining with plaintiff and parenting time given to defendant.

On July 6, 2006, defendant moved for a change of custody on the basis that plaintiff allegedly failed to follow the parenting time schedule, failed to provide proper clothing and hygiene to the minor child, allowed the minor child's medical insurance to lapse, used marijuana and crack cocaine, lived with an unstable boyfriend, and transported the minor child in her car without a child restraint. Defendant also alleged that he smelled crack cocaine emanating from plaintiff's car when plaintiff dropped the minor child off, that plaintiff had rarely visited the minor child when the child was in the hospital, and that plaintiff dressed the minor child in clothing inappropriate for the weather.

The trial court scheduled a hearing on defendant's motion for September 5, 2006. Defendant refiled the identical motion on August 30, 2006. The September 5th hearing was adjourned, however, because plaintiff was in the hospital, allegedly for treatment for drug abuse, and another hearing was scheduled for September 15th.[1] Defendant then filed an amended motion for a change of custody on September 8, 2006. On October 10, 2006, the trial court granted defendant's motion,

[1] Although the trial court's docket entries indicate that an order was entered on September 15, 2006, it appears from the record that the matter was adjourned to October 10, 2006.

awarding defendant temporary sole physical custody, with joint legal custody for both plaintiff and defendant, and scheduled another hearing for January 9, 2007. The minor child then began living with defendant and his wife, Lisa. Plaintiff was allowed reasonable parenting time but only on the condition that any parenting time be supervised. At the January 9, 2007, hearing the trial court appointed a guardian ad litem for the minor child, ordered supervised parenting time for plaintiff to take place at HelpSource,[2] and scheduled an evidentiary hearing for April 4, 2007.

At the April 4, 2007, hearing, the guardian ad litem testified that the minor child was in an established custodial environment with defendant. The guardian ad litem further indicated that he had concerns regarding plaintiff's drug use and that he had recommended drug screening and treatment. Ultimately, the guardian ad litem recommended that the minor child should remain in defendant's physical custody. Both plaintiff and defendant consented to this recommendation. Consequently, the trial court entered an order on May 2, 2007, that summarized the parties' agreement, under which the parties maintained joint legal custody while defendant maintained sole physical custody. The order required both plaintiff and defendant to undergo random, but weekly, drug screenings and continued plaintiff's supervised parenting time, which was to gradually increase depending on plaintiff's successful and timely completion of substance abuse counseling and negative drug screens. Lisa, however, did not become the minor child's guardian or otherwise establish any legal connection to the minor child.

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[2] In 2006, HelpSource was a private nonprofit agency offering a variety of services, including, but not limited to, supervised parenting time and assistance with substance abuse.

In August 2007 defendant died. Lisa filed a complaint for custody of the minor child, but dismissed it after the trial court determined that she did not have standing. Plaintiff then moved for a change of custody, citing defendant's death as a change of circumstances. On October 19, 2007, the trial court denied plaintiff's motion and "continued [its] current orders," which included supervised parenting time, reasoning on the record that, "if an established custodial environment is in place for a minor child, this court shall not disrupt that custodial environment until an evidentiary hearing has been held." In coming to this determination, however, the trial court recognized the parental presumption under MCL 722.25 that it is in the child's best interests to be placed with the parent and also noted that it did not wish to delay the matter in any way. The trial court stated:

> [Pursuant to MCL 722.25, Lisa] would have a burden by clear and convincing evidence in this case. Unless Ms. Kane is deemed unfit. And as a result, I am reappointing [the guardian ad litem] on behalf of the child to go to reinvestigate the home environments for this child . . . .

Thus, the minor child remained with Lisa pending an evidentiary hearing on November 20, 2007, which was as soon as the trial court's docket would permit.

Plaintiff moved for rehearing on November 2, 2007, alleging that the trial court erred by ordering a best interests hearing instead of immediately returning the minor child to plaintiff. In response, Lisa filed a brief opposing plaintiff's motion and also filed a motion to intervene. The trial court heard plaintiff's motion on November 20, 2007. At that hearing, the trial court again recognized the statutory presumption in favor of a parent and also recognized the competing presumption, under MCL 722.27(1)(c), in favor of maintaining

the established custodial environment. The trial court then reiterated its previous statement regarding the applicable burden of persuasion when the parent is deemed unfit. The trial court stated:

> [I]n a child custody dispute between a natural parent who does not have the status of a fit parent and a third party custodian, the trial court is not required to apply the statutory presumptions in favor of the parent. In this situation, the natural parent must show, by a preponderance of the evidence, that a change in the child's established custodial environment is in the child's best interest.

The trial court then took note of the factual history leading up to the present dispute, including plaintiff's consistent drug abuse, residence with an abusive boyfriend, and sporadic employment record. The court also noted that even when the minor child was in plaintiff's physical custody, the minor child nonetheless lived almost exclusively with defendant because plaintiff left the minor child with defendant, and that the minor child, when living with plaintiff, was neglected and lived in deplorable conditions. Because of these facts, the trial court deemed it necessary to reappoint the minor child's guardian ad litem to "properly assess the situation." As a result, the trial court concluded that it could not change the minor child's established custodial environment until a best interests evidentiary hearing was held. Further, with respect to Lisa's motion to intervene, the court noted that caselaw does not permit a third party to intervene, but "that does not preclude the court from deciding, after a best interest hearing, that it is in the child's best interest to be placed with a third party."[3]

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[3] Plaintiff sought leave to appeal the trial court's November 20, 2007, determination on plaintiff's motion for rehearing, which this Court

On December 11, 2007, the day of the rescheduled best interests hearing, the parties moved for an adjournment in order to collect more information concerning the minor child's progress at school. In addition, plaintiff had tested positive for cocaine and the guardian ad litem requested more time for a hair follicle test. Accordingly, the trial court adjourned the hearing to February 14, 2007.

The trial court then issued a supplemental order on January 11, 2008, directing that the minor child remain with Lisa pending the evidentiary hearing and that the minor child receive, as necessary, counseling to deal with the loss of her father. The order also required plaintiff to reenroll in a drug abuse treatment program, attend weekly appointments with her case manager and monthly appointments with her psychiatrist, and allotted plaintiff additional parenting time over the holidays as long as plaintiff remained at her father's house. Plaintiff now appeals this supplemental order. The trial court stayed the evidentiary hearing scheduled for February 14, 2008, pending this Court's disposition of the matter.

II. STANDARDS OF REVIEW

Three standards of review are relevant to child custody appeals. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Findings of fact should be affirmed "unless the evidence

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denied. *Kane v Anjoski*, unpublished order of the Court of Appeals, entered December 7, 2007 (Docket No. 282246).

clearly preponderates in the opposite direction." *Phillips*, *supra* at 20. The trial court's discretionary decisions, such as its custody awards, are reviewed for an abuse of discretion. *Id*. Lastly, "[q]uestions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (quotation marks and citations omitted).

Further, we review matters of statutory construction de novo. "The primary goal of judicial interpretation . . . is to ascertain and give effect to the intent of the Legislature." *Taylor v Currie*, 277 Mich App 85, 94; 743 NW2d 571 (2007) (quotation marks and citation omitted). "The first criterion in determining . . . intent is the specific language of the statute. . . . If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted . . . ." *Id.* (quotation marks and citation omitted).

III. THIRD-PARTY STANDING

Plaintiff first argues that Lisa is a third party who does not have standing to initiate a custody dispute or intervene in a paternity action. We agree.

Generally, a party has standing if it has " 'some real interest in the cause of action, . . . or interest in the subject matter of the controversy.' " *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992), quoting 59 Am Jur 2d, Parties, § 30, p 414. However, this concept is not given such a broad application in the context of child custody disputes involving third parties, or " 'any individual other than a parent,' " *Heltzel v Heltzel*, 248 Mich App 1, 31 n 20; 638 NW2d 123 (2001) (citation omitted). For example, a third party does not have standing by virtue of the fact that he or she resides with

the child and has a "personal stake" in the outcome of the litigation. *Bowie*, *supra* at 42; see also *In re Clausen*, 442 Mich 648, 678-682; 502 NW2d 649 (1993). Nor may a third party " 'create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the [child's] best interests . . . .' " *Heltzel*, *supra* at 28-29 (citation omitted); *Terry v Affum (On Remand)*, 237 Mich App 522, 529; 603 NW2d 788 (1999). Rather, under the Child Custody Act the Legislature has limited standing for third parties to two circumstances. Pursuant to MCL 722.26b, third-party guardians have standing to bring an action for the custody of a child. That provision provides, in part:

> (1) Except as otherwise provided in subsection (2), a guardian or limited guardian of a child has standing to bring an action for custody of the child as provided in this act.
>
> (2) A limited guardian of a child does not have standing to bring an action for custody of the child if the parent or parents of the child have substantially complied with a limited guardianship placement plan regarding the child . . . .

A third party also has standing under MCL 722.26c(1)(b), if the third party meets all the following conditions:

> (*i*) The child's biological parents have never been married to one another.
>
> (*ii*) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.
>
> (*iii*) The third person is related to the child within the fifth degree by marriage, blood, or adoption.

Neither of these provisions applies to the instant case. Lisa never became a guardian of the minor child

and, therefore, MCL 722.26b does not confer standing on Lisa. Further, standing is precluded under MCL 722.26c(1)(b). Even though plaintiff and defendant were never married, MCL 722.26c(1)(b)(*i*), and Lisa is related to the minor child through her marriage to defendant, MCL 722.26c(1)(b)(*iii*), plaintiff shared legal custody with defendant at the time of defendant's death, MCL 722.26c(1)(b)(*ii*). Thus, not all three requirements are met to create third-party standing. If a third party does not fit within one of the two statutory standing requirements, the third party lacks standing to create a custody dispute.[4] Lisa meets none of the statutory standing requirements, and both the minor child's residence with Lisa after defendant's death and Lisa's petition for custody are insufficient to create standing. Therefore, the trial court properly concluded that Lisa did not have standing to file a petition for custody.[5]

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[4] We also note that a party moving to intervene in litigation, as Lisa did here, must demonstrate that the party has standing to assert his or her claims. *Karrip v Cannon Twp*, 115 Mich App 726, 732; 321 NW2d 690 (1982). Because Lisa did not have standing, the trial court properly denied Lisa's motion to intervene.

[5] Although our conclusion is in agreement with plaintiff's position, we must note that we agree with plaintiff only to the extent that a third party does not have standing to create a custody dispute, or to intervene, in the absence of satisfying either of the statutory standing requirements. We disagree with plaintiff's contention that the trial court abused its discretion by allowing a third party without standing to "create a custody dispute." This assertion is factually inaccurate. Our review of the record shows that the trial court did not permit a third party without standing to petition for custody because it explicitly concluded that Lisa lacked standing. To the contrary, this matter was initiated on plaintiff's own petition. For this same reason, we find no merit in plaintiff's related argument that the trial court's allegedly improper course of action is tantamount to terminating plaintiff's parental rights. Assuming, for the sake of argument, that the trial court does award Lisa custody following any further hearings, plaintiff's parental rights will not be terminated and plaintiff may move for another change of custody.

IV. INTERIM CUSTODY AWARD

Plaintiff next contends that the trial court clearly erred and abused its discretion when it temporarily awarded custody to Lisa pending a best interests evidentiary hearing. Specifically, plaintiff asserts that the court erred because it modified the child custody order by awarding Lisa physical custody before holding an evidentiary hearing pursuant to MCL 722.25(1), which creates a presumption in favor of the natural mother, plaintiff. According to plaintiff, the minor child should have been automatically returned to plaintiff's physical custody upon defendant's death. We cannot conclude under the circumstances of this case that the trial court committed clear error requiring reversal or that it abused its discretion by permitting the minor child to remain with Lisa.

A. PRESUMPTIONS UNDER THE CHILD CUSTODY ACT

At the outset, we note the steps necessary to effectuate a change in custody pursuant to the Child Custody Act. A party seeking a change in custody must first establish proper cause or a change of circumstances by a preponderance of the evidence. *Vodvarka*, *supra* at 508-509; MCL 722.27(1). The movant must make this showing before the trial court can consider which burden of persuasion applies and conduct a child custody evidentiary hearing. *Vodvarka*, *supra* at 509. These initial steps, requiring the movant to establish proper cause or a change of circumstances, as well as the trial court's consideration of the burden of persuasion, taken before the court can conduct the evidentiary hearing "are intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Id.* (quotation marks and citation omit-

ted). Accordingly, when a motion for a change of custody is made, it is not improper for a trial court to continue the child's current established custodial environment pending the evidentiary hearing.

As indicated, after a movant first establishes proper cause or a change of circumstances warranting a change in custody, the trial court must then determine the relevant burden of persuasion before conducting the hearing. In most instances, the factual history of the case will not require lengthy consideration of the issue. Generally, if a petition for a change in custody involves a parent and a third party, there is a strong presumption that awarding custody to the parent is in the child's best interests. See *Heltzel*, *supra* at 26. This presumption is based on parents' fundamental due process liberty interest in the care, custody, and control of their children. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *Herbstman v Shiftan*, 363 Mich 64, 67; 108 NW2d 869 (1961). The Legislature recognized this interest in MCL 722.25(1), which provides the following burden of persuasion:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.

In such instances, the third party will bear the burden of proof and is required to rebut the parental presumption by clear and convincing evidence. *Heltzel*, *supra* at 26.

The Child Custody Act, however, also creates a presumption in favor of maintaining the established custodial environment. MCL 722.27(1)(c) provides, in relevant part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (c) 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 and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

This provision permits a court to modify a custody order so as to change a child's established custodial environment only if there is "clear and convincing evidence that it is in the best interest of the child." *Id.* As a result, in custody disputes between a parent and a third party with whom a child has an established custodial environment, a conflict arises between these two presumptions.

B. *HELTZEL v HELTZEL* AND *MASON v SIMMONS*

Courts have attempted to reconcile the interplay between the parental presumption and the custodial environment presumption in situations where, as here, the conflict exists. In *Heltzel* this Court determined, in recognition of parents' fundamental liberty interest in raising their children, that the parental presumption trumps the presumption of an established custodial environment. *Heltzel*, *supra* at 23-28. And, we agree

with that conclusion. This parental presumption protects not only parents' rights to the care and custody of their children, but also protects the children's parallel rights to the integrity of their family. Accordingly, in order to overcome the parental presumption, the *Heltzel* Court held that a third party nonparent must "prove[] that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person." *Heltzel, supra* at 27. Thus, under normal circumstances, where the parent is fit, he or she is entitled to the parental presumption and the third party bears the burden of persuasion.

However, in *Mason v Simmons*, 267 Mich App 188, 190-192; 704 NW2d 104 (2005), which involved a custody dispute between a parent and a custodial third party, this Court addressed whether an unfit parent is to be afforded the same deferential treatment to which a fit parent is entitled in considering a child's best interests in a custody dispute between the parent and the third party. The Court held that "when a parent's conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child, the reasoning and holding of *Heltzel* do not govern." *Id.* at 206. The Court did find, however, that because of the fundamental constitutional right of parents to make decisions concerning the care and custody of their children, even an unfit parent was entitled to some deference given his or her status as a parent. *Id.* at 198. Thus, in custody disputes between an unfit parent and a third-party custodian, even though the presumption in favor of maintaining an established custodial environment is triggered and the burden of persuasion shifts to the parent, the lower "preponder-

ance of the evidence" burden of persuasion is on the unfit parent to demonstrate that a change in the established custodial environment is in the child's best interests.[6] *Id.* at 207.

While neither *Heltzel* nor *Mason* directly addresses the factual situation presented in this case, these two cases, taken together, nonetheless inform the present matter because an unfit parent, or one who acts inconsistently with his or her parental interest, is not entitled to the parental presumption announced in *Heltzel*. Further, and most significantly, *Heltzel* and *Mason* indicate that an additional step is necessary, under certain limited circumstances, before applying the framework announced in *Vodvarka* in change of custody matters. Namely, when a custody issue arises between a parent and a third party after the death of a custodial parent, which issue presents legitimate and compelling indicia on the record that raise serious concerns regarding the parent's current ability to care for the safety and welfare of the child and suggests that the parent is unfit, the trial court is required to first make a preliminary finding of parental fitness before proceeding further. Once this preliminary finding is made, whether by judicial notice if appropriate,[7] through pleadings and documentary evidence, or by an evidentiary hearing, the trial court may proceed to determine the proper burden of persuasion to be applied, as announced in either *Heltzel* or *Mason*. There is no require-

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[6] We are bound to apply the holding in *Mason*, *supra*, pursuant to MCR 7.215(J)(1), even though we recognize that it appears to conflict with the plain language of MCL 722.27(1)(c): "The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."

[7] We can envision circumstances in which a child, because of the actions of an individual parent, is under the jurisdiction of the juvenile court. MCL 712A.2 *et seq*.

ment, despite the parent's fundamental liberty interest, that the child be immediately returned to an allegedly unfit noncustodial parent because these preliminary steps are necessary for the protection of the child's health and welfare and to prevent unwarranted and disruptive changes of custody. *Vodvarka*, *supra* at 509. However, we emphasize, for the purpose of providing trial courts with guidance in future similar circumstances, that in the absence of any legitimate indicia indicating that a noncustodial parent is unfit to the extent that a child may be at risk if returned, and in the absence of any legal relationship between the third party and the child, the trial court is required to return the child to the non-custodial parent upon notice of a custodial parent's death.[8]

C. APPLICATION

In the present matter, defendant had physical custody of the minor child and joint legal custody of the minor child with plaintiff, while Lisa, in the context of this child custody dispute, had no legal relationship with the minor child. Once plaintiff learned of defendant's death, plaintiff petitioned the trial court for a change of custody. There is no dispute that plaintiff established by a preponderance of the evidence that a change in circumstances, defendant's death, warranted her petition for a change of custody. *Vodvarka*, *supra* at 509. Under normal circumstances, any custodial arrange-

[8] While the circuit courts of this state have continuing jurisdiction over child custody disputes, *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), there will generally no longer be any case or controversy to resolve after the death of a custodial parent. In that event, the circuit court's exercise of its continuing jurisdiction over the child would merely involve dissolving the order awarding custody and returning the child to the surviving parent, including taking any necessary steps to provide for the orderly transition of the child to the care and custody of the surviving parent.

ments with a third party would have yielded to a parent's constitutional right to the custody and care of the child and the parental presumption of MCL 722.25(1), and plaintiff would have been awarded custody of the minor child upon notice of defendant's death.

This was not the outcome of plaintiff's motion for a change of custody. At the hearing on plaintiff's motion for rehearing, the trial court noted the factual history of the case, including plaintiff's consistent drug abuse, plaintiff's residence with an abusive boyfriend, and plaintiff's neglect of the minor child. Given the substantial evidence on the record, the trial court had legitimate concerns regarding plaintiff's parental fitness, especially in light of the fact that plaintiff was only permitted supervised visitation and tested positive for cocaine on the date of the evidentiary hearing. Because the record contained serious legitimate and compelling allegations regarding plaintiff's current parental fitness, the trial court, while recognizing both the parental presumption and the custodial environment presumption, indicated that it would continue its current orders until more information had been collected regarding plaintiff's fitness. This was the proper course of action. It was appropriate for the trial court to maintain the status quo while it made its preliminary findings, including first determining plaintiff's parental fitness, then determining which burden of persuasion would be applicable, and finally conducting the evidentiary best interests hearing. The trial court did not commit clear legal error, nor did it abuse its discretion by permitting the minor child to remain with Lisa in the interim.

D. PARENTAL FITNESS

Although we have concluded that the trial court did not err, we find it necessary to provide some guidance

with respect to making a constitutionally sound determination of parental fitness, because the trial court must make such a finding on remand. We first note that while the courts of this state have consistently held that the rights of a parent are not to be disturbed absent a showing of unfitness, they have not articulated a clear standard by which a parent may be found unfit in the context of a child custody dispute and the application of the parental presumption. See *Burkhardt v Burkhardt*, 286 Mich 526, 534-535; 282 NW 231 (1938); *Liebert v Derse*, 309 Mich 495, 500; 15 NW2d 720 (1944); *Riemersma v Riemersma*, 311 Mich 452, 458; 18 NW2d 891 (1945). In *Mason*, *supra*, in which this Court ultimately concluded that the parental presumption of MCL 722.25(1) does not apply if a parent is found to be unfit, the Court provided little direction with respect to making a finding of fitness. The Court merely stated: "If a parent is unfit or fails to adequately care for a child, i.e., neglects or abandons a child, [the parental presumption is] extinguished." *Mason, supra* at 200. Over four decades earlier, in *Herbstman*, *supra*, our Supreme Court provided a similar, albeit more nuanced, approach to making a finding of parental fitness. The Court stated:

> The rights of parents are entitled to great consideration, and the court should not deprive them of custody of their children without extremely good cause. A child also has rights, which include the right to proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals, or well-being; the right to proper custody by his parents, guardian, or other custodian; and the right to live in a suitable place free from neglect, cruelty, drunkenness, criminality, or depravity on the part of his parents, guardian, or other custodian. It is only when these rights of the child are violated by the parents themselves that the child becomes subject to judicial control. [*Herbstman, supra* at 67-68.]

More recently, our Supreme Court in *In re Clausen*, *supra* at 686, recognized the interdependent nature of both children's and parents' liberty interests. The Court indicated that these mutual interests may be broken where a parent is unfit, thereby warranting interference with the parent-child relationship. *Id*. at 687 n 46.

Each of these cases relates parental fitness to the child's needs. And, while none of these cases articulates a standard for determining parental fitness, it is nonetheless clear, given the interdependent nature of the rights involved, that the inquiry must focus on a parent's abilities relative to the child's needs when determining parental fitness. See *id.*; *Herbstman*, *supra* at 67-68. In many instances, the relevant factors may be plainly evident in the facts of the case. However, courts may also look for additional guidance from the criteria enumerated in MCL 712A.2(b) and utilized in child protective proceedings. See *In re Brock*, 442 Mich 101, 107; 499 NW2d 752 (1993) ("The purpose of child protective proceedings is the protection of the child . . . ."). As our Supreme Court outlined in *Herbstman*, *supra* at 67-68, such criteria may include, but are not limited to, the ability or inability to provide: proper and necessary supervision and support; education as required by law; medical, surgical, and other care necessary for a child's health, morals, or well-being; and a safe and suitable environment free from neglect, cruelty, drunkenness, criminality, or depravity.[9] Further, given the fundamental nature of the liberty interest involved, *Troxel*, *supra* at 65, we are of the view that a parent should be deemed unfit only after such an

[9] We stress that these factors are to be considered only in the context of determining a parent's fitness and are not to be weighed in comparison to the competing custodian.

inquiry shows, by a preponderance of the evidence, that the parent is, in fact, *currently* unfit. See *In re Brock*, *supra* at 108-109. It is important for us to stress that a finding of unfitness in the context of custody proceedings may always be revisited. That a parent is once found unfit does not somehow bar him or her from resolving issues, becoming fit in the future, and seeking custody at a later time whereupon the parental presumption would again be applied.

V. CUSTODY AWARD "TO OTHERS"

Plaintiff further claims that the trial court improperly concluded that it had authority, pending an evidentiary hearing, to award custody to Lisa, a third party without standing, pursuant to MCL 722.27(1)(a), which provides, in pertinent part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may . . . :
>
> (a) Award the custody of the child to 1 or more of the parties involved *or to others* and provide for payment of support . . . ." [Emphasis added.]

In plaintiff's view, the language referring "to others" in MCL 722.27(1)(a) means "others with standing." We observe at the outset that the trial court has not acted pursuant to this authority at this point in the proceedings, although it has indicated that it has the power to make such an award regardless of the applicable presumption. We agree with the trial court.

The meaning of MCL 722.27(1)(a) is clear and unambiguous. If a child custody dispute is pending, the trial court may award custody of the child to others if it is in the child's best interests. There is no limiting language

in the statute that conditions an award "to others" to only those "others having standing," as plaintiff argues. Rather, the statute's sole limitation is that the award be in the child's best interests, after weighing the parental presumption, applicable burdens of proof, and the statutory best interests factors.

Further, we cannot agree with plaintiff's argument that the Legislature must have intended the "to others" provision to mean "others with standing" because interpreting the language to include all "others" would abrogate the standing requirements of MCL 722.26c. To adopt plaintiff's interpretation is to engage in judicial construction, which is neither necessary nor permitted when, as in this case, a statute is plain and unambiguous. *Taylor*, *supra* at 94. Moreover, there is no merit to plaintiff's contention that the standing requirements of MCL 722.26c will be abrogated if trial courts are permitted to award custody "to others" for the child's best interests. As we have discussed, if a third party lacks standing, he or she cannot become a party to a custody dispute. *Bowie*, *supra* at 48-49. It is a threshold requirement of MCL 722.27(1) that a custody dispute be properly initiated before the trial court can make any award. A third party without standing cannot initiate that dispute. However, once a custody dispute has been properly initiated, it is within the court's authority to award custody of the child to a third party pursuant to MCL 722.27(1)(a) if it is appropriate to do so under the particular facts of the case. The trial court was not inaccurate in its statement that it had authority to award the child at issue "to others" pursuant to MCL 722.27(1)(a) after a best interests evidentiary hearing.

VI. CONSTITUTIONAL CLAIM

Lastly, plaintiff characterizes the trial court's determination as an egregious violation of her constitutional

rights because the decision effectively allows "any person" at "any time" to obtain custody of a child, contrary to *Troxel*, *supra* at 65. We disagree. Plaintiff's characterization of the trial court's determination is inaccurate. The trial court did not allow Lisa to petition for custody of the minor child or to intervene in the paternity action because, in fact, the trial court ruled that Lisa lacked standing. Thus, the trial court's decision cannot be construed as permitting "any person" to seek, "at any time," custody of a child.

Rather, the trial court in this matter recognized the parental deference that is due under due process standards, *Heltzel*, *supra*, and properly indicated that this parental preference is afforded only to fit parents, *Mason*, *supra*. The trial court further indicated that the presumption in favor of maintaining an established custodial environment would apply if plaintiff is found to be currently unfit. *Mason, supra.* These recognized burdens of proof adequately protect plaintiff's fundamental right and liberty interests, particularly in light of the consideration of the child's best interests, safety, and welfare. Therefore, we conclude that the trial court did not deny plaintiff's constitutional right to the care, custody, and control of the minor child.

Having found that the trial court did not commit clear legal error or abuse its discretion, we affirm the trial court's interim custody order permitting the minor child to remain in the established custodial environment of Lisa's home pending the best interests hearing. MCL 722.28; *Berger*, *supra* at 705.

Affirmed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

PEOPLE v SADOWS
PEOPLE v GALE

Docket Nos. 286689 and 286693. Submitted March 11, 2009, at Detroit. Decided March 19, 2009, at 9:15 a.m.

The Wayne County Prosecuting Attorney charged Colleen E. Sadows and John J. Gale with the felony offense of operating a vehicle while intoxicated (OWI), third offense, pursuant to MCL 257.625(9) or (11), as amended by 2006 PA 564, effective January 3, 2007. The statutory amendment removed a requirement that prior convictions of OWI or operating a vehicle while under the influence of liquor (OUIL) had to be within 10 years of a current OWI charge in order for the current charge to be enhanced from a misdemeanor to a felony. Each defendant had sustained the initial OUIL conviction more than 10 years before the current charge. The Wayne Circuit Court, Deborah A. Thomas, J., quashed the information on motions by Sadows and Gale, ruling that the amended statute, as applied to Sadows and Gale, were violative of the constitutional prohibition against ex post facto laws and of the constitutional rights of equal protection and due process. The prosecuting attorney appealed in each case, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. MCL 257.625(9) and (11), as amended, do not violate the prohibition against ex post facto laws. The amendment does not attach legal consequences to prior offenses that occur before the effective date of the amendment. Rather, the amendment makes the consequences of a current offense occurring after January 3, 2007, more severe on the basis of the prior convictions.

2. MCL 257.625(9) and (11), as amended, do not violate equal protection or due process. Their enhancement provisions are rationally related to the legitimate governmental interest in reducing habitual drunken driving and alcohol-related traffic fatalities. Additionally, and with respect to due process, Sadows and Gale had constructive notice that their prior OUIL convictions would subject them to felony prosecutions if they operated a vehicle while under the influence of liquor.

Reversed and remanded for further proceedings.

Michael A. Cox, Attorney General, *B. Eric Rustuccia*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Assistant Prosecuting Attorney.

Paul C. Youngs, P.C. (by *Paul C. Youngs*), for Colleen E. Sadows.

Daniel J. Blank for John J. Gale.

Before: SAAD, C.J., and BANDSTRA and HOEKSTRA, JJ.

PER CURIAM. The prosecution appeals by right the trial court's orders granting defendants' motions to quash the informations. Because MCL 257.625, as amended by 2006 PA 564, does not violate the prohibition against ex post facto laws, and because it does not deny defendants their rights to equal protection and due process, we reverse and remand for further proceedings.

I

In Docket No. 286689, defendant, Colleen Sadows, was charged with operating a vehicle while intoxicated (OWI), MCL 257.625(1), a misdemeanor. Because Sadows was previously convicted of operating a motor vehicle while under the influence of liquor (OUIL) in 1997 and 2001, the prosecution sought to convict Sadows of a felony pursuant to MCL 257.625(9) or (11), as amended by 2006 PA 564, effective January 3, 2007.[1] In

[1] Before MCL 257.625 was amended, a defendant could only be convicted of a felony rather than a misdemeanor if he or she had been convicted or two or more drunken driving offenses within the previous 10 years. *People v Perkins*, 280 Mich App 244, 250; 760 NW2d 669 (2008), aff'd 482 Mich 1118 (2008). The amendment eliminated the 10-year

Docket No. 286693, defendant John Gale was charged with OWI and, because he had previously been convicted of OUIL in 1994 and 2000, the prosecution also sought to convict him of a felony pursuant to MCL 257.625(9) or (11). Each defendant filed a motion to quash the respective information. The trial court granted the motions, concluding that MCL 257.625(9) and (11), as amended, were not merely sentencing enhancements because the subsections changed the charged offense from a misdemeanor to a felony and that the two subsections violated the constitutional prohibition against ex post facto laws and the constitutional guarantee of equal protection.[2]

II

The prosecution argues that the trial court erred by ruling that the application of MCL 257.625(9) and (11), as amended, violates the Ex Post Facto Clause of both the federal constitution and the state constitution, US Const, art I, § 10; Const 1963, art 1, § 10. We agree. We review constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). A statute is presumed constitutional, *People v Hubbard (After Remand)*, 217 Mich App 459, 483; 552 NW2d 493 (1996), and the party challenging the statute has the burden of proving its invalidity, *People v Thomas*, 201 Mich App 111, 117; 505 NW2d 873 (1993).

In *People v Perkins*, 280 Mich App 244, 251-252; 760 NW2d 669 (2008), this Court held that MCL 257.625(9),

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requirement and allows the use of any two drunken driving convictions for enhancement, regardless of the time that elapsed between the prior convictions and the current offense. *Id.*

[2] This Court consolidated the two cases for appeal. *People v Sadows*, unpublished order of the Court of Appeals, entered August 22, 2008 (Docket Nos. 286689, 286693).

as amended, did not violate the prohibition against ex post facto laws. The Court reasoned that "the amendment did not attach legal consequences to [the] prior offenses, which occurred before the amendment's effective date. Rather, the amendment made the consequences of current offenses, which occurred after January 3, 2007, more severe on the basis of [the] prior convictions." *Id.* at 251. Because MCL 257.625(9) does not punish the prior offenses, "the change in the predicate offenses used to raise current conduct to the felony level does not constitute an ex post facto violation." *Id.* at 252.[3] Our Supreme Court "affirm[ed] the Court of Appeals decision holding that . . . MCL 257.625 does not violate the ex post facto provisions of the federal and state constitutions." *People v Perkins*, 482 Mich 1118 (2008). Accordingly, the trial court erred by concluding that the application of MCL 257.625, as amended, violates the prohibition against ex post facto laws.[4]

The prosecution also argues that the trial court erred by concluding that MCL 257.625, as amended, violates the Equal Protection Clause of both the federal constitution and the state constitution, US Const, Am XIV, § 1; Const 1963, art 1, § 2. We agree.

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[3] The Court's decision in *Perkins* also applies to MCL 257.625(11).

[4] We reject any argument by defendants that, because a sentencing court is not to consider prior convictions for which there is a 10-year period between the discharge date of the prior conviction and the sentencing offense in scoring prior record variables 1 through 5, MCL 777.50(1), (2), the Legislature did not intend for the amendment of MCL 257.625(9) and (11) to apply to OWI or OUIL convictions that were obtained more than 10 years before the current OWI offense. Such an argument is contrary to the plain language of MCL 257.625(9) and (11). *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). Further, the amendment of MCL 257.625(9) and (11) is the more specific and more recent enactment. *Verizon North, Inc v Pub Service Comm*, 260 Mich App 432, 438; 677 NW2d 918 (2004).

The guarantee of equal protection requires that government treat similarly situated persons alike. *People v Haynes*, 256 Mich App 341, 345; 664 NW2d 225 (2003). "Unless the alleged discrimination involves a suspect class or impinges on the exercise of a fundamental right, a contested statute is evaluated under the rational basis test." *Id.* Defendants do not allege that MCL 257.625(9) and (11), as amended, target a suspect class. Further, the disparate treatment of criminal offenders does not impinge on an individual's fundamental rights. *Id.* Defendants have not established that the amendment of MCL 257.625(9) and (11) is arbitrary and not rationally related to a legitimate governmental interest. *Haynes, supra* at 346. Rather, the enhancement provisions are tailored to OWI repeat offenders and are rationally related to the government's interest in reducing habitual drunken driving and alcohol-related traffic fatalities. See *id.* at 347-348. The trial court erred by ruling that the application of MCL 257.625(9) and (11), as amended, violates the constitutional guarantee of equal protection.

We also reject defendants' argument that the application of MCL 257.625(9) and (11) violates the Due Process Clause of both the federal constitution and the state constitution, US Const, Am XIV, § 1; Const 1963, art 1, § 17. "The constitutional guarantee of due process, in its most fundamental sense, is a guarantee against arbitrary legislation." *Whitman v Lake Diane Corp*, 267 Mich App 176, 181; 704 NW2d 468 (2005). As already stated, MCL 257.625(9) and (11), as amended, are not arbitrary. The amendment is rationally related to the Legislature's interest in reducing habitual drunken driving. Further, defendants had constructive notice, pursuant to the amendment, that their prior OUIL convictions would subject them to felony prosecutions if they operated a vehicle while under the influ-

ence of liquor. *Haynes, supra* at 349. Consequently, defendants' argument that the application of MCL 257.625(9) and (11), as amended, violates their due process rights is unavailing.[5]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

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[5] We refuse to find MCL 257.625(9) and (11), as amended, violative of due process because, as argued by defendants, the administrative burdens of applying the amendment would be "considerable." No considerable administrative burdens are present in applying the amendment to either defendant.

TRANSOU v CITY OF PONTIAC

Docket No. 280046. Submitted December 10, 2008, at Detroit. Decided January 22, 2009. Approved for publication March 19, 2009, at 9:20 a.m.

Darin Transou brought an action in the Oakland Circuit Court against the city of Pontiac, seeking damages for injuries he sustained when struck by a golf ball at a golf course owned by the city. The court, Rudy, J. Nichols, J., granted the city summary disposition on the ground that the plaintiff's action was barred by governmental immunity. The plaintiff appealed.

The Court of Appeals *held*:

The trial court properly ruled that the plaintiff's action is barred by governmental immunity. The plaintiff argued that the proprietary-function exception to governmental immunity found in MCL 691.1413 applied. A proprietary function is any activity conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding any activity normally supported by taxes or fees. Whether an activity actually generates a profit is not dispositive when determining whether the governmental agency conducts the activity primarily for the purpose of producing a pecuniary profit, but the existence of profit is relevant to the agency's intent. An agency may conduct an activity on a self-sustaining basis without being subject to the proprietary-function exception. Where the profit is deposited and how it is spent also indicate intent. Depositing the profit in the general fund or using it on unrelated events indicates a pecuniary motive, while using it to defray the expenses of the activity indicates a nonpecuniary purpose. In this case, the revenue the golf course generates is intended to be applied to the course's operation and service of the bond debt incurred when the golf course was reconstructed as part of a golf course development project that included the development of the surrounding community. The golf course has operated at a loss for many years, and other city revenues have been used to meet the course's obligations. Thus the golf course revenue is used in a self-sustaining manner. Using the revenue to extinguish the bonds issued to finance the housing component of the development project is not

use of it for an unrelated event because the development of surrounding housing was part of the development project. The golf course revenue has not been budgeted for use by other city departments or considered as a means to reduce tax millages or fund other city operations.

Affirmed.

GOVERNMENTAL IMMUNITY — PROPRIETARY-FUNCTION EXCEPTION — PECUNIARY PROFIT BY GOVERNMENTAL AGENCIES — WORDS AND PHRASES.

For purposes of the propriety-function exception to governmental immunity, "proprietary function" means any activity conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding any activity normally supported by taxes or fees; whether an activity actually generates a profit is not dispositive when determining whether the governmental agency conducts the activity primarily for pecuniary profit, but the existence of profit is relevant to the agency's intent; an agency may conduct an activity on a self-sustaining basis without being subject to the proprietary-function exception; where the profit is deposited and how it is spent also indicates intent; depositing the profit in the general fund or using it on unrelated events indicates a pecuniary motive, while using it to defray the expenses of the activity indicates a nonpecuniary purpose (MCL 691.1413).

Marcellus Long, Jr., for the plaintiff.

Law Offices of Berry, Johnston, Sztykiel, Hunt & McCandless, P.C. (by *Eric S. Goldstein*), for the defendant.

Before: SERVITTO, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM. This matter arises out of injuries plaintiff sustained when struck by a golf ball at defendant's golf course. Defendant moved for summary disposition, asserting that the action was barred by governmental immunity under MCL 691.1407(1). The trial court agreed, and plaintiff now appeals as of right. We affirm.

Although not specified in the record, the trial court granted defendant summary disposition under MCR 2.116(C)(7) and (10). We review de novo a trial court's

decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(7) is properly granted when a claim is barred by governmental immunity and the nonmoving party has failed to allege facts that justify an exception to that immunity. *Steele v Dep't of Corrections*, 215 Mich App 710, 712-713; 546 NW2d 725 (1996). A motion under MCR 2.116(C)(10) is properly granted if no genuine issue of fact exists and the moving party is entitled to a judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In reviewing a motion brought under MCR 2.116(C)(7) or MCR 2.116(C)(10), we consider all the evidence, including admissions, affidavits, depositions, and pleadings in the light most favorable to the nonmoving party. *Rice*, *supra* at 30-31; *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

Plaintiff argues that the trial court erred by determining that the proprietary function exception to governmental immunity did not apply. We disagree. Generally, governmental agencies are immune from tort liability. MCL 691.1407(1). However, MCL 691.1413 provides that governmental immunity does not apply "to actions to recover for bodily injury . . . arising out of the performance of a proprietary function . . . ." That same section defines "proprietary function" as "any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." *Id.* Thus, to be a proprietary function, the "activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). Two considerations are relevant to the first prong of this inquiry:

> First, whether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to the governmental agency's intent. An agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exemption. Second, where the profit is deposited and where it is spent indicate intent. If profit is deposited in the general fund or used on unrelated events, the use indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose. [*Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004) (citations omitted).]

Our review of the record shows that defendant's golf course is not a propriety function within the meaning of MCL 691.1413 because there is no genuine issue of material fact about whether the golf course is "conducted primarily for the purpose of producing a pecuniary profit . . . ." *Coleman*, *supra* at 621. Although the parties dispute whether the golf course generates a profit, the record shows that any revenue the golf course does generate is intended to be applied to its operation and its bond service obligation. This debt was incurred in the mid-1990s when the golf course was reconstructed as part of the golf course development project, which also included the development of a surrounding residential community. Nonetheless, the golf course has operated at a loss since the fiscal year ending in 1995, and defendant's finance director, Mr. Raymond Cochran, noted that other city revenues have been used to meet the golf course's obligations.

Given these facts, we are not persuaded that this use of the golf course's revenue shows a pecuniary motive. Any revenue from the operation of the golf course was not deposited in a general fund or used on unrelated events. *Herman*, *supra* at 145. Rather, revenue was to be used in a self-sustaining manner—to meet operation costs and to service the debt incurred during redevel-

opment. *Id.* We see no merit in plaintiff's contrary contention that the golf course's revenue was to be used on "unrelated events" because it was intended to extinguish the bonds issued to finance the housing component of the development project. Rather, the record reflects that the development of surrounding housing was part of the development project and, therefore, it is not an unrelated event. Further, Mr. Cochran stated in his affidavit that "[g]olf course revenues have never been budgeted in an anticipatory fashion for use by other City departments or divisions . . . and have not been considered as a basis to reduce tax millages nor to fund other City operations."[1]

Viewed in the light most favorable to plaintiff, the evidence does not show that that the golf course was operated "primarily for the purpose of producing a pecuniary profit . . . ." *Coleman*, *supra* at 621. Accordingly, the operation of the golf course is not a proprietary function, and the trial court properly ruled that plaintiff's action is barred by governmental immunity.

Affirmed.

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[1] In opposition to defendant's motion for summary disposition, plaintiff presented an affidavit prepared by an accountant. The affidavit was neither signed nor notarized. This deficiency was brought to plaintiff's attention in defendant's reply, but there is no indication in the record that the defects were cured. Because the affidavit does not comply with the court rules, we do not consider it. MCR 2.113(A); MCR 2.114(C)(2).

TEVIS v AMEX ASSURANCE COMPANY

Docket No. 282412. Submitted January 13, 2009, at Detroit. Decided March 19, 2009, at 9:25 a.m.

Terrence Tevis brought an action in the Genesee Circuit Court against Amex Assurance Company and Geico Indemnity Company, seeking no-fault personal protection insurance benefits after he was injured in Michigan in a collision involving a motorcycle he was operating and an automobile. The plaintiff did not have a no-fault automobile insurance policy of his own, but he lived with his parents, who had a no-fault policy from Geico. The automobile involved in the accident was covered by a policy issued in the state of Washington by Amex, which had filed a certification pursuant to MCL 500.3163 that any accidental bodily injury or property damage occurring in Michigan arising from the ownership, operation, maintenance, or use of a motor vehicle by an out-of-state resident who is insured under an automobile liability insurance policy from Amex would be subject to the personal and property protection insurance system of the no-fault act. Both insurers moved for summary disposition, each claiming that the other was first in priority of liability. The court, Geoffrey L. Neithercut, J., granted Geico's motion and denied Amex's motion. Case evaluation ended in a proposed award of $190,000 in favor of the plaintiff and against Amex. The plaintiff accepted the award, but Amex rejected it. The plaintiff and Amex stipulated a single issue to be decided by the jury—whether the plaintiff owned the motorcycle involved in the accident—and further stipulated the amount of damages the plaintiff would recover if the jury finds that he did not own the motorcycle. The jury determined that the plaintiff did not own the motorcycle. The damages, as adjusted under the case evaluation court rule, MCR 2.403, were more favorable to the plaintiff than the case evaluation. The plaintiff moved for case evaluation sanctions and attorney fees pursuant to MCL 500.3148 of the no-fault act. The court denied the motion. Amex appealed, and the plaintiff cross-appealed.

The Court of Appeals *held*:

1. Amex has standing to pursue an appeal. It is an aggrieved party whose appeal of the trial court's ruling on the motions for summary disposition is within the jurisdiction of the Court of Appeals under MCR 7.203(A).

2. Under MCL 500.3163, Amex may be liable for personal protection insurance benefits for a Michigan resident injured in an accident involving an out-of-state vehicle insured by Amex, an out-of-state insurer that has filed a certification pursuant to MCL 500.3163. This statute explicitly provides that an insurer may file a certification that any accidental bodily injury or property damage occurring in Michigan and arising from the ownership of a motor vehicle by an out-of-state resident insured by the insurer under an automobile liability policy is subject to the personal and property protection insurance system under the no-fault act. The statute has no language limiting an out-of-state insurer's liability to situations when the accidental bodily injury is sustained by its insured, nor is there any restriction on the application of the no-fault act. MCL 500.3163(3) also explicitly provides that claimants have the right to receive benefits from the insurer as if the insurer were an insurer of personal and property protection insurance applicable to accidental bodily injury or property damage.

3. Amex is first in priority of liability for the personal protection insurance benefits claimed by the plaintiff. Under MCL 500.3114(5)(a), the insurer of the owner or registrant of a motor vehicle involved in an accident with a motorcycle is first in priority of liability for personal protection insurance benefits claimed by an operator or passenger of the motorcycle.

4. Even though the jury did not determine the amount of damages for the plaintiff because of the parties' stipulation, it nevertheless rendered a verdict more favorable to the plaintiff than the case evaluation for purposes of case evaluation sanctions against Amex. None of the exceptions to the mandatory imposition of sanctions pursuant to MCR 2.403 applies. The trial court erred in denying the plaintiff's motion for case evaluation sanctions against Amex.

5. The trial court correctly determined that the plaintiff was not entitled to an award of attorney fees under MCL 500.3148. Amex's refusal to pay the plaintiff's claim was not unreasonable, given the question of fact regarding ownership of the motorcycle and also because of the question relating to the applicability of MCL 500.3163 to this case.

Affirmed in part, reversed in part, and remanded for entry of a judgment in the plaintiff's favor that includes case evaluation sanctions.

1. INSURANCE — NO-FAULT — NONRESIDENT MOTOR VEHICLE OWNERS — OUT-OF-STATE AUTOMOBILE LIABILITY INSURERS — CERTIFICATION OF NO-FAULT COVERAGE.

An out-of-state insurer that is not authorized to transact automobile

liability insurance and personal and property protection insurance in Michigan may voluntarily file a certification that any accidental bodily injury or property damage occurring in Michigan and arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident will be subject to the personal and property protection insurance system set forth in the no-fault act; no-fault coverage pursuant to such certification applies to any accidental bodily injury or property damage sustained in Michigan, not just those sustained by the out-of-state insured (MCL 500.3163).

2. PRETRIAL PROCEDURE — CASE EVALUATION SANCTIONS — PARTIES REJECTING CASE EVALUATION — VERDICTS FOR PURPOSES OF AWARDING CASE EVALUATION SANCTIONS — STIPULATED DAMAGES.

A jury, in a case in which a party has rejected a case evaluation and the parties have stipulated an award of damages for the plaintiff depending on a specific finding of fact by the jury, renders a verdict for purposes of possible case evaluation sanctions when it makes its finding of fact (MCR 2.403[O][2]).

George Hamo for Terrence Tevis.

Kopka, Pinkus, Dolin & Eads, PLC (by *Aaron D. Sims* and *Michelle T. Trasher*), for Amex Assurance Company.

Moblo & Fleming, P.C. (by *David J. Fleming* and *Allison L. Silverstein*), for Geico Indemnity Company.

Before: SAAD, C.J., and DAVIS and SERVITTO, JJ.

PER CURIAM. Amex Assurance Company (Amex) appeals as of right the trial court's order granting Geico Indemnity Company's motion for summary disposition and denying Amex's cross-motion for summary disposition. Plaintiff cross-appeals from the trial court's order denying his motion for case evaluation sanctions against Amex and for attorney fees pursuant to the no-fault act. We affirm in part, reverse in part, and remand for entry of a judgment in plaintiff's favor inclusive of case evaluation sanctions.

This matter arises out of an automobile-motorcycle accident in which the motorcycle operator, plaintiff, incurred serious injuries. The automobile involved in the accident was covered by an insurance policy issued in the state of Washington by Amex. While plaintiff did not have a no-fault insurance policy, his parents, with whom he resided, had such a policy issued by defendant Geico Indemnity Company (Geico). When both insurers failed or refused to pay personal protection insurance (PIP) benefits to plaintiff, he initiated this action. Shortly after this action commenced, Geico moved for summary disposition on the basis that Amex was the insurer first in priority for purposes of PIP benefits payable to or on behalf of plaintiff. Amex also moved for summary disposition, arguing that Geico was the first priority insurer. The trial court agreed with Geico and granted its motion for summary disposition, while denying Amex's cross-motion. This Court denied Amex's application for leave to appeal and the matter proceeded to trial against Amex. A judgment was ultimately entered in favor of plaintiff and against Amex in the amount of $326,895.01. Plaintiff thereafter sought case evaluation sanctions and attorney fees, both of which the court declined to award. These appeals followed.

I. STANDING TO APPEAL

At the outset, we note that plaintiff and Geico challenge Amex's standing to pursue an appeal, arguing that, absent a cross-claim against Geico, Amex has no right to appeal the summary disposition ruling in Geico's favor. We disagree.

Pursuant to MCR 7.203(A), this Court "has jurisdiction of an appeal of right filed by an aggrieved party." The term "aggrieved party" is defined, for purposes of MCR 7.203, as one who is not merely disappointed over

a certain result, but one who has "suffered a concrete and particularized injury. . . . [A] litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292, 715 NW2d 846 (2006).

On appeal, Amex's sole argument is that the trial court erred in interpreting and applying of MCL 500.3163. The lower court's ruling regarding this statute served as the basis for the determination that Amex was liable for PIP benefits payable to, or on behalf of, plaintiff and for granting Geico's motion for summary disposition and denying Amex's cross-motion for summary disposition. Because Amex's pecuniary interest has been directly affected by the summary disposition order and Amex has suffered a particularized "injury," it is an "aggrieved party" with respect to the trial court's summary disposition ruling. Amex has standing to challenge that ruling on appeal.

II. STANDARD OF REVIEW

We review a trial court's decision regarding a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim. *Id.* When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). We review issues of statutory interpretation de novo. *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007).

III. COVERAGE BY A NONRESIDENT'S OUT-OF-STATE INSURANCE POLICY FOR INJURIES TO A MICHIGAN RESIDENT

Amex contends that the trial court erred by ruling that MCL 500.3163 was applicable to the instant matter and by relying on the statute to grant summary disposition in Geico's favor on the issue of priority. We disagree.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. *Liberty Mut Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 45; 638 NW2d 155 (2001). The first criterion in determining intent is the language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Id.* However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *Id*. Only if the language is ambiguous do we look to other factors in attempting to ascertain the purpose behind the legislation. A liberal construction in favor of the public and the policyholders is preferred when the statute involved is an insurance law. *Michigan Life Ins Co v Comm'r of Ins*, 120 Mich App 552, 558; 328 NW2d 82 (1982).

MCL 500.3163 provides:

> (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage

> occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.
>
> (2) A nonadmitted insurer may voluntarily file the certification described in subsection (1).
>
> (3) Except as otherwise provided in subsection (4), if a certification filed under subsection (1) or (2) applies to accidental bodily injury or property damage, the insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage.
>
> (4) If an insurer of an out-of-state resident is required to provide benefits under subsections (1) to (3) to that out-of-state resident for accidental bodily injury for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to $500,000.00. Benefits under this subsection are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

As noted by our Court in *Kriko v Allstate Ins Co of Canada*, 137 Mich App 528, 532; 357 NW2d 882 (1984), there are at least two benefits that an out-of-state insurance company receives by filing and maintaining on file a § 3163 certificate, even though it does not write any motor vehicle insurance policies in this state. First, the out-of-state insurance company makes its insurance policies more attractive to potential customers who

might be regular travelers in the state of Michigan. Second, the out-of-state insurer may avail itself of the potential benefits provided by Michigan's no-fault system by filing its certification. There is no dispute that Amex filed the § 3163 certificate in the instant matter, thus subjecting itself to, and availing itself of, Michigan's no-fault system. The issue is whether, as Geico contends (and plaintiff concurs), MCL 500.3163 places Amex in the priority position for purposes of PIP benefits to a Michigan resident who was injured in an accident involving an out-of state vehicle insured by out-of state insurer Amex. We hold that it does.

Michigan cases addressing the application of MCL 500.3163 generally involve situations where a nonresident, insured by an out-of state insurer who has filed the certification set forth in MCL 500.3163(1), is seeking benefits from that out-of-state insurer for injuries that occurred in a Michigan automobile accident. These cases initially appear to support an argument that the statute imposes liability for benefits on an out-of-state insurer only where its own insured suffers injuries. In *Transport Ins Co v Home Ins Co*, 134 Mich App 645, 651; 352 NW2d 701 (1984), for example, a panel of our Court determined that the only conditions for an insurer's liability under § 3163 are: (1) certification of the carrier in Michigan, (2) existence of an automobile liability policy between the nonresident and the certified carrier, and (3) a sufficient causal relationship between the *nonresident's injuries* and his or her ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. *Transport Ins Co* appears to indicate liability only attaches to an out-of-state insurer with respect to injuries incurred by an out-of-state resident. Later Michigan cases involving § 3163 have employed this same standard. *Liberty Mut Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35,

40; 638 NW2d 155 (2001), for example, noted that "[u]nder MCL § 500.3163(1), insurers authorized to transact PIP insurance in Michigan are required to pay Michigan PIP benefits to their out-of-state resident insureds in the event of a motor vehicle accident occurring in Michigan." See, also, *Goldstein v Progressive Casualty Ins Co*, 218 Mich App 105, 110; 553 NW2d 353 (1996) ("the apparent intent of § 3163 . . . is to guarantee that insured nonresidents injured in Michigan are protected against economic losses to the same extent as Michigan residents"). None of these cases, however, involved or addressed the very narrow issue presented to this Court—whether no-fault benefits are payable by an out-of-state insurer to, or on behalf of, a *Michigan* resident injured in an accident resulting from its nonresident insured's ownership of a motor vehicle. The above cases provide little guidance.

The explicit language of MCL 500.3163 provides that an insurer may file a certification that *any* accidental bodily injury or property damage occurring in Michigan and arising from the ownership of a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies is subject to the personal and property protection insurance system under the Michigan no-fault act. There is no language limiting an out-of-state insurer's liability only to situations where the accidental bodily injury is sustained by its insured, nor is there any restriction on the application of the no-fault act. Instead, the above language unequivocally subjects the out-of-state insurer to the *entire* Michigan personal and property insurance system when *any* accidental bodily injury arising from an out-of-state insured's ownership or use of a motor vehicle occurs.

MCL 500.3163(3) also explicitly provides that if the certification applies to accidental bodily injury or prop-

erty damage, not only do the insurer and its insureds have the rights and immunities under the no-fault act for personal and property protection, *claimants* have the rights and benefits of personal and property protection insurance claimants, "including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage." By including such language, the Legislature clearly contemplated that persons other than an out-of-state insurer's insureds may have a right to recover benefits from the out-of state insurer. The language in MCL 500.3163 being clear and unambiguous, judicial construction is neither required nor permitted, and we must apply the statute as written. *Liberty Mut Ins Co, supra.* In doing so, we conclude that the trial court properly determined that MCL 500.3163 applies.

Because Amex filed a § 3163 certificate, it agreed to be governed by the Michigan no-fault act when an accident involving its insured's vehicle occurred in Michigan, and we look to MCL 500.3114 to determine the order of priority for payment of no-fault benefits. MCL 500.3114(5) provides:

> (5) A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.

> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

Applying the above to the facts at hand, Amex, being the insurer of the owner of the motor vehicle involved in the accident, is the priority insurer for purposes of no-fault benefits payable to, or on behalf of, plaintiff. The trial court therefore did not err in its summary disposition ruling. We next turn to plaintiff's cross appeal, beginning with his claim of entitlement to case evaluation sanctions.

IV. CASE EVALUATION SANCTIONS

A trial court's decision whether to grant case evaluation sanctions presents a question of law, which this Court reviews de novo. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Case evaluation sanctions are provided for at MCR 2.403(O) "(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. . . ." The use of the word "must" indicates that the imposition of these sanctions is mandatory. *Allard v State Farm Ins Co*, 271 Mich App 394, 398-399; 722 NW2d 268 (2006). The purpose of case evaluation sanctions is to shift the financial burden of trial onto the party who demands a trial by rejecting a proposed case evaluation award. *Id*.

Here, it is undisputed that the case evaluation award was $190,000 in favor of plaintiff and against Amex. It is also undisputed that plaintiff accepted and Amex rejected the award. The matter then proceeded to trial. The only issue presented to the jury, though, was whether plaintiff owned the motorcycle at the time of the accident (he not being entitled to PIP benefits if he was the owner of an uninsured motorcycle). The parties

stipulated the amount of damages in the event that the jury found that plaintiff was not the owner of the motorcycle. The jury found that plaintiff was not the owner, and while Amex does not dispute that the damages award was more favorable to plaintiff ($296,503.47, adjusted pursuant to MCR 2.403[O][3] to $326,895.01), it nevertheless asserts that plaintiff was not entitled to case evaluation sanctions. According to Amex, because the parties stipulated the amount of damages, the jury did not render a "verdict" as contemplated by MCR 2.403(O) and plaintiff is precluded from seeking case evaluation sanctions. We disagree.

MCR 2.403(O)(2) provides:

> For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation

While the jury in this matter did not determine the precise amount of the damages in light of the parties' stipulation, the jury's determination that plaintiff was not the owner of the motorcycle and thus entitled to PIP benefits *necessarily* led to the entry of a judgment incorporating the stipulated damages award. The parties both understood, when making their damages stipulation, that if the jury found that plaintiff was entitled to PIP benefits, a judgment would enter in the amount agreed upon by the parties. The jury verdict, then, was essentially that plaintiff was entitled to PIP benefits in the amount agreed upon by the parties. That the actual amount does not appear on the jury verdict form does not make it any less a part of the verdict. Moreover, MCR 2.403(O)(2) provides that "verdict"

includes those items listed in subsections a through c. Nothing in the rule indicates that a verdict is limited to only those items.

The verdict in this matter was indisputably more favorable to plaintiff, as defined in MCR 2.403(3), than the case evaluation. There are only three narrow exceptions to the mandatory imposition of case evaluation sanctions. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997). First, the trial court may decline to award costs in a case involving equitable relief when the verdict is more favorable to the rejecting party than the evaluation award. *Id*. The second exception applies only to dramshop actions. Third, the trial court "may, in the interest of justice, refuse to award costs" when the judgment is "entered as a result of a ruling on a motion after the party rejected the [case] evaluation" under MCR 2.403(O)(2)(c). *Id*. Because this case does not fall within any of the exceptions provided in the plain language of the court rule, the trial court was required to award case evaluation sanctions to plaintiff.

The trial court, however, was not required to award plaintiff his requested attorney fees. Plaintiff sought attorney fees pursuant to MCL 500.3148:

> (1) An 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. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d

552 (2008). What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact. *Id*. Questions of law are reviewed de novo; a trial court's findings of fact are reviewed for clear error. *Id*.

In declining to award attorney fees, the trial court stated, in part:

> . . . I can't give you what you request because, first of all, this whole ownership issue is on appeal constantly, and the Court of Appeals needs to resolve it and they haven't . . . . And until they resolve it, it's hard to accuse any insurance company of being frivolous because they're trying to get out from responsibility for something when they don't know who the owner is. And, secondly, I really kind of locked myself in when I denied that summary disposition motion that they brought because when I said it was a factual dispute . . . if I rule those ways, then I can't accuse them of being frivolous in their defense of the case.

Plaintiff places undue emphasis on the court's use of the word "frivolous," in making its ruling, contending that the trial court employed the wrong standard in determining the issue of attorney fees. It can be gleaned from its reasoning, however, that the trial court essentially determined that Amex's initial refusal of PIP benefits was not unreasonable. The trial court indicated that the issue for trial, ownership, is still often subject to dispute and not entirely resolved by this Court, and that it had previously concluded that a factual dispute about ownership existed in this matter. Moreover, as addressed elsewhere in this opinion, whether MCL 500.3163 applied to the specific factual situation presented in this case had not previously been considered by this Court. Given the above, we, like the trial court, cannot conclude that Amex unreasonably refused to pay

PIP benefits and we therefore cannot conclude that the trial court erred in declining to award attorney fees.

Affirmed in part, reversed in part, and remanded for the entry of a judgment in plaintiff's favor inclusive of case evaluation sanctions. We do not retain jurisdiction.

HUDSON v MATHERS

Docket No. 280396. Submitted January 14, 2009, at Detroit. Decided March 19, 2009, at 9:30 a.m.

Kenyatta Hudson brought an action in the Wayne Circuit Court against Marshall Mathers (also known as Eminem), Ondre Moore, D-12, Inc., and others, alleging breach of management and partnership agreements. The court, Kathleen Macdonald, J., granted Moore summary disposition of the plaintiff's breach of contract claim against Moore and granted several of the defendants summary disposition of the plaintiff's unjust enrichment claim against them. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by dismissing the breach of contract claim against Moore. Under his agreement with Moore, the plaintiff was to be paid a fee for assisting Moore in making basic career decisions. Accordingly, the plaintiff qualified as a Type B personnel agency under article 10 of the Occupational Code, MCL 339.101 *et seq*., and was required under MCL 339.1003(1) to be licensed. The plaintiff was not licensed and did not qualify for the exemption from licensing found in MCL 339.1003(2)(d).

2. The agreement with Moore provided that Georgia law governed it. The parties did not raise the choice of law provision, however, until more than 3½ years into the litigation. Generally, the parties' choice of law should be applied if the issue is one that the parties could have resolved by an express contractual provision, but exceptions exist. The parties' choice of law will not be followed if (1) the state chosen has no substantial relationship with the parties or the transaction or (2) there is no reasonable basis for choosing that state's law. The law of the state chosen will also not be applied when it would be contrary to the fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue involved and whose law would apply in the absence of an effective choice of law by the parties. Both parties are Michigan residents, and they executed the agreement in Michigan. The plaintiff offered no evidence that Georgia has a substantial relationship to either the parties or the transaction. The trial court properly applied Michigan law and

dismissed the plaintiff's breach of contract claim against Moore because the plaintiff was not licensed as a personnel agency. Allowing the plaintiff to proceed against Moore under an equitable theory such as unjust enrichment would defeat the statutory bar to an action found in MCL 339.1019(b).

3. The court properly dismissed the plaintiff's unjust enrichment claim against the other members of D-12. Unjust enrichment requires a plaintiff to prove (1) the defendant's receipt of a benefit from the plaintiff and (2) an inequity to the plaintiff resulting because the defendant retained the benefit. If that is proved, the law will imply a contract in order to prevent unjust enrichment, but only if no express contract covers the same subject matter. The express contract between the plaintiff and D-12 governed the plaintiff's entitlement to compensation for his work as a manager, so no contract may be implied under an unjust enrichment theory.

Affirmed.

1. AGENCY — PERSONNEL AGENCIES — CAREER ASSISTANCE — OCCUPATIONAL CODE — LICENSURE UNDER OCCUPATIONAL CODE — ACTIONS BY PERSONNEL AGENCIES.

A person who is to receive a fee for assisting another in making basic career decisions is a Type B personnel agency and must be licensed under article 10 of the Occupational Code; article 10 prevents a personnel agency from bringing an action for compensation for performing an act without alleging and proving that the agency and its agent are licensed under the article (MCL 339.1001[*l*], 339.1003[1], 339.1019[b]).

2. CONFLICT OF LAWS — CHOICE OF LAWS — CONTRACTS.

A court should apply the parties' choice of law provision if the issue is one that the parties could have resolved by an express contractual provision; the parties' choice of law will not be followed if the chosen state has no substantial relationship to the parties or the transaction or if there is no reasonable basis for choosing that state's law; a chosen state's law will also not be applied when it would be contrary to the fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue involved and whose law would apply in the absence of an effective choice of law by the parties.

3. EQUITY — UNJUST ENRICHMENT — CONTRACTS — IMPLIED CONTRACTS.

If a plaintiff proves the defendant's receipt of a benefit from the plaintiff and an inequity resulting to the plaintiff because the

> defendant retained the benefits, the law will imply a contract in order to prevent unjust enrichment, but only if there is no express contract covering the same subject matter.

The Sanders Law Firm, PC (by *Herbert A. Sanders*), for Kenyatta Hudson.

Plunkett Cooney (by *Mary Massaron Ross*, *Hilary A. Dullinger*, and *Peter W. Peacock*) for Marshall Mathers and others.

Before: SAAD, C.J., and DAVIS and SERVITTO, JJ.

PER CURIAM. In this action alleging breach of management and partnership agreements between plaintiff and the various defendants, plaintiff appeals as of right, challenging the trial court's orders granting summary disposition of his breach of contract claim against defendant Ondre Moore under MCR 2.116(C)(10) and granting summary disposition of his unjust enrichment claim against several of the defendants under MCR 2.116(C)(10). We affirm.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). This Court " 'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.' " *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000), quoting *Unisys Corp v Ins Comm'r*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

I. PLAINTIFF'S OBLIGATION TO OBTAIN A LICENSE

Plaintiff argues that the trial court erred by dismissing his breach of contract claim against Moore. We disagree.

The state of Michigan mandates licensing of all personnel agencies pursuant to MCL 339.1003(1), which provides: "A person shall not open, operate, or maintain a personnel agency in this state without first obtaining the appropriate license from the department."

MCL 339.1019(b) provides:

> A personnel agency, or any licensed agent or other agent or employee of a personnel agency shall not do any of the following:
>
> * * *
>
> (b) Bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for services as a personnel agency without alleging and proving that the agency and its agent were licensed under this article during the performance of the act or contract.

Under the Occupational Code, MCL 339.101 *et seq.*, there are two types of personnel agencies. A "Type A" personnel agency is

> a person who is engaged in the business or profession of serving, assisting, or in any way aiding a client seeking employment or making basic career decisions, who puts a client in direct contact with employers, and who receives a fee from the client for the services rendered or offered to be rendered. [MCL 339.1001(k).]

A "Type B" personnel agency is

> a person who is engaged in the business or profession of serving, assisting, or in any way aiding or consulting with a client to make basic career decisions and who receives a fee from the client for the services rendered or offered to be rendered. [MCL 339.1001(*l*).]

The two categories of personnel agencies were created in 1992, as part of a revision of article 10 of the Occupational Code by 1992 PA 253. Before the revision, there were five classes of employment agencies, with varying degrees of regulation. The 1992 revision replaced the five classes with the two categories of "personnel" agencies: (1) Type A agencies, which are employment agencies that place clients in direct contact with employers, and (2) Type B agencies, which are more in the nature of consulting agencies and assist clients in making basic career decisions.

In this case, the management agreement states that plaintiff was to provide Moore with "advice, counsel and guidance in the development of [his] career as an artist in the entertainment and entertainment-related industries" and to advise and counsel Moore on various aspects of his career. Thus, the agreement was one whereby plaintiff agreed to assist Moore in making basic career decisions, and plaintiff was to receive a fee for those services. Accordingly, plaintiff qualifies as a Type B personnel agency, as defined in MCL 339.1001(*l*), and was required to be licensed under MCL 339.1003(1).

We disagree with plaintiff's claim that he is exempt from licensure under MCL 339.1003(2)(d), which provides an exemption for the

> business of procuring, offering, promising, promoting, or attempting to provide an engagement for an athletic event, a circus, concert, vaudeville, theatrical, or other entertainment, or of giving information as to where an engagement

> may be procured or provided for an actor, artist, athlete, entertainer, or performer in an athletic event, a circus, vaudeville, theatrical, or other entertainment.

That exemption is not applicable here because plaintiff's contract was not a contract to procure, offer, promise, or promote any engagements for Moore, nor was plaintiff in the business of giving information about where engagements could be procured or provided for Moore. Indeed, the contract provides:

> Artist [Moore] acknowledges that Manager [plaintiff] is not an employment agency or theatrical agent, that Manager has not offered or attempted or promised to obtain, seek or procure employment or engagements for Artist, and that manager is not obligated, authorized, licensed or expected to do so.

II. CHOICE OF LAW

In a further attempt to avoid application of article 10, plaintiff relies on ¶ 14 of the contract to argue that it is not governed by Michigan law. Paragraph 14 provides:

> Jurisdiction. Notwithstanding any subsequent agreements entered into by Artist, Artist agrees that the validity, construction and effect of this agreement shall be governed by the laws of the State of Georgia.

When determining the applicable law, the expectations of the parties must be balanced with the interests of the states. *Martino v Cottman Transmission Systems, Inc*, 218 Mich App 54, 60; 554 NW2d 17 (1996). The parties' choice of law should be applied if the issue is one the parties could have resolved by an express contractual provision. However, there are exceptions. The parties' choice of law will not be followed if (1) the chosen state has no substantial relationship to the parties or the transaction or (2) there is no reasonable basis for

choosing that state's law. Also, the chosen state's law will not be applied when it would be contrary to the fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and whose law would be applicable in the absence of an effective choice of law by the parties. *Id*. at 60-61.

Both parties are Michigan residents, and the contract was executed in Michigan. Plaintiff did not offer any evidence showing that Georgia has a substantial relationship to either the parties or the transaction. Moreover, plaintiff filed this case in Michigan, and this case proceeded in Michigan for more than three years before the choice of law issue was ever raised. In response to defendants' prior motion for partial summary disposition (based in part on the statute of limitations), plaintiff cited Michigan law and at no time claimed that Georgia law governed the parties' agreement. It was not until more than 3½ years into litigation, when another motion for summary disposition was filed, that the choice of Georgia law in the parties' contract was mentioned. Accordingly, the trial court did not err by refusing to apply Georgia law.

For these reasons, the trial court properly dismissed plaintiff's breach of contract claim against Moore because plaintiff was not licensed as a personnel agency. Nor could plaintiff proceed against Moore under an equitable theory, such as unjust enrichment, because doing so would defeat the statutory bar to an action provided by MCL 339.1019(b). See *Stokes v Millen Roofing Co*, 466 Mich 660, 671-673; 649 NW2d 371 (2002).

III. UNJUST ENRICHMENT

The trial court also properly dismissed plaintiff's unjust enrichment claim against the other members of defendant D-12, Inc. Unjust enrichment requires a

plaintiff to prove (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). If this is established, the law will imply a contract in order to prevent unjust enrichment. *Id*. However, a contract will be implied only if there is no express contract covering the same subject matter. *Id*.

There was an express contract in place between plaintiff and D-12 that governed plaintiff's entitlement to compensation for his work as a manager. Accordingly, a contract may not be implied under a theory of unjust enrichment.

Affirmed.

ALKEN-ZIEGLER, INC v HAGUE

Docket No. 282065. Submitted March 3, 2009, at Lansing. Decided March 31, 2009, at 9:00 a.m.

Alken-Ziegler, Inc., brought an action in the Kalkaska Circuit Court against Larry K. Hague, alleging that the defendant embezzled and converted $38,030.63 of the plaintiff's property. The plaintiff sought statutory damages under MCL 600.2919a, which permits the recovery of treble damages for embezzlement and conversion claims. The court, Dennis F. Murphy, J., granted the plaintiff's motion for summary disposition and entered a judgment of $114,091.90, with statutory interest, costs, and reasonable attorney fees to be determined later. During a hearing on the plaintiff's subsequent motion for the taxation of costs and reasonable attorney fees, the defendant argued that because the plaintiff's insurer had reimbursed the plaintiff for all but $5,000 of the $38,030.63 embezzled, the plaintiff only sustained actual damages of $5,000, which when trebled should result in a judgment for $15,000. The court agreed with the defendant and modified the judgment, reducing the amount awarded to $15,000, plus attorney fees and costs. The plaintiff's delayed application for leave to appeal was granted.

The Court of Appeals *held*:

The term "actual damages" in MCL 600.2919a means the actual loss a complainant suffered as a result of a defendant's criminal conduct. The actual loss that the plaintiff suffered as a result of the defendant's embezzlement is $38,030.63. The definition of "actual damages" does not contemplate the victim's receipt of insurance proceeds in determining actual damages. Once inflicted and created, actual damages do not change simply because an insurer has a contractual obligation to compensate the victim in whole or in part. The order modifying the original judgment must be vacated and the case must be remanded to the trial court to reinstate the original judgment of $114,091.90.

Order vacated and case remanded.

EMBEZZLEMENT — CONVERSION — DAMAGES — WORDS AND PHRASES — ACTUAL DAMAGES.

The term "actual damages" in the statute that allows a victim of the criminal theft, embezzlement, or conversion of property to recover three times the amount of actual damages sustained means the actual loss the victim suffered as a result of the defendant's criminal conduct; once inflicted and created, the amount of actual damages does not change simply because an insurer has a contractual obligation to compensate the victim in whole or in part for the actual loss (MCL 600.2919a).

Conklin Benham, P.C. (by *Martin L. Critchell*), for the plaintiff.

Before: MURPHY, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM. We granted plaintiff's delayed application for leave to appeal the June 5, 2007, order modifying a judgment entered in plaintiff's favor. We vacate the June 5, 2007, order and remand this case to the trial court.

I

Defendant worked as a maintenance supervisor for plaintiff, a manufacturer of steel parts for the automobile and other industries, until plaintiff terminated defendant's employment on February 1, 2006. On February 3, 2006, plaintiff brought this action against defendant, alleging that defendant embezzled and converted approximately $38,000 of plaintiff's property by selling scrap metal owned by plaintiff to a third party who paid defendant. Plaintiff sought damages under MCL 600.2919a, which permits the recovery of treble damages for embezzlement and conversion claims.[1]

[1] The record also reveals that criminal charges stemming from defendant's conduct were filed in the Kalkaska Circuit Court.

Plaintiff moved for summary disposition under MCR 2.116(C)(10). Plaintiff's motion asserted that defendant had admitted the embezzlement and had failed to respond to interrogatories or a request for admissions. On September 19, 2006, the trial court granted plaintiff summary disposition of its embezzlement and conversion claims and entered a judgment of $114,091.90, with statutory interest, costs, and reasonable attorney fees to be determined. This judgment apparently reflects the trebling of the $38,030.63 that defendant embezzled from plaintiff.

On October 9, 2006, plaintiff filed a motion for taxation of costs and reasonable attorney fees. The trial court conducted hearings on the motion on November 7, 2006,[2] and March 19, 2007. It came to light at the beginning of the hearing that plaintiff's insurer had reimbursed plaintiff for all but $5,000[3] of the loss it sustained from defendant's embezzlement. Defendant argued that plaintiff's actual loss was therefore only $5,000, and that the judgment should be reduced to reflect actual damages of $5,000, with treble damages of $15,000. Plaintiff maintained that it sustained actual damages of $38,030.63 as a result of defendant's embezzlement regardless of whether its insurer reimbursed it for the loss.[4] Thus, the question arose whether plaintiff's actual damages for purposes of trebling under MCL 600.2919a was the amount that defendant embezzled or the difference between that amount and the amount that plaintiff was reimbursed by its insurer.

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[2] The hearing apparently commenced after the sentencing hearing in defendant's criminal case concluded. The judgment of sentence apparently included an order for restitution.

[3] Plaintiff's insurance deductible was $5,000.

[4] Plaintiff also asserted that it was obligated to repay its insurer pursuant to a subrogation clause in the insurance contract.

The trial court ultimately adopted the latter position, concluding that plaintiff's actual damages consisted of the $5,000 in embezzlement losses that plaintiff's insurance did not cover. In an order entered on June 5, 2007, the trial court modified the judgment, reducing the amount awarded to plaintiff to $15,000. The order also awarded plaintiff $9,740 in attorney fees and $430.93 in costs.

II

Pursuant to MCL 600.2919a(1)(a), a person damaged as a result of another person's stealing or embezzling property or converting property to the other person's own use may recover three times the amount of actual damages. Plaintiff argues that "actual damages" under this statute are the amount a defendant actually embezzled. Resolution of the issue presented turns on the definition of actual damages, which presents a question of law that this Court reviews de novo. *Northville Charter Twp v Northville Pub Schools*, 469 Mich 285, 289; 666 NW2d 213 (2003).

The statute does not define the term "actual damages." When interpreting statutory language, our obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001). We give undefined statutory terms their plan and ordinary meanings. *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). In those situations, we may consult dictionary definitions. *Id.*

Black's Law Dictionary (8th ed) defines "actual damages" as: "An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." Applying this definition to MCL 600.2919a, "actual damages" means the actual loss a complainant suffered as a result of a defendant's criminal conduct. Here, there is no dispute that defendant embezzled $38,030.63 from plaintiff. Defendant did not pay back any of these funds.[5] This figure clearly represents the actual loss suffered by plaintiff as a result of defendant's embezzlement. The trial court initially entered a judgment awarding plaintiff three times that amount, or $114,091.90.

Upon discovering that plaintiff's insurer reimbursed plaintiff all but $5,000 of the embezzled funds, the trial court modified its judgment to reduce plaintiff's actual damages to $5,000. The definition of "actual damages," however, does not contemplate the victim's receipt of insurance proceeds in determining actual damages. Actual damages must exist in the first instance before the question of insurance proceeds properly arises. Once inflicted and created, actual damages do not change simply because an insurer has a contractual obligation to compensate the victim in whole or in part. The statute in question is not designed or intended to minimize a defendant's liability for his criminal conduct if his victim had the wherewithal to purchase insurance coverage to protect itself from the criminal conduct of third parties. It is the embezzler's misconduct, not the

[5] If defendant had repaid any of the funds, he might be entitled to offset the amount he repaid to determine the amount of actual damages. See, e.g., *In re Hamama*, 182 BR 757 (ED Mich, 1995). In this case, however, defendant did not repay any of the embezzled funds. To the extent that the record in this case includes mention of a criminal conviction and restitution order, the record does not include documents relating to those matters, and they are not at issue in this appeal.

interplay between the embezzler and the victim's insurer, that creates actual damages. Indeed, MCL 600.2919a is a punitive statute that provides for recovery of three times the amount embezzled. Punitive damages reflect a worthy public policy consideration of punishing dishonest defendants and setting an example for similar wrongdoers. To define "actual damages" as the amount embezzled less the amount a victim receives in insurance benefits as a result of a covered loss thwarts the purpose of the statute.[6]

III

We conclude that the trial court erred by modifying the judgment and reducing the amount of the judgment on the basis that plaintiff's actual damages did not include the amount reimbursed by its insurer. We therefore vacate the order modifying the judgment and remand to the trial court to reinstate the original judgment of $114,091.90. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

Order vacated and case remanded.

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[6] Indeed, defining "actual damages" as the amount embezzled less any amount received as insurance proceeds in this matter would result in treble damages of $15,000, less than half the amount embezzled. Additionally, MCL 600.2919a(2) notes that the remedy provided in MCL 600.2919a is cumulative to other rights or remedies the person may have at law. Plaintiff's right to collect under an insurance policy for the loss incurred as a result of defendant's embezzlement does not diminish plaintiff's right to recover three times the amount of actual damages under MCL 600.2919a.

PEOPLE v HORTON

Docket No. 281412. Submitted February 4, 2009, at Detroit. Decided February 17, 2009. Approved for publication March 31, 2009, at 9:05 a.m.

The Wayne Circuit Court, Thomas E. Jackson, J., granted a motion by Lajamille Horton to suppress evidence and dismissed without prejudice charges against Horton of possession of a firearm by a felon, carrying a weapon in a vehicle, and possession of a firearm during the commission of a felony. The prosecution appealed, alleging that the court erred by determining that information about a person with a gun, which police officers received in person from a citizen who refused to identify himself, was inadequate to allow the officers to approach the defendant's vehicle, ask the defendant for identification, and order the defendant out of his vehicle, whereupon the officers discovered a pistol on the seat that had been occupied by the defendant.

The Court of Appeals *held*:

1. A tip made in person by a citizen who is unwilling to disclose his or her name is distinct from an anonymous telephone tip.

2. Three factors may be examined to determine whether information from a citizen informant carries enough indicia of reliability to provide police officers with a reasonable suspicion of criminal activity that justifies an investigatory stop: the reliability of the particular informant, the nature of the particular information given to the police, and the reasonableness of the suspicion in light of the first two factors.

3. Information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period by the officers' own observations.

4. Citizen-informants, with respect to their reliability, are not subjected to the same stringent test as persons who are themselves criminally involved or disposed because such citizen-informants are motivated by good citizenship and their information is imparted in the aid of law enforcement.

5. The totality of the circumstances provided reasonable suspicion for the police to briefly detain the defendant. The tipster stated that he personally observed an individual waving an "[U]zi-type" gun at a specific location approximately a mile away and that the tipster had just left that location. He described the make, model, and color of the suspect's vehicle. The descriptive information was detailed and was corroborated by the police in less than five minutes. The trial court erred in suppressing the evidence. The orders of the trial court must be reversed and the case must be remanded for the reinstatement of the charges.

Reversed and remanded.

1. SEARCHES AND SEIZURES — REASONABLE SUSPICION OF CRIMINAL ACTIVITY — INFORMANTS — CITIZEN-INFORMANTS — RELIABILITY OF INFORMATION PROVIDED TO POLICE.

Whether information supplied to the police by a citizen-informant carries enough indicia of reliability to provide police officers with a reasonable suspicion of criminal activity that justifies an investigatory stop depends on the reliability of the particular informant, the nature of the particular information given, and the reasonableness of the suspicion in light of the first two factors.

2. SEARCHES AND SEIZURES — INFORMANTS — CITIZEN-INFORMANTS — RELIABILITY OF INFORMATION PROVIDED TO POLICE.

Information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period by the officers' own observations.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Assistant Prosecuting Attorney, for the people.

Detroit Legal Aid and Defender Association (by *Nancy Shell*) for the defendant.

Before: WILDER, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM. The prosecution appeals as of right a circuit court order granting defendant's motion to suppress evidence and dismissing, without prejudice, charges of possession of a firearm by a felon, MCL 750.224f, carrying a weapon in a vehicle, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court concluded that information that the police received in person from a tipster who refused to identify himself was inadequate to allow the police to approach defendant in his car, ask for identification, and subsequently order him out of the car. We reverse and remand for reinstatement of the charges.

While on patrol at approximately 2:00 a.m., Detroit police officers Thomas Turkaly and Mecha Mathis were flagged down by a man who was pumping gas at a gas station. The man told them that a black male driving a burgundy Chevrolet Caprice was at the gas pumps at another gas station at Grand River and Wyoming in Detroit, which was approximately a mile away, and was waving an "[U]zi type weapon" with a long clip. The tipster reported that the man was approximately 30 years old and "seemed to be pretty nervous and upset." The tipster refused to provide his name.

Less than five minutes after speaking to the tipster, Officers Turkaly and Mathis arrived at the gas station at Grand River and Wyoming, where they observed a burgundy Chevrolet Caprice parked near the pumps. Defendant was in the driver's seat. The officers stopped their cruiser behind defendant's vehicle, activated their emergency lights to effect a traffic stop, and ordered defendant out of the vehicle. Officer Mathis asked defendant for a driver's license, registration, and proof of insurance. The testimony was equivocal regarding defendant's response to this request. When defendant

got out, however, Officer Turkaly saw on the driver's seat a Glock semi-automatic pistol with an extended magazine that protrudes, making it appear like "an [U]zi type weapon."

The trial court first considered whether the police action was justified without the anonymous tip. The court believed that the police properly could approach a driver and ask for his driver's license if they observed a car sitting at a gas station at 2:00 a.m. "with nothing else going on," and that the police would have the right to order the driver out of the car if the driver was unable to produce the documents. However, the court found that the record was unclear about whether defendant produced his license or other documentation.

The court then examined the effect of the tip. The court considered the prosecutor's argument that the tip was more reliable because it was made face-to-face, instead of by an anonymous telephone informant, but discounted that argument because the police did not get any information from the tipster, e.g., his license plate number. The court concluded that the face-to-face nature of the tip was insufficient to accord it more reliability than an anonymous telephone tip and, therefore, concluded that it was insufficient to justify defendant's brief detention. Accordingly, the court granted defendant's motion to suppress and dismissed the case without prejudice.

On appeal, the prosecution argues that this case is indistinguishable from *People v Tooks*, 403 Mich 568; 271 NW2d 503 (1978), which also involved a tip by an unidentified citizen.

"This Court reviews a trial court's factual findings in a suppression hearing for clear error. But the '[a]pplication of constitutional standards by the trial court is

not entitled to the same deference as factual findings.' " *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005) (citations omitted).

As explained in *Jenkins*, *supra*:

> A brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances. A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior. [*Id*. at 32 (citations and quotation marks omitted).]

In *Tooks*, a man approached the police and reported seeing a man show a gun to two other men. He described all three men by race and age. He further described two of the men by height and the clothing they wore and described the build of the man with the gun. Four or five blocks away, the police encountered three men matching the descriptions. The police patted down the defendant, who matched the description of the man with the gun, and discovered a pistol in his pocket. The Supreme Court concluded that the information provided by the anonymous informer provided reasonable suspicion for the stop and frisk. The Court identified three factors for examination to "determin[e] whether the information from the citizen-informant, carried enough indicia of reliability to provide the officers with a reasonable suspicion": "(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." *Tooks*, *supra* at 577. The Court rejected the defendant's argument that the fact that the citizen-informant was unknown and unnamed "necessarily

lead[s] to the conclusion that the information was neither reliable nor credible." *Id*. The Court explained:

> There is certainly nothing inherently unreliable about a citizen as opposed to a known informant giving information to the police. A regular informant can, and often does, provide police with detailed and accurate information and, because of a continuing relationship which at times exists, the police are in a position to judge the accuracy of such information based on a prior experience with the individual. However, informants by their very nature are often involved in or connected with criminal activity. To favor the known informant over the citizen in this case is illogical. We feel that information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officers' own observations. As stated in a decision of the California Court of Appeals and cited as authority by the Michigan Court of Appeals, *People v Emmert*, 76 Mich App 26, 31, fn 1; 255 NW2d 757 (1977)[:]
>
> " ' "Citizen informants are not subjected with respect to their reliability to the same stringent test as persons who are themselves criminally involved or disposed upon the rationale that such citizens are motivated by good citizenship and their information is imparted in the aid of law enforcement. " ' " *People v Schulle*, 51 Cal App 3d 809, 813; 124 Cal Rptr 585 (1975).
>
> We find that there was ostensible reason for the citizen refusing to disclose his name and that there was no resulting inherent unreliability. [*Tooks*, *supra* at 577-578.]

With regard to the second factor, the Court referred to the detail and preciseness of the description and that it was verified by the police within a short time and a short distance from where the police received the information. *Id*. at 579-580. Concerning the third factor, the Court reasoned that "the knowledge that a gun was openly displayed in public does create a reasonable

suspicion of criminal activity sufficient to warrant the type of investigation including a pat-down search which occurred in this case, and that investigation is exactly the type of 'good police work' which is not only acceptable but necessary for the safety of the public." *Id*. at 581.

Defendant argues that the present case is distinguishable from *Tooks*, because the citizen-informant in that case gave a reason for not wanting to provide his name. Although the Court in *Tooks* referred to the fact that the informant gave a reason for not wanting to identify himself as a factor in assessing the reliability of the information provided, the decision does not indicate that either the presence or absence of a reason is dispositive of the question whether the informant's tip may be considered reliable.

Defendant also suggests that the Court's reliance, in *Tooks*, on the specificity of the information may no longer be valid in light of *Florida v J L*, 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000). In that case, an anonymous caller reported to the police that a young black male wearing a plaid shirt and standing at a particular bus stop was carrying a gun. The caller did not indicate how he knew of the gun or provide any basis for believing that he had inside information about the subject. *Id*. at 271. An unspecified time after the police received the information, two officers were sent to the scene, and they arrived six minutes after the dispatch. The police saw three black males, including 16-year-old J L, who was wearing a plaid shirt. *Id*. at 268. The officers had no reason other than the tip to suspect illegal conduct. They searched the three males and found a gun in J L's pocket. *Id*. The Supreme Court held that the anonymous tip alone, which "lacked [even] moderate indicia of reliability," did not provide

reasonable suspicion justifying the police officers' stop and frisk of the suspect. *Id*. at 271, 274. "The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." *Id*. at 271. The Court rejected the view that the reliability of the information was sufficiently demonstrated because the police found a person matching the description at the location given by the informant, explaining:

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. [*Id*. at 272.]

We conclude that *J L* does not undermine the analysis in *Tooks*, because courts have recognized that a tip made in person by a citizen who is unwilling to disclose his name is distinct from an anonymous telephone tip. Justice Kennedy's concurrence in *J L* discusses this distinction:

> If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. [*Id*. at 276 (Kennedy, J., concurring).]

See, also, *United States v Sanchez*, 519 F3d 1208, 1214 (CA 10, 2008), and *United States v Valentine*, 232 F3d 350, 354-355 (CA 3, 2000), and cases cited therein. In

Tooks, *supra* at 581, the Court specifically noted that it was "not dealing with an anonymous telephone tip to a police station . . . ."

Moreover, other facts of this case distinguish it from *J L*. The tipster in that case did not indicate how he knew that the individual at the bus stop was carrying a gun and did not supply any information to show that he had inside knowledge about the individual or the "concealed criminal activity." *J L*, *supra* at 272. In the present case, the tip concerned readily observable activity, and the tipster indicated the basis for his knowledge, i.e., his recent viewing of the activity. Cf. *People v Rollins*, 382 Ill App 3d 833, 840; 892 NE2d 21 (2008).

The totality of the circumstances provided reasonable suspicion for the police to briefly detain defendant in this case. The tipster indicated that he had personally observed an individual waving an "[U]zi-type" gun at a specific location approximately a mile away and had just left that location. He described the make, model, and color of the suspect's vehicle. The descriptive information was detailed, and the police corroborated it in less than five minutes. The facts fit the observation made in *Tooks*, *supra* at 577, that "information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officers' own observations."

For these reasons, the trial court erred in granting defendant's motion to suppress. In light of our conclusion, we need not address the prosecution's additional argument regarding whether the trial court clearly erred by concluding that the record was unclear about

whether defendant produced his license or other documentation in response to Officer Mathis's request.

Reversed and remanded for reinstatement of the charges. We do not retain jurisdiction.

ANGLERS OF THE AUSABLE, INC v
DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket Nos. 279301, 279306, 280265, and 280266. Submitted December 9, 2008, at Grand Rapids. Decided March 31, 2009, at 9:10 a.m.

Anglers of the AuSable, Inc., Mayer Family Investment, L.L.C. (Mayer), and the Nancy A. Forcier Trust (Forcier) brought an action in the Otsego Circuit Court against the Department of Environmental Quality and its director (collectively the DEQ) and Merit Energy Company, alleging, in part, common-law water rights violations and statutory violations of the Natural Resources and Environmental Protection Act (NREPA), including the Michigan Environmental Protection Act (MEPA). The alleged violations concerned a corrective action plan approved by the DEQ, which called for pumping contaminated groundwater that originated from Merit's nonriparian property to a treating station on the property, then through a pipeline constructed, in part, over state land to a wetland owned by the Department of Natural Resources (DNR), from which Kolke Creek originates and flows into Lynn Lake and eventually into the AuSable River. Plaintiffs Mayer and Forcier are riparian owners of land abutting the creek, lake, or river and are members of Anglers of the AuSable, which uses the water resources for recreational purposes. The plaintiffs claimed that the proposed discharge of the treated water will harm the quality of the water and their use of the water. The court, Dennis F. Murphy, J., issued an opinion and order enjoining Merit Energy from discharging any treated water into the Kolke Creek system. The court specifically found that the proposed discharge would constitute an unreasonable use of riparian rights, which the DNR's easement for the pipeline failed to convey to Merit Energy, and a violation of MEPA. The plaintiffs moved for clarification and modification of the order, and the court entered an order indicating that no bar exists for the artificial use of a watercourse for the benefit of a parcel outside a watershed, that the DNR may convey riparian rights by easement to Merit Energy, that the proposed discharge was unreasonable, and that the prior order of the court was the final order in this case. The court then awarded the

plaintiffs fees and costs. Separate appeals were brought by the DEQ, Anglers of the AuSable and Mayer, and Merit Energy, and the appeals were consolidated.

The Court of Appeals *held*:

1. Jurisdiction was proper in the Otsego Circuit Court. The pre-enforcement review provision of part 201 of the NREPA, MCL 324.20137(4), does not apply to this action and did not deprive the circuit court of subject-matter jurisdiction.

2. The circuit court erred by failing to dismiss the DEQ from this action. The DEQ's review of Merit Energy's corrective action plan and the DEQ's issuance of a general permit and certificate of coverage allowing the discharge of treated water into the wetland constituted administrative decisions and were not conduct. Where a defendant's conduct itself does not offend MEPA, no MEPA violation exists. An improper administrative decision, standing alone, does not harm the environment. Therefore, MEPA provides no basis for review of the DEQ's decision.

3. The trial court erred by ruling that the easement from the DNR did not allow Merit Energy to discharge the water into the watershed. The DNR, as a riparian owner, could lawfully convey the easement to Merit Energy. The riparian right to discharge water into a watercourse was granted by easement.

4. The trial court did not err by finding that the proposed discharge would affect the plaintiffs' riparian property rights by affecting their use of Kolke Creek and Lynn Lake.

5. The trial court correctly determined that surface water law was inapplicable in this case because there is no dispute that Kolke Creek is classified as a watercourse at the point that it flows onto the plaintiffs' land. The treated water was no longer surface water by the time it reached the plaintiffs' land.

6. The trial court correctly determined that the reasonable use balancing test applied to the dispute in this case. Because the rights the DNR granted Merit Energy by easement are riparian rights, the dispute should be analyzed under the reasonable use test that is applicable to disputes between riparian proprietors.

7. There are two equally available ways to prove a prima facie case that MEPA has been violated. First, the trial court may make detailed and specific findings that the defendant's conduct has polluted, impaired, or destroyed, or is likely to pollute, impair, or destroy, the air, water, or other natural resources. Second, the trial court may find that the defendant has violated an applicable pollution control standard. Determining whether a statute con-

tains a pollution control standard is relevant when the plaintiff has alleged, as a way to prove a prima facie case, that the defendant's conduct has, or will, violate a statute or regulation. At that point, the trial court must decide if the statute contains a pollution control standard. If it does, the defendant's violation of the statute, by itself, can be used to satisfy the prima facie case standard. If, as in this case, the cited statute does not contain a pollution control standard, then a violation of the statute cannot, by itself, establish a prima facie case.

8. The trial court, although not required to do so, did articulate a pollution control standard in this case.

9. Any error the trial court may have committed regarding the admission of evidence or testimony relating to the evidence was harmless.

10. The Revised Judicature Act does not support an award of costs for transcripts under the facts of this case. The trial court erred in awarding the plaintiffs such costs. The trial court erred in awarding transcript costs under MEPA. Costs allowed under MEPA are the same as those allowed under the Revised Judicature Act.

11. Attorney fees are not awardable under MEPA. The trial court erred by awarding under MEPA "other costs" that constitute nothing more than office overhead and other expenses related to the general practice of law that are generally encompassed by attorney fees.

12. The opinion and order of the trial court must be reversed insofar as it holds that the easement failed to convey riparian rights to Merit Energy and that the DEQ should not be dismissed from this case. The order awarding costs and fees with regard to the DEQ and for transcripts under the Revised Judicature Act and "other costs" under MEPA must be reversed. In all other respects the opinion and order of the trial court must be affirmed.

Affirmed in part and reversed in part.

1. ENVIRONMENT — ENVIRONMENTAL PROTECTION ACT — ADMINISTRATIVE LAW — APPEAL.

Where a defendant's conduct itself does not offend the Michigan Environmental Protection Act, no violation of the act exists; an improper administrative decision, standing alone, does not harm the environment and does not provide a basis for judicial review of the decision under the act (MCL 324.1701 *et seq*.).

2. WATER AND WATERCOURSES — RIPARIAN RIGHTS — EASEMENTS — NONRIPARIAN LANDOWNERS.

Full riparian rights and ownership may not be severed from riparian land and transferred to nonriparian back lot owners; however, the original owner of riparian property may grant an easement to back lot owners allowing them to enjoy certain rights that are traditionally regarded as exclusively riparian; rights granted to a nonriparian owner by easement are not limited to access or ingress and egress, and may include the riparian owners' right to drain their land into an adjoining watercourse.

3. ENVIRONMENT — ENVIRONMENTAL PROTECTION ACT — PRIMA FACIE CASE OF ENVIRONMENTAL PROTECTION ACT VIOLATIONS — POLLUTION CONTROL STANDARDS.

A trial court, in determining whether a plaintiff has made out a prima facie violation of the Michigan Environmental Protection Act, may employ either of the equally available methods of making detailed and specific findings that the defendant's conduct has polluted, impaired, or destroyed, or is likely to pollute, impair, or destroy, the air, water, or other natural resources, or it may find that the defendant has violated an applicable pollution control standard (MCL 324.1701 *et seq.*).

4. ENVIRONMENT — ENVIRONMENTAL PROTECTION ACT — COSTS — ATTORNEY FEES.

The costs allowed under the Michigan Environmental Protection Act are the same as costs allowed under the Revised Judicature Act; the Michigan Environmental Protection Act does not provide for an award of attorney fees (MCL 324.1701 *et seq*., 600.101 *et seq*.).

Olson, Bzdok & Howard, P.C. (by *James M. Olson*, *Scott W. Howard*, and *Jeffrey L. Jocks*), and *Thomas A. Baird* for Anglers of the AuSable, Inc.

Topp Law PLC (by *Susan Hlywa Topp*) for Mayer Family Investments, L.L.C., and the Nancy A. Forcier Trust.

Michael A. Cox, Attorney General, *B. Eric* Restuccia, Solicitor General, and *Tonatzin M. Alfaro Maiz*, Assistant Attorney General, for the Department of Environmental Quality.

Foster, Swift, Collins & Smith, P.C. (by *Charles E. Barbieri* and *Zachary W. Behler*), for Merit Energy Company.

Before: MURRAY, P.J., and MARKEY and WILDER, JJ.

MURRAY, P.J. In these consolidated appeals, defendants, the Department of Environmental Quality and the Director of the Department of Environmental Quality (collectively the DEQ), and Merit Energy Company, appeal as of right the trial court's June 25, 2007, opinion and final order granting in part plaintiffs' motion for clarification and modification of the court's prior order of injunction. Plaintiffs Anglers of the AuSable, Inc., and Mayer Family Investments, L.L.C., cross-appeal that same order. We reverse that order to the extent it concludes that the DEQ's easement failed to convey riparian rights to Merit Energy, and we reverse the trial court's decision not to dismiss the DEQ. In all other respects we affirm that order. Additionally, defendants appeal as of right the trial court's order awarding plaintiffs fees and costs. We reverse that order insofar as it pertains to the DEQ and to the extent that it awards costs for (1) James Janiczek's transcript under the Revised Judicature Act (RJA), MCL 600.2401 *et seq*., and (2) "other costs" under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq*. In all other respects, we affirm that order.

I. BACKGROUND

This case arises out of Merit Energy's proposed plan to treat a plume of contaminated groundwater, located in the Manistee watershed, and discharge that treated water into the AuSable River water system.

In 2004, Merit Energy purchased the Hayes 22 Central Production Facility (CPF) located in Hayes Township, Otsego County, Michigan, from Shell Western Exploration and Production, Inc. Pursuant to the transfer agreement with Shell, Merit Energy entered into a settlement agreement with the DEQ to treat the plume, which originated from the CPF. Although spanning an area of 60 acres, the exact size of the plume, which continues to expand, is unknown. Among the contaminants in the plume are benzene, toluene, ethylbenzene, and xylenes (BTEX) and chlorides contained in brine. The plume has already contaminated two residential drinking wells and may contaminate other residential wells as it continues to expand.

After acquiring the CPF, Merit Energy evaluated a number of options to treat the plume, ultimately deeming air stripping—a process forcing a stream of air through water causing hydrocarbons (i.e., the BTEX) to evaporate—the most effective option.[1] Regarding disposal of treated water, Merit Energy determined that discharge into a waterway would be the most prudent alternative and selected Kolke Creek as the best outlet.[2]

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[1] Merit Energy also considered using infiltration basins (shallow underground basins permitting absorption of treated water into soil) and injection wells (a process by which contaminated groundwater is exchanged with treated water), but rejected these options because complications, including increased plume size, may ensue. In ultimately settling on air stripping, Merit Energy worked closely with the DEQ to find a cost-effective procedure that would satisfy DEQ regulations. The DEQ approved the air stripping, and that decision was at issue in the administrative appeal. See note 6 of this opinion.

[2] Although Merit Energy examined Frenchman's Creek, Lake Tecon, and the Manistee River as alternative discharge outlets, Merit Energy concluded that Kolke Creek was the best option because the others contained access problems and were farther from the plume.

Kolke Creek forms the headwater system for the AuSable River watershed. Groundwater feeds this creek, which originates in a wetland system owned by the Michigan Department of Natural Resources (DNR). From the wetland system, the creek flows past four beaver dams then under a driveway owned by plaintiff Nancy A. Forcier Trust (Forcier) and into Lynn Lake. Both Kolke Creek and Lynn Lake form an oligotrophic system, i.e., an ecosystem with low nutrient content and resultant high degree of clarity.[3] While Mayer is the only riparian owner along Lynn Lake, members of Anglers use this lake for recreational purposes.[4]

In 2004, the DEQ approved Merit Energy's corrective action plan, which called for pumping the contaminated groundwater from the plume to the CPF for iron and air stripper treatment. In addition, the DEQ issued a general permit and certificate of coverage (COC) allowing discharge of treated water from the air stripper system into the wetland area flowing into Kolke Creek.[5] Accordingly, Merit Energy constructed a pipeline from the CPF to the wetland system. The pipeline spans 1.3 miles and traverses nearly one-half mile of state-owned land. Merit Energy obtained an easement from the DNR for the construction over state land. Although the COC permits Merit Energy to discharge 800 gallons of treated water a minute into Kolke Creek, the plan

[3] The AuSable River is a designated Blue Ribbon trout stream, and the evidence showed that Kolke Creek provides optimal spawning conditions for native brook trout.

[4] Janney Simpson of plaintiff Mayer Family Investments testified that her family has used this water system since 1916, and that she and her family currently use Lynn Lake for fishing, swimming, rowing, kayaking, and canoeing and that they also fish near the inlet of Kolke Creek.

[5] Specifically, the water was to be discharged into an underground catch basin where it would bubble up into a riprap and "sheet flow" down into the wetland area.

provides for a discharge of only 700 gallons a minute, at which rate it was estimated the plume would be fully treated in 10 years. The pipeline was constructed in late 2005 or 2006. However, the remainder of the corrective action plan has not been implemented.

When a hearing referee dismissed plaintiffs' administrative challenge to the COC in September 2005, plaintiffs filed suit in the Otsego Circuit Court, petitioning for review of that decision and alleging both common-law water rights violations and statutory violations under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., including MEPA. The trial court separated plaintiffs' petition regarding the contested case hearing and remanded that matter for review by the DEQ director.[6]

Following a bench trial regarding plaintiffs' other claims, the trial court issued an opinion and order on May 29, 2007, enjoining Merit Energy from discharging any treated water into the Kolke Creek water system. Specifically, after determining that it had proper subject-matter jurisdiction, the court concluded that the proposed discharge would constitute an unreasonable use of riparian rights, which the DNR's easement failed to convey to Merit Energy, as well as a MEPA violation. The court noted, however, that should Merit Energy obtain an easement granting riparian rights, an evidentiary hearing would commence if the parties were unable to agree on reasonable use. Plaintiffs moved for clarification and

[6] The director affirmed the hearing referee's decision, which, upon plaintiffs' subsequent appeal, the circuit court reversed. Both this Court, and the Supreme Court on reconsideration, denied defendants' delayed application for leave to appeal the circuit court's decision. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 483 Mich 887 (2009); *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, unpublished order of the Court of Appeals, entered September 24, 2008 (Docket No. 284315).

modification of this order, and the court entered an order of clarification and modification on June 25, 2007, indicating that no bar exists for the artificial use of a watercourse for the benefit of a parcel outside a watershed, the DNR may convey riparian rights by easement to Merit Energy, and the proposed discharge was unreasonable. The court also modified the May 29, 2007, order to be the final order in this case.

On August 8, 2007, the court awarded plaintiffs fees and costs for their expert witnesses under MCL 600.2164 of the RJA or, alternatively, under MEPA in the interests of justice. In addition, the court awarded "other costs" requested by plaintiffs exclusively under MEPA.

II. ANALYSIS

A. SUBJECT-MATTER JURISDICTION

Defendants first argue that the pre-enforcement review provision of part 201, MCL 324.20101 *et seq*., of the NREPA deprived the trial court of subject-matter jurisdiction over plaintiffs' MEPA claim. We disagree. This Court reviews de novo both the question of subject-matter jurisdiction and application of the NREPA, but reviews a trial court's factual findings for clear error. *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 14; 732 NW2d 458 (2007); *Michigan Bear Hunters Ass'n v Natural Resources Comm*, 277 Mich App 512, 526; 746 NW2d 320 (2008); *Preserve the Dunes, Inc v Dep't of Environmental Quality* (*On Remand*), 264 Mich App 257, 259; 690 NW2d 487 (2004) (*Preserve the Dunes II*).

The pre-enforcement review provision of part 201 provides, in relevant part: "A state court does not have jurisdiction to review challenges to a response activity

selected or approved by the department under this part or to review an administrative order issued under this part in any action . . . ." MCL 324.20137(4) (emphasis supplied).[7] The evidence established that the DEQ's approval of Merit Energy's corrective action plan fell under part 615, not part 201. Part 615 of the NREPA regulates oil and gas well facilities and provides the DEQ with authority over matters relating to unreasonable damage to groundwater resulting from the use of such facilities. See MCL 324.61501(q)(*i*)(B), MCL 324.61503, and MCL 324.61505. Indeed, DEQ employees Ricky Henderson and Judith Woodcock, who reviewed and approved the corrective action plan, testified that the plan was specifically "approved by the department under" part 615.

Defendants, however, contend that the pre-enforcement bar is applicable because the corrective action plan constitutes a "response activity" under part 201. For several reasons, this argument is not persuasive. First, as noted above, the DEQ did not select or approve the corrective action plan under part 201, but instead specifically cited part 615. Second, part 201 defines a "[r]esponse activity" as the

> evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of public health and enforcement actions related to any response activity. [MCL 324.20101(1)(ee).]

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[7] While MCL 324.20137(4)(a) through (e) contain several exceptions to this bar on pre-enforcement review, the parties raise no issue regarding these exceptions.

Here, even though the corrective action plan referenced part 201 to establish "risk based cleanup goals for the site," it is not clear that such guidance constituted a "response activity" under part 201. For starters, the DEQ expressly approved a "Corrective Action Plan," which is specifically referenced in part 615, and to which part 201 makes no reference. Rather, part 201 provides for a "[r]emedial action plan," which is "a work plan for performing remedial action *under this part*." MCL 324.20101(1)(dd) (emphasis supplied). Moreover, that administrative rules promulgated under part 615 require well cleanup in accordance with all applicable state laws and regulations pertaining to losses of oil and gas is insufficient to show that part 615 incorporates part 201. See Mich Admin Code, R 324.1006. Indeed, neither part 615 nor rules promulgated pursuant to that part make any reference to part 201. Furthermore, it is part 615 of the NREPA that deals specifically with oil and gas waste—the contamination at issue in this case.[8] Therefore, given that part 201 expressly limits jurisdiction only where a response activity is approved "under this part," MCL 324.20137(4), the bar of part 201 does not apply to this case where the corrective action plan was not a "response activity" and was approved by the DEQ under part 615.

In furtherance of their argument that the preenforcement review provision of part 201 applies, defendants rely on *Genesco, Inc v Dep't of Environmental*

[8] Part 615 defines "[u]nderground waste," in part, as: "Unreasonable damage to underground fresh . . . waters . . . from operations for the . . . handling of oil or gas," MCL 324.61501(q)(i)(B), and defines "[s]urface waste," in part, as: "The unnecessary or excessive surface loss or destruction without beneficial use, however caused, of gas, oil, or other product, but including the loss or destruction . . . resulting from . . . seepage [or] leakage . . . especially a loss or destruction . . . from inefficient storage or handling of oil," MCL 324.61504(q)(ii)(A).

Quality, 250 Mich App 45, 53; 645 NW2d 319 (2002), contending that because parts 201 and 615 both have the same general purpose of protecting the environment, they must be construed *in pari materia*. *Genesco*, however, is not instructive on this issue.

In *Genesco*, the DEQ approved a remedial action plan under part 201. The plaintiff, which operated a leather tannery adjacent to a contaminated lake, claimed that because the DEQ's remediation plan under part 201 violated part 17 (i.e., MEPA), the pre-enforcement review provision of part 201 was inapplicable. *Id*. at 47-49. This Court affirmed the trial court's conclusion that part 201 deprived the court of subject-matter jurisdiction and held that "claims under part 17 may not be brought where the underlying controversy is over a 'response activity' as defined in part 201." *Id*. at 53. In arriving at this conclusion the Court explained that "parts 17 and 201 must be read in pari materia because they both have the same general purpose of protecting the environment . . . and must be read in the context of the entire [NREPA] so as to produce an harmonious whole" lest pre-enforcement litigation frustrate the DEQ's attempt to clean contaminated sites. *Id*.

Here, we have already concluded that plaintiffs' challenge was in no way predicated on part 201. Thus, in contrast to *Genesco*, the parts of the NREPA to be construed *in pari materia* are parts 17 (MEPA) and 615. Unlike part 201, however, part 615 contains no bar to subject-matter jurisdiction. Thus, application of *Genesco* does not deprive the circuit court of subject-matter jurisdiction.

While we are cognizant of defendants' argument that this conclusion may allow pre-enforcement litigation that could potentially delay future cleanup efforts of contaminated sites approved under part 615, the plain

language of part 201 unambiguously limits subject-matter jurisdiction to plans approved "under this part." MCL 324.20137(4). Thus, even were we to construe parts 201 and 615 *in pari materia*, we would conclude that the pre-enforcement bar is inapplicable here. Indeed, where "the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 528; 734 NW2d 533 (2007) (quotation marks and citation omitted). In light of this, the proper forum for resolution of defendants' concern is the Legislature, rather than this Court. Therefore, there was no bar to the circuit court's subject-matter jurisdiction in this case.[9]

We also disagree with defendants' argument that because part 615 confers exclusive jurisdiction on the Ingham Circuit Court to hear this case, plaintiffs brought suit in the wrong forum. See MCL 324.61517(2). As a point of fact, plaintiffs did not bring suit under part 615. Rather, plaintiffs responded that the pre-enforcement provision of part 201 was inapplicable because the DEQ approved Merit Energy's plan under part 615. In other words, plaintiffs' reliance on part 615 does not underlie and was

[9] Defendants point out that because the DEQ used the spill clean-up criteria and definition of petroleum in part 201 in its administration of part 615, the corrective action plan constituted a "response activity" under part 201. However, that the DEQ did not require Merit Energy to conduct any interim response activities or feasibility studies as required by regulations promulgated pursuant to part 201 undercuts this point. See MCL 324.20114(1)(h) and Mich Admin Code, R 299.5526(1)(h) and (n). Additionally, defendants contend that the transfer settlement agreement demonstrates that the proposed remediation plan constituted a "response activity." However, a fair reading of the transfer settlement agreement in context does not support this conclusion. Indeed, the transfer settlement agreement expressly provides: "Both parties agree under part 615, the Agreement set forth herein is necessary to prevent waste, to alleviate pollution, impairment, and the destruction of the State of Michigan's natural resources."

not used as a basis for a cause of action in this case, but rather is asserted in a defensive posture to defendants' argument that part 201 bars subject-matter jurisdiction. Jurisdiction was proper in the Otsego Circuit Court. MCL 324.1701(1).

B. THE DEQ'S ADMINISTRATIVE ACTION

We do, however, agree with the DEQ's contention that because its review of Merit Energy's corrective action plan and issuance of the COC constituted an administrative decision, it did not violate MEPA. "[W]e review de novo the proper application of MEPA. But we will not overturn a trial court's findings of fact unless they are clearly erroneous." *Preserve the Dunes II*, *supra* at 259 (citations omitted).

"MEPA provides a cause of action for declaratory and other equitable relief for conduct that is likely to result in the pollution, impairment, or destruction of Michigan's natural resources" and provides for immediate judicial review of allegedly harmful conduct. *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 512; 684 NW2d 847 (2004) (*Preserve the Dunes I*); MCL 324.1701(2) and MCL 324.1703(1). Regarding intervention in permit proceedings, MEPA "requires a potential intervenor to file a pleading asserting that the proceeding or action for judicial review involves *conduct* that has violated, or is likely to violate, MEPA." *Preserve the Dunes I, supra* at 521 (emphasis supplied); MCL 324.1705(1). However, "[w]here a defendant's conduct itself does not offend MEPA, no MEPA violation exists." *Preserve the Dunes I, supra* at 519. Because plaintiffs challenged the DEQ's approval of the corrective action plan, their challenge pertained to an administrative decision rather than conduct. However, "[a]n improper administrative decision, standing alone, does not harm the environment." *Id*.

Indeed, it is the actual discharge of treated water into Kolke Creek and Lynn Lake that plaintiffs assert would harm the environment. Thus, MEPA provides no basis for judicial review of this agency decision. "To hold otherwise would broaden by judicial fiat the scope of MEPA and create a cause of action that has no basis in MEPA's language or structure." *Id*. at 524. Consequently, the court erred by failing to dismiss the DEQ from this action.[10]

C. THE EASEMENT

Defendants next argue that the trial court erred by finding that the easement failed to adequately specify the right to discharge treated water. "The extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). We hold that the trial court erred by ruling that the easement did not allow Merit Energy to discharge the water into the watershed.

"[T]he use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Id*. at 41 (quotation marks and citation omitted). Not surprisingly, these purposes are determined by the text of the easement. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003) (*Little II*). "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. If the text of the easement is ambiguous, extrinsic

[10] Plaintiffs contend that the DEQ was a proper party because the COC gave Merit Energy riparian or property rights to discharge treated water into Kolke Creek that would harm the environment. However, the COC merely authorizes the discharge of water and makes no reference to a grant of property rights.

evidence may be considered by the trial court in order to determine the scope of the easement." *Id*. (citation omitted).[11]

The easement in this case expressly provided Merit Energy the "right to place, construct, operate, repair, and maintain" the pipeline over the state-owned land at issue. The term "operate" clearly and unambiguously refers to the operation of the pipeline that will discharge treated water into Kolke Creek. Further supporting this plain meaning is the easement's own requirement that Merit Energy notify the DNR of the *release* of any toxic or hazardous substance resulting from *operation* of the pipeline. Additionally, attached to the easement is a condition requiring Merit Energy to submit "operating instructions" requiring visual inspection of the water line and discharge point on a regular basis. Thus, the term "operate" clearly encompasses the discharge of treated water. Further, plaintiffs are incorrect that the easement only permitted operation of the pipeline to the riprap area above the wetland. On the contrary, the reference diagram attached to the easement clearly indicates discharge flowing into Kolke Creek. Therefore, the trial court erred by concluding that the easement failed to grant Merit Energy the right to discharge treated water into Kolke Creek.

We also reject plaintiffs' contention on cross-appeal that because Merit Energy's land is nonriparian, the

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[11] Although both defendants and the trial court cited this Court's opinion in *Little v Kin*, 249 Mich App 502, 511; 644 NW2d 375 (2002) (*Little I*), aff'd 468 Mich 699 (2003), in support of the proposition that "the intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant" to determine the scope of an easement, our Supreme Court expressly rejected this approach, finding it "clearly inconsistent with the well-established principles of legal interpretation . . . [and] thus incorrect." *Little II*, *supra* at 700 n 2.

trial court erred by ruling that Merit Energy could lawfully obtain an easement. This Court reviews the scope and application of common-law claims, such as the application of riparian law, de novo, but reviews a trial court's factual findings in a bench trial for clear error. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 53; 709 NW2d 174 (2005), aff'd in part, rev'd in part, and remanded on other grounds 479 Mich 280 (2007); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

"[W]hile full riparian rights and ownership may not be severed from riparian land and transferred to non-riparian backlot owners, Michigan law clearly allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights that are traditionally regarded as exclusively riparian." *Little v Kin*, 249 Mich App 502, 504-505; 644 NW2d 375 (2002) (*Little I*), aff'd 468 Mich 699 (2003). Traditionally, riparian owners[12] are permitted to drain their land into an adjoining watercourse, *Saginaw Co v McKillop*, 203 Mich 46, 52; 168 NW 922 (1918), and rights granted to nonriparians by easement are not limited to access or ingress and egress, *Dyball v Lennox*, 260 Mich App 698, 706; 680 NW2d 522 (2004), citing *Little I*, *supra* at 514-516. Thus, the DNR, as a riparian owner, could lawfully convey the easement at issue to Merit Energy.

While plaintiffs maintain that the grant was apart from the land because it pertained to water originating on nonriparian land, this argument confuses the right at issue, i.e., the DNR's right to discharge water into a watercourse. This right is inherently riparian and

[12] "Land which includes or is bounded by a natural watercourse is defined as riparian." *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985).

therefore connected to, rather than apart from, the land. *McKillop*, *supra* at 52. It is this riparian right that was granted by easement. Therefore, plaintiffs' argument does not hold water.[13]

D. COMMON-LAW CLAIMS

As an initial matter, defendants claim that the court erred by finding that the proposed discharge would affect plaintiffs' property rights by affecting their use of Kolke Creek and Lynn Lake.[14] We disagree. This Court reviews the scope and application of common-law claims de novo, but reviews a trial court's factual findings in a bench trial for clear error. *Nestlé*, *supra* at 53; *Walters*, *supra* at 456.

"Riparian rights are derived from and are dependent on ownership of 'land' which abuts a natural body of water; thus, they constitute part of the property possessed by riparian landowners and become their property rights." *Hess v West Bloomfield Twp*, 439 Mich 550, 562; 486 NW2d 628 (1992). " '[A]ll the riparian proprietors have an equal or common right to use the water, but each must exercise his rights in a reasonable manner and to a reasonable extent, so as not to interfere unnecessarily with the corresponding rights of others.' " *Square Lake Hills Condo Ass'n v Bloomfield Twp*, 437 Mich 310, 337 n 9; 471 NW2d 321 (1991)

[13] Although plaintiffs call attention to *Alburger v Philadelphia Electric Co*, 112 Pa Commw 441, 445; 535 A2d 729 (1988), that case pertained to a riparian owner's right to discharge into a stream water not originating from riparian land. In contrast, the water in this case would be discharged into an area feeding a watercourse that originated *exclusively* on riparian land.

[14] We note that, contrary to defendants' assertion, Mayer and Forcier, as members of Anglers, had standing as individual plaintiffs. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 629; 684 NW2d 800 (2004).

(LEVIN, J., dissenting), quoting 23 Michigan Law & Practice, Waters and Watercourses, § 2, p 262.

Merit Energy proposes to use this water system to discharge treated water. The trial court found that the following would result as a consequence of Merit Energy's use: increased sedimentation, phosphorus levels, and erosion into Lynn Lake; significant flooding along Kolke Creek; aesthetic and economic impairment of Kolke Creek; overall drop in water quality and increase in turbidity;[15] and harm to aquatic life. The record supports these findings. In light of the effects of the proposed discharge, Merit Energy's use of the water system would necessarily interfere with plaintiffs' use, thereby affecting their riparian rights. Indeed, our Supreme Court has long held that any use that "materially . . . adulterates the water" may impair riparian rights "for the ordinary purposes of life." *People v Hulbert*, 131 Mich 156, 168-169; 91 NW 211 (1902) (quotation marks and citations omitted). Moreover, although defendants assert that diminution in water quality alone is not actionable, plaintiffs' alleged injury in fact was sufficient to support a cause of action where they "aver[red] that they use[d] the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 629; 684 NW2d 800 (2004) (quotation marks and citations omitted).

Defendants also contend that plaintiffs cannot claim a property right in lands that have been traditionally flooded as a result of the Lake Tecon impoundment above the discharge site. However, the only authority defendants cite in support of this proposition does not

[15] Turbidity is a measurement of cloudiness in the water caused by suspended particles.

address this specific point. See *Burt v Munger*, 314 Mich 659; 23 NW2d 117 (1946); *Hyatt v Albro*, 121 Mich 638; 80 NW 641 (1899). In any event, the proposed discharge would have a qualitatively different effect on Kolke Creek than any traditional flooding. Indeed, plaintiffs' expert, Dr. Christopher Grobbel, testified that previous flooding was a natural event of short-term duration, whereas the proposed discharge would inundate the area for a period of many years. Thus, defendants' argument fails.

On cross-appeal, plaintiffs argue that the trial court should have applied surface water law because the proposed discharge does not originate on the DNR's land. We disagree. The characterization of water as a watercourse or surface water governs a party's right to discharge water into a water system. *Kernen v Homestead Dev Co*, 232 Mich App 503, 511-512; 591 NW2d 369 (1998).[16] Here, the corrective action plan calls for the treated water to be discharged into the wetland system that flows into Kolke Creek. The wetland system and Kolke Creek originate solely on DNR property. It is undisputed that Kolke Creek is classified as a watercourse before flowing onto plaintiffs' land. Thus, regardless of whether the treated water is surface water at the discharge point, it is no longer surface water by the time it reaches plaintiff's land because surface waters "are lost by . . . reaching some definite water-

[16] The characterization of water as a watercourse entitles a riparian owner to reasonable use of that watercourse, but does not permit the riparian owner to pollute the water or to unreasonably increase the flow to the extent that it floods another riparian owner's property. *Kernen supra* at 511-512. In contrast, the characterization of water as surface water renders an increase in flow by the owner of an upper estate a trespass because "the owner of a lower or servient estate must receive the surface water from the upper or dominant estate in its natural flow." *Id*. at 512 (quotation marks and citation omitted).

course or substantial body of water into which they flow." *Id*. at 511 n 7. Therefore, the trial court correctly deemed surface water law inapplicable.

Plaintiffs argue, alternatively, that the trial court erroneously applied the reasonable use balancing test. However, this Court has determined that "under Michigan's riparian authorities, water disputes between riparian proprietors are resolved by a reasonable use test that balances competing water uses to determine whether one riparian proprietor's water use, which interferes with another's use, is unreasonable under the circumstances." *Nestlé*, *supra* at 58. "Under the reasonable use doctrine, a riparian owner may make any and all reasonable uses of the water, as long [as he does] not unreasonably interfere with the other riparian owners' opportunity for reasonable use." *Id*. at 55 (quotation marks and citation omitted). Here, although Merit Energy is not a riparian proprietor, its proposed discharge specifically utilizes the rights granted by the DNR's easement. Since the rights the DNR granted by easement are riparian, this dispute should be analyzed under the law applicable to disputes between riparian proprietors.

It is plaintiffs' contention that the reasonable use balancing test enunciated in *Nestlé* is inapplicable because *Nestlé* was a groundwater case. Although plaintiffs are correct that *Nestlé* applied the reasonable use balancing test to a groundwater claim, the test is not limited to groundwater cases. On the contrary, after reviewing the origin and development of water law in Michigan since the 19th century, *id*., citing *Dumont v Kellogg*, 29 Mich 420, 422 (1874), *Nestlé* specifically concluded, *before addressing any groundwater claim*,

that "water disputes between riparian proprietors are resolved by a reasonable use test," *Nestlé, supra* at 58.

Plaintiffs note that *Nestlé* is distinguishable because the groundwater at issue in *Nestlé* had a hydraulic connection to the watercourse whereas Merit Energy's proposal to discharge treated water constitutes a use of riparian rights to benefit nonriparian (i.e., Merit Energy's) land. This contingency does not distinguish *Nestlé*, but instead is a factor in *Nestlé*'s reasonable use balancing test. *Id*. at 72. Moreover, *Nestlé* relied on the Restatement of Torts, 2d, in applying the reasonable use balancing test to the groundwater dispute, *id*. at 71 n 46, citing 4 Restatement Torts, 2d, § 850A, p 220, and the factors set forth in that Restatement section pertain to the reasonable use of water generally—i.e., without specific limitation to groundwater disputes. Further, although *Nestlé* expressly adopted and applied the reasonable use balancing test to a dispute between groundwater and riparian users, *Nestlé* identified this test as the one "first stated in *Dumont*[.]" *Nestlé, supra* at 68. The *Dumont* test was not limited to groundwater cases. *Dumont*, *supra* at 423-425. In light of this, it cannot be said that *Nestlé* ignored the doctrine of stare decisis or that its explanation of the reasonable use balancing test constituted mere dictum. Consequently, we conclude that because it was only the *Nestlé* Court's application of the reasonable use balancing test that pertained to a groundwater dispute, its explanation and analysis of the reasonable use balancing test is instructive here.[17] Therefore, the trial court correctly concluded that the reasonable use balancing test applies.

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[17] Plaintiffs' assertion that an "unreasonable use per se test" was applicable also fails in light of the *Nestlé* Court's treatment of that issue: "[I]n the context of riparian rights, prior courts have determined that uses that did not benefit the riparian land were unreasonable per se . . . we believe that such a per se rule is incompatible with modern use of the

Finally, we note Merit Energy's contention that the trial court failed to determine the volume of water to be discharged under the reasonable use balancing test. However, that finding would have been premature given the trial court's finding—albeit an erroneous one—that the easement did not convey the right to discharge. In any event, the arguments and evidence presented at trial focused on whether the *proposed* discharge was reasonable or whether reasonable alternatives existed, and the trial court determined the reasonableness of the proposed discharge. In addition, the trial court's final order did not effectively overrule the interim order's enjoining of the proposed discharge or conclusion that further evidence could be submitted concerning a lower discharge amount, as the only limiting language in the final order refers to the court's finding that the proposed discharge was unreasonable.

E. MEPA

Defendants' principal argument under MEPA is that the trial court erred by finding a prima facie violation of MEPA because it failed to apply part 31 (the water resources protection act) of the NREPA, MCL 324.3101 *et seq*., as a pollution control standard. We disagree. "[W]e review de novo the proper application of MEPA. But we will not overturn a trial court's findings of fact unless they are clearly erroneous." *Preserve the Dunes II, supra* at 259 (citations omitted).

To establish a prima facie violation of MEPA, a plaintiff must show that "the defendant has or is likely to pollute, impair, or destroy the air, water, or other natural resources." *Nestlé*, *supra* at 88, citing MCL

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balancing test. Instead, we hold that the location of the use is but one of the factors that should be considered in balancing the relative interests." *Nestlé*, *supra* at 72 n 49.

324.1703(1) and *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975). "[I]n determining that a plaintiff has made out a prima facie MEPA violation, the trial court may either (1) make detailed and specific findings that the defendant's conduct has polluted, impaired, or destroyed, or is likely to pollute, impair, or destroy, the air, water, or other natural resources, *or* (2) find that the defendant has violated an applicable pollution control standard." *Nestlé*, *supra* at 89 (citations omitted; emphasis supplied). Once a prima facie case is established, the burden shifts to the defendant, who may rebut the prima facie case with evidence to the contrary. *Id*.

As a preliminary matter, defendants argue that the standards for determining a prima facie MEPA violation enunciated in *Nestlé* do not present "equally available methods" of inquiry. Rather, defendants contend that a court may make detailed and specific factual findings regarding a defendant's conduct *only if* no applicable pollution control standard exists or if an existing pollution control standard is deficient. Although a creative argument, we cannot square it with the statute and caselaw.

MEPA does not contain specific standards or requirements concerning adverse environmental impact. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30; 576 NW2d 641 (1998). It does, however, set forth how a case is to proceed in the circuit court, starting off with the plaintiff's having to prove a prima facie case that the defendant's conduct has polluted or will likely pollute natural resources:

> When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the

> public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part. [MCL 324.1703(1).]

Courts are to consider this statute for guidance in crafting findings of fact, *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 488; 608 NW2d 531 (2000), and the statute's focus is entirely on the defendant's conduct relative to polluting, impairing, or destroying natural resources. Consequently, and contrary to defendants' argument, our courts have held that there are two ways to prove a prima facie MEPA case, *one of which* is proving that the defendant's conduct violated a pollution control standard. See *Nestlé, supra* at 89; *Preserve the Dunes I, supra* at 517 n 5 (noting that the defendant's opportunity to rebut a prima facie case remains the same "whether that violation has been established *independently or by reference to another statute's pollution control standard*" [emphasis supplied]).

Defendant places great emphasis on MCL 324.1701(2), which provides:

> In *granting relief* provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:

> (a) Determine the validity, applicability, and reasonableness of the standard.
>
> (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court. [Emphasis supplied.]

The plain language of this section applies at the point when a circuit court is "granting relief" as authorized by subsection 1,[18] and thus applies *after* a violation of MEPA has been found. Black's Law Dictionary (7th ed); *ADVO-Systems, Inc v Dep't of Treasury*, 186 Mich App 419, 424; 465 NW2d 349 (1990) (dictionaries are useful tools for determining the common understanding of undefined statutory terms). Through this section, the Legislature has provided courts with the explicit authority to fashion relief consistent with existing pollution control standards, or to adopt new standards if the existing ones are found invalid, inapplicable, or unreasonable.[19] But the Legislature has created no requirement that a prima facie case must include a trial court analysis and finding about any applicable pollution control standard. Indeed, as already discussed, MCL 324.1703(1) contains no such requirement, and its general provisions on standards of proof indicate otherwise. See *Nemeth, supra* at 30 (observing that MEPA creates an environmental common law that "does not impose specific requirements or standards; instead, it provides for de novo review in Michigan courts, allowing those courts to determine any adverse environmental effect and to take appropriate measures"). Thus, the

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[18] Subsection 1, MCL 324.1701(1), allows a circuit court to grant declaratory and equitable relief if the plaintiff proves that the defendant has violated MEPA.

[19] Without such a legislative grant of authority, a court disregarding applicable statutory requirements would be acting outside the realm of valid judicial authority. *Miller v Riverwood Recreation Ctr, Inc*, 215 Mich App 561, 563; 546 NW2d 684 (1996).

only determinative statutory requirement in evaluating a prima facie MEPA violation "is whether the defendant's conduct will, in fact, pollute, impair, or destroy a natural resource." *Preserve the Dunes I*, *supra* at 517 n 5.

And that is where defendants misconstrue the varying statements about pollution control standards in *Nemeth* and its progeny. Determining whether a statute contains a pollution control standard is relevant when the plaintiff has alleged, as a way to prove a prima facie case, that the defendant's conduct has, or will, violate a statute or regulation. At that point the court must decide if the statute contains a pollution control standard, for if it does, the defendant's violation of the statute, by itself, can be used to satisfy the prima facie case standard. *Nemeth, supra* at 36; *Nestlé, supra* at 89. If the statute does not contain a pollution control standard, as the trial court concluded in this case, then a violation of the statute cannot alone establish a prima facie case. *Id.* at 94. Hence, *Nemeth* does not *require* a trial court to determine whether statutes cited by defendants contain pollution control standards, as *Nemeth* and the other decisions addressed the need to decide if the statutes allegedly violated contained pollution control standards in order to avoid using the violations as lone support for prima facie cases.

Here, plaintiffs attempted to prove a prima facie case with factual proof that defendants' discharge of treated water into Kolke Creek will likely pollute, impair or destroy natural resources in violation of parts 31, 301, and 303 of MEPA. As required by caselaw, see *Nemeth, supra* at 35, the trial court determined that parts 301 and 303 did not contain pollution control standards, but nonetheless properly utilized them, in part, in deciding whether defendants violated MEPA. See *Nestlé, supra*

at 92 n 69. The trial court made detailed findings of fact in determining that defendants' rate of discharging treated water would likely pollute or impair the natural resource at issue, and that defendants therefore violated MEPA. That process is all that is required by statute, MCL 324.1703(1), and caselaw. *Nemeth, supra* at 36-37; *Ray, supra* at 309-310; *Nestlé, supra* at 88-89.[20]

Defendants argue, in the alternative, that the trial court substantively erred by relying on the *Portage* factors and using parts 301 and 303 as pollution control standards in finding a prima facie MEPA violation. This is incorrect. For starters, while the *Portage* factors are case specific, *Nemeth*, *supra* at 35, the trial court did not exclusively rely on them in its analysis. On the contrary, the court also examined parts 301 and 303, which the court acknowledged did not contain pollution control standards, as well as relied on its own findings under the common-law reasonable use factors in finding a prima facie violation. This is an appropriate use of both the *Portage* factors and parts 301 and 303. *Nestlé*, *supra* at 92 n 69, 97. Indeed, the court ultimately concluded that a review of all the factors "weigh[s] in favor of plaintiffs" and that it was "[f]or this reason . . . that plaintiffs have established a prima facie MEPA violation." Therefore, defendants' contention fails.

Finally, we disagree with defendants' assertion that the trial court failed to articulate a pollution control standard. "[T]he MEPA specifically authorizes a court to determine the validity, reasonableness, and applica-

[20] That the trial court did not explicitly discuss why part 31 of the NREPA and part 4 of the regulations did not contain pollution control standards is insignificant because the caselaw requires only that the court utilize an "appropriate standard" when deciding the case and fashioning relief, and that standard can be, as in this case, the detailed findings and conclusions made by the court. *Nemeth, supra* at 35; *Ray, supra* at 309.

bility of any standard for pollution or pollution control and to specify a new or different pollution control standard if the agency's standard falls short of the substantive requirements of MEPA." *Nemeth*, *supra* at 30 (quotation marks, citation, and emphasis omitted). Here, the court made detailed and specific findings that the proposed discharge would: significantly affect wildlife; cause increased flooding, sedimentation, phosphorus levels, chloride levels, and erosion; and severely affect the water quality of the system. Although the court failed to use the words "pollution control standard" in making its findings, we do not find this flaw fatal. First of all, since the court found no pollution control standard, it did not need to create a new one. Second, even statutes that articulate pollution control standards need not contain the words "pollution control standard" to be considered as containing pollution control standards. Rather, determinative of whether statutes contain pollution control standards is whether "the purposes are to protect natural resources or to prevent pollution and environmental degradation . . . ." *Nestlé*, *supra* at 92 In this case, it is clear that the purpose of the trial court's findings and conclusion that Merit Energy's specific discharge proposal violated MEPA was to protect natural resources and prevent environmental degradation. In other words, the court sufficiently articulated a pollution control standard by holding that the discharge of 700 gallons a minute of treated water into Kolke Creek would likely pollute and impair that watershed system.

Before moving on, however, we again note that the trial court's interim order allows Merit Energy to return to court with a different proposal, presumably one providing for a discharge of less than the 700 gallons a minute that the court found violated MEPA. The trial court will then have another opportunity to

either make detailed findings of fact, or perhaps explicitly create a new standard that sets a limit, if any, regarding the amount of treated water that can lawfully be discharged into Kolke Creek.[21]

F. EVIDENTIARY CLAIMS

This brings us to defendants' assertion that the trial court committed numerous evidentiary errors. Specifically, defendants argue that the trial court erred by finding that the proposed discharge would likely pollute, impair, or destroy natural resources because its decision was based on the following inadmissible evidence: (1) article abstracts admitted as exhibit 83 and the testimony of plaintiff's expert, Dr. Mark Luttenton based on this exhibit and (2) graphs admitted as exhibits 67 and 135 and the stage discharge analysis of plaintiff's expert, David Hyndman, based on these exhibits. Also, defendants assert that the court improperly excluded defense exhibits and defense expert testimony.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "However, when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed de novo, and admitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion." *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We hold that the trial court did not abuse its discretion in its evidentiary rulings or, if it did so, it was harmless error.

[21] Neither party has cited a statute or regulation that places any limit on the amount of discharge, if any, that is permitted in this situation.

i. EXHIBIT 83 AND EXPERT ANALYSIS

Exhibit 83 consisted of article abstracts pertaining to the effects of chlorides on water systems. Defendants maintain that this evidence was inadmissible hearsay. Defendants are correct, as the article abstracts are out-of-court statements offered for their truth and do not fall within an established hearsay exception. MRE 801(c); *Merrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998). However, we conclude that any error was harmless as there is no indication that the court relied on these abstracts in making its decision.[22]

Further, the inadmissibility of exhibit 83 did not preclude Luttenton's testimony concerning the effects of chlorides on aquatic invertebrates. Under MRE 703, the "facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Therefore, a party must show that the "facts or data" upon which an expert relies is admissible before an expert may render an opinion. *People v Yost*, 278 Mich App 341, 362-363; 749 NW2d 753 (2008). This presumes, however, that the "facts or data" refer to the facts of the case that would support the expert's opinion and do not include information or documentation pertaining to the expert's education concerning the topic.

Arguably, the abstracts upon which Luttenton relied pertained to his education on the introduction of chlorides into water systems and their effect on aquatic invertebrates. In contrast, the facts that support Luttenton's opinion are the data concerning the actual chlorides the proposed discharge would add to Kolke

[22] While plaintiffs argue that the abstracts were admissible under MRE 707, that rule pertains to the admissibility of statements in reliable treatises for impeachment purposes on cross-examination and is therefore not applicable here.

Creek and Lynn Lake. Exhibit 83 did not contain that data, which defendants do not challenge. Thus, Luttenton's opinion on this matter was properly admitted. In any event, if the evidence was improperly admitted, any error would be harmless as the court's consideration of the effects on aquatic invertebrates was but one of many negative effects supporting the injunction.

ii. EXHIBITS 67 AND 135 AND EXPERT ANALYSIS

Hyndman testified that the proposed discharge would increase the water level and flow in Lynn Lake and Kolke Creek. This stage discharge analysis was based on water flow measurements made by Hyndman, Grobbel, and Robert Workman. The court admitted these measurements as exhibits 67 and 135.

Defendants challenge the admission of these exhibits on the ground that they were based on unreliable data. "[T]he trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007) (DAVIS, J.). Rather, the focus of the inquiry is whether the expert based his conclusions on a sound foundation. *Id*. at 139.

With respect to this inquiry, MRE 702 provides:

> 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.

Regarding exhibit 67, defendants assert that the data were unreliable because, with the exception of one flow measurement, Hyndman relied on Grobbel's measurements even though Hyndman claimed his measurement procedure was more reliable than Grobbel's and because Hyndman's and Grobbel's measurements were taken inside culverts. We agree with the trial court and hold that the trial court correctly ruled that defendants' stated objections to the procedures employed by Hyndman go more to the weight of his testimony than to the reliability, and thus admissibility, of his testimony. *Surman v Surman*, 277 Mich App 287, 309-310; 745 NW2d 802 (2007).

We also reject defendants' arguments for two additional reasons. First, while Hyndman claimed that Grobbel used a different measurement procedure, he did not assert that his was more reliable, and defendants fail to explain how the use of different procedures affected the reliability of the measurements. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Second, both Hyndman and Grobbel asserted that the ideal locations for measurements in this system were on the upstream side of culverts. Thus, the stage discharge analysis was not based on unreliable data.[23]

Concerning exhibit 135, defendants point out that Hyndman simply fashioned this exhibit by adding and removing data points from exhibit 67. However, Hyndman explained that he only removed one data point, which was an "outlier," i.e., a data point that was not representative of the relationship depicted in the exhibit. Additionally, disagreement between Grobbel and

[23] Defendants also challenge Hyndman's failure to apply a standard deviation analysis. However, Hyndman explained that this approach was not proper in evaluating the measurements at issue. Thus, the trial court had discretion to accept or reject Hyndman's evaluation.

Susan Baker, a defense expert, is relevant to the credibility and weight of each witness's testimony, the determination of which is within the province of the trial court. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Apparently, the court gave more weight to Hyndman's stage discharge analysis, and that was not an abuse of discretion. And any error was harmless since Hyndman's conclusion and the court's ruling were not solely based on the stage discharge analysis, but focused on additional factors that included the effect of the proposed discharge on wildlife and water quality. *People v Rodriquez* (*On Remand*), 216 Mich App 329, 332; 549 NW2d 359 (1996) ("The erroneous admission of evidence is harmless if it did not prejudice the defendant.").[24]

iii. EXCLUSION OF DEFENSE EXHIBITS AND EXPERT TESTIMONY

Defendants' last evidentiary argument is that the trial court erroneously excluded portions of Baker's testimony and exhibits supporting that testimony, as well as portions of Workman's surrebuttal testimony.

With respect to Baker, the court excluded a portion of exhibit XX, a North Carolina storm manual, exhibit EE, which consisted of Baker's drawings illustrating the evolutionary stages of the Kolke Creek system, and Baker's related testimony. These exclusions were not improper. First, the only portion of exhibit XX excluded was the portion that Baker admitted she did not use in her analysis. Thus, that evidence was not relevant and

[24] Defendants also contend there was inadequate time to prepare for the introduction of these exhibits since they were not disclosed until the day before trial. However, given that defendants did not begin their case-in-chief until two weeks after exhibit 67 was entered and given that exhibit 135 was entered as rebuttal testimony and applied the same discharge analysis as exhibit 67, we conclude that there was no prejudice.

was therefore inadmissible. MRE 402; *Woodard v Custer*, 476 Mich 545, 569; 719 NW2d 842 (2006). Second, concerning exhibit EE, even if a proper foundation were laid, Baker's analysis of this exhibit concerning whether the system was no longer in an eroding state was not dispositive with regard to Baker's ultimate conclusion that the proposed discharge would not cause erosion. Indeed, Baker considered the effects of vegetation, beaver dams, shear stress, tractive force, and permissible velocity in reaching this conclusion. Thus, any error in excluding exhibit EE and testimony pertaining to that exhibit did not prejudice defendants and was therefore harmless.[25]

Regarding Workman, defendants assert that the court improperly precluded Workman's surrebuttal testimony concerning analysis of Grobbel's flow measurements incorporated into exhibit 135. However, it does not appear that Workman was qualified to render such an opinion, given that his expertise was in aquatic biology and his analysis of the flow measurements pertained to aquatic wildlife and habitat rather than hydrology or hydrogeology, for which Workman was offering surrebuttal testimony. Indeed, under MRE 702, an expert must be qualified "by knowledge, skill, experience, training, or education" before rendering an opinion. *Craig*, *supra* at 78. In light of this, the trial court did not abuse its discretion by precluding Workman's testimony on this issue.

G. EXPERT FEES AND COSTS

Merit Energy challenges the trial court's award pursuant to the RJA and, alternatively, MEPA for "other

[25] We note that, contrary to defendants' assertion, the record reveals that the trial court admitted exhibit TT in its entirety.

costs," as well as transcript costs under "Category D"[26] and the transcript cost of James Janiczek.[27] Merit Energy is correct in part. "[T]he award of taxable costs to the prevailing party is within the trial court's discretion." *Allard v State Farm Ins Co*, 271 Mich App 394, 403; 722 NW2d 268 (2006). "However, what constitutes costs is governed by statute, and questions of statutory construction are reviewed de novo." *Nestlé*, *supra* at 106 (citations omitted).

The RJA provides the statutory authority for awards of costs and fees. *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996). "Under MCL 600.2405(2) [of the RJA], 'costs' include matters specially made taxable elsewhere in the statutes or court rules." *Nestlé*, *supra* at 107. Accordingly, plaintiffs sought costs under MCL 600.2164 (regarding recovery of costs for experts) and MCL 324.1703(3).

i. COSTS AND FEES UNDER THE RJA

Merit Energy initially challenges the trial court's award of "other costs" under the RJA. However, plaintiffs concede that costs and fees awarded under the "other costs" category are only recoverable under MEPA through the RJA catch-all provision, MCL 600.2405(2).

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[26] Each charge in plaintiffs' expert invoices is itemized under one of four categories: "Category T" for "Trial Matters," referring to work done in preparation for trial testimony; "Category D" for "Deposition Matters," referring to time spent preparing for and attending depositions; "Category C" for "Consultations," referring to work involving meetings with plaintiffs' attorneys regarding strategy; and "Category NL" for "Non Lawsuit" matters, referring to work done on matters before the lawsuit was filed or work done in review of matters not pertaining to the lawsuit.

[27] The DEQ also challenged the award of certain costs and fees. However, its dismissal from this matter renders those challenges moot.

Next, Merit Energy correctly argues that MCL 600.2543(2) and 600.2549 of the RJA do not permit taxation of transcript costs. At the outset, we note that except for Janiczek's transcript, for which the court expressly awarded costs under the RJA, transcript costs fall under plaintiffs' "other costs" category. However, the RJA did not support an award for any transcript costs. Indeed, plaintiffs did not acquire transcripts for the purpose of moving for a new trial or for appeal as required by MCL 600.2543(2) (pertaining to recovery for trial transcripts costs). Similarly, plaintiffs did not file with the trial court clerk any deposition transcript that was read into evidence, as required by MCL 600.2549. *Morrison v East Lansing*, 255 Mich App 505, 522; 660 NW2d 395 (2003). Consequently, the RJA did not permit an award for any transcript costs, including Janiczek's.

Although Merit Energy also challenges the award for "Category D" costs and fees on this same statutory basis, "Category D" contains no deposition transcript expense; rather, it "refers to any [expert's] work in preparation for any deposition and . . . attendance at any deposition." Thus, MCL 600.2549 is inapplicable to the review of the costs awarded for "Category D" expenses.[28]

ii. "OTHER COSTS" UNDER MEPA

Merit Energy's final contention is that MEPA did not support an award for plaintiffs' "other costs." Although subsection 1703(3) of MEPA contains a rather open-ended cost provision stating: "Costs may be apportioned

[28] The DEQ raised additional arguments challenging the propriety of awards for "Category D" and "Category T" costs and fees, but since the DEQ should have been dismissed from this case, we decline to address them. See MCR 7.302(G)(4).

to the parties if the interests of justice require[,]" this Court has held that because "the statutory authority for costs is found at MCL 600.2401 *et seq*.[,] . . . the costs allowed under MEPA are the same as the costs allowed under the Revised Judicature Act." *Nestlé*, *supra* at 108. Thus, plaintiffs' attempt to distinguish "taxable costs" under the RJA from "costs" under MEPA is nothing more than a distinction without a difference. Consequently, the trial court erred by awarding transcript costs included in the "other costs" category as those costs were not proper under the RJA.

Additionally, we hold that the trial court erred by awarding the remainder of the "other costs" category —including expenses for copy costs, fax costs, postage, UPS overnight delivery, travel expenses, filing fees, transcripts, Westlaw research, and miscellaneous trial supplies—because these costs amount to no more than attorney fees, which are not awardable under MEPA. *Nemeth*, *supra* at 44. While plaintiffs assert that these costs represent expenses broader than attorney fees, this argument fails to take into account that attorney fees encompass more than just "work performed personally by members of the bar." *Allard*, *supra* at 404 (quotation marks and citation omitted). Rather,

> [t]he rule allowing an award of attorney fees has traditionally anticipated the allowance of a fee sufficient to cover the office overhead of an attorney together with a reasonable profit. The inclusion of . . . *the expenses incurred*[] reflects the traditional understanding that attorney fees should be sufficient to recoup at least a portion of overhead costs. Fixed overhead costs include such items as employee wages, rent, equipment rental, and so forth. Thus, until a statute or a court rule specifies otherwise, the attorney fees must take into account the work not only of attorneys, but also of secretaries, messengers, paralegals, and others whose labor contributes to the work product for which an attorney bills a client, and it must also take account of

> other expenses and profit. [*Id*. at 404-405 (some emphasis in original omitted; quotation marks and citations omitted).]

Here, the additional costs categorized as "other costs" (with the exception of the transcript costs) constitute nothing more than office overhead and other expenses related to the general practice of law. Thus, these "other costs" are best described as attorney fees, for which MEPA does not expressly provide compensation. In light of this, the trial court abused its discretion by awarding "other costs" under MEPA.

H. CONCLUSION

We reverse the trial court's June 25, 2007, opinion and final order insofar as it holds that the DEQ's easement failed to convey riparian rights to Merit Energy, and we hold that the DEQ should have been dismissed from this case. In all other respects we affirm that order. In addition, we reverse the trial court's order awarding costs and fees insofar as it pertains to the DEQ and to the extent that it awards costs for (1) Janiczek's transcript under the RJA and (2) "other costs" under MEPA. In all other respects, we affirm that order. No taxable costs pursuant to MCR 7.219, a question of public policy involved.

TRUCKOR v ERIE TOWNSHIP

Docket No. 279475. Submitted November 5, 2008, at Detroit. Decided March 31, 2009, at 9:15 a.m.

Jeffrey A. Truckor and Alcatraz Industries, Inc., brought an action in the Monroe Circuit Court against Erie Township and several township officials, challenging a township zoning ordinance that regulated the operation of adult entertainment businesses. Alcatraz operated an adult entertainment business on land owned by Truckor and planned to move it to another parcel of land that Truckor owned, but was unable to do so because the business would not be 1,200 feet from any residential use, as required by the ordinance. The court, Michael W. LaBeau, J., granted the defendants' motion for summary disposition, ruling that the ordinance did not violate the plaintiffs' right to free speech because it did not unreasonably limit alternative channels of communication. The plaintiffs appealed.

The Court of Appeals *held*:

1. The ordinance does not violate the plaintiffs' First Amendment rights. A community cannot effectively preclude by zoning the operation of legal businesses. Content-neutral time, place, and manner regulations, however, are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. In this case, the plaintiffs are already exercising their First Amendment rights by operating an existing adult entertainment business that is grandfathered under the ordinance. It is proper to include grandfathered sites when analyzing reasonable alternative avenues of communication. A government does not violate the First Amendment when it allows the protected speech to occur, even if not in the desired locale.

2. The ordinance does not allow unbridled discretion in the handling of an application for a special use permit to operate an adult entertainment business. The ordinance sets out a detailed procedure that the township's planning commission and the township board must follow when they receive and rule on a special use application, as well as nine standards the applicant must meet to avoid denial. The ordinance also provides specific time frames for the application process, including time frames

applicable when a public hearing is required. Thus, the ordinance does not constitute an unlawful prior restraint on speech.

3. The trial court did not err by dismissing the plaintiffs' additional claims, such as interference with business relationships and conspiracy. All the claims in the plaintiffs' complaint derived from the alleged unconstitutionality of the ordinance.

Affirmed.

GLEICHER, P.J., dissenting, would hold that the ordinance violates the First Amendment because it fails to provide adult entertainment businesses with adequate alternative avenues of expression. As the majority acknowledges, under the ordinance's footage restrictions, there is no place for a new adult entertainment business to locate within the zoning district that the ordinance requires. Thus, the ordinance effectively denies any adult entertainment business the opportunity to locate within the township and prevents the plaintiffs from relocating their business. An ordinance that permits only one grandfathered business and prohibits its relocation does not leave open ample alternative avenues of communication. The First Amendment does not mandate that a community host or leave available any specific minimum number of sites for adult entertainment venues, but it does require that interested parties have a reasonable opportunity to disseminate this form of constitutionally protected expression.

CONSTITUTIONAL LAW — FIRST AMENDMENT — FREE SPEECH — ADULT ENTERTAINMENT — ZONING — ALTERNATIVE AVENUES OF COMMUNICATING PROTECTED SPEECH — GRANDFATHERING UNDER ZONING ORDINANCES.

Content-neutral time, place, and manner zoning regulations of protected speech such as nonobscene erotic entertainment are acceptable under the First Amendment as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication; in determining the availability of reasonable alternative avenues of communication, a court may consider the existence of currently operating adult entertainment businesses grandfathered under the ordinance.

Patrick R. Millican for Jeffrey A. Truckor and Alcatraz Industries, Inc.

Lucas Law PC (by *Frederick Lucas*) for Erie Township and others.

Lennard, Graham & Goldsmith, P.L.C. (by *Phillip D. Goldsmith*), for W. Thomas Graham.

Before: GLEICHER, P.J., and K. F. KELLY and MURRAY, JJ.

MURRAY, J. Erie Township, located in the southwest corner of Monroe County, adopted an ordinance that allows for the operation of adult entertainment establishments, but only in the C-2 zoning district, and then only if certain footage requirements are met. Plaintiffs, the owner of land (Jeffrey A. Truckor) and the entity operating an adult entertainment establishment on that land (Alcatraz Industries, Inc.), appeal by right the trial court's order granting defendants'[1] motion for summary disposition, denying plaintiffs' motion for summary disposition and motion for declaratory judgment, and dismissing the case. The discrete constitutional questions presented are whether the township's regulations "unreasonably limit alternative avenues of communication," *City of Renton v Playtime Theatres, Inc*, 475 US 41, 47; 106 S Ct 925; 89 L Ed 2d 29 (1986), or constitute a prior restraint on plaintiffs' speech. We hold that (1) the township has not suppressed plaintiffs' "speech," (2) the ordinance otherwise does not unreasonably limit alternative means of communication, and (3) the ordinance does not constitute an unlawful prior restraint. We therefore affirm the trial court's order.

I. FACTS AND PROCEEDINGS

Plaintiff Truckor owns a parcel of land on Telegraph Road in Erie Township, on which he operated an adult entertainment business featuring topless dancing from 1992 to 2000. In 2000, Truckor transferred to plaintiff

[1] The individual defendants are involved in the Erie Township government, holding positions such as township trustee, township planning commission member, township supervisor, township clerk, township treasurer, and township attorney.

Alcatraz his permits to operate the adult entertainment business. From 2000 through the present, Alcatraz has been operating the adult entertainment business on the Telegraph Road property, which Truckor still owns. In 2003, the township enacted an adult entertainment ordinance, which provides that any adult entertainment establishment must obtain a special use permit, be located on property zoned C-2, and be at least 1,200 feet away from, *inter alia*, any residential district or residential use.

In particular, § 11.02 allows for the operation of adult entertainment businesses, with subsection A containing the footage requirements and subsection B containing "special performance standards" for signage, lighting, hours of operation, and other particulars. Additionally, under § 5.06 an applicant for a special land use permit—which adult businesses must obtain—must also satisfy the following nine criteria in order to obtain the permit:

> 1. The project will be harmonious with and in accordance with the Land Use Plan of the Township.
>
> 2. The project will be harmonious with and in accordance with the general intent and purposes of this Ordinance.
>
> 3. The project will be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed. In determining whether this requirement has been met, consideration shall be given to:
>
> a. The bulk, placement, and materials of construction of proposed structures.
>
> b. Pedestrian and vehicular circulation.
>
> c. The location of vehicular use or parking areas.

4. The project will not be hazardous to any person or property, or detrimental or disturbing to the public welfare or to existing or reasonably anticipated future uses in the same general vicinity.

5. The project will be served adequately by essential public facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities and schools, and minimize the impact of traffic generated by the proposed development on adjacent properties.

6. The project will not involve uses, activities, processes, materials and equipment or conditions of operation that will be detrimental to any person, property or general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare or odors.

7. The project will not create excessive additional requirements at public cost for public facilities and services.

8. The project shall be in compliance with the site plan approval standards of Section 4.05.

9. The project shall be in compliance with all applicable site development requirements of Article 11 (Standards for Specific Special Land Uses).

Although there are no specific timetables within Article 11 for a decision by the township, under Article 3 of the ordinance, which is the article addressing general administration and enforcement of the ordinance, "all approvals applied for under the Ordinance shall be acted upon in a timely manner." Specifically, a designated approving body must decide any application no more than 90 days from when the application is deemed complete. Art 3, § 3.08(A)(2). If a public hearing is necessary, it must be held within 60 days of a completed application, and 90 days after the hearing. Art 3, § 3.08(A)(3). Article 11 of the ordinance states that decisions "shall" be made and the planning commission must state its reasons in writing for recom-

mending approval or denial of an application, with reference to the standards within § 5.06. An appeal from the township board is to the circuit court, but there is no provision within the ordinance to allow an establishment to operate while the administrative and judicial process is underway.

In 2005, Truckor purchased a parcel of property zoned C-2 on Victory Road in the township, the property to which Alcatraz planned to move the Telegraph Road adult entertainment business.[2] The township, however, would not allow plaintiffs to construct an adult entertainment business on the Victory Road property because the property was not at least 1,200 feet from a residential area. Indeed, the township has conceded that because of the footage requirements, there is no current possibility for a new establishment to locate within the C-2 district.

According to plaintiffs, after being informed of this restriction, defendant Paul Mikels, the township supervisor, informed Truckor that he should not apply for a variance on the Victory Road property because it would be denied for lack of hardship. Mikels suggested that Truckor seek an amendment to the zoning ordinance. Thus, on August 29, 2005, Truckor filed a petition to amend the zoning ordinance to change the 1,200-foot restriction to 750 feet, which he believed would enable him to construct the adult entertainment business, provided that he obtain a special use permit as required by the ordinance. The Erie Township Planning Commission held a public hearing on the petition on October 6, 2005.

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[2] The record is not entirely clear as to whether plaintiffs want to move the current establishment or desire to operate a second adult entertainment business on Victory Road. At oral argument before this Court, however, plaintiffs' counsel represented to the Court that plaintiffs wanted to relocate the current business to the Victory Road location.

On November 28, 2005, before the township reached a decision on Truckor's petition, plaintiffs filed a nine-count complaint against defendants. The crux of plaintiffs' complaint was that the ordinance violated their right to free speech by removing all channels of communication for adult entertainment businesses and by acting as a prior restraint on free speech. The complaint also contained several tort claims that were based on the invalidity of the ordinance and defendants' acts under the ordinance.

After defendants first moved for summary disposition, the trial court entered an order staying the proceedings for 90 days to allow the township to complete the decision-making process on Truckor's petition to amend the ordinance and to allow Truckor to apply for a variance. Thereafter, the Erie Township Board of Trustees denied Truckor's petition for an amendment, and the Erie Township Zoning Board of Appeals denied his application for a variance.

The trial court subsequently granted defendants' motion for summary disposition, holding that the ordinance did not violate plaintiffs' right to freedom of speech as guaranteed by the First Amendment to the United States Constitution. Relevant to the issues on appeal, the trial court ruled that the ordinance did not unreasonably limit alternative avenues of communication:

> So the—the—the only significant issue here is whether the township has provided a reasonable alternative avenue for an adult entertainment business.
>
> The Court finds that the township is—has adequately demonstrated that there is an alternative for this expression since the plaintiffs are currently engaged in running an adult entertainment business in Erie Township, because there is in fact other land in the township in which this sort of business could at least potentially be limited—or be—be built. However, I'm—that secondary portion is not necessary for this

> Court ruling. Therefore, I find that they are not entitled—plaintiffs are not entitled to—to declaratory judgment or summary disposition as to a matter of law as to Counts I through IV, but that the defendants are.

Plaintiffs' complaint was subsequently dismissed, and this appeal followed.

II. ANALYSIS

Plaintiffs first argue that the trial court erred in ruling that the adult entertainment ordinance was constitutional, asserting that the ordinance instead violates their right to freedom of speech as guaranteed by the First Amendment to the United States Constitution. Specifically, plaintiffs argue that the ordinance does not leave open alternative avenues of communication and is a prior restraint on their speech.

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

A. SUPPRESSION OF SPEECH

All ordinances are presumed to be constitutional and are construed to be so unless their unconstitutionality

is clearly apparent. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 341-342; 675 NW2d 271 (2003). The foundation for this presumption is our recognition that elected officials generally act in a constitutional manner when regulating within their particular sphere of government. *Maynard v Bd of Canvassers of the Kent Co First Representative Dist*, 84 Mich 228, 256; 47 NW 756 (1890) (CAHILL, J., dissenting). The party challenging the ordinance has the burden of rebutting the presumption that the ordinance is constitutional. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 539; 669 NW2d 594 (2003).

Our duty in this case is not to determine whether the activity that occurs inside Alcatraz's place of business is entitled to First Amendment[3] protection, as that issue —whether correct or not—has been decided long ago. See *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513,

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[3] The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The "free speech" clause of the Michigan Constitution of 1963 is contained in art 1, § 5, and provides:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

The Michigan and United States constitutions' free speech clauses "are coterminous." *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003). Thus, both the United States Supreme Court and our Court have recognized that nude dancing is not inherently expressive conduct and falls only "within the outer ambit of the First Amendment's protection." *City of Erie v Pap's A M*, 529 US 277, 289; 120 S Ct 1382; 146 L Ed 2d 265 (2000) (opinion by O'Connor, J.). Accord *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 526; 569 NW2d 841 (1997).

526; 569 NW2d 841 (1997), citing *Barnes v Glen Theatre, Inc*, 501 US 560, 565-566; 111 S Ct 2456; 115 L Ed 2d 504 (1991), where it was noted that "[n]onobscene, erotic entertainment, such as topless dancing, is a form of protected expression under the First Amendment, but enjoys less protection than other forms of First Amendment expression, such as political speech." Additionally, "[t]he use of zoning and licensing ordinances to regulate exhibitions of 'adult entertainment' is widely recognized." *Jott*, *supra* at 526.

An ordinance that does not suppress protected forms of sexual expression, but which is designed to combat the undesirable secondary effects of businesses that purvey such activity, is to be reviewed under the standards applicable to content-neutral time, place, and manner regulations. *Renton, supra* at 49. " '[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id*. at 47. See, also, *Los Angeles v Alameda Books, Inc*, 535 US 425, 433-434; 122 S Ct 1728; 152 L Ed 2d 670 (2002) (opinion by O'Connor, J.).

The parties agree that the challenged ordinance is a content-neutral time, place, and manner regulation. Further, plaintiffs do not contest that the ordinance serves a substantial governmental interest and for good reason. See *Young v American Mini Theatres, Inc*, 427 US 50, 71; 96 S Ct 2440; 49 L Ed 2d 310 (1976) (a municipality's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect").

In light of these admissions, and as noted at the outset of this opinion, the issue in dispute is whether the ordinance unreasonably limits alternative avenues

of communication. This is a question of law. *Fly Fish, Inc v Cocoa Beach*, 337 F3d 1301, 1309 (CA 11, 2003). Toward that end, there is no minimum number of locations, or a minimum percentage of land, that an ordinance must make available for adult entertainment usage. *Jott, supra* at 533. Each city is obviously unique, often differing significantly from other cities in terms of its character, geography, population, and other circumstances. *Id*. Because each city presents its own unique set of circumstances, "each case must be decided according to its specific facts." *Id*., citing *Christy v Ann Arbor*, 824 F2d 489, 491 (CA 6, 1987), modification recognized by *DLS, Inc v Chattanooga*, 107 F3d 403 (CA 6, 1997) (quotation marks omitted). In considering this issue, courts look to the number of lots or buildings available in the district for these establishments, the physical size of the municipality and acreage available for these businesses, the ratio of these establishments per population in the municipality, and the market demand for opening such enterprises. See, e.g., *Renton, supra* at 53-54; *Young*, *supra* at 71; *Jott*, *supra* at 529-530; *Executive Arts Studio, Inc v Grand Rapids*, 391 F3d 783, 797-798 (CA 6, 2004).[4]

We know from our precedents that a community cannot effectively zone out legal businesses. For example, in *City of Ferndale v Ealand* (*On Remand*), 92 Mich App 88, 90; 286 NW2d 688 (1979), the city of Ferndale enacted an ordinance allowing for the operation of adult businesses in a C-2 district so long as it was not within 1,000 feet of any residential type dwelling, but allowing for a waiver of the footage requirement under certain circumstances. At the trial held on the plaintiff's equal protection claim, a city building inspec-

[4] For a thorough discussion of the federal caselaw in this area, see *Pack Shack, Inc v Howard Co*, 377 Md 55, 80-84; 832 A2d 170 (2003).

tor testified that no location within the C-2 district met the ordinance requirements. *Id.* at 90-91. Relying on *Young*, *supra*, and *Nortown Theatre Inc v Gribbs*, 373 F Supp 363, 369-370 (ED Mich, 1974), this Court held the ordinance to be a violation of the equal protection clause because " 'the effect of the restriction is an almost total ban on uses conceded by the Defendants to be lawful.' " *Ealand, supra* at 93, quoting *Nortown, supra* at 369-370. This Court also rejected the city's argument that the waiver would provide sufficient flexibility to uphold its constitutionality. *Ealand*, *supra* at 94.

The present case would be on all fours with *Ealand* except for two points. First, plaintiffs have not alleged an equal protection claim. Second, and more importantly, plaintiffs are already exercising their First Amendment rights through operation of the existing business. It is the impact of this last point that in large part determines the outcome of this case.

We can initially set aside any dispute about whether we can consider the grandfathered business that Alcatraz currently operates. Though we are unaware of any Michigan authority addressing whether to include grandfathered sites in the "reasonable alternative avenues of communication" analysis, we are persuaded that the most sensible approach is to do so because the grandfathered site is still an operating business within the township. See *Boss Capital, Inc v City of Casselberry*, 187 F3d 1251, 1254 (CA 11, 1999), abrogated on other grounds by *City of Littleton v Z J Gifts D-4, LLC*, 541 US 774 (2004) (holding that it was proper to count grandfathered sites when determining whether location restrictions in an ordinance left open reasonable alternative avenues of expression for adult businesses).

And that is where plaintiffs' case under the First Amendment fails. Remember that, according to *Renton*,

all the government must do in this type of case is "refrain from effectively denying [plaintiffs] a reasonable opportunity to open and operate an adult theatre within the [township]." *Renton*, *supra* at 54. This is because, at its core, the First Amendment prevents the government from suppressing speech, see *Turner Broadcasting Sys, Inc v FCC*, 512 US 622, 641-642; 114 S Ct 2445; 129 L Ed 2d 497 (1994); *Texas v Johnson*, 491 US 397, 403; 109 S Ct 2533; 105 L Ed 2d 342 (1989), and once it is shown that the plaintiffs' rights to engage in the protected speech are not infringed, there can be no First Amendment violation. The First Amendment is not violated when the government allows the protected speech to occur, even if not in the desired locale. *Renton*, *supra* at 52.

Consequently, courts have repeatedly rejected First Amendment claims in cases like the instant one, where the new zoning ordinance does not reduce the number of adult businesses that operated previous to enactment of the ordinance. See, e.g., *Fly Fish, Inc*, *supra* at 1310, where the court held that "[b]y guaranteeing that the number of sites available under a new zoning ordinance is not less than the existing sites, the ordinance does not suppress speech, but merely relocates it, as allowed by *Renton*." See, also, *Lakeland Lounge of Jackson, Inc v City of Jackson*, 973 F2d 1255, 1260 (CA 5, 1992). In a similar vein, one federal district court has recognized that an ordinance does not suppress speech when the plaintiff establishment is currently operating under those regulations. *Sands North, Inc v Anchorage*, 537 F Supp 2d 1032, 1040 (D Alas, 2007).

In light of these decisions and the undisputed fact that plaintiffs have not been prevented from operating their adult business in the township and are grandfathered in under the new ordinance, we hold that

plaintiffs cannot maintain a cause of action under the First Amendment. It is simply impossible to show that the government (the township) has unlawfully suppressed plaintiffs' speech while the business still operates within the township borders. *Id*. Absent evidence of even a threat to prevent this business operation, plaintiffs' claim can only be premised on the location of the operations, and caselaw is clear that the township can reasonably regulate the location of such enterprises.[5]

Even if we had to go further and decide whether the one adult entertainment business already in the township provides a reasonable alternative avenue for protected expression, we would hold that it does. Based on the record presented to the trial court, we know that (1) the township is largely rural and sparsely populated,[6] (2) plaintiffs already operate the one adult entertainment establishment in the township (and in fact, the entire county), (3) based on the township population, there is a 4,850:1 ratio of people to adult entertainment establishments in the township, and (4) there is no other establishment seeking to operate within the township.

Caselaw developed after *Renton* has concluded that a municipality cannot totally ban adult uses or fail to provide reasonable sites for relocation that are at least sufficient to enable the current adult businesses to

[5] We disagree with our esteemed dissenting colleague for three reasons. First, as we read plaintiffs' complaint and brief on appeal, the only facial challenge is relative to the prior restraint issue. Second, that Erie Township is similar in size to Clinton Township tells us nothing about the characteristics of these two townships that are located many miles apart and located in different geographical regions of the state (southeast border of state and northeast of Detroit). Third, and in relation to our second point, we believe it is critical that the record shows that not one other adult business has sought to operate in the township and plaintiffs continue to operate their establishment under the ordinance.

[6] Erie Township is a largely rural community with a population of just under 5,000 people.

remain in business. See *DI MA Corp v City of St Cloud*, 562 NW2d 312, 321-322 (Minn App, 1997). In order to determine whether there is a sufficient number of available sites, courts look to the number of sites compared with the number of adult businesses currently in existence, or that are seeking to open such a business. *Diamond v City of Taft*, 215 F3d 1052, 1057 (CA 9, 2000).

Here, the evidence shows that Alcatraz is the only adult business establishment that has ever operated in Erie Township, or that is even seeking to operate in Erie Township. The evidence also shows an acceptable business-population ratio of one business for every 4,850 people. See *Executive Arts Studio, Inc v Grand Rapids*, 227 F Supp 2d 731, 754 (WD Mich, 2002), aff'd 391 F3d 783 (CA 6, 2004); *Univ Books & Videos, Inc v Miami-Dade Co*, 132 F Supp 2d 1008, 1015 (SD Fla, 2001). There is simply no dispute that under the ordinance and the township's decision to grandfather in plaintiffs' current operations, plaintiffs are fully engaged in their protected speech.

Additionally, it is undisputed that the ordinance does not facially zone out all adult businesses, for it allows the preexisting establishment to operate outside the C-2 district. And as noted, the township has a substantial interest in curtailing the secondary effects of the adult orientated business. For these reasons, we hold that the ordinance does not violate these plaintiffs' rights to freedom of expression as guaranteed by the First Amendment. See *Casanova Entertainment Group, Inc v City of New Rochelle*, 375 F Supp 2d 321, 341-342 (SD NY, 2005).[7]

[7] Whether the ordinance effectively precludes another establishment opening up within the C-2 district is not necessary to decide, as the facts established in this case reveal that the township has not suppressed plaintiffs' speech.

B. PRIOR RESTRAINT

Plaintiffs also maintain a facial attack through which they argue that the ordinance constitutes an unconstitutional prior restraint on speech because it lacks procedural safeguards. The term "prior restraint" is used to describe an administrative or judicial order that forbids certain communications in advance of the time that the communications are to occur, *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 623; 673 NW2d 111 (2003), and is likewise based upon the First Amendment to the United States Constitution. Plaintiffs argue that under *Freedman v Maryland*, 380 US 51; 85 S Ct 734; 13 L Ed 2d 649 (1965), and *FW/PBS, Inc v City of Dallas*, 493 US 215; 110 S Ct 596; 107 L Ed 2d 603 (1990), overruled in part by *Littleton*, *supra* at 781, the special use permit ordinance constitutes an unlawful prior restraint on speech because it gives both unbridled discretion to the decision maker and places no limitations on when any administrative decision must be made.[8]

It is certainly true that *FW/PBS*, in applying two of the three parts of the *Freedman* test, held that licensing decisions regarding adult establishments must have strict time limits for municipal decisions to avoid any First Amendment free speech infirmities. *FW/PBS*, *supra* at 226-227. However, since *Thomas v Chicago Park Dist*, 534 US 316, 322-323; 122 S Ct 775; 151 L Ed 2d 783 (2002), numerous courts have held that *content-*

[8] For their part, defendants only argued below that plaintiffs' prior restraint argument should not be considered by the court if it finds that the space regulations do not violate the First Amendment. But, as this opinion makes clear, the "time, place and manner" argument is separate from a prior restraint argument based on the unbridled discretion given to a local decision maker. See *Thomas v Chicago Park Dist*, 534 US 316, 323-324; 122 S Ct 775; 151 L Ed 2d 783 (2002).

neutral ordinances are not subject to *Freedman*'s administrative time limit requirements. For example, in *Solantic, LLC v City of Neptune Beach*, 410 F3d 1250, 1270 (CA 11, 2005), the court held that "[w]hether a licensing ordinance—which constitutes a prior restraint on speech—must contain a time limit within which to make licensing decisions depends on whether the ordinance is content based or content neutral." See, also, *Covenant Media of South Carolina, LLC v North Charleston*, 493 F3d 421, 431-432 (CA 4, 2007).[9]

Assuming the validity of these cases, the issue is whether the ordinance is content based or content neutral. If it is a content-based ordinance, then the time limit requirements under *Freedman* and *FW/PBS* apply; if the ordinance is not content based, i.e. it is content neutral, then the time limit requirements do not apply. *Id*. In this case, because plaintiffs have admitted that the ordinance is content neutral, the holdings of *Freedman* and *FW/PBS* are not applicable. Therefore, plaintiffs' prior restraint argument under the First Amendment free speech clause is without merit under this line of cases.

In any event, even applying *Freedman* reveals that the special permit provision is not an unconstitutional prior restraint that bestows unbridled discretion on decision makers. The provision sets out a detailed procedure that the Planning Commission and Township Board must follow when they receive and rule on a special use application. The provision also sets out nine standards that must be met, or else the permit "shall be

[9] Plaintiffs' reliance on a passage from *11126 Baltimore Blvd, Inc v Prince George's Co*, 58 F3d 988, 995 (CA 4, 1995), is misplaced, as the United States Court of Appeals for the Fourth Circuit has subsequently stated that that particular passage is no longer good law after *Thomas*. *Covenant Media, supra* at 432 n 7.

denied." Additionally, for each step of the decision-making process, the Planning Commission and/or Township Board are directed to review the application for a specific purpose, then the application passes to the next stage of the process (e.g., "the Planning Commission shall review the application . . . for completeness," then "the Planning Commission shall publish a notice of public hearing," then "the Planning Commission shall recommend approval, denial, or approval with conditions," then "[u]pon review of the special land use application, all supporting materials, public hearing comments, and the recommendations of the Planning Commission, the Township Board shall deny, approve, or approve with conditions" the application). Additionally, the ordinance contains specific time frames for deciding completed applications, including separate time frames if a public hearing is required. Therefore, the process does not allow unbridled discretion in the handling of an application, and the ordinance does not constitute an unlawful prior restraint on speech.[10]

C. TORT CLAIMS

Finally, plaintiffs argue that the trial court erred in dismissing their claims of interference with business relationships, conspiracy, intentional infliction of emotional distress, and for punitive damages. We disagree.

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[10] The trial court did not rely on inadmissible evidence in granting defendants' motion for summary disposition. First, plaintiffs present no evidence that the challenged facts are false or that the challenged exhibits are inauthentic. Second, and more importantly, even if the evidence were inadmissible, this would not have changed the trial court's ultimate decision on the constitutionality of the ordinance. The trial court expressly stated that its decision was not based on the challenged evidence. Likewise, our conclusion concerning the constitutionality of the ordinance is not based on the challenged evidence, and a consideration of that evidence is unnecessary to resolve the issues on appeal.

All of the claims in plaintiffs' complaint derive from the alleged unconstitutionality of the ordinance. Indeed, plaintiffs acknowledge that they are entitled to reversal only "[i]f the Ordinance is found to be unconstitutional . . . ." However, we have held that the ordinance is constitutional. Consequently, plaintiffs can sustain none of their claims, and no amount of discovery would change this fact. Accordingly, because the ordinance is constitutional, we affirm the trial court's dismissal of plaintiffs' complaint.

Affirmed.

K. F. KELLY, J., concurred.

GLEICHER, P.J. (*dissenting*). I respectfully dissent. Because the challenged zoning ordinance fails to provide adult businesses with adequate alternative avenues of expression, it violates the First Amendment.

Zoning ordinances aimed at ameliorating "the undesirable secondary effects" of adult entertainment businesses, rather than regulating the content of their expression, do not offend the First Amendment. *City of Renton v Playtime Theatres, Inc*, 475 US 41, 49; 106 S Ct 925; 89 L Ed 2d 29 (1986). In *Renton*, the United States Supreme Court explained that content-neutral zoning regulations pass constitutional muster "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id*. at 47. But zoning authorities may not use " 'the power to zone as a pretext for suppressing expression' " and must "refrain from effectively denying" adult businesses "a reasonable opportunity" to operate. *Id*. at 54 (citation omitted).

Plaintiff Alcatraz Industries, Inc., a corporation owned by plaintiff Jeffrey A. Truckor, operates an adult

entertainment business on Telegraph Road in defendant Erie Township. After plaintiffs opened their Telegraph Road business, the township enacted a zoning ordinance addressing the secondary effects of adult entertainment establishments. Erie Township's ordinance limited future adult entertainment locations to property zoned C-2 and imposed a 1,200-foot separation requirement between adult businesses and residential areas. In 2005, Truckor purchased land on Victory Road, within Erie Township's C-2 zoning district, because he sought to move the adult business to this new location. As the majority acknowledges, Erie Township officials advised Truckor that because of the ordinance's footage requirements, "there is no current possibility for a new establishment to locate within the C-2 district." *Ante* at 159. Thus, the township's zoning ordinance effectively denies any adult business the opportunity to locate within Erie Township and prevents plaintiffs from relocating their current adult establishment. Nevertheless, the majority deems the challenged ordinance constitutionally valid, concluding that "[i]t is simply impossible to show that the government (the township) has unlawfully suppressed plaintiffs' speech while the business still operates within the township borders." *Ante* at 167.

However, in my view, the central issue presented is not whether plaintiffs' ability to operate an adult establishment on Telegraph Road fulfills their First Amendment rights. Rather, the appropriate inquiry is whether Erie Township's zoning ordinance satisfies constitutional requirements. Plaintiffs have mounted a facial challenge to the constitutionality of the ordinance. "A facial challenge is one that attacks the very existence or enactment of the ordinance; it alleges that the mere existence and threatened enforcement of the ordinance adversely affects all property regulated in the market as

opposed to a particular parcel." *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 525; 569 NW2d 841 (1997). The overbreadth doctrine "allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000).

Indisputably, the township possesses a substantial interest in controlling the deleterious secondary effects of adult businesses. But under the intermediate-level scrutiny applied by the United States Supreme Court in *Renton*, an ordinance must "leave open *ample* alternative channels for communication of the information." *Clark v Community for Creative Non-Violence*, 468 US 288, 293; 104 S Ct 3065; 82 L Ed 2d 221 (1984) (emphasis added). Since *Renton*, the United States Supreme Court has reaffirmed this concept.

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." [*Ward v Rock Against Racism*, 491 US 781, 791; 109 S Ct 2746; 105 L Ed 2d 661 (1989) (citation omitted).][1]

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[1] In *Los Angeles v Alameda Books, Inc*, 535 US 425, 429-430; 122 S Ct 1728; 152 L Ed 2d 670 (2002) (opinion by O'Connor, J.), the United States Supreme Court reversed a ruling of the United States Court of Appeals for the Ninth Circuit that struck down a zoning ordinance that prohibited the location of more than one adult entertainment enterprise in a building. A four-justice plurality reviewed the ordinance by applying the *Renton* framework, which imposed intermediate scrutiny of zoning ordinances aimed at controlling "the secondary effects of protected speech." *Id*. at 433-434, 438, 440-443. In a concurring opinion, Justice Kennedy agreed with the result reached by the plurality, but described as

The township's zoning ordinance must refrain from "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Id*. at 799. In my view, an ordinance that permits only one grandfathered adult business and prohibits its relocation within the township does not leave open "ample alternative avenues of communication" in Erie Township.

Even assuming that plaintiffs sought to open a second establishment rather than merely move the first, I would hold that Erie Township's zoning scheme fails to allow "ample, accessible real estate" or a reasonable opportunity to operate an alternative channel of communication. *Renton*, *supra* at 53-54. Admittedly, Erie Township is a small, rural community. But its geographical size is similar to that of Clinton Township, which enacted the zoning ordinance approved in *Jott*, *supra* at 533-534, permitting 12 adult entertainment sites. My research reveals no caselaw supporting the notion that one adult establishment, barred from relocation, satisfies *Renton*'s requirement of "alternative avenues of communication." *Renton, supra* at 50. Although the First Amendment does not mandate that a community host or leave available any specific minimum number of sites for adult entertainment venues, it does require that interested parties have a "reasonable opportunity" to disseminate this form of constitutionally protected expression.

"something of a fiction" *Renton*'s "content neutral" characterization of a zoning ordinance intending to curb secondary effects arising from the operation of an adult entertainment business. *Id*. at 448 (opinion by Kennedy, J.). But Justice Kennedy later clarified that "[n]evertheless, . . . the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id*.

Because Erie Township's ordinance unreasonably limits to one the number of adult establishments that may operate in the township, and forecloses that single establishment from altering its location, I would hold that the ordinance violates *Renton* and would reverse.

In re NESTOROVSKI ESTATE

Docket No. 271704. Submitted January 8, 2008, at Detroit. Decided March 31, 2009, at 9:20 a.m.

Bora Petrovski filed a petition in the Oakland County Probate Court challenging the validity of a will and two deeds signed by her father, Vlado Nestorovski. The decedent had bequeathed all of his property and assets to the respondent, Vasko Nestorovski, the petitioner's brother, with the exception of a $60,000 payment to the petitioner, and had quitclaimed his individual ownership of two Michigan properties to the respondent. The petitioner alleged that the respondent had unduly influenced the decedent and that the decedent had lacked the requisite testamentary capacity at the time he signed the will, which had named the respondent as the personal representative of the estate, and had lacked the competency to execute the deeds. The petitioner sought to have the will and the deeds set aside and requested an award of attorney fees and costs. The court, Eugene Arthur Moore, J., entered an order prepared by the petitioner's attorney and approved by the respondent's attorney that set the matter for binding arbitration before a sole arbitrator selected by the parties. The arbitrator determined that the decedent had been subjected to undue influence and had not been competent to make a will and recommended setting aside the quitclaim deeds and a power of attorney signed by the decedent and distributing the assets equally between the petitioner and the respondent. The arbitrator further recommended that each party bear its own attorney fees and that no fees be charge to the estate. The respondent eventually contested the entire arbitration award, contending that pursuant to *In re Meredith Estate*, 275 Mich 278 (1936), the probate court lacked the authority to refer to arbitration the parties' estate-based dispute concerning the decedent's testamentary capacity. The court subsequently adopted the arbitrator's decision and award in its entirety. The respondent appealed.

The Court of Appeals *held*:

1. The respondent's claim that the parties lacked a written arbitration agreement is factually and legally unfounded.

2. The distinctions between this case and *In re Meredith Estate* are highly significant and render that case inapplicable to this case. Here, unlike in *In re Meredith Estate*, all the interested parties stipulated in writing to submit their dispute to binding arbitration and the arbitrator held a hearing during which she placed the witnesses under oath.

3. Since *In re Meredith Estate* was decided, there have been three substantial revisions of Michigan's probate laws and significant procedural innovations have accompanied the evolution of the probate court's substantive powers. Along with the Legislature's modernization of probate practice, Michigan's courts have approved an expansion in the use of alternative dispute resolution procedures. Although the Supreme Court suggested in obiter dictum in *In re Meredith Estate* that arbitration would divest the probate court of its rightful jurisdiction, that rejection concerned the particular probate arbitration conducted in *In re Meredith Estate*. Other precedents support the proposition that the Supreme Court has approved of and accepted properly conducted common-law arbitration in probate matters. Probate proceedings do not inherently lack arbitrability. As shown by the Supreme Court's unconditional acceptance and enforcement of an arbitration agreement in *Hoste v Dalton*, 137 Mich 522 (1904), the Supreme Court has signaled that, even under the probate laws existing 100 years ago, properly convened and conducted arbitration could resolve a will contest.

4. The Estates and Protected Individuals Code, MCL 700.1101 *et seq*., which took effect in April 2000, has eliminated virtually all the restrictions that applied to probate court powers when *In re Meredith Estate* was decided in 1936.

5. To the limited extent that *In re Meredith Estate* barred arbitration of probate disputes, that holding lacks continued viability because it has been superseded by more recent legislative developments and intervening changes in the court rules. The central holding of *In re Meredith Estate* lacks applicability in this case and does not preclude the instant parties from conducting binding common-law arbitration of probate disputes, including the question of testamentary capacity, because here, unlike in *In re Meredith Estate*, all the interested parties had notice of the contemplated arbitration, agreed that the arbitration would supply a binding resolution regarding the decedent's testamentary capacity, and actively participated in the arbitration process.

6. This case involves common-law arbitration, to which the statutory arbitration procedures do not apply, because the order submitting the parties' dispute to arbitration did not provide that

a judgment could be entered in accordance with the arbitrator's decision. The common law does not limit the parties' ability to arbitrate real estate disputes and does not preclude arbitration regarding the decedent's capacity to execute the deeds. Although MCL 600.5005 prohibits the submission of certain real estate disputes to statutory arbitration, MCL 600.5005 does not apply to or restrict common-law arbitration.

7. The probate court had the authority to set aside the power of attorney.

8. The arbitrator, with regard to the distribution of the decedent's entire probate estate, had authority to consider the decedent's capacity to execute the power of attorney in 2000.

9. The respondent did not defend the will in good faith, given the arbitrator's finding that the respondent had exerted undue influence on the decedent. Therefore, the respondent was not entitled to have his attorney fees paid by the decedent's estate.

Affirmed.

SAAD, C.J., dissenting, stated that although he agrees that the Supreme Court would overrule *In re Meredith Estate* today if faced with the question whether testamentary capacity is arbitrable, the Court of Appeals does not have the authority to rule contrary to *In re Meredith Estate* simply because of a belief that the Supreme Court would overturn its precedent in light of legislative, court rule, and decisional law changes. Until the Supreme Court states otherwise, the Court of Appeals is bound by the principle of stare decisis to follow the holding in *In re Meredith Estate* that testamentary capacity is not arbitrable. The probate court's order affirming the arbitration award should be reversed.

1. WILLS — DECEDENTS' ESTATES — ARBITRATION — COMMON LAW — TESTAMENTARY CAPACITY.

Properly convened and conducted binding common-law arbitration may be used to resolve a will contest, including the question of the testator's testamentary capacity.

2. COMMON LAW — ARBITRATION — DEEDS — CAPACITY TO EXECUTE DEEDS.

The common law does not limit parties' ability to arbitrate real estate disputes, including a person's mental capacity to execute a deed.

Payne, Broder & Fossee (by *Andrew J. Broder*) and *Underwood & March* (by *Lauren M. Underwood*) for the petitioner.

Kemp Klein Law Firm, P.C. (by *Alan A. May* and *Debra Nance*), for the respondent.

Before: SAAD, C.J., and BORRELLO and GLEICHER, JJ.

GLEICHER, J. Respondent, Vasko Nestorovski, appeals as of right an Oakland County Probate Court order adopting an arbitrator's decision invalidating the decedent's 2001 will, setting aside two deeds signed in 2001 and a power of attorney signed in 2000, and distributing the assets of the decedent's estate pursuant to the laws of intestate succession. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Vlado Nestorovski, the decedent, was born in Macedonia in 1925. In 1972, Vlado and his wife emigrated to the United States. The Nestorovskis' two children, respondent and petitioner, Bora Petrovski, are the only interested persons for the purposes of these proceedings.[1]

In April 2001, respondent consulted attorney Rod Sarcevich regarding an estate plan for Vlado. Sarcevich referred respondent to attorney Ronald Ambrose. Ambrose met with respondent and Vlado at his law office. Ambrose later testified that during their meeting, which lasted less then 10 minutes, Vlado spoke only "broken English." The parties agree that Vlado could not read or understand documents written in English. After Ambrose's single brief meeting with Vlado and respondent, Ambrose prepared Vlado's will, which bequeathed all of his property and assets to respondent, with the exception of a $60,000 payment to petitioner. Ambrose also prepared two quitclaim deeds conveying

[1] Vlado's wife, Vesna, died in 1994 and is not an interested party. MCR 5.125(C)(8)(a).

Vlado's individual ownership of two Michigan properties to respondent, with joint ownership and survivorship rights.

On April 25, 2001, Sarcevich brought the will, the deeds, and another power of attorney to the home Vlado shared with respondent and respondent's family.[2] Vlado signed the documents in the presence of a priest and a neighbor. Sarcevich admitted that he did not speak Serbian and that he made no effort to explain the documents to Vlado. The priest, a certified translator, translated the documents into Serbian for Vlado.

After Vlado's death, petitioner filed in the Oakland County Probate Court a petition challenging the validity of the will and the two deeds. The petition alleged that respondent unduly influenced Vlado and that Vlado lacked the requisite testamentary capacity because he had suffered from Alzheimer's disease since 1999. Petitioner sought to have the will and the deeds set aside and requested an award of attorney fees and costs.

The probate court ordered the parties to engage in facilitation of their dispute. On May 20, 2005, the court-appointed facilitator spent six hours with the litigants, but could not achieve a resolution. On September 27, 2005, the day scheduled for trial, the probate court entered a handwritten order prepared by petitioner's attorney, stating, "This matter is to be scheduled for binding arbitration before a sole arbitrator to be determined by the parties within one week." The signature of respondent's attorney appears on the order, next to the word "Approved." The parties agree that no transcript exists documenting their positions regarding the planned arbitration. Neither party ever filed an objection to arbitration,

[2] Vlado and Vesna lived with respondent, respondent's wife, and respondent's family for 27 years.

and neither sought to revoke the agreement before the arbitrator rendered a decision.

The arbitration commenced on November 29, 2005, and extended through three days. The parties presented witnesses and submitted written closing arguments. Patricia Gormely Prince, the parties' chosen arbitrator, later prepared a detailed "Arbitration Decision and Award," finding that "Vlado was subject to undue influence and was not competent to make a Will." Prince similarly concluded that Vlado's lack of capacity warranted the setting aside of the two quitclaim deeds Vlado signed in April 2001 and a power of attorney that Vlado signed in 2000. Prince also determined that MCL 700.2101 and MCL 700.2103 required that Vlado's estate be equally divided between petitioner and respondent. Prince recommended that the parties bear "their own attorney fees" and that no fees be charged to Vlado's estate.

On May 31, 2006, respondent filed in the probate court "Objections to Certain Provisions" of the arbitration decision, which contested only the portions of the ruling involving Vlado's real property and the power of attorney Vlado signed in 2000. In support of those objections, respondent invoked MCL 600.5005 and *McFerren v B & B Investment Group*, 233 Mich App 505; 592 NW2d 782 (1999). On the same day, respondent filed a "Supplemental Objection" to the entire arbitration decision and award, insisting that, as reflected by the Michigan Supreme Court's analysis in *In re Meredith Estate*, 275 Mich 278; 266 NW 351 (1936), the probate court lacked the authority to refer to arbitration the parties' estate-based dispute concerning Vlado's testamentary capacity. The probate court confirmed the arbitrator's decision "in its entirity [sic]," and this appeal ensued.

II. ANALYSIS

A. THE AGREEMENT TO ARBITRATE

Respondent contends that because the parties did not have a written arbitration agreement, the probate court erred by adopting the arbitrator's award. Respondent failed to raise this issue in the probate court. "Generally, an issue not raised before and considered by the trial court is not preserved for appellate review." *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). However, because "the question is one of law and the facts necessary for its resolution have been presented," we choose to review respondent's contention. *Id*. at 98-99.

In a document filed in the probate court entitled "Response to Petition for Entry of Order Upon Breach of Contract," respondent admitted that the probate court entered a stipulated order for arbitration. This Court has recognized that stipulations are "a type of contract . . . ." *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 394; 573 NW2d 336 (1997). "Stipulated orders that are accepted by the trial court are generally construed under the same rules of construction as contracts." *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000).

The stipulated order involved here unambiguously provides that "[t]his matter is to be scheduled for binding arbitration before a sole arbitrator to be determined by the parties within one week." Moreover, by voluntarily participating in the arbitration process without objection, respondent waived the issue whether the parties had entered into a valid agreement to arbitrate. *American Motorists Ins Co v Llanes*, 396 Mich 113, 114; 240 NW2d 203 (1976). "[A] party may not participate in an arbitration and adopt a 'wait and see'

posture, complaining for the first time only if the ruling on the issue submitted is unfavorable." *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99-100; 323 NW2d 1 (1982). We thus reject as factually and legally unfounded respondent's claim that the parties lacked a written arbitration agreement.

Respondent next challenges the arbitrator's ruling as violative of MCL 700.1302, pursuant to which the probate court possesses exclusive jurisdiction over estate-related disputes. We review de novo "a trial court's determination that an issue is subject to arbitration . . . ." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007).

Respondent's jurisdictional argument rests primarily on *In re Meredith Estate*. According to respondent, *In re Meredith Estate* compels a conclusion that despite the parties' stipulation to submit their dispute to arbitration, they could not properly agree to "supersede" the probate court's statutorily vested responsibility to determine Vlado's testamentary capacity. Respondent therefore suggests that the probate court lacked authority to adopt the arbitrator's decision. Petitioner concedes that § 1302 invests the probate court with "exclusive legal and equitable jurisdiction" regarding all matters relating to a decedent's estate, but argues that this jurisdictional exclusivity does not limit the probate court's power to enforce a common-law arbitration agreement. Petitioner further asserts that MCR 5.143(A) specifically authorizes the probate court to employ methods of alternative dispute resolution and that the jurisdictional limitations deemed critical in *In re Meredith Estate* no longer apply. Because the parties argue at length concerning the interpretation and application of *In re Meredith Estate*, we now turn to a careful examination of that decision.

The decedent in *In re Meredith Estate* executed his will in March 1932, naming the Detroit Trust Company and James O. Murfin as his executors and trustees. *In re Meredith Estate, supra* at 284. In August 1934, the decedent executed a codicil that named Frederick W. Campbell as an additional executor and trustee, but did not otherwise alter any aspects of the will. *Id*. After the decedent died in December 1934, Murfin petitioned for the admission of the will to probate, and Campbell petitioned to admit the codicil. *Id*. at 284-285. At a probate court hearing, Murfin testified that the decedent's doctors had advised Murfin that the decedent "was mentally incompetent to transact business when" he executed the codicil. *Id*. at 285. The decedent's housekeeper expressed her belief that "Mr. Meredith knew what he was doing" when he executed the codicil, and that his doctor had examined him before he executed it. *Id*.

Campbell and Murfin agreed "in open court to submit the question of the mental competency of the testator to a leading Detroit attorney." *Id*. The attorney interviewed witnesses and concluded that the decedent lacked "sufficient testamentary capacity to make and execute the codicil . . . ." *Id*. The probate court admitted the will to probate, but rejected the codicil. *Id*. at 286. Campbell appealed, arguing that because the probate of a will or codicil constituted an in rem proceeding, it was not subject to common-law arbitration. *Id*. at 287.

The Michigan Supreme Court considered whether the executors possessed the authority to submit the question of the testator's mental capacity to ascertainment by a third party. The Supreme Court commenced its analysis by observing, "The rule is firmly settled in this State that estates of deceased persons may be settled between all those interested competent to con-

tract without the intervention of the probate court." *Id*. at 290. However, the Supreme Court noted, "That question is not here." *Id.* Rather, the Supreme Court explained, "The only question is who shall act as executor of his last will and testament which includes the original instrument and any legal codicils thereto duly admitted to probate." *Id*. The Supreme Court further demarcated the scope of its analysis as follows: "Assuming there was an agreement between the executors named in the will and the executor named in the codicil, the question is whether *they* had any power or authority to agree in open court to submit the question of the mental competency of the testator to a third person for determination." *Id*. (emphasis added).

The Supreme Court reasoned as follows that the probate court had erred by adopting the arbitrator's decision:

> The statutes contemplate a hearing before the probate court and a determination by the probate court of the testamentary capacity of the testator. Under the statute, notice of the time and place of proving the will and the codicil must be given and this notice is usually given by publication to all persons interested, and the date fixed by such notice is "when all concerned may appear and contest the probate of the will." No order or rule of court named [the third-party attorney] as the person before whom testimony in relation to the mental competency of the testator was to be taken and the testimony, if any adduced, was not taken before him by deposition. [*Id*. at 290-291 (citations omitted).]

Manifestly, the Supreme Court premised its decision in *In re Meredith Estate* on the language of the probate statutes then in existence. The following statements in the opinion underscore our conclusion that in reaching its decision, the Supreme Court in *In re Meredith Estate*

relied exclusively on the provisions of the 1929 Michigan Compiled Laws governing probate proceedings:

> The sole authority to pass upon the testamentary capacity of the testator *is vested by statute* in the probate court. . . .
>
> Parties cannot by agreement supersede the *essential regulations made by law* for the investigation of causes, and by stipulation set aside *the statutory method* prescribed for determining the mental capacity of the testator.
>
> The right to contest a will is, in this State, purely statutory and can be exercised only in accordance with and within *the limitations prescribed by statute*. [*Id.* at 291-292 (citations omitted; emphasis added).]

The Supreme Court further observed in *In re Meredith Estate* that "[t]he legatees and beneficiaries under the trusts created by the will are not here" and "[t]here is nothing upon the face of the order which indicates it was an order entered by consent." *Id*. at 294, 296. Consequently, the executors and trustees of the decedent's estate had

> no such interest in the estate as to permit them to agree to submit the testamentary capacity of testator to a third person for determination. Their agreement could not bind those who have a pecuniary interest in the estate. *No agreement of this kind under any circumstances could bind the estate unless all persons interested therein were parties thereto.* [*Id.* at 294 (emphasis added).]

The Supreme Court in *In re Meredith Estate* thus held that executors or trustees may not agree to arbitrate the competency of a testator. In obiter dictum, the Supreme Court added:

> No stipulation such as here involved can oust the jurisdiction of the probate court, permit the probate judge to abdicate his jurisdiction and power or delegate it to a third person not a judicial officer, and no stipulation can

> provide for the determination of the status of the codicil in any other manner than that provided by statute. Jurisdiction to determine the competency of the testator may not be conferred by agreement on a third person. [*Id*. at 297.]

Several conclusions reached by the Supreme Court in *In re Meredith Estate* derive from its unique facts. The arbitration conducted by the "leading Detroit attorney" proceeded informally, without notice to or involvement of all interested parties or the administration of oaths to witnesses. *Id*. at 285, 291. Murfin and Campbell neglected to agree in advance whether the arbitration would be binding. *Id*. at 295. These procedural deficiencies undoubtedly fueled the Supreme Court's condemnation of the use of arbitration under the circumstances presented in that case. *Id*. at 295-298.

But the procedures utilized in this case differ markedly from those described in *In re Meredith Estate*. Here, all interested parties agreed to submit their dispute to binding arbitration. Counsel for the parties entered into a written stipulation for binding arbitration, and the arbitrator held a hearing during which she placed witnesses under oath. These distinctions are highly significant and render *In re Meredith Estate* inapplicable. However, because of the broad nature of the Michigan Supreme Court's critical pronouncements regarding the arbitrability of any probate dispute, we must now consider whether the current state of the law in Michigan allows for resolution of probate litigation through binding arbitration.

During the more than 72 years that have elapsed since the Michigan Supreme Court announced its decision in *In re Meredith Estate*, our Legislature has enacted three substantial revisions of Michigan's probate laws. When the Supreme Court decided *In re Meredith Estate*, 3 Comp Laws 1929, Chapter LI,

§ 15519 *et seq*., governed the powers and jurisdiction of the probate courts. During that era, our Supreme Court observed that "[p]robate courts have always been regarded as courts for peculiar and limited purposes, which are outside ordinary litigation, and incapable of dealing completely with ordinary rights." *Burgess v Jackson Circuit Judge*, 249 Mich 558, 563; 229 NW 481 (1930). In 1939, the Legislature enacted a new probate code. 1939 PA 288. In 1978, the Legislature replaced the 1939 probate code with the Revised Probate Code. 1978 PA 642. Neither the older probate codes nor the Revised Probate Code furnished the probate court with general equitable powers. *Van Etten v Manufacturers Nat'l Bank of Detroit*, 119 Mich App 277, 282-283, 287; 326 NW2d 479 (1982). However, when the Legislature enacted the Revised Probate Code, it unquestionably expanded the powers of the probate courts by contemporaneously enacting MCL 600.847, which provides as follows:

> In the exercise of jurisdiction vested in the probate court by law, the probate court *shall have the same powers as the circuit court to hear and determine any matter and make any proper orders* to fully effectuate the probate court's jurisdiction and decisions. [Emphasis added.]

In 1998, our Legislature enacted the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., which took effect in April 2000. EPIC confers on probate courts the "exclusive legal and equitable jurisdiction" of matters that "relate[] to the settlement of a deceased individual's estate . . . ." MCL 700.1302(a). Section 1303(1) of EPIC provides the following:

> In addition to the jurisdiction conferred by section 1302 and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent . . . :

(a) Determine a property right or interest.

(b) Authorize partition of property.

(c) Authorize or compel specific performance of a contract in a joint or mutual will or of a contract to leave property by will.

In addition to expanding the probate court's powers, the Legislature crafted EPIC as a user friendly code, with provisions designed to reduce court involvement in trusts and estates. For example, MCL 700.1303(3) states:

> The underlying purpose and policy of this section 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.

The Legislature additionally instructed that all of EPIC

> shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following:
>
> (a) To simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals.
>
> * * *
>
> (c) To promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors. [MCL 700.1201.]

Significant procedural innovations have accompanied the evolution of the probate court's substantive powers. In 1980, this Court declared that "the general court rules do not apply to the probate court except in those instances where the probate court rules adopt provisions of the general court rules by specific reference." *In re Swanson Estate*, 98 Mich App 347, 350; 296

NW2d 256 (1980). The current Michigan Court Rules contrarily provide that "[p]rocedure in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter." MCR 5.001(A). Thus, the rules of practice in probate courts are now substantially similar to those in the circuit courts.

Along with the Legislature's modernization of probate practice, Michigan's courts have witnessed an expansion in the use and judicial approval of alternative dispute resolution (ADR) procedures. In 1999, this Court observed that "[j]udicial approval of arbitration has broadened and strengthened in recent decades." *Rembert v Ryan's Steak Houses, Inc*, 235 Mich App 118, 128; 596 NW2d 208 (1999). "While our legal system may have had only a lukewarm tolerance for arbitration in the past, it now embraces arbitration as an expeditious, inexpensive, and fair means of dispute resolution." *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 271; 602 NW2d 603 (1999), disapproved on other grounds in *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006). In contrast with currently prevailing judicial philosophies regarding ADR, "centuries of judicial hostility to arbitration agreements" previously limited their enforcement. *Scherk v Alberto-Culver Co*, 417 US 506, 510; 94 S Ct 2449; 41 L Ed 2d 270 (1974).[3] The United States Supreme Court observed in *Scherk* that English courts "traditionally considered irrevocable arbitration agree-

[3] In *Dean Witter Reynolds, Inc v Byrd*, 470 US 213, 219-220; 105 S Ct 1238; 84 L Ed 2d 158 (1985), the Supreme Court again noted "the judiciary's longstanding refusal to enforce agreements to arbitrate" and Congress's more recent characterization of this attitude as " 'an anachronism of our American law' " deriving from " 'the jealousy of the English courts for their own jurisdiction . . . .' " *Id*. at 220 n 6 (citation omitted).

ments as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Id*. at n 4.

In *In re Meredith Estate*, *supra* at 297, the Supreme Court suggested in obiter dictum that arbitration would divest the probate court of its rightful jurisdiction: "No stipulation such as here involved can oust the jurisdiction of the probate court, permit the probate judge to abdicate his jurisdiction and power or delegate it to a third person . . . ." This Court rejected a similar jurisdictional argument in *Rooyakker*, *supra* at 150-152, in which the plaintiffs challenged a circuit court's enforcement of a contractual agreement containing client solicitation and arbitration clauses. The plaintiffs asserted that because the circuit courts have exclusive jurisdiction of claims under the Michigan Antitrust Reform Act (MARA), MCL 445.771, the circuit court erred by referring to arbitration the question whether the client solicitation clause violated MARA. *Rooyakker, supra* at 155. This Court concluded that the circuit court did not err, explaining, "Just because the statute provides jurisdiction to the circuit court, it does not follow that it precludes arbitration. If the Legislature intended to exempt all antitrust actions from arbitration, it could have done so." *Id*. at 156.

We find the logic of *Rooyakker* compelling and reject the notion that arbitration divests a court of its rightful statutory jurisdiction. We agree with the Minnesota Supreme Court's explanation that

> there appears never to have been any factual basis for holding that an agreement to arbitrate "ousted" jurisdiction. It has no effect upon the jurisdiction of any court. Arbitration simply removes a controversy from the arena of litigation. It is no more an ouster of judicial jurisdiction than is compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue.

> Each disposes of issues without litigation. One no more than the other ousts the courts of jurisdiction. The right to a jury trial, even in a criminal case, may be waived. So, also, may the right to litigate be waived. Such waiver may be the result of contract or unilateral action. [*Park Constr Co v Independent School Dist No 32, Carver Co*, 209 Minn 182, 186; 296 NW 475 (1941).]

See also *Wold Architects & Engineers*, *supra* at 249 (concurring opinion by CORRIGAN, J.):

> [T]he common-law rule allowing unilateral revocation of arbitration agreements is based on the outdated notions that arbitration is an unfavorable means of resolving disputes and that arbitration ousts the courts of their rightful jurisdiction over disputes. The courts are no longer jealous of their jurisdiction, and arbitration is now a favored method of dispute resolution.

We further observe that when the Supreme Court decided *In re Meredith Estate*, the common law generally supported the use of arbitration in will contests. For example, in two cases predating *Meredith*, *Hoste v Dalton*, 137 Mich 522, 523-524; 100 NW 750 (1904), and *Sellers v Perry*, 191 Mich 619; 158 NW 144 (1916), the Supreme Court upheld agreements removing will challenges from probate court jurisdiction.[4] Reflective of this pro-arbitration attitude in the context of probate disputes is Professor Martin Domke's note, in his treatise on Commercial Arbitration, that President George Washington "embodied in his Last Will and Testament a reference to arbitration by fair-minded men"; Washington's will provided, in relevant part, as follows:

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[4] In *Sellers*, *supra* at 627, the Supreme Court expressed, "It is, we think, well settled in this State that legatees under a will, and persons having such an interest in the estate as to entitle them to contest the instrument, may make valid agreements to forbear a contest, and such contracts are favored by the law when made in good faith."

> "But having endeavored to be plain and explicit in all the Devises—even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if contrary to expectation the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the devises to be consonant with law, my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two—which three men thus chosen shall, unfettered by Law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes, to be binding on the Parties as if it had been given in the Supreme Court of the United States." [1 Domke, Commercial Arbitration (3d ed), § 16.6 p 16-36 (2008 update).]

Despite the Michigan Supreme Court's rejection of the particular probate arbitration conducted in *In re Meredith Estate*, other precedent supports the proposition that our Supreme Court has approved of and accepted properly conducted common-law arbitration in probate matters. In *Hoste*, *supra* at 523, the widow and children of the deceased "entered into a written agreement by which they settled a pending contest of the will" of the decedent. The arbitration agreement provided, " 'If any question should hereafter arise between the parties hereto as to the construction and enforcement of this agreement, the same shall be submitted for decision to this court [the agreement was entitled in the circuit court for the county of Wayne] and its decision shall be final.' " *Id*. at 525. The complainants brought suit to enforce the arbitration agreement, and the circuit court entered a decree in their favor. *Id*. at 523. The defendants contended that the arbitration agreement was invalid because it "ousts the Supreme Court

of jurisdiction." *Id*. at 526. The Supreme Court rejected this argument, reasoning as follows:

> The agreement under consideration does not oust all courts of their jurisdiction. On the contrary, it requires the decision of a court of competent jurisdiction, and the only court of original jurisdiction. It is true that the agreement, by preventing the defeated litigant from reviewing his case in the Supreme Court, ousts that court of its jurisdiction. That agreement is not prohibited by the foregoing authorities. [*Id*.]

The Supreme Court concluded, "We think on grounds of public policy litigants should be encouraged to accept as final the decisions of courts of original jurisdiction." *Id*. at 527.

In light of the Michigan Supreme Court's analysis in *Hoste*, we reject respondent's argument that probate proceedings inherently lack arbitrability.[5] The Supreme Court's unconditional acceptance and enforcement of the arbitration agreement in *Hoste* clearly signals that even under the probate laws existing 100 years ago, properly convened and conducted arbitration could resolve a will contest.

Moreover, EPIC has eliminated virtually all the restrictions that applied to probate court powers in 1936, when the Supreme Court decided *In re Meredith Estate*. The aversion to arbitration articulated in *In re Meredith Estate* must give way to the substantial changes in the substantive and procedural law governing probate practice, as well as jurisprudential recogni-

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[5] On the same basis, we reject the dissent's contention that *In re Meredith Estate* held that testamentary capacity is *never* arbitrable, or resides "within the exclusive jurisdiction of the probate court." *Post* at 204-205. The dissent has elected to entirely ignore *Hoste*, as well as the plain language in *In re Meredith Estate* anchoring that opinion to its unique facts and the probate statutes then in existence.

tion of the "desirability of arbitration as an alternative to the complications of litigation." *Scherk*, *supra* at 511 (quotation marks and citation omitted). For example, the current Michigan Court Rules contain several provisions encouraging courts and litigants to utilize ADR. A court rule applicable to the circuit courts, MCR 2.410, addresses ADR procedures in those courts, describing them as "any process designed to resolve a legal dispute in the place of court adjudication," including settlement conferences, case evaluation, domestic relations mediation, "and other procedures provided by local court rule or ordered on stipulation of the parties." MCR 2.410(A)(2). In 2001, our Supreme Court adopted a corresponding probate court rule, MCR 5.143(A), which states, "The court may submit to mediation, case evaluation, or other alternative dispute resolution process one or more requests for relief in any contested proceeding. MCR 2.410 applies to the extent feasible."

In summary, we hold that to the limited extent that *In re Meredith Estate* barred arbitration of probate disputes, that holding lacks continued viability because it has been superseded by more recent legislative developments and intervening changes in the court rules. Further, the central holding of *In re Meredith Estate* lacks applicability here, because all interested parties had notice of the contemplated arbitration, agreed that the arbitration would supply a binding resolution regarding Vlado's testamentary capacity, and actively participated in the arbitration process. Therefore, *In re Meredith Estate* does not preclude the instant parties from conducting binding common-law arbitration of probate disputes, including the question of testamentary capacity.[6]

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[6] We emphasize that, contrary to the allegations made by the dissent, our holding in this case neither overrules *In re Meredith Estate* nor

B. THE QUITCLAIM DEEDS

Respondent next argues that the arbitrator lacked the authority to render any award regarding the quitclaim deeds, which she set aside on the basis of her finding that "Vlado was subject to undue influence and was not competent to transfer property." In support of his argument, respondent invokes MCL 600.5005 and *McFerren*. Petitioner replies that because the parties participated in common-law rather than statutory arbitration, the arbitrator properly considered the distribution of Vlado's real property. Petitioner further asserts that respondent's full participation in the arbitration deprived him of the ability to challenge its scope. We review de novo a circuit court's decision to enforce a statutory arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). The existence of a contract to arbitrate and its enforceability constitute judicial questions that we also consider de novo. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

In Michigan, a distinction exists between statutory and common-law arbitration. *Wold Architects & Engineers*, *supra* at 229. The Michigan arbitration act (MAA), MCL 600.5001 *et seq*., governs statutory arbitration.[7] For an agreement to qualify for statutory arbitration, it must meet the requirements contained in

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disturbs the rule of stare decisis. *Post* at 205. The facts of the instant case bear no resemblance to those presented in *In re Meredith Estate*, and neither do the controlling statutory authorities. The doctrine of stare decisis lacks applicability when the Legislature has amended the statutory underpinnings of a Supreme Court decision. See *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002), and *People v Pfaffle*, 246 Mich App 282, 303-304; 632 NW2d 162 (2001).

[7] Throughout *Wold Architects & Engineers*, *supra* at 235, the Supreme Court referred to statutory arbitration as being governed by the provisions of "MCL 600.5001 *et seq*." We thus construe MCL 600.5005, as contained within the MAA.

the statute. *Wold Architects & Engineers*, *supra* at 229. The statute, MCL 600.5001(1), applies to the arbitration of existing controversies, and provides as follows:

> All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission.

The arbitration statute "only refers to such agreements as fix upon some designated court in which judgment shall be entered on the award." *McGunn v Hanlin*, 29 Mich 476, 480 (1874). "When the parties' agreement to arbitrate does not comply with the requirements of MCL 600.5001, the parties are said to have agreed to a common-law arbitration." *Wold Architects & Engineers*, *supra* at 231. "[T]he result of a defective statutory arbitration is a common-law arbitration . . . ." *Whitaker v Seth E Giem & Assoc, Inc*, 85 Mich App 511, 513; 271 NW2d 296 (1978). Because the order submitting the parties' dispute to arbitration did not provide that a judgment could enter in accordance with the arbitrator's decision, this case involves common-law arbitration, to which the statutory arbitration procedures do not apply. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996).

Respondent contends that regardless of whether the arbitration qualified as common-law or statutory, the arbitrator lacked jurisdiction to consider the parties' interests in Vlado's real property. Respondent points out that MCL 600.5005 prohibits submitting to arbitration a dispute involving real estate ownership interests. Additionally, respondent asserts that in *McFerren*, this

Court construed MCL 600.5005 as precluding arbitration of all disputes regarding fee ownership interests in real property.

In *McFerren*, *supra* at 509-511, this Court held that an arbitrator lacked jurisdiction to decide competing quiet-title claims because of the arbitration prohibition contained in MCL 600.5005:

> A submission to arbitration shall not be made respecting the claim of any person to any estate, in fee, or for life, in real estate, except as provided in Act No. 59 of the Public Acts of 1978, as amended, being sections 559.101 to 559.272 of the Michigan Compiled Laws.[8] However, a claim to an interest for a term of years, or for 1 year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, concerning the boundaries of lands, or concerning the admeasurement of dower, may be submitted to arbitration.

However, seven years after this Court decided *McFerren*, our Supreme Court reemphasized in *Wold Architects & Engineers* that common-law arbitration continues to exist in Michigan, not having been preempted by statutory arbitration. According to the Supreme Court, statutory and common-law arbitrations "have long coexisted" in our state, and the MAA includes no provisions evidencing a legislative intent to reform the common law. *Wold Architects & Engineers, supra* at 234. Because "the language of the MAA does not show an intention to abrogate common-law arbitration," the Supreme Court concluded "that the MAA . . . does not occupy the entire area of arbitration law and does not preempt common-law arbitration in Michigan." *Id*. at 234-235. If arbitration agreements do not conform to the MAA, they simply are not enforceable under the MAA. *Id*. at 231. For example, if parties were to

[8] Those statutes involve condominiums and do not apply here.

arbitrate a real estate dispute in violation of MCL 600.5005, they could not enforce the award in the circuit court.

If parties wish to conform an agreement to statutory requirements, they must reduce it to writing and include the requirement that a circuit court may enter judgment on the award. "Otherwise, it will be treated as an agreement for common-law arbitration." *Wold Architects & Engineers, supra* at 235. Here, the parties failed to conform their arbitration agreement to the statutory requirements. Accordingly, the common-law arbitration they conducted is not subject to the statutory arbitration requirements or prohibitions. Because the common law does not limit the parties' ability to arbitrate real estate disputes, we reject that MCL 600.5005 precluded arbitration regarding Vlado's capacity to execute the deeds.

The Supreme Court's decision in *Hoste* buttresses our conclusion that MCL 600.5005 does not apply to or restrict a common-law arbitration. The complainants in *Hoste* were married women. *Id*. at 524. The MAA then in effect provided, "All persons, except infants and married women, and persons of unsound mind, may, by an instrument in writing, submit to the decision of one or more arbitrators, any controversy existing between them . . . ." 1897 CL 10924. The defendants argued that the parties' settlement, achieved through arbitration, did not bind them "because complainants, being married women, were incapable of entering into a contract of arbitration." *Hoste*, *supra* at 524. The Supreme Court rejected this logic, holding, "The arbitration in question was not a statutory arbitration, and therefore the clause in section 10924 of the Compiled Laws of 1897, excepting 'married women' from the persons who may enter into a statutory arbitration, has no application." *Hoste, supra* at 524.

Here, as in *Hoste*, the parties conducted a common-law arbitration. Here, as in *Hoste*, the MAA would have altogether precluded arbitration of the dispute. But because the common law governed the instant parties' arbitration, and not the statute, the heirs remained free to contractually agree to arbitrate whether Vlado possessed the requisite mental capacity when he signed the two quitclaim deeds in April 2001. Although MCL 600.5005 prohibits the submission of certain real estate disputes to statutory arbitration, we hold on the basis of *Wold Architects & Engineers* that § 5005 does not eliminate the parties' ability to arbitrate a real estate dispute under the common law.

C. THE POWER OF ATTORNEY

Respondent next argues that neither the arbitrator nor the probate court possessed the authority to set aside a power of attorney Vlado executed in 2000. The power of attorney permitted a Macedonian attorney to act on Vlado's behalf with respect to real and personal property Vlado owned in Macedonia. Respondent avers that the probate court lacked jurisdiction to enter an order regarding the Macedonian property or affecting the actions of the foreign attorney.

Respondent premises his argument on quoted material contained in *Niemetta v Teakle*, 210 Mich 590; 178 NW 37 (1920), specifically its holding that a court lacked power "to make decrees affecting property beyond its jurisdiction." *Id*. at 592-593. However, in *Niemetta*, the Supreme Court upheld an equitable order entered by the Wayne Circuit Court regarding property located in Macomb County, explaining, "In view of the fact that all parties were before the court we see no serious barriers in the way which would prevent the Wayne circuit court from com-

pelling an equitable adjustment of the matters involved." *Id*. at 594.

Contrary to respondent's contention, the probate court in this case did not assume jurisdiction over the Macedonian property. Rather, the arbitrator merely determined that Vlado had become incompetent by January 1, 2000. In light of the arbitrator's finding concerning Vlado's lack of competency, the arbitrator recommended that the probate court set aside the power of attorney Vlado signed in September 2000 and that the foreign property be considered an asset of the probate estate unless it had been transferred before January 1, 2000. We conclude that the probate court correctly determined that it possessed the authority to set aside the power of attorney.

D. THE SCOPE OF THE ARBITRATION

Respondent additionally contends that the arbitrator exceeded the scope of the arbitration agreement by considering whether Vlado lacked testamentary capacity before the date that he executed the will and the deeds. Although respondent failed to raise this issue in the probate court, we nonetheless will address it because the argument involves a legal question and the facts necessary for its resolution appear in the record. *Adam*, *supra* at 98-99.

A three-part test applies for ascertaining the arbitrability of a particular issue: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *Detroit Automobile Inter-Ins Exch v Reck*, 90 Mich App 286, 290; 282 NW2d 292 (1979). This Court has expressed a general disapproval of segregating

disputed issues "into categories of 'arbitrable sheep and judicially-triable goats'." *Id*. at 289. "Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 75; 492 NW2d 463 (1992).

The parties' stipulation, which constituted their arbitration agreement, described the scope of the contemplated arbitration simply as "[t]his matter." The "matter" pending before the probate court involved the distribution of Vlado's entire probate estate, not merely selected assets. Petitioner's March 2004 petition alleged that "[f]rom 1999 to the time of his death, Vlado Nestorovski did not have the mental capacity, ability, or power to understand the nature, character, effect and extent of his property." Vlado's testamentary capacity to execute the power of attorney plainly falls within the broad scope of the matters presented in the case. Respondent's failure to lodge in the probate court an objection to the arbitrator's consideration of the power of attorney further suggests that the parties understood this issue to fall within the scope of the parties' arbitration agreement. Because the basic arbitrability requirements exist in this case, we find that the arbitrator properly considered Vlado's capacity to execute the 2000 power of attorney.

Respondent lastly complains that the arbitrator exceeded her authority by deciding that both parties should bear their own attorney fees and that none of the fees should be chargeable to the estate. Respondent maintains that MCL 700.3720 requires that the estate pay his attorney fees. According to MCL 700.3720, "[i]f a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal

representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred." "[W]here the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary rather than the estate should be responsible for the attorney's fees." *In re Valentino Estate*, 128 Mich App 87, 95-96; 339 NW2d 698 (1983). Given the arbitrator's well-supported finding that respondent exerted undue influence on Vlado, we conclude that MCL 700.3720 does not apply here because respondent did not defend the April 2001 will "in good faith."

Affirmed.

BORRELLO, J. concurred.

SAAD, C.J. (*dissenting*).

I. INTRODUCTION

The precise issue litigated in *In re Meredith Estate*, 275 Mich 278; 266 NW 351 (1936) is the arbitrability of testamentary capacity; the Michigan Supreme Court in *Meredith* concluded that testamentary capacity is not arbitrable. In all material respects, an identical issue is presented to the Court, because we are asked to decide whether the parties' agreement to arbitrate Vlado Nestorovski's testamentary capacity is enforceable. Because we are bound by the principle of stare decisis embodied both in our jurisprudential history and in specific holdings from our highest court, *Meredith*'s holding must control. Until our Supreme Court modifies its own precedent, the rule in this jurisdiction is that testamentary capacity is not arbitrable. Therefore, I respectfully dissent from the majority's departure from *Meredith*'s holding.

II. NATURE OF THE CASE

The underlying issue before the trial court was the testamentary capacity of the testator, Vlado Nestorovski. The key issue on appeal is whether testamentary capacity is subject to binding arbitration or is within the exclusive jurisdiction of the probate court. Because our Supreme Court ruled in *Meredith* that testamentary capacity is not arbitrable, the issue upon which the majority and I disagree is whether our Court, as an intermediate appellate court, may overrule *Meredith* on the basis of our belief that the Michigan Supreme Court would overrule *Meredith* if faced with the question today.

Because *Meredith* is binding on all inferior courts, including this Court, I respectfully disagree with the majority that we have the authority to rule contrary to *Meredith* simply because we believe that the Supreme Court would overturn its precedent in light of legislative, court rule, and decisional law developments.

Though I agree that the Michigan Supreme Court would overrule *Meredith* if faced with this precise issue today, the law that governs our authority as an inferior court precludes this Court from taking this action. Indeed, it is quite clear that Michigan Supreme Court precedent that is binding on this Court does not permit an inferior court, appellate or trial, to overrule Supreme Court precedent; rather, such precedent places the prerogative of overruling Supreme Court decisions with the Supreme Court.

Accordingly, because *Meredith* is "good law" until our Supreme Court rules that it is not, we are bound by Supreme Court precedent that clearly and unequivocally mandates that we follow its precedents and leave the business of overruling Supreme Court decisions to the Supreme Court.

III. FACTUAL RELATIONSHIP TO *MEREDITH*

The majority paradoxically contends that *Meredith* is both a fact-specific holding unintended for extension and a "critical pronounce[ment] [of] the arbitrability of *any* probate dispute . . . ." *Ante* at 188 (emphasis added). It is, in fact, neither. The issue before the court in *Meredith* was narrow, and so too was its holding. Indeed, *Meredith* addressed the discrete issue whether testamentary capacity is arbitrable and it clearly and narrowly held that it is not. Because the arbitrability of testamentary capacity is precisely the issue before the Court today, our decision must be constrained by the Michigan Supreme Court's ruling in *Meredith*.

IV. ANALYSIS

Michigan Supreme Court precedent precludes our Court from overruling decisions of the Michigan Supreme Court. In *People v Mitchell*, 428 Mich 364; 408 NW2d 798 (1987), our Supreme Court admonished this Court for failing to adhere to its earlier holding that an unsigned search warrant lacked validity. The Court made clear that the impropriety lies not in reaching the incorrect conclusion, but in overruling the Supreme Court:

> Although the Court of Appeals panel in this case *correctly anticipated our holding*, we disapprove of the manner in which the panel indicated its disagreement . . . . An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts. [*Id*. at 369 (emphasis added).]

Similarly, I believe that the majority "correctly anticipates" the Supreme Court's ruling, but incorrectly oversteps its authority in doing so.

Recently, our Supreme Court reaffirmed its holding in *Mitchell* and reiterated the importance of vertical stare decisis. In *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), overruled on other grounds in *Karaczewski v Farbman Stein & Co*, 478 Mich 28 (2007), the Michigan Supreme Court reversed this Court's holding that the necessity to abide by the Supreme Court's ruling in *Roberts v I X L Glass Corp*, 259 Mich 644; 244 NW 188 (1932), was obviated by post-decision amendment of the statute to which *Roberts* related.[1] Unequivocally asserting exclusive authority to overrule its decisions, the Michigan Supreme Court again held that "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and *until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority*." *Boyd, supra* at 523 (emphasis added), citing *Edwards v Clinton Valley Ctr*, 138 Mich App 312; 360 NW2d 606 (1984); *McMillan v Michigan State Hwy Comm*, 130 Mich App 630; 344 NW2d 26 (1983), rev'd in part on other grounds 426 Mich 46 (1986); *Ratliff v Gen Motors Corp*, 127 Mich App 410; 339 NW2d 196 (1983); *Schwartz v City of Flint (After Remand)*, 120 Mich App 449; 329 NW2d 26 (1982), rev'd on other grounds 426 Mich 295 (1986). Our Supreme Court in *Boyd* further noted:

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[1] In support of the proposition that post-decision amendments of statutes on which higher court decisions are predicated can warrant departure from the doctrine of stare decisis, the majority cites *People v Pfaffle*, 246 Mich App 282, 303-304; 632 NW2d 162 (2001), and *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002). For reasons clearly set forth in this dissent, the Court in *Pfaffle* cited no authority to support such a theory. In *Lamp*, the Court, like the majority here, cited cases in support of its holding. However, each of those cases discusses the circumstances under which it is proper for the Michigan Supreme Court, not an intermediate appellate court, to overrule *its own* precedent.

> While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, *that conclusion does not excuse the Court of Appeals from applying the decision to the case before it. Because this Court has never overruled* Roberts*, it remains valid precedent*. [*Boyd, supra* at 523 (citations omitted; emphasis added).]

The United States Supreme Court has issued the same mandate to inferior federal courts. Though not binding on our state's jurisprudence, the United States Supreme Court has ruled that only it, and not intermediate appellate courts, may overrule United States Supreme Court precedent. This decision underscores the important foundational nature of vertical stare decisis. In *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477; 109 S Ct 1917; 104 L Ed 2d 526 (1989), the Court analyzed an issue similar to the one before us. While the Court in *Rodriguez, id.* at 480, ultimately agreed with the United States Court of Appeals for the Fifth Circuit that the well-known case of *Wilko v Swan*, 346 US 427; 74 S Ct 182; 98 L Ed 168 (1953) (restricting the arbitrability of certain securities matters) should be overruled because the "judicial hostility to arbitration" present at *Wilko*'s issuance "has been steadily eroded over the years," the Supreme Court determined that it was nonetheless improper for the Court of Appeals to ignore the precedent:

> We do not suggest that the Court of Appeals on its own authority should have taken the step in renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. [*Rodriguez, supra* at 484.]

Finally, while the degree of adherence to principles of stare decisis varies among our sister states, the great majority of state courts clearly hold that lower courts lack the authority to ignore what they perceive as outmoded precedent.[2] The reasons underlying the judiciary's commitment to stare decisis are readily apparent and are absolutely essential to our jurisprudence. Clearly, predictability and the rule of law would be undermined if lower courts could simply contravene established precedent, even for what appear to be good reasons. As explained in a recent law review article:

> Serious rule of law costs would follow if lower courts were free to ignore precedent established by a higher court of appeal. At the same time, the appellate process itself substantially mitigates the costs of adhering to an erroneous precedent, because it can always be addressed by the court of last resort. Thus, maintaining vertical stare decisis imposes few costs in terms of popular sovereignty and provides maximal rule of law benefits. [Lash, *Originalism, popular sovereignty, and reverse stare decisis*, 93 Va L R 1437, 1454 (2007).]

Moreover, to ignore the rule of stare decisis would inevitably grant to all lower courts, including trial courts, the authority to circumvent higher court rulings under the guise of anticipating that the higher court will change its position. This is a very dangerous, slippery slope. For these reasons, our Supreme Court and the United States Supreme Court have held that, even when a lower court correctly anticipates an overruling decision by the higher court, the inferior court

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[2] See, e.g., *State v Fornof*, 218 Ariz 74, 76; 179 P3d 954 (Ariz App, 2008); *State v Benton*, 168 Ga App 665, 667; 310 SE2d 243 (1983); *State ex rel Martinez v City of Las Vegas*, 135 NM 375, 381-382; 89 P3d 47 (2004); *Cannon v Miller*, 313 NC 324; 327 SE2d 888 (1985); *Fisher v Westmont Hospitality*, 935 SW2d 222, 224 (Tex App, 1996); *Roadcap v Commonwealth*, 50 Va App 732, 742-743; 653 SE2d 620 (2007).

must nonetheless leave the business of overturning Supreme Court precedent to the Supreme Court. Simply stated, "we cannot render decisions based on speculation regarding what the current membership of the Supreme Court may decide." *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 353; 764 NW2d 304 (2009).

V. CONCLUSION

Mitchell and *Boyd* prohibit intermediate appellate courts from overturning higher court precedent. These holdings and principles apply, of course, with equal force to trial courts' obligation to conform to established precedent. *Mitchell* and *Boyd* clearly prohibit intermediate appellate courts from overruling Supreme Court precedent, even when the intermediate appellate court, as here, correctly anticipates that the Supreme Court would overrule its earlier ruling. *Mitchell, supra* at 369; *Boyd, supra* at 523. Therefore, the majority is without power or authority to overrule *Meredith*. Though the majority strains to justify its holding by tracing the "evolution" of the probate code and our courts' increasing approval of arbitration, it cites no legal authority that has changed the *Meredith* holding that testamentary capacity is not arbitrable. As much as the majority would like to distinguish or dilute the unequivocal holding of *Meredith* because it disagrees with its current viability, such attempts are unavailing. As our Supreme Court made clear in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), the Supreme Court may revisit its *own* decisions from time to time, yet it is equally clear, and dispositive here, that only the Supreme Court may do so. *Id*. And it hardly advances proper jurisprudence for our Court to overrule Supreme Court precedent while claiming not to do so. I believe it is imprudent for this Court to arrogate to itself powers it does not have.

For these reasons, I respectfully dissent from the majority's opinion and I would reverse the probate court's order that affirmed the arbitration award.

DEPARTMENT OF LABOR AND ECONOMIC GROWTH, UNEMPLOYMENT INSURANCE AGENCY v DYKSTRA
DEPARTMENT OF LABOR AND ECONOMIC GROWTH, UNEMPLOYMENT INSURANCE AGENCY v JORDAN

Docket Nos. 280591 and 280592. Submitted January 7, 2009, at Grand Rapids. Decided April 7, 2009, at 9:00 a.m.

Tracey Dykstra applied for federal trade readjustment allowance (TRA) benefits, which are intended to supplement state unemployment benefits for workers who have lost their jobs as a result of competition from imports. Eligibility for the benefits requires the worker to enroll in an approved training program, have completed an approved training program, or have obtained a waiver of the training requirement. Dykstra filed a request for a waiver, but did so after the deadlines found in 19 USC 2291(a)(5)(A)(ii). The Unemployment Insurance Agency of the Department of Labor and Economic Growth (now the Department of Energy, Labor, and Economic Growth) denied her request. She appealed, and a hearing referee reversed the agency's decision after finding that Michigan Works! had failed to comply with its statutory duty to notify Dykstra of the need to submit the form required for a waiver. The agency appealed, and the Employment Security Board of Review affirmed the hearing referee's decision. The agency appealed in the Kent Circuit Court, Dennis C. Kolenda, J., which affirmed. The agency applied for leave to appeal, which the Court of Appeals denied in an unpublished order, entered October 16, 2006 (Docket No. 271535). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 480 Mich 869 (2007).

Robert D. Jordan applied for TRA benefits and requested a waiver of the training requirement. He obtained the waiver, but the agency denied him benefits on the ground that he obtained the waiver after the deadlines imposed by 19 USC 2291(a)(5)(A)(ii). A hearing referee affirmed the agency's denial, but the board of review reversed, concluding that the deadlines did not apply to waivers. The agency appealed in the Kent Circuit Court, Donald A. Johnston, J., which affirmed. The agency applied for leave to

appeal, which the Court of Appeals denied in an unpublished order, entered December 12, 2006 (Docket No. 272634). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 480 Mich 869 (2007). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The United States Department of Labor determined that the deadlines found in 19 USC 2291(a)(5)(A) apply to the waiver of the training requirement permitted under 19 USC 2291(a)(5)(C) and (c). Under this interpretation, neither Dykstra nor Jordan met the eligibility requirements for TRA benefits because they missed the deadlines. A court must defer to a federal agency's interpretation of a statute if Congress directly addressed the precise question at issue. If Congress did not directly address the issue, that is, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute. Congress's intent must be given effect, and a court must reject administrative constructions that are contrary to clear congressional intent.

2. A plain reading of the statutory scheme as a whole indicates that Congress clearly provided that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) apply only to enrollments in approved training programs under 19 USC 2291(a)(5)(A)(i). Congress clearly intended the waivers permitted by 19 USC 2291(a)(5)(C) and (c) to be subject only to the timing restrictions generally applicable to the provision of TRA benefits. Given this clear intent, the Department of Labor's determination that the deadlines apply to waivers is not entitled to any deference. The trial courts did not err by affirming the board's decisions that Dykstra and Jordan were entitled to TRA benefits.

Affirmed.

1. ADMINISTRATIVE LAW — FEDERAL ADMINISTRATIVE AGENCIES — DEFERENCE TO FEDERAL AGENCY INTERPRETATIONS OF STATUTES.

A court must defer to a federal agency's interpretation of a statute if Congress directly addressed the issue; if Congress did not directly address the issue, that is, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute; Congress's intent must be given effect, and the court must reject administrative constructions that are contrary to clear congressional intent.

2. UNEMPLOYMENT COMPENSATION — TRADE READJUSTMENT ALLOWANCE BENEFITS — WAIVERS OF TRAINING REQUIREMENT FOR TRADE READJUSTMENT ALLOWANCE BENEFITS — DEADLINES FOR TRADE READJUSTMENT ALLOWANCE BENEFITS APPLICATIONS.

The deadlines stated in 19 USC 2291(a)(5)(A)(ii) apply only to enrollments in approved training programs that are necessary for an unemployed worker to be eligible for federal trade readjustment allowance (TRA) benefits; the deadlines do not apply to applications for waivers from the training-program requirement; those waivers are subject only to the timing restrictions generally applicable to the provision of TRA benefits (19 USC 2291[a][5][A][i] and [ii], 19 USC 2291[a][5][C], 19 USC 2291[c]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Mark F. Davidson* and *Donna K. Welch*, Assistant Attorneys General, for the Department of Labor and Economic Growth, Unemployment Insurance Agency.

Pinsky, Smith, Fayette & Kennedy, LLP (by *H. Rhett Pinsky*), for Tracey Dykstra.

Kenneth T. Saukas, P.C. (by *Steven L. Williams*), for Robert D. Jordan.

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

M. J. KELLY, J. In these consolidated appeals, the Department of Labor and Economic Growth, Unemployment Insurance Agency (the Agency), appeals by leave granted the trial court orders affirming the decisions of the Employment Security Board of Review (the Board) granting federal trade readjustment allowance (TRA) benefits to claimants Tracey Dykstra and Robert Jordan under the Trade Act of 1974. See 19 USC 2101 *et seq*. On appeal, we must determine whether the time limits provided under 19 USC 2291(a)(5)(A)(ii) limit the period within which a claimant may obtain a waiver of

the Trade Act's training requirement. See 19 USC 2291(a)(5)(C) and 19 USC 2291(c). We conclude that, under the statute's plain terms, the time limits provided under 19 USC 2291(a)(5)(A)(ii) do not apply to the waivers permitted by 19 USC 2291(a)(5)(C) and 19 USC 2291(c). Further, because the statute is not ambiguous, the Agency had to comply with its terms notwithstanding the contrary interpretation of the United States Department of Labor (the Department). Therefore, the trial courts did not err when they issued orders affirming the Board's decisions. For these reasons, we affirm in both cases.

I. BACKGROUND, BASIC FACTS, AND PROCEDURAL HISTORY

A. TRA BENEFITS

Under the Trade Act, Congress established a program of benefits intended to supplement state unemployment benefits for workers who have lost their jobs as a result of competition from imports. See *Int'l Union, United Automobile, Aerospace, & Agricultural Implement Workers of America v Brock*, 477 US 274, 277; 106 S Ct 2523; 91 L Ed 2d 228 (1986).

> Under the Act's scheme, a group of workers, their union, or some other authorized representative may petition the Secretary of Labor to certify that their firm has been adversely affected by imports. [19 USC 2271 to 2273.] If the Secretary issues a certificate of eligibility for such a group, workers within that group who meet certain standards of individual eligibility may then apply for and receive TRA benefits. These benefits are funded entirely by the Federal Government, as is the cost of administering the program. [*Id.*]

Although the Trade Act requires the Secretary of Labor to make the initial certification, the Trade Act permits the secretary "to contract out the job of making

individual eligibility determinations to the state agencies that administer state unemployment insurance programs." *Id.*; see 19 USC 2311(a). In Michigan, the Agency has been empowered to make the individual eligibility determinations. Nevertheless, Congress has charged the Department with the duty of prescribing regulations necessary to carry out the Trade Act, see 19 USC 2320, and the Agency is "bound to apply the relevant regulations promulgated by the Secretary of Labor and the substantive provisions of the Act." *Brock*, 477 US at 278.

In order for a worker to be eligible for benefits, the worker must meet one of three eligibility criteria: the worker must be enrolled in an approved training program, have completed an approved training program, or have obtained a written waiver of the training requirement. See 19 USC 2291(a)(5)(A) to (C); see also 19 USC 2291(c). With regard to the first criterion—enrollment in an approved training program—19 USC 2291(a)(5)(A)(ii) also provides that the worker must enroll no later than the latest of

> (I) the last day of the 16th week after the worker's most recent total separation from adversely affected employment which meets the requirements of [19 USC 2291(a)(1) and (2)],
>
> (II) the last day of the 8th week after the week in which the Secretary issues a certification covering the worker,
>
> (III) 45 days after the later of the dates specified in subclause (I) or (II), if the Secretary determines there are extenuating circumstances that justify an extension in the enrollment period, or
>
> (IV) the last day of a period determined by the Secretary to be approved for enrollment after the termination of a waiver issued pursuant to [19 USC 2291(c)].

Congress added these deadlines in 2002, and they are commonly referred to as the "8/16 deadline." See PL

107-210, § 114(b)(3), 116 Stat 939. The Department explained that the amendment was designed to accelerate a worker's reentry into the work force:

> To promote adjustment and accelerate reemployment, the Reform Act[1] provides that eligibility for TRA, which is additional income support after unemployment insurance (UI) is exhausted, will be contingent on a worker's enrollment in training not later than 16 weeks after separation from employment or 8 weeks after the petition for eligibility has been approved, whichever date is later. In extenuating circumstances, these deadlines for enrollment in training may be extended up to 45 days; and a waiver of the enrollment in training requirement to receive basic TRA may be issued only under limited and specified conditions. The Reform Act also increased the length of time that TRA is available to an adversely affected worker who is in training by increasing the availability of "additional" TRA from 26 to 52 weeks and by further adding up to 26 additional weeks of TRA if a worker is enrolled in a course of remedial education. The primary purpose of this extended income support is to minimize workers' financial hardship until they complete training. By requiring that workers expeditiously enroll in training as a condition of receiving TRA, the Reform Act amendments provide that workers will be more likely to complete the training within the duration of that income support. [71 Fed Reg 50760, 50762 (August 25, 2006).]

To that end, the Department has determined that the deadlines stated in § 2291(a)(5)(A) apply to the waivers permitted under § 2291(c):

> This deadline is either the last day of the 8th week after the week of issuance of the certification of eligibility covering the worker or the last day of the 16th week after the worker's most recent total qualifying separation, whichever is later (commonly referred to as the 8/16 week deadline). The "8/16 week deadline" applies to eligibility

[1] PL 107-210, §§ 101 *et seq*., 116 Stat 939.

> for all TRA, both basic and additional TRA. If a worker fails to meet the applicable 8/16 week deadline, then the worker is not eligible for any TRA (basic TRA or additional TRA, including TRA for remedial training) under the relevant certification. In many cases, the 8/16 week deadline for a worker will be reached while the worker is still receiving unemployment insurance (UI). Some workers are not aware that this deadline may apply before they exhaust their UI. The SWA [State Workforce Agency] is responsible for informing workers of these requirements. *The SWA must also assist such workers in enrolling in an approved training program prior to the 8/16 week deadline, or issue the workers waivers prior to the 8/16 week deadline, if appropriate.* [Trade Adjustment Assistance Program, Training and Employment Guidance Letter No 11-02, Change 1, 69 Fed Reg 60903 (October 13, 2004) (emphasis added).]

Thus, under the Department's interpretation of 19 USC 2291(a)(5)(A) to (C), a worker must enroll in training or obtain a waiver before the 8/16 deadline in order to qualify for TRA benefits

In the present cases, the Secretary of Labor certified that both claimants' firms were adversely affected by imports. Hence, both Dykstra and Jordan were entitled to TRA benefits if they met the individual eligibility requirements. However, although both Dykstra and Jordan obtained waivers under 19 USC 2291(c), they did not obtain the waivers within the 8/16 deadline provided under 19 USC 2291(a)(5)(A)(ii). For that reason, the Agency denied both claimants' requests for TRA benefits.

B. TRACEY DYKSTRA

Dykstra appealed the Agency's decision in April 2005. A hearing referee held a hearing on the matter in June 2005. At the hearing, an unemployment claims examiner for the Agency specializing in TRA claims

testified that Michigan Works![2] was responsible for notifying employees of their right to receive TRA benefits. The examiner indicated that one method of notification used with companies that have large numbers of employees who are being laid off because of foreign competition is to hold an en masse meeting. Dykstra attended such a meeting after she was laid off, but stated that she was not informed that she needed to fill out Form 802, which is the request for waiver of the TRA training requirement permitted by 19 USC 2291(a)(5)(C). Dykstra stated that she filed the form only after she learned about it from a coworker. However, she filed the form after the enrollment deadlines stated in 19 USC 2291(a)(5)(A). The unemployment examiner testified that it was her opinion that Michigan Works! was at fault for Dykstra's untimely filing because it failed to timely notify Dykstra of the need to submit the form. The referee then reversed the Agency's decision to deny Dykstra's application for benefits. The referee reasoned that the failure of Michigan Works! to comply with its statutory duty under 19 USC 2311(f)(1) to notify Dykstra of her eligibility for TRA benefits constituted good cause for her untimely application.

The Agency then appealed to the Board, which affirmed the referee's decision. The Board determined that Dykstra acted on the faulty advice of a Michigan

[2] Michigan Works! is an association of local agencies. See MCL 408.113(d). The local agencies are selected by local workforce development boards, which also oversee the entities' provision of workforce services under the Michigan Works One-Stop Service Center System Act, MCL 408.111 *et seq*. See MCL 408.119 and MCL 408.123. The local Michigan Works! agencies are authorized to serve as the administrators for state and federal funding provided for workforce development services and activities. See MCL 408.127, MCL 408.129, and MCL 408.131.

Works! employee. It also rejected the Agency's argument that Michigan Works! was not authorized to act on the Agency's behalf.

On appeal in the circuit court, the Agency argued that TRA benefits were only available to claimants who met the statutory requirements, including the deadlines set forth in 19 USC 2291(a)(5)(A)(ii), and that because Dykstra did not meet the deadlines, she was ineligible for benefits. The Agency asserted that the Board's decision was contrary to law and had to be reversed. It also argued that Dykstra could not use the doctrine of estoppel to expand the deadlines on the basis of governmental workers' errors. The circuit court disagreed and determined that the Agency should be estopped from denying Dykstra benefits when it had failed to exercise its statutory duty. The Agency moved for reconsideration, which was granted in part and denied in part. The circuit court vacated that portion of its previous order applying the doctrine of estoppel, but upheld its previous order to the extent that it awarded Dykstra benefits. It reasoned that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) did not apply to a waiver obtained under 19 USC 2291(a)(5)(C) and 19 USC 2291(c).

C. ROBERT JORDAN

After a chance encounter with a former coworker, Jordan discovered that he might be eligible to receive TRA benefits. Jordan later went to a local Michigan Works! office and applied for TRA benefits and requested a waiver of the training requirement on the ground that he was within two years of meeting the requirements for retiring. See 19 USC 2291(c)(1)(C). Although Jordan obtained his waiver, the Agency denied him benefits on the ground that he obtained the

waiver outside the deadlines imposed by 19 USC 2291(a)(5)(A)(ii). Jordan appealed the Agency's decision, and the referee assigned to his case held a hearing in April 2005. The referee affirmed the Agency's denial of benefits because Jordan did not file within the statutory deadlines and failed to establish "good cause" for his late application.

Jordan then appealed to the Board. The Board determined that the deadlines in 19 USC 2291(a)(5)(A)(ii) did not apply to the waivers permitted by 19 USC 2291(a)(5)(C). Therefore, because Michigan Works! had issued Jordan a valid waiver, the Board determined that Jordan was eligible for TRA benefits. The Board further found the Agency's argument that Michigan Works! was not its agent to be disingenuous. Accordingly, the Board reversed the referee's decision.

On appeal in the circuit court, the Agency argued that TRA benefits were only available to claimants who met the statutory deadlines set forth in 19 USC 2291(a)(5)(A)(ii). Because Jordan did not meet the requisite deadlines, the Agency contended, he was ineligible for benefits. The Agency also reiterated its argument that the doctrine of estoppel did not apply.

Jordan responded that the Board's decision was not contrary to law because it correctly determined that the deadlines in § 2291(a)(5)(A)(ii) applied only to the enrollment provisions of § 2291(a)(5)(A)(i). He noted that there was no time requirement under the section applicable to waivers. He also argued that it would be inequitable to apply a deadline for benefits that he had not known existed. He asserted that such a result was contrary to the purpose of the law. The Agency countered that the Board's decision was contrary to the Department's interpretation of the statute, which was entitled to deference.

The circuit court held a hearing on the matter in July 2006. In August 2006, the circuit court issued an order affirming the Board's decision.

D. THE APPEALS

After the circuit courts affirmed the reinstatement of benefits, the Agency applied for leave to appeal in this Court in both cases, which this Court denied for lack of merit. See *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, unpublished order of the Court of Appeals, entered October 16, 2006 (Docket No. 271535); *Dep't of Labor & Economic Growth v Jordan*, unpublished order of the Court of Appeals, entered December 12, 2006 (Docket No. 272634). However, in lieu of granting leave to appeal, our Supreme Court remanded each case to this Court for consideration as on leave granted. See *Dep't of Labor & Economic Growth v Dykstra*, 480 Mich 869 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007). This Court thereafter consolidated the appeals.

II. THE STATUTORY DEADLINES

A. STANDARD OF REVIEW

Congress has determined that the review of a determination by a cooperating state agency is to be done "in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." 19 USC 2311(d). This Court reviews "a lower court's review of an agency decision to 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.' " *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571,

575; 659 NW2d 629 (2002) (citation omitted). The circuit court's review of the Agency's decision "is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Id.* at 576. However, this Court reviews de novo the proper interpretation of statutes, such as the Trade Act. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

B. PRINCIPLES OF AGENCY DEFERENCE

The present case involves the proper interpretation of the Trade Act. As already noted, the Department has interpreted the Trade Act and determined that the deadlines stated under 19 USC 2291(a)(5)(A)(ii) apply to the waivers permitted by 19 USC 2291(a)(5)(C). Because Congress has charged the Department with the responsibility of promulgating regulations to implement the Trade Act, see 19 USC 2320, the Department's interpretation of the relevant statutory provisions may be entitled to deference. See *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837, 842-843; 104 S Ct 2778; 81 L Ed 2d 694 (1984). As the Supreme Court explained in *Chevron*, whether a court must defer to an agency's interpretation of a statute depends first on whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*; see also *State Treasurer v Abbott*, 468 Mich 143, 148; 660 NW2d 714 (2003). However, if Congress has not directly addressed the precise question at issue, the reviewing

court does not "simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 US at 843.

This deference follows from Congress's decision to commit the administration of a particular program to the agency:

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. [*Id.* at 843-844 (citation omitted).]

The level of deference is strong; the "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id*. at 843 n 11. Nevertheless, the Supreme Court noted that, ultimately, the

> judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise

> question at issue, that intention is the law and must be given effect. [*Id*. at 843 n 9 (citations omitted).]

Accordingly, the first question that must be answered is whether Congress has spoken on the issue of a deadline for filing a training waiver.

C. TIMING AND WAIVERS

The Agency argues that, because 19 USC 2291(a)(5)(C) is silent or ambiguous with regard to time constraints, this Court must defer to the Department's interpretation that the enrollment deadlines provided under 19 USC 2291(a)(5)(A)(ii) should also apply to the waivers permitted under 19 USC 2291(a)(5)(C). However, this Court will not read statutes in isolation, and, after examining the statutory scheme as a whole, see *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001), we do not agree that Congress was silent on the timing applicable to the waivers permitted by § 2291(a)(5)(C).[3]

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[3] We note that the Department is rewriting the applicable regulations, which will be codified at 20 CFR 618, and has recognized that it is possible that Congress did not intend for the deadlines stated in 19 USC 2291(a)(5)(A)(ii) to apply to waivers. See 71 Fed Reg 50760 (August 25, 2006). The Department has solicited public comment on this issue:

> A related issue, on which the Department seeks public comment, is whether the deadlines should apply to waivers of the training requirement in the case of adversely affected workers who do not enroll in training by the applicable deadline; whether the issuance of a waiver after the deadline has passed can revive eligibility for basic TRA. The Department's current position, reflected in § 618.725(a) [of the proposed regulations], is that an adversely affected worker who neither enrolls in training by the applicable deadline, nor receives a waiver of the training requirement by that deadline, may not become eligible for TRA by later receiving such a waiver. This position was articulated in the operating instructions in Training and Employment Guidance Letter (TEGL) No. 11-02, Change 1 (69 FR 60903 (2004)), which interpreted [19 USC 2291(a)(5)(A)] as imposing "a deadline by

A worker does not have to apply for TRA benefits in order to be eligible for training, but he or she does need to meet at least one of the training requirement alternatives stated in § 2291(a)(5) in order to receive monetary benefits. See 19 USC 2291(a); 19 USC 2296; 20 CFR 617.11. Section 2291(a)(5) clearly provides three alternative ways to meet the training requirement: enroll in training, complete training, or obtain a waiver of the training requirement. See also 20 CFR 617.11(a)(2)(vii)(A). Although the statute does provide a specific deadline within which the enrollment alternative must be met, Congress unequivocally provided that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) were to apply to the "enrollment required under clause (i)." Likewise, when crafting an extension for extenuating circumstances, Congress clearly indicated that the extension applied to the "enrollment period." 19 USC 2291(a)(5)(A)(ii)(III). Hence, under a plain reading, it appears that Congress intended the timing deadlines stated in § 2291(a)(5)(A)(ii) to apply only to enrollments under § 2291(a)(5)(A)(i). Further, the provision of a

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which a worker must be enrolled in approved training, or have a waiver of this requirement, in order to be eligible for TRA." However, a CSA [cooperating state agency] recently brought to the Department's attention an alternative reading, based on the structure of the Act, that the applicable deadline applies only to enrollment in training and not to waivers of the training requirement. The argument is that the alternative deadlines are contained only in the Act's provision on the enrollment in training requirement, [19 USC 2291(a)(5)(A)]; that language in [19 USC 2291(a)(5)(A)(ii)] suggests the requirement applies only to the enrollment in training requirement in [19 USC 2291(a)(5)(A)(i)]; and that the alternative requirement that the worker receive a waiver of the training requirement is contained in a separate provision, [19 USC 2291(a)(5)(C)] of the Act. While this argument is plausible, the Department is concerned that it effectively undermines Congress' intent that TAA-eligible [eligible for trade adjustment assistance] workers be quickly returned to work or quickly provided with the training they need to succeed in the labor market. In light of this argument, the Department encourages public comments on this issue. [*Id.* at 50784-50785.]

deadline for the enrollment alternative without providing a similar deadline for the waiver alternative is consistent with the statutory scheme and the purpose behind the TRA benefits.

As the Agency aptly notes, the primary purpose of TRA benefits is to assist workers who have lost their jobs because of competition from imports to quickly return to suitable employment. See 20 CFR 617.2; see also 19 USC 2102(4). Congress has determined that this goal can best be accomplished in many cases by retraining the adversely affected worker. See, e.g., 19 USC 2291(a)(5). In such cases, it makes sense to require the worker to demonstrate a commitment to be retrained by requiring the worker to enroll in an approved training program within a specified time. However, Congress also determined that TRA benefits should be paid to some workers who are adversely affected by foreign competition even without the worker completing or enrolling in a retraining program. To this end, Congress empowered the Secretary of Labor to waive the training requirement imposed under 19 USC 2291(a)(5)(A).[4] See 19 USC 2291(a)(5)(C); 19 USC 2291(c). And the purpose behind a strict deadline for enrollment in retraining does not apply equally to cases involving waivers.

A worker can only qualify for a waiver of the training requirement when there are circumstances that make it "not feasible or appropriate for the worker" to enroll in a training program. 19 USC 2291(c)(1). These circum-

[4] We find it noteworthy that Congress framed this authority as the power to waive "the requirement to be enrolled in training described in subsection (a)(5)(A)," which is the same subsection that contains the deadlines. See 19 USC 2291(c)(1). Because the deadlines are contained in this subsection, when waiving the requirements of § 2291(a)(5)(A), the Secretary of Labor also presumably waives the accompanying deadlines. This is evidence that Congress contemplated that the Secretary of Labor might issue waivers even after the deadlines found in § 2291(a)(5)(A)(ii).

stances include situations in which the worker will be recalled to work, already has marketable skills, will be retiring, or has health issues that preclude enrollment in an approved training program or when an approved program is unavailable or the worker has good reason for delaying enrollment. See 19 USC 2291(c)(1)(A) to (F). Thus, Congress has specifically provided that TRA benefits may be available to workers who will not participate in a training program. Indeed, in the case of workers who are about to retire, the worker may never even return to active employment.[5] In such cases, a strict deadline would serve only to deprive workers of the TRA benefits that Congress deemed appropriate. Further, given that some circumstances that give rise to eligibility for a waiver may not be known within the deadlines provided under § 2291(a)(5)(A)(ii), application of those deadlines to the training waivers permitted under § 2291(a)(5)(C) might defeat the purpose behind the waiver provision. It is also noteworthy that Congress provided limits on the provision of TRA benefits, which include general limitations on the period within which benefits may be paid to a worker. See 19 USC 2291(a)(1) (requiring workers to apply for TRA benefits before the expiration of a two-year period or the termination of certification); 19 USC 2293 (placing substantive limits on the payment of TRA benefits). Thus, Congress actually provided deadlines for the provision of benefits that are applicable to benefits paid under a waiver of the training requirement. These deadlines are consistent with the purpose behind the waiver provision and Congress's decision to limit the application of the deadlines stated in § 2291(a)(5)(A)(ii) to the enrollment provision found in § 2291(a)(5)(A)(i). We further note that Congress crafted specific limitations

[5] This is may very well be the case for Jordan.

on the duration of waivers and provided for the revocation of waivers when the basis for granting the waiver is no longer applicable.[6] 19 USC 2291(c)(2). Hence, in addition to directly limiting application of the deadlines found under § 2291(a)(5)(A)(ii), Congress provided clear guidance on the timing and efficacy of waivers.

D. CONCLUSION

When the relevant statutory scheme is interpreted as a whole, Congress's decision to limit the strict deadlines specified under § 2291(a)(5)(A)(ii) to enrollments under § 2291(a)(5)(A)(i) and its refusal to create a similar deadline for the waivers permitted by § 2291(a)(5)(C) must be understood to have been deliberate. For this reason, we conclude that Congress was not silent on the issue; rather, Congress unambiguously provided that the deadlines stated in § 2291(a)(5)(A)(ii) only applied to the enrollment option provided by § 2291(a)(5)(A)(i). And Congress clearly intended the waivers permitted by § 2291(a)(5)(C) to be subject only to the timing restrictions generally applicable to the provision of TRA benefits. See 19 USC 2291(a)(1). Because Congress's intent is clear, the Department's determination that the § 2291(a)(5)(A)(ii) deadlines should apply to the waivers permitted under § 2291(a)(5)(C) and § 2291(c) is not entitled to any deference. Indeed, because the Department's

[6] Congress also provided that, when a waiver is revoked, a worker might still obtain TRA benefits under the enrollment provision if the worker enrolls in an approved training program within a period set by the Secretary of Labor after the termination of the waiver. See 19 USC 2291(a)(5)(A)(ii)(IV). It is telling that Congress did not choose to effect this provision through a tolling mechanism—that is, Congress did not provide that the grant of a waiver tolls the period provided under § 2291(a)(5)(A)(ii). Instead, it authorized the secretary to establish a new period after the revocation of the waiver. The decision to handle revocations in this manner further suggests that Congress understood that a waiver could be granted outside the period provided under 19 USC 2291(a)(5)(A)(ii).

construction of the statutory scheme contradicts Congress's unambiguously stated intent to limit application of the § 2291(a)(5)(A)(ii) deadlines, we must reject that construction.[7] *Chevron*, 467 US at 843 n 9. With regard to both claimants, the Board properly determined that the claimants were entitled to TRA benefits. Because the Board did not err in this regard, the trial courts properly affirmed the Board's decisions.

We are cognizant that at least one foreign jurisdiction has determined that the statutory language at issue is sufficiently ambiguous to warrant deference to the Department's interpretation. See *Wisconsin Dep't of Workforce Dev v Labor & Industry Review Comm*, 297 Wis 2d 546; 725 NW2d 304 (Wis App, 2006); see also *Lowe v Unemployment Compensation Bd of Review*, 877 A2d 494, 498 (Pa Cmwlth, 2005). However, foreign authorities are not binding on this Court, and we find these authorities unpersuasive. See *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006) (noting that judicial decisions from foreign jurisdictions are not binding on this Court). The statutory provisions at issue are not ambiguous, and we will enforce them as written.[8] See *Macomb Co Pros-*

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[7] We also do not share the Agency's concern that it must follow the Department's interpretation or risk breaching its agreement with the Department. Under the Department's own regulations, the Agency is tasked with following the law. See 20 CFR 617.59. And because we have determined that Congress plainly provided that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) do not apply to waivers, that determination is the law and must be given effect. *Chevron*, 467 US at 843 n 9.

[8] Even if we were to conclude that the statutory language was ambiguous, we would nevertheless decline to defer to the Department's construction. The Department's interpretation is not codified as a regulation. Instead, the Department's interpretation is found in a letter intended to provide guidance to the various agencies charged with making TRA benefit determinations. Hence, it is not entitled to *Chevron* deference. See *United States v Mead Corp*, 533 US 218, 231-235; 121 S Ct 2164; 150 L Ed 2d 292 (2001) (explaining that agency policy statements, manuals, and enforcement guidelines are not entitled to *Chevron* defer-

ecutor, 464 Mich at 158 (noting that courts will enforce unambiguous statutes as written).

There were no errors warranting relief.[9]

Affirmed in both cases. Because the cases involved important questions of public policy, none of the parties may tax costs under MCR 7.219.

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ence). Further, although the letter is persuasive authority, see *Skidmore v Swift & Co*, 323 US 134, 140; 65 S Ct 161; 89 L Ed 124 (1944), because the letter is inconsistent with the statute's language and underlying purpose, we would decline to follow it.

[9] Given our resolution of this issue, we decline to address the parties' alternative arguments concerning estoppel.

PETERSON v FERTEL

Docket No. 282770. Submitted March 12, 2009, at Detroit. Decided April 9, 2009, at 9:00 a.m.

Julia Peterson, as personal representative of the estate of decedent Andrew Peterson, brought a medical malpractice action in the Wayne Circuit Court against David Fertel, D.O., John R. Schairer, D.O., Garden City Hospital, and others. Case evaluation resulted in a proposed monetary award for the plaintiff and against Fertel, Schairer, and the hospital. The court, Michael F. Sapala, J., on the defendants' motions for summary disposition, granted summary disposition for Fertel and Schairer. The plaintiff filed a motion for reconsideration of the grant of summary disposition to Fertel and Schairer, and also rejected the case evaluation. Schairer accepted the case evaluation, but Fertel rejected it. The court denied the plaintiff's motion for reconsideration. Fertel and Schairer moved for costs and attorney fees as case evaluation sanctions. The court granted the motion, and its award included expert witness fees and attorney fees incurred from the date the plaintiff rejected the case evaluation. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by awarding case evaluation sanctions against the plaintiff and in favor of Fertel and Schairer. MCR 2.403(O) provides that a party that rejects a case evaluation in an action that proceeds to verdict must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. The rule also provides that when the opposing parties reject a case evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. Finally, the rule provides three definitions of "verdict," one of which is a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. In this case, Fertel and Schairer received a result more favorable than the case evaluation and the trial court's order denying the plaintiff's motion for reconsideration constituted a verdict under the court rule, i.e., it was a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

2. The trial court did not abuse its discretion with respect to the case evaluation sanctions awarded. Under MCR 2.403(O)(1) and (6), "actual costs," defined as costs taxable in any civil action and reasonable attorney fees for services necessitated by the rejection of the case evaluation, must be awarded against a party that rejected a case evaluation when the verdict is more favorable to the opposing party than the case evaluation. Expert witness fees qualify as actual costs under the court rule, and expert witness fees are not limited to fees associated with testifying in a deposition or at trial and may include fees associated with trial preparation. The case need not be remanded for an evidentiary hearing on the attorney fee award. The plaintiff failed to request a hearing below, and Fertel and Schairer submitted evidence that supports the trial court's award.

Affirmed.

1. PRETRIAL PROCEDURE — CASE EVALUATION SANCTIONS — VERDICTS FOR PURPOSES OF AWARDING CASE EVALUATION SANCTIONS.

A ruling that denies a motion for reconsideration of a grant of summary disposition, if the ruling is made after a party's rejection of a case evaluation, is a verdict for purposes of case evaluation sanctions (MCR 2.403[O][1], [2][c]).

2. COSTS — CASE EVALUATION SANCTIONS — EXPERT WITNESS FEES — TRIAL PREPARATION COSTS.

Expert witness fees incurred in trial preparation may be awarded as actual costs for purposes of case evaluation sanctions (MCR 2.403[O][1], [6][a]).

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Geoffrey N. Fieger*, *Lloyd G. Johnson*, and *Heather A. Jefferson*), for Julia Peterson.

Rutledge, Manion, Rabaut, Terry & Thomas, P.C. (by *Matthew J. Thomas* and *Paul Manion*), for David Fertel, D.O.

Mellon, McCarthy & Pries, P.C. (by *James T. Mellon*), for John R. Schairer, D.O.

Before: SAAD, C.J., and BANDSTRA and HOEKSTRA, JJ.

SAAD, C.J. In this medical malpractice action, plaintiff appeals the trial court's order that granted defendants Dr. David Fertel and Dr. John Schairer's motions to tax costs and for case evaluation sanctions. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEEDINGS

For purposes of the questions on appeal, the parties do not dispute the essential facts of the case. Plaintiff alleged that defendants, Dr. David Fertel, Dr. John Schairer, Dr. Andrew Zazaian, Dr. David Patterson, and Garden City Hospital, negligently failed to timely diagnose and treat plaintiff's decedent, Andrew Peterson. Pursuant to MCR 2.403, case evaluation took place on April 16, 2007, and the panel recommended an award in favor of plaintiff against Dr. Fertel, Dr. Schairer, and the hospital. Thereafter, defendants filed motions for summary disposition and the trial court granted summary disposition to Drs. Fertel and Schairer on May 1, 2007. Plaintiff filed a motion for reconsideration on May 11, 2007, and plaintiff rejected the case evaluation on May 15, 2007, pursuant to MCR 2.403(L)(1).[1] Dr. Fertel also rejected the case evaluation, but Dr. Schairer accepted it. The trial court denied plaintiff's motion for reconsideration in an order entered on June 19, 2007, and, thereafter, plaintiff settled her claims against the remaining defendants.

In October 2007, Drs. Fertel and Schairer filed motions to tax costs and for case evaluation sanctions. The trial court granted the motions and awarded Dr. Fertel $12,425.50 and awarded Dr. Schairer $8,484.28. The awards included costs incurred by the doctors for expert

[1] Plaintiff failed to respond to the case evaluation and, under MCR 2.403(L)(1), a failure to file a written acceptance or rejection within 28 days of the evaluation constitutes a rejection.

witnesses and attorney fees incurred from the date plaintiff rejected the case evaluation.

II. ANALYSIS

A. AWARD OF CASE EVALUATION SANCTIONS

Plaintiff contends that the trial court erred when it awarded case evaluation sanctions to Drs. Fertel and Schairer because the trial court granted their motions for summary disposition before the deadline for acceptance or rejection of the case evaluation award.

As our Supreme Court explained in *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008):

> A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005); *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006). We review for an abuse of discretion a trial court's award of attorney fees and costs. *Wood* [*v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982)]. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation." *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). As this Court further explained in *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006):

> "Well-established principles guide this Court's statutory [or court rule] construction efforts. We begin our analysis by consulting the specific . . . language at issue." *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). This Court gives effect to the rule

> maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning. See *Willett v Waterford Charter Twp*, 271 Mich App 38, 48; 718 NW2d 386 (2006). If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written. See *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005).

The trial court awarded case evaluation sanctions pursuant to MCR 2.403(O), which provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

The purpose of the rule that provides for case evaluation sanctions is "to encourage settlement and deter protracted litigation by placing the burden of litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator's evaluation." *Broadway Coney Island, Inc v Commercial Union Ins Cos*, 217 Mich App 109, 114; 550 NW2d 838 (1996).

The parties do not dispute that Drs. Fertel and Schairer received a "more favorable" result under MCR 2.403(O). Instead, plaintiff claims that case evaluation sanctions are improper because the trial court granted summary disposition to Drs. Fertel and Schairer *before*

plaintiff rejected the case evaluation. Drs. Fertel and Schairer take the position that, because plaintiff's motion for reconsideration remained pending when plaintiff rejected the case evaluation, the trial court's ruling on plaintiff's motion for reconsideration constitutes a "verdict" because it is "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). Plaintiff maintains that the trial court made its dispositive ruling before the rejection and that this rendered the case evaluation irrelevant because Drs. Fertel and Schairer were already dismissed from the case.

The plain language of the MCR 2.403(O) provides that the fee shifting mechanism applies if a party has rejected the case evaluation "and the action proceeds to verdict . . . ." The rule further states that a "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." While plaintiff is correct that the trial court granted Dr. Fertel and Dr. Schairer's motions for summary disposition before plaintiff rejected the evaluation, the rule does not limit its definition of "verdict" to orders following motions for summary disposition.

We hold that the ruling on plaintiff's motion for reconsideration is a "verdict" within the meaning of MCR 2.403(O)(2)(c). It indisputably constitutes a ruling on a motion after plaintiff rejected the case evaluation. The ruling is also a "judgment," which is defined as "[a] court's final determination of the rights and obligations of the parties in a case." *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 220 n 4; 625 NW2d 93 (2000) (quotation marks and citation omitted). And, unlike cases holding that certain orders do not constitute verdicts, this case does not involve an alternative resolution, like settlement or arbitration, that would indi-

cate a mutual decision to avoid further litigation and trial. Plaintiff characterizes the case evaluation as "totally irrelevant" after the grant of summary disposition, but this ignores the plain objective of a motion for reconsideration in this context, which is to call attention to the trial court's alleged error in granting the motion for summary disposition, to urge the reversal of that decision, to keep the action alive against the defendants and, at its essence, to continue the litigation toward trial. Accordingly, granting case evaluation sanctions against plaintiff, who sought to continue the litigation by rejecting the evaluation, fulfills the purpose of the rule, which is to encourage settlement and to deter protracted litigation.[2] For these reasons, we af-

[2] Plaintiff says that she did not attempt to thwart the purpose of the rule by rejecting the case evaluation while the parties were simply awaiting a decision on a motion filed before the deadline for acceptance or rejection of the case evaluation. In *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 34; 666 NW2d 310 (2003), this Court opined that the fee shifting rule applies to judgments entered as a result of a ruling on a motion filed after mediation, because the rule specified it at the time mediation occurred in that case. But the rule was amended in 1997 and, among other changes, the Supreme Court eliminated the reference to a motion filed after mediation, thus negating the suggestion that the rule may not apply when a motion is filed before case evaluation. See 454 Mich cxxviii. Indeed, the court rule does not state that the motion at issue must be filed after the rejection, only that the *ruling* must be made after rejection. MCR 2.403(O)(2)(c).

The change to the rule was recommended by the Supreme Court's Mediation Rule Committee. The report states the following with regard to the change:

> *Current subrule (O)(2)(c) includes in the definition of "verdict" a judgment entered on a motion "filed" after mediation. The Committee concluded that the time of filing of the motion was irrelevant. The rule should be the same if the motion was filed before mediation but for some reason not decided until later.*
>
> *The Committee recommends a second change regarding cases decided on motion after mediation. Its view was that, in general, rulings on dispositive motions should precede mediation. However,*

firm the trial court's grant of case evaluation sanctions to Drs. Fertel and Schairer.

B. AMOUNT AWARDED

Though we review the decision whether to award case evaluation sanctions de novo, we review the amount awarded for an abuse of discretion. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 356; 737 NW2d 807 (2007). We also review for abuse of discretion the amount awarded as reasonable attorney fees. *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002). We hold that the trial court did not abuse its discretion.

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in some courts, cases are submitted to mediation too soon. Discovery is sometimes not complete, and dispositive motions have not been ruled on. This can distort the mediation process, as the mediators' evaluation may be affected by the knowledge that a dispositive motion is pending or is likely to be filed. That is, they may take into account the likelihood of the defendant winning on a motion in evaluating the case. The evaluation might have been quite different if the panel knew that the motion had been denied. This decreases the likelihood that mediation will dispose of the case, either through acceptance of the evaluation or by facilitating settlement.

A number of members favored eliminating motion-based judgments from the definition of "verdict." The majority did not agree with that view. However, though again there was disagreement, the majority thought the judge should be given some discretion not to award costs in the case of decisions on post-mediation motions. The language recommended for new subrule (O)(10) [now subrule O(11)] is based on MCR 2.405(D)(3), which gives similar discretion to the court under the offer of judgment rule. [*Report of Supreme Court Mediation Rule Committee*, 451 Mich 1204, 1223 (1996) (emphasis in original).]

The above discussion confirms that the time of the motion filing it is not relevant under MCR 2.403(O)(2)(c), only that the ruling must occur after case evaluation. The discussion also contemplates that, because the timing of case evaluation and the filing of dispositive motions may undermine the value of the case evaluation process, a plaintiff may ask the trial court to apply subrule O(11), which provides that, "[i]f the 'verdict' is the result of a motion as provided by subrule O(2)(c), the court may, in the interest of justice, refuse to award actual costs." However, plaintiff expressly chose not to request relief under this rule, and we need not address it further.

The trial court awarded Drs. Fertel and Schairer case evaluation sanctions under MCR 2.403(O)(1) and (6), which provide:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> * * *
>
> (6) For the purpose of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

Thus, under MCR 2.403(O), Drs. Fertel and Schairer were entitled to collect from plaintiff their actual costs because plaintiff rejected the case evaluation and both doctors received a more favorable result.

As this Court explained in *Campbell v Sullins*, 257 Mich App 179, 203-204; 667 NW2d 887 (2003):

> Case-evaluation sanctions include actual costs. MCR 2.403(O)(1). The term "actual costs" is defined, in part, as "those costs taxable in any civil action." MCR 2.403(O)(6)(a). Expert-witness fees qualify as "actual costs" under MCR 2.403(O). *Elia* [*v Hazen*, 242 Mich App 374, 379-380; 619 NW2d 1 (2000)].

Plaintiff asserts that the trial court should not have awarded any expert witness fees because the expert witnesses did not testify in a deposition or at trial. However, the statute addressing expert witness fees

does not state that the expert must provide testimony in order to recover expert witness fees:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly. [MCL 600.2164(1).]

Indeed, it is well settled that, regardless of whether the expert testifies, the prevailing party may recover fees for trial preparation. *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674, 691; 513 NW2d 217 (1994); *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989). As the Court in *Herrera* explained:

> The language "is to appear" in [MCL 600.2164] applies to the situation at bar in which the case was dismissed before defendant had a chance to call its proposed expert witnesses at trial. Furthermore, the trial court was empowered in its discretion to authorize expert witness fees which included preparation fees.

The reason for the rule is succinctly set forth in *State Hwy Comm'r v Rowe*, 372 Mich 341, 343; 126 NW2d 702 (1964):

> It is not amiss to observe generally that few expert witnesses could testify properly or effectively without careful preparation and, on occasion, without necessary disbursement in the course of such preparation. For instance any medical or legal expert, testifying without preparation and confronted by a cross-examiner of competence, would

> find little comfort in the witness box. More important, his testimony would provide but little light for the trier or triers of fact.

For the above reasons, we affirm the trial court's award of expert witness fees to both Drs. Fertel and Schairer.

Plaintiff also challenges the amount of attorney fees awarded by the trial court and asks this Court to remand the case for an evidentiary hearing. As noted, Drs. Fertel and Schairer were entitled to "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b). Plaintiff's counsel conceded that Drs. Fertel and Schairer are entitled to attorney fees, but now argues, for the first time, that the trial court should conduct a hearing to determine whether the amount of fees is reasonable. Defendants submitted evidence to support the trial court's award and, while a trial court must hold an evidentiary hearing when the amount of attorney fees is challenged and when a hearing is requested, *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005), plaintiff did not, despite ample opportunity to do so. Accordingly, we reject plaintiff's claim and decline to remand for further proceedings.

Affirmed.

AUTO-OWNERS INSURANCE COMPANY v
FERWERDA ENTERPRISES, INC

Docket No. 277574. Submitted October 14, 2008, at Grand Rapids. Decided April 9, 2009, at 9:05 a.m.

Auto-Owners Insurance Company brought an action in the Mason Circuit Court, seeking a determination regarding its liability to its insured, Ferwerda Enterprises, Inc., doing business as Holiday Inn Express Ludington (Holiday Inn), under a commercial general liability insurance policy for injuries sustained by Daryl and Melissa Bronkema and their three minor children. The Bronkemas were exposed in Holiday Inn's indoor-pool building to gas from chlorine and muriatic acid that had formed in the system that filters, heats, and sanitizes the pool water. Holiday Inn filed a counterclaim, alleging breach of contract, estoppel, and waiver and seeking attorney fees and penalty interest. The court, Richard I. Cooper, J., granted summary disposition in favor of Holiday Inn, determining that the Bronkemas' personal injury claims fell within the scope of the policy, specifically the heating equipment exception to the policy's pollution exclusion. The court entered a judgment in favor of Holiday Inn on its breach of contract claim and its claim that Auto-Owners owed it a duty to defend and indemnify against the Bronkemas' underlying personal injury lawsuit and awarded costs and attorney fees. The court also awarded the Bronkemas attorney fees and costs and awarded penalty interest to Holiday Inn and the Bronkemas. Auto-Owners appealed, and Holiday Inn cross-appealed with regard to the dismissal of its counterclaims based on waiver and estoppel.

The Court of Appeals *held*:

1. The language of the entire contract of insurance, including the building heating equipment endorsement, fairly admits an interpretation that the building heating equipment language encompasses the integrated heating, filtration, and treatment system in the Holiday Inn's pool room and an interpretation that it does not. Because an ambiguity exists, the insurance contract qualifies as ambiguous, and a fact-finder must ascertain its meaning. The trial court erred by determining as a matter of law that the building heating equipment endorsement unequivocally provided coverage under the policy.

2. There is a question of fact to be determined by the fact-finder with regard to whether subsection f(1)(d)(i) of the policy, which excludes coverage in certain situations where pollutants are brought onto the hotel's premises for operational purposes, precludes coverage in this case.

3. There is no merit to Holiday Inn's waiver claim. Holiday Inn cannot establish any reasonable reliance to support its claim that Auto-Owners should be deemed estopped from denying coverage for the Bronkemas' bodily injury claims.

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

O'CONNELL, P.J., dissenting, stated that the endorsement language is not ambiguous and clearly provides coverage under the facts of this case. The orders of the trial court should be affirmed.

Gross & Nemeth, P.L.C. (by *James G. Gross*), and *Lincoln G. Herweyer, P.C.* (by *Lincoln G. Herweyer*), for Auto-Owners Insurance Company.

Varnum, Riddering, Schmidt & Howlett LLP (by *Mark S. Allard* and *April H. Sawhill*), for Ferwerda Enterprises, Inc.

Gee & Longstreet LLP (by *Bruce W. Gee*) for Daryl, Jackson T., Caleb A., Savannah J., and Melissa Bronkema.

Before: O'CONNELL, P.J., and BANDSTRA and GLEICHER, JJ.

GLEICHER, J. In this insurance contract dispute, plaintiff appeals as of right a circuit court order granting defendant Ferwerda Enterprises, Inc. (Holiday Inn), summary disposition of plaintiff's declaratory judgment action. The circuit court also granted Holiday Inn summary disposition with respect to its claim that plaintiff owed it a duty to defend and indemnify against the underlying personal injury lawsuit of defendants Daryl Bronkema, individually and as next friend of Jackson T., Caleb A., and Savannah J. Bronkema,

minors, and Melissa Bronkema. The circuit court then awarded Holiday Inn damages and awarded Holiday Inn and the Bronkemas attorney fees, costs, and penalty interest. We reverse the circuit court's orders with regard to these matters and remand to the circuit court for further proceedings consistent with this opinion.

Holiday Inn cross-appeals as of right the circuit court's order dismissing its counterclaims based on waiver and estoppel. We affirm the circuit court's order dismissing these claims.

I. UNDERLYING FACTS AND PROCEDURE

The Holiday Inn Express Ludington offers its guests the use of a swimming pool, located in a building attached to the hotel. The equipment used to operate the pool includes a water pump, polyvinyl chloride (PVC) lines that carry pool water to and from the water pump, a boiler that heats the pool water, and a device called a Rola-Chem that dispenses chemicals into the pool water. The pump propels pool water through the PVC lines into the filter and then into the boiler, which heats the water. From the boiler, the warmed water travels to the Rola-Chem, which injects chlorine and muriatic acid, and the pump then pushes the warmed, chemically treated water back into the pool. An affidavit signed by Jeffrey Curtis, Holiday Inn's general manager, describes the mechanical equipment as "an integrated system that filters, heats, and sanitizes the indoor pool water."

The boiler used to heat the pool water serves as the primary source of heat for the entire pool building. Curtis's affidavit explains, "There are no heat ducts from any source in the pool pump room. The sole source of heat for the pump room is the heat given off by the integrated pipe and boiler system." Gerald Gregorski, a mechanical engineer, also supplied an affidavit, which attested that the

pool "lose[s] heat through the processes of convection and evaporation," and as a result heats the air space in the building housing the pool. Gregorski's affidavit continues, "Because of heat loss through convection and evaporation, pools require the use of a heater to maintain a constant water temperature. A system that pumps pool water into a boiler to heat the water and pumps the heated water back into the pool heats the building where the pool is located." Plaintiff retained engineer Michael T. Williams to inspect the Holiday Inn's pool equipment. At his deposition, Williams conceded that "the only source of heat for the pool building at issue in this litigation in the Holiday Inn Express that requires the use of equipment is the heating of the pool water by the boiler in the utility room." Williams expressed that apart from solar heat entering the pool room's windows, he did not know of any source of heat besides the boiler.

On April 9, 2004, an elbow in the PVC line "blew out." A Holiday Inn maintenance man repaired it, but did not turn off the Rola-Chem "feeder system" while completing the repair. Gases created by the continuously flowing chlorine and muriatic acid formed in the PVC lines. When the maintenance man successfully repaired the elbow and powered the system back on, a cloud of the gas traveled through the PVC lines, entered the pool area, and injured the Bronkema family.

Plaintiff filed a declaratory judgment action seeking a determination whether Holiday Inn's insurance policy with plaintiff covered the Bronkemas' claims for personal injuries.[1] Holiday Inn filed a counterclaim alleging

[1] Plaintiff initially paid about $10,000 toward the Bronkemas' medical bills. But after the parties ultimately failed to reach a settlement, the Bronkemas commenced a tort action against Holiday Inn. When plaintiff received the Bronkemas' lawsuit, it concluded that their claims were excluded from coverage pursuant to the policy's pollution exclusion. Plaintiff mailed Holiday Inn a letter containing its opinion that the policy did not

breach of contract, estoppel, and waiver and requesting attorney fees and penalty interest. Pursuant to MCR 2.116(C)(10), plaintiff moved for summary disposition, contending that Holiday Inn's policy did not cover the Bronkemas' injuries. Holiday Inn then filed a cross-motion for partial summary disposition under MCR 2.116(C)(8), (9), and (10), on the basis that an endorsement to the policy's building heating equipment exclusion afforded coverage for the Bronkemas' personal injuries.

The circuit court determined as a matter of law that the Bronkemas' personal injury claims fell within the scope of Holiday Inn's policy with plaintiff, specifically the "heating equipment exception" to the policy's pollution exclusion, and thus granted summary disposition of the declaratory judgment action in favor of Holiday Inn. Ultimately, after multiple summary disposition and other hearings, the circuit court entered a final judgment awarding Holiday Inn nearly $529,000 on its breach of contract claim, granting Holiday Inn more than $186,000 in attorney fees and costs, awarding the Bronkemas more than $71,000 in attorney fees and costs, and granting all defendants "penalty interest pursuant to [MCL 500.2006]."

II. STANDARD OF REVIEW AND GOVERNING LEGAL PRINCIPLES

Because the circuit court considered documentation beyond the pleadings in granting Holiday Inn summary disposition, it appears that the court ruled under MCR 2.116(C)(10), which tests a claim's factual support. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue

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cover the Bronkemas' claims, Holiday Inn expressed its disagreement, and plaintiff filed the declaratory judgment action.

regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, *supra* at 621. "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*, *supra* at 183.

"Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). This Court applies to insurance contracts the same contract construction principles that govern any other type of contract, and thus begins by considering the language of the parties' agreement to determine their intent. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005).

> Accordingly, an insurance contract should be read as a whole and meaning should be given to all terms. The policy application, declarations page of policy, and the policy itself construed together constitute the contract. The contractual language is to be given its ordinary and plain meaning. An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. "[U]nless a contract provision violates law or one of the traditional [contract] defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equi-

ties struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. [*Id*. at 715 (citations omitted).]

III. THE INSURANCE POLICY

Holiday Inn's form "Commercial General Liability" insurance policy, issued by plaintiff, included the following pollution exclusion:

> This insurance does not apply to:
>
> * * *
>
> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
>
> (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
>
> (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or
>
> (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
>
> (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

* * *

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Holiday Inn's policy included an endorsement entitled "Amendment of Pollution Exclusion—Exception for Building Heating Equipment." Prefacing the title appear the words, "This endorsement changes the policy. Please read it carefully." Below the title, the endorsement states, "This endorsement modifies insurance provided under the COMMERCIAL GENERAL LIABILITY COVERAGE FORM." The endorsement deleted subparagraph f(1)(a) of the pollution exclusion, and replaced it with other language:

Under SECTION I—COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, exclusion f., subparagraph (1)(a) is deleted and replaced by the following:

This insurance does not apply to:

f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured. However, this subparagraph, (a), does not apply to "bodily injury" if sustained within a building at such premises, site or location and caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises, site or location.

IV. ANALYSIS

A. THE BUILDING HEATING EQUIPMENT EXCEPTION

The circuit court ruled as a matter of law that the building heating equipment endorsement unequivocally provided coverage under the policy. In *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 354; 559 NW2d 93 (1996), this Court construed an "absolute pollution exclusion" similar to the instant pollution exclusion and observed, "There is a definite national trend to construe such exclusions as clearly and unambiguously precluding coverage for claims arising from pollution. . . . Most courts that have examined similar exclusions have concluded that they are clear and unambiguous and are just what they purport to be—absolute."

Holiday Inn's policy's definition of the term "pollution" contributes to the absolute character of the exclusion, given that it includes any "irritant or contaminant" in liquid, solid, or gaseous form. This broad definition expands the reach of the pollution exclusion well beyond traditional environmental pollutants and includes an enormous variety of substances.[2] However, the instant policy's building heating equipment exception renders the pollution exclusion less "absolute" because it excises the pollution exclusion from the form policy when a person in the insured's building suffers bodily injury "caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises . . . ." The building heating equipment exception thus serves to resurrect coverage otherwise unavailable under the broad pollution exclusion.

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[2] In *Western Alliance Ins Co v Gill*, 426 Mass 115, 118-120; 686 NE2d 997 (1997), the Supreme Judicial Court of Massachusetts presented a comprehensive list of the nontraditional "pollutants" that courts have examined under the pollution exclusion, including fumes from new carpeting, odors from cement used to install a plywood floor, and photographic chemicals.

"[E]ndorsements often are issued to specifically grant certain coverage or remove the effect of particular exclusions. Thus, such an endorsement will supercede [sic] the terms of the exclusion in question." 4 Holmes' Appleman on Insurance (2d ed), § 20.1, p 156. "When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail." *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990). "[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between provisions in the main policy and the endorsement, the endorsement prevails." *Nationwide Mut Ins Co v Schmidt*, 307 F Supp 2d 674, 677 (WD Pa, 2004).

The building heating equipment endorsement extends coverage for bodily injury arising from the discharge or dispersal of pollutants where vapor, smoke or fumes generated by building heating equipment cause an injury. The circuit court determined that the harmful gases in this case emanated from the integrated mechanical system that heated the pool building. Plaintiff endeavors to avoid application of the endorsement by contending that the "chlorine injector (i.e. the Rola-Chem feeder), *not* the pool water heater, was the source of the toxic fumes." (Emphasis in original.) But the evidence, viewed in the light most favorable to Holiday Inn, gives rise to a genuine issue of material fact concerning whether the gases formed within the PVC lines, not within the Rola-Chem feeder, and dispersed only after the maintenance man repowered the entire pool filtration and heating system; when heated water eventually flowed into the pool, the toxic gas accompanied the water.

The circuit court further found that because the pool building's heat derived from the heated water delivered to

the pool through the equipment that leaked the chlorine gas, the pollutant emanated from "equipment used to heat a building." We recognize, as plaintiff maintains, that the building heating equipment endorsement usually applies to pollution occurrences emanating from a furnace. But plaintiff does not dispute that in this case the pool's heating equipment provided the only mechanical source of heat for the pool room. And under the circumstances presented in this case, we find equally plausible that the building heating equipment endorsement applies to the lone mechanical source of heat in Holiday Inn's pool room, specifically the integrated heat, filtration, and treatment system demonstrated by some evidence supplied by Holiday Inn.

In summary, we conclude that in this case the language of the entire contract of insurance, including the building heating equipment endorsement, fairly admits an interpretation that the building heating equipment language encompasses the apparently integrated heating, filtration, and treatment system in Holiday Inn's pool room and an interpretation that it does not. *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982); *Royal Prop Group*, *supra* at 715. Because an ambiguity exists with respect to whether the building heating equipment endorsement encompasses the heating, filtration, and treatment system in Holiday Inn's pool room, the parties' insurance contract qualifies as ambiguous, and a fact-finder should ascertain its meaning. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003).

B. INSURANCE POLICY SUBSECTION f(1)(d)(i)

Plaintiff also urges that subsection f(1)(d)(i) excludes coverage under the facts of this case, in which Holiday Inn brought chlorine and muriatic acid, both "pollutants," onto hotel premises for operational purposes. Subsection

f(1)(d)(i) excludes coverage for bodily injury arising from the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants":

> (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
>
> (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor[.]

The pollution exclusion defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

According to plaintiff, the fact that the insured brought the liquid chlorine and muriatic acid onto the premises in connection with the operation of the swimming pool brings into operation the pollution exclusion in subsection f(1)(d)(i). Deposition testimony did support that Holiday Inn purchased large containers of liquid chlorine and muriatic acid to clean its pool. This evidence reasonably tends to establish that Holiday Inn brought to its premises chemicals within the broad policy definition of "pollutants" that ultimately injured the Bronkemas. This situation gives rise to a reasonable inference that the exclusion in f(1)(d)(i) precludes recovery for the Bronkemas' bodily injuries.

Whether substances such as chlorine and muriatic acid generally qualify as pollutants remains a subject of debate in caselaw construing absolute pollution exclusions.[3] But, in this case, a reasonable position also exists

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[3] For example, in *Pipefitters Welfare Ed Fund v Westchester Fire Ins Co*, 976 F2d 1037, 1043 (CA 7, 1992), the United State Court of Appeals for the Seventh Circuit explored the notion that chlorine could be fairly characterized as a pollutant:

that neither chlorine nor muriatic acid, the liquid "pollutants" that Holiday Inn brought onto its premises, injured the Bronkemas. Some evidence presented to the circuit court reasonably tends to establish that a toxic combination of the two chemicals inside PVC piping yielded a harmful gas that dispersed into the swimming pool area. Under this view of the evidence, the gas or vapor constituted the "pollutant" that caused bodily injury to the Bronkemas.

In summary, a rational person viewing the circumstances of this case in light of the policy language in subsection f(1)(d)(i) could reasonably conclude either that no coverage exists because the Bronkemas suffered injury from pollutants that Holiday Inn brought onto its premises or that plaintiff owes coverage because Holiday Inn did not import onto its premises the toxic gas cloud that injured the Bronkemas. In this situation,

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> Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

In *MacKinnon v Truck Ins Exch*, 31 Cal 4th 635, 650; 3 Cal Rptr 3d 228; 73 P3d 1205 (2003), the California Supreme Court observed, "Virtually any substance can act under the proper circumstances as an 'irritant or contaminant.' " Regarding the "absurd results" postulated in *Pipefitters*, the California Supreme Court commented:

> The hypothetical allergic reaction to pool chlorine, proposed by the *Pipefitters* court, illustrates this absurdity. Chlorine certainly contains irritating properties that would cause the injury. Its dissemination throughout a pool may be literally described as a dispersal or discharge. Our research reveals no court or commentator that has concluded such an incident would be excluded under the pollution exclusion. [*Id*.]

a fact-finder must make the relevant determination regarding the scope of coverage. *Klapp*, *supra* at 469.

V. CROSS-APPEAL BY HOLIDAY INN

Holiday Inn contends that the trial court erred by dismissing its estoppel and waiver counterclaims against plaintiff. We consider de novo the application of legal doctrines such as waiver and estoppel. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).

Waiver signifies "a voluntary and intentional abandonment of a known right." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). Holiday Inn contends that in denying coverage plaintiff waived any potential reliance on any pollution exclusions apart from subsection f(1)(a), and any right to challenge the applicability of the building heating equipment endorsement. Holiday Inn's argument focuses on a letter written by plaintiff on August 17, 2005, which denied a coverage obligation, specifically quoting pollution exclusion subsections f(1)(a) and (d)(i); advised Holiday Inn that if it disagreed with plaintiff's denial, plaintiff would initiate "a declaratory judgment action"; and concluded with the following language:

> *All rights, terms, conditions and exclusions in your policy are in full force and effect and are completely reserved*. No action by any employee, agent, attorney, or other person on behalf of Auto-Owners Insurance Company; or hired by Auto-Owners Insurance Company on your behalf; shall waive or be construed as having waived any right, term condition, exclusion or any other provision of the policy. [Emphasis added.]

Plaintiff's letter explicitly referenced pollution exclusion subsection f(1)(d)(i), which the circuit court addressed. Furthermore, the clear and unambiguous language emphasized above reflects plaintiff's express reser-

vation of its rights under all provisions of Holiday Inn's policy, and Holiday Inn presented no evidence suggesting that plaintiff ever retreated from this position. We thus reject Holiday Inn's waiver claim as lacking merit.

Holiday Inn lastly suggests that the circuit court should have deemed plaintiff estopped from denying coverage for the Bronkemas' bodily injury claims. Holiday Inn emphasizes on appeal that plaintiff initially paid bodily injury benefits to the Bronkemas and insists that plaintiff undisputedly "failed to give reasonable notice of its defense that the [building heating equipment] Endorsement was inapplicable."

> For equitable estoppel to apply, the [party raising the defense] must establish that (1) the [other party's] acts or representations induced the [party raising the defense] to believe that the pollution exclusion clause would not be enforced and that coverage would be provided, (2) the [party raising the defense] justifiably relied on this belief, and (3) the [party raising the defense] was prejudiced as a result of its reliance on its belief that the clause would not be enforced and coverage would be provided. [*Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 204; 702 NW2d 106 (2005) (opinion by CAVANAGH, J.).]

Estoppel usually does not expand an insurance policy's express coverage absent egregious, inequitable action by the insurer. *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999).

In light of plaintiff's clear and unambiguous explanation of the bases for its denial of coverage and its reservation of rights with respect to other policy provisions, we reject that Holiday Inn can establish any reasonable reliance in this case. The August 2005 letter clearly placed Holiday Inn, from the outset of this litigation, on notice of plaintiff's belief that the pollution exclusion provisions precluded recovery arising from the Bronkemas' bodily injuries. Furthermore, plaintiff's initial payment of the Bronkemas' medical bills does not

alter our analysis because "[t]he fact that an insurer has paid some benefits to an insured party does not preclude it from later asserting that it owes nothing" when a lawsuit over coverage arises. *Calhoun v Auto Club Ins Ass'n*, 177 Mich App 85, 89; 441 NW2d 54 (1989).

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

BANDSTRA, J., concurred.

O'CONNELL, P.J. (*dissenting*). I respectfully dissent.

The majority determines that the endorsement to the Holiday Inn's insurance policy is ambiguous. I disagree. In my opinion, the endorsement is well written and perfectly clear. The endorsement provides coverage for bodily injury caused by smoke or fumes from equipment used to heat a building. All parties to this action agree that the boiler and the attachments to the boiler were used to heat the pool building. The parties also agree that smoke, fumes, or vapor from this heating unit and its attachments may have been responsible for the bodily injury sustained by the individual defendants. Applying the endorsement language to the facts of this case, it is clear that insurance coverage exists for fumes or vapor emanating from this heating unit.[1] I would affirm and adopt as my own the learned decision of the trial court.

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[1] One issue presented to this Court is whether cleaning agents such as chlorine, muriatic acid, bleach detergents, drain cleaner, or other types of disinfectants are pollutants within the meaning of the Holiday Inn's commercial insurance policy. I conclude that this issue is not outcome-determinative in this case and its resolution is best left for another day. However, I agree with the majority's statement in footnote 3 of its opinion and the indication that to date no court has classified chlorine as a pollutant when it has been used to clean swimming pools. I concur with the majority's opinion that the context in which a product is used may be useful in determining whether the product is a pollutant. Stated another way, the use of a product may make the terms of an insurance contract ambiguous to the ordinary reader.

The conceptual difficulty that bedevils presentation of this issue in the present case is attributable to the use of the term "pollutant" in the insurance policy and the common understanding of that term among most people in our society. In particular, the use of this term in the contract leads to a deceptively simple question: What is a pollutant? In this case, the insurance policy provides a definition: "pollutants" are "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." But this definition merely requires us to re-pose our original question and ask, What is an irritant or a contaminant?

Years ago, this Court, referencing an opinion by the United State Supreme Court, stated:

> The phenomenon of identical words meaning different things, even in a single document, such as an insurance contract or statute, let alone in two separate documents, is neither unique to the case at bar nor to the elasticity and inherent limitations of the English language. *Nat'l Organization for Women, Inc v Scheidler*, [510] US [249, 258]; 114 S Ct 798; 127 L Ed 2d 99, 109 (1994) (recognizing that the statutory term "enterprise" in 18 USC 1962 [a] and [b] does not import an economic motive that is required in conjunction with the term "enterprise" in [18 USC] 1962[c] because "enterprise" was used in two different senses in the different subparagraphs). [*Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 341; 535 NW2d 583 (1995).]

The fact that one word may have multiple meanings depending on its use only adds to the confusion. Moreover, lower courts have been instructed to discern the meaning of a word by examining it carefully in its proper context. In *Tyler v Livonia Pub Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999), our Supreme Court stated:

> Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: "[i]t is known from its associates," see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting. *State ex el Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 249; 240 NW2d 460 (1976), quoting *People v Goldman*, 7 Ill App 3d 253, 255; 287 NE2d 177 (1972).[9]

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[9] United States Supreme Court Justice Antonin Scalia has clarified the meaning of this rule by the example he uses in his recent book, *A Matter of Interpretation*. We repeat it here: "If you

tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else." (Princeton, New Jersey: Princeton University Press, 1997), p 26.

The idea of a word meaning something different in light of the surrounding language relates closely to the issue raised by this case: In what context is a chemical a pollutant? By defining a pollutant as an irritant or a contaminant, the insurance policy links a chemical's status as a pollutant with its desirability in a particular context. But this definition leads to yet another question: Is it possible to define a product as a pollutant for some purposes and as a non-pollutant for other purposes? The insurance policy precludes insurance coverage if "the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor." But is a chemical that is brought to the premises for a desired purpose a "pollutant"? When does a chemical become a pollutant?

I offer this example. Under some insurance policies, fluoride would be considered a pollutant. If fluoride were dumped in large quantities into a stream, lake, or unapproved landfill, state and federal agencies would complain, the guilty party would be prosecuted, and any insurance policy would exclude coverage for the resulting harm to the environment. In this case, fluoride would be a contaminant. However, if a city or municipality were to add fluoride to its municipal water system, few people would claim that the city or municipality had polluted the drinking water supply, even though cities are prohibited from adding pollutants to drinking water. In certain amounts and among certain populations, the addition of this chemical into the water serves a purpose (preventing tooth decay) and is desired. Flouride, in this situation, would not contaminate the water supply and would not be a pollutant.

A similar situation exists in this case. The Holiday Inn typically added chlorine to pool water to serve as a disinfectant. The chlorine did not contaminate the water, because its presence served a purpose and was desirable. However, if water containing the same concentration of chlorine were served to guests to drink, that water would be considered contaminated and, therefore, polluted, because it contained a substance that was not desired for the water's intended purpose, namely, drinking. The question whether this water is contaminated and, therefore, polluted depends on the surrounding circumstances. Accordingly, the term "pollutant" is ambiguous under the terms of this policy.

I. ENDORSEMENT LANGUAGE

The Holiday Inn's insurance policy included an endorsement entitled, "Amendment of Pollution Exclusion—Exception for Building Heating Equipment." Prefacing the title appear the words, "This endorsement changes the policy. Please read it carefully." Below the title, the endorsement states, "This endorsement modifies insurance provided under the COMMERCIAL GENERAL LIABILITY COVERAGE FORM." The endorsement deleted subparagraph f(1)(a) of the pollution exclusion provision and replaced it with other language:

> Under SECTION I—COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, exclusion f., subparagraph (1)(a) is deleted and replaced by the following:
>
> This insurance does not apply to:
>
> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured. However, this subparagraph, (a), does not apply to "bodily injury" if sustained within a building at such premises, site or location and caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises, site or location.

II. FACTS

As the majority states in its opinion, the

> boiler used to heat the pool water serves as the primary source of heat for the entire pool building. Curtis's affidavit explains, "There are no heat ducts from any source in the pool pump room. The sole source of heat for the pump room is the heat given off by the integrated pipe and boiler

system." Gerald Gregorski, a mechanical engineer, also supplied an affidavit, which attested that the pool "lose[s] heat through the processes of convection and evaporation," and as a result heats the air space in the building housing the pool. Gregorski's affidavit continues, "Because of heat loss through convection and evaporation, pools require the use of a heater to maintain a constant water temperature. A system that pumps pool water into a boiler to heat the water and pumps the heated water back into the pool heats the building where the pool is located." Plaintiff retained engineer Michael T. Williams to inspect the Holiday Inn's pool equipment. At his deposition, Williams conceded that "the only source of heat for the pool building at issue in this litigation in the Holiday Inn Express that requires the use of equipment is the heating of the pool water by the boiler in the utility room." Williams expressed that apart from solar heat entering the pool room's windows, he did not know of any source of heat besides the boiler. [*Ante* at 245-246.]

III. CONCLUSION

Endorsement f(1)(a) of the modified pollution exclusion provision clearly provides coverage if bodily injury is "caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises, site or location." The facts indicate that the boiler and attachments used to heat the pool constituted the sole heating unit for the pool building and, therefore, was "equipment used to heat [the] building." In my opinion, the endorsement provided coverage for this unfortunate occurrence.[2]

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[2] Plaintiff also argues that subsection f(1)(d)(i) excludes coverage under the facts of this case because the Holiday Inn brought chlorine and muriatic acid, which it claims are both "pollutants," onto the hotel premises for operational purposes. Although these chemicals add a different dimension to the equation, their presence is not outcome-determinative to this issue. All parties appear to agree that if smoke, vapor, or fumes had emanated from a traditional heating unit (such as a

I would affirm the orders of the trial court.

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regular boiler or furnace) instead of a boiler used to heat a pool, coverage would exist under the policy. In my opinion, this is a distinction without a difference. Both the furnace and the boiler require either gas or fuel oil to operate efficiently. This endorsement would nullify itself if plaintiff were allowed to disclaim coverage because the Holiday Inn brought gas or fuel oil (which could also be considered pollutants) onto the hotel premises for operational use. The chemicals did not cause the injury; rather, the fumes emanating from the heating unit did.

Also, I note that if an endorsement is in conflict with an exclusion, the terms of the endorsement prevail. As the majority states in its opinion:

> [E]ndorsements often are issued to specifically grant certain coverage or remove the effect of particular exclusions. Thus, such an endorsement will supercede [sic] the terms of the exclusion in question. When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail. [Endorsements] by their very nature are designed to trump general policy provisions, and where a conflict exists between provisions in the main policy and the endorsement, the endorsement prevails. [*Ante* at 252 (quotation marks and citations omitted).]

In my opinion, the endorsement prevails over the exclusion in subsection f(1)(d)(i).

MARILYN FROLING REVOCABLE LIVING TRUST v
BLOOMFIELD HILLS COUNTRY CLUB

Docket Nos. 275580, 277438, and 278383. Submitted December 9, 2008, at Detroit. Decided April 9, 2009, at 9:10 a.m.

The Marilyn Froling Revocable Living Trust brought an action in the Oakland Circuit Court against the Bloomfield Hills Country Club, Alan and Marilynne Kiriluk, Roger B. and Barbara Smith, Gregg and Cindi Williams, the city of Bloomfield Hills, and others, seeking damages arising out of the flooding of the plaintiff's residential property in Bloomfield Hills. The Kiriluks, Smiths, and Williamses made an offer to stipulate the entry of a judgment, to which the plaintiff did not respond. The court, Fred M. Mester, J., granted summary disposition in favor of the city, ruling that the doctrine of governmental immunity barred the claim against the city and that the plaintiff had failed to properly allege its inverse condemnation claim against the city. The court also granted summary disposition in favor of the Kiriluks, Smiths, and Williamses after determining that the three-year period of limitations had expired before the plaintiff brought its action. The court awarded attorney fees and costs to the Kiriluks, Williamses, and Smiths under the offer of judgment court rule, MCR 2.405. The plaintiff appealed the orders granting summary disposition to the city and the Kiriluks, Williamses, and Smiths and awarding the Kiriluks, Williamses, and Smiths attorney fees and costs under MCR 2.405. The plaintiff also appealed separately the parts of the order awarding the Kiriluks attorney fees and costs related to the second of two law firms that represented the Kiriluks (Potter, DeAgostino, Campbell & O'Dea) and awarding the Kiriluks, Williamses, and Smiths attorney fees and costs related to representation provided to them by Honigman Miller Schwartz and Cohn LLP. The Kiriluks, Williamses, and Smiths cross-appealed with regard to the attorney fees and costs awards. The appeals were consolidated.

The Court of Appeals *held*:

1. The Michigan Supreme Court has completely and retroactively abrogated the common-law "continuing wrongs" doctrine in Michigan, including in nuisance and trespass cases. Therefore, the plaintiff cannot rely on the doctrine to save its claims.

2. The facts show that the plaintiff's last claim first accrued in June 2001. The plaintiff's claims were time-barred because they were not filed by June 2004. The trial court properly granted summary disposition in favor of the Kiriluks, Williamses, and Smiths on the ground that the claim was not filed within the three-year period of limitation provided in MCL 600.5805(10).

3. The trial court did not err by granting the Williamses and the Smiths summary disposition. The plaintiff failed to support its claim that summary disposition was premature by identifying a disputed issue, supporting that issue with independent evidence, and offering an affidavit under MCR 2.116(H) to support its contention.

4. The trial court did not err by granting summary disposition in favor of the city on the ground of governmental immunity. The plaintiff waived any argument that a sewage disposal system event exception to governmental immunity applied in this case.

5. The plaintiff failed to allege any affirmative action by the city directed at the plaintiff's property. The trial court did not err by dismissing the inverse condemnation claim against the city.

6. The offer of judgment made by the Kiriluks, Williamses, and Smiths was actually an attempt to enter a stipulated order of dismissal. The offer failed to meet the requirements for an offer of judgment under MCL 2.405(A)(1). The trial court erred by concluding that the Kiriluks, Williamses, and Smiths were entitled to an award of attorney fees and costs under MCL 2.405. The parts of the trial court's orders awarding such costs and attorney fees must be reversed.

Affirmed in part and reversed in part.

MURPHY, P.J., concurring, wrote separately to state that there is no point in citing unpublished opinions in the majority's opinion when published opinions with precedential value exist.

1. NEGLIGENCE — LIMITATION OF ACTIONS — CONTINUING-WRONGS DOCTRINE.

The Supreme Court, in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263 (2005), and its progeny completely and retroactively abrogated the common-law "continuing wrongs" doctrine in Michigan jurisprudence, including in nuisance and trespass cases.

2. LIMITATION OF ACTIONS — ACCRUAL OF ACTIONS — NEGLIGENCE.

A plaintiff may not bring an action to recover damages for injury to property unless, after the claim first accrued, the action is commenced within three years after the time of the injury; a claim

accrues at the time the "wrong" upon which the claim is based was done regardless of the time when damage results; the "wrong" is done when the plaintiff is harmed by the negligent act rather than when the defendant acted negligently (MCL 600.5805[1], [10]; 600.5827).

3. MOTIONS AND ORDERS — SUMMARY DISPOSITION — DISCOVERY COMPLETION BEFORE SUMMARY DISPOSITION.

Summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete; the question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position; the party claiming that summary disposition is premature must identify a disputed issue and support that issue with independent evidence by offering the affidavit required by MCR 2.116(H) and probable testimony to support its contentions.

4. JUDGMENTS — OFFERS OF JUDGMENT — SETTLEMENT OFFERS — FINAL ADJUDICATION ON THE MERITS — RES JUDICATA.

A "judgment," as contemplated by the court rule regarding offers to stipulate entry of a judgment, is one that has all the attributes of a judgment after full litigation, is considered a final adjudication on the merits, and implicates the doctrine of res judicata; an offer of settlement is not the same as an offer of judgment (MCR 2.405).

Mark Granzotto, P.C. (by *Mark Granzotto*), for the Marilyn Froling Revocable Living Trust.

Secrest Wardle (by *William P. Hampton* and *Shannon K. Ozga*) and *Marcelyn Stepanski* for the city of Bloomfield Hills.

Potter, DeAgostino, O'Dea & Patterson (by *Steven M. Potter* and *Rick J. Patterson*) for Alan and Marilynne Kiriluk.

Honigman Miller Schwartz and Cohn LLP (by *Peter M. Alter* and *Michael P. Hindelang*) for Roger B. and Barbara Smith and Gregg and Cindi Williams.

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

PER CURIAM. These consolidated appeals arise out of flooding on residential property located on Rathmor Road in the city of Bloomfield Hills. In Docket No. 275580, plaintiff Marilyn Froling Revocable Living Trust (the Froling Trust) appeals as of right the trial court's December 21, 2006, order granting the city of Bloomfield Hills (the city) and Alan and Marilynne Kiriluk, Roger and Barbara Smith, and Gregg and Cindi Williams (collectively, the neighbors) summary disposition and the trial court's ruling that the neighbors were entitled to attorney fees and costs under MCR 2.405. In Docket No. 277438, the Froling Trust appeals as of right the trial court's March 23, 2007, order awarding the Kiriluks attorney fees and costs. In Docket No. 278383, the Froling Trust appeals as of right the trial court's May 9, 2007, order awarding the neighbors attorney fees and costs, and the neighbors cross-appeal that order. We affirm in part and reverse in part.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE FLOODING OF THE FROLINGS' PROPERTY

In 1987, Harold Warner owned two adjacent lots on Rathmor Road in Bloomfield Hills, Michigan. Warner lived in a house on one of the lots, lot 6. The other lot, directly to the east, lot 5, was undeveloped. The Kiriluks purchased lot 5 in January 1987. And in June 1987, William and Marilyn Froling purchased lot 6. William Froling, an experienced real estate developer, met with Warner, walked around the property, and inspected the catch basins and water drainage system. The Frolings purchased the property "as is."

In 1989, the Kiriluks began plans to build a house on their property. Before construction of the Kiriluks' house, there had been a natural swale on the southwest

corner of the Kiriluks' lot. The swale served to move water away from the Frolings' property. Engineers hired by the Kiriluks proposed a site plan that took into account the existing natural drainage system, and the city approved the plan. However, during construction, the Kiriluks brought in dirt to raise the height of their property, and during the re-grading of the lot, the Kiriluks filled in the swale, preventing the natural runoff of water from the southeast corner of the Frolings' property. Despite this alleged deviation from the approved plan, the city issued an occupancy permit for the Kiriluks' home.

In April 1989, the Frolings began experiencing significant flooding on their property. William Froling testified that during heavy rain that month he witnessed water surging through a culvert constructed under Rathmor Road and flowing onto the south side of the road. The flooding was so severe that the water levels reached the steps of the front and back porches of the Frolings' home.

From then on, on numerous occasions following periods of heavy rain or spring thaw, substantial amounts of water would pool on the Frolings' property, particularly on the west and south sides of their home. According to William Froling, the most significant periods of flooding occurred in June 1996, June 1997, June 2001, April and May 2004, and January 2005. During the June 1997 incident, the Frolings' basement was completely flooded, causing over $20,000 in property damage. According to the Frolings, in addition to the Kiriluks' construction, re-grading, construction, and re-direction of water flow on other neighboring properties, including those owned by the Williamses and the Smiths, also contributed to the flooding on their property.

In September 1989, William Froling wrote to the city, requesting that it take steps to alleviate any further flooding problems on his property, asserting that the city should have taken proper precautions when it approved the subdivision plan. Notably, despite claiming that Warner "said he never had any serious water problems while he lived there," Froling indicated that he was put on notice of potential flooding problems at the time he bought the property:

> When I bought the house from Mr. Harold Warner, I asked him why he didn't install lawn sprinklers—and his remark was "Well, live there a year first and I think you will find out you won't need sprinklers!" Of course, I did not know what he meant.

The city hired an engineering firm to investigate the Frolings' flooding complaints, and the investigation revealed that 29 acres of the surrounding property drained into the Frolings' property. (The Frolings also later hired engineers, who determined that 55 acres of the surrounding property drained into their land.) However, the engineers discovered a private drainage system that they thought was probably constructed by the original property owners and was likely the responsibility of the owners of the system.

In November 1989, the city wrote a letter to William Froling, stating that the city's policy was to not involve itself in storm water damage in existing subdivisions and that it was the various property owners' responsibility to resolve any storm water drainage problems affecting their property. More specifically, the city explained as follows:

> In 1923, when the Donnelly Farms Subdivision Plat was approved, drainage easements or other utility easements were not required by Bloomfield Township, which granted the plat approval. By today's standards, a retention basin

with adequate holding capacity and regulated release of storm water would be required. The City of Bloomfield Hills does not involve itself in storm water drainage concerns, except where new subdivisions are being considered or the property being developed is in a floodplain . . . .

Historically, as property developed, each developer was responsible for their storm water runoff. In the 1960's, the City's concern was to prevent any storm water from entering the sanitary sewer system and this is a continuing concern to the City of Bloomfield Hills and other governmental agencies today.

In addressing stormwater [sic] drainage, each property owner is responsible for their own specific problems—some involve trenching or berming, others with their own storm sewer and culverts, and some have installed retention ponds on their property. Any of these methods implemented, have been at the affected property owner's expense. In some instances, where the drainage solution of one property owner detrimentally affects another, civil action in court results in a workable solution.

In your subdivision, . . . your property is on the lowest elevation. My predecessor, who served the City of Bloomfield Hills for the past forty years, told me he had suggested to the Homeowners Association at one time, that they acquire the vacant lot as a retention pond for stormwater [sic] runoff. However, there was no interest in that proposal, as no one was having drainage problems and the value and location of the property warranted development.

I am not aware of any other stormwater [sic] runoff problems in your subdivision and the solution to your specific problem would appear to be best resolved by accommodating the existing flows of water around your property so as not to affect your home. You can accomplish this by one of the above mentioned methods without involving your neighbor's property; although, you could take this before your Homeowner Association to determine if sufficient interest exists to explore other engineering solutions.

In October 1990, the city wrote to the Frolings again, stating that the cost of installation of any storm drain system to alleviate storm water runoff on private land would be the property owners' responsibility.

In 1995, the Smiths' basement flooded with water. The Smiths blamed the flooding on water coming from the Bloomfield Hills Country Club (the Country Club) and complained to the Country Club's management. The Smiths and the Country Club ultimately agreed on a solution: installation of an underground pipe extending from the golf course directly into a pond on the Smiths' and the Williamses' properties. However, this "solution" increased the flow of water onto the Frolings' property. The additional amount of water flowing into the pond forced the pond to overflow with greater frequency. The water coming out of the pond would flow through a drainage ditch that the city had created on the north side of Rathmor Road and then through the culvert in the road onto the lower lying property on the south side of Rathmor Road.

In June 1997, the Frolings' property was flooded again, causing a substantial amount of property damage. After that flood, William Froling wrote to the city commissioners, requesting that they consider construction of a storm water drainage system. In that letter, Froling stated that a neighbor had told him that Warner used a canoe to get off the property after a heavy rain. Froling claimed that the city erred in approving the Kiriluks' construction and that the city had "confiscated" his property for a retention pond.

The city again hired engineers to study the drainage problems. And in October 1997, the engineers reported their findings to the city's manager, stating that "the existing drainage system is not of a size large enough to adequately handle the upstream drainage during larger

storm events." The engineers drew up a proposed storm drainage system to "be constructed by the home owner." The engineers estimated that the cost of the project would be approximately $210,000. Residents of Rathmor Road then signed a petition, requesting that the city construct a storm sewer consistent with the engineers' plan and proposing that the construction be paid through general tax revenues. The city rejected the proposal.

In March 2000, the Frolings retained a realtor to market their home. However, the realtor advised them that the flooding problems had to be resolved before the home could be sold. The realtor also advised them that, absent a permanent correction of the flooding problems, the property was " 'not saleable' as is."

In September 2000, after more flooding, William Froling wrote a letter to the city mayor, explaining that during this most recent incident, water was pouring onto their land from every direction, from the east and the Kiriluks' lot, from the north through the culverts under Rathmor Road, and from the golf course to the south. Froling proposed the creation of a special assessment district to construct the storm water system that the city's engineers had proposed. The city responded that a special assessment would not be established without a petition signed by area residents.

In 2002, the Country Club added multiple pipes to its course for additional drainage. The pipes tied directly into the pipes that already extended to the Smith/Williams pond.

In May 2004, rain fell consistently over an 18-day period, and the Frolings' property was flooded again. The Frolings had to hire workers to pump the floodwater away from their house.

In September 2004, the city's engineers submitted another report to the city, suggesting alternative proposals to remedy the storm water drainage problems. The engineers estimated that the updated cost of construction was approximately $350,000. The engineers explained, however, that "these options are to take water away from Mr. Froling's property at property lines or corners," but they would "do nothing for the water that drains from his property toward the home which is at the lowest point of his 2.5 acre lot." According to the engineers, "To create positive drainage around his home, substantial[ly] more work on his property would need to be done."

B. THE FROLING TRUST'S COMPLAINT

On November 8, 2004, the Froling Trust[1] filed the present suit, alleging that, among others,[2] the city and the neighbors had taken actions that increased the flow of the water entering the Frolings' property. More specifically, the Froling Trust asserted claims of nuisance and trespass against the neighbors. The Froling Trust also asserted a claim of intentional trespass against the Kiriluks. With respect to the city, the Froling Trust asserted claims of gross negligence and taking by inverse condemnation for not preventing the flooding.

C. THE NEIGHBORS' OFFER TO STIPULATE

On January 7, 2005, the neighbors served on the Froling Trust an offer to stipulate the entry of a judgment, offering to resolve all the claims made against them for a

[1] In June 1988, the Frolings deeded their home to the Froling Trust, the named plaintiff in these consolidated appeals.

[2] These other parties are not part of these appeals.

total of $100. The offer stated that it was being made "to compromise and settle disputed claims and should not be construed as an admission of any allegation or liability on any claim" and that "no judgment entered pursuant to this offer shall operate as an adjudication of the merits of any allegation or claim." The Froling Trust did not respond.

D. THE CITY'S MOTION FOR SUMMARY DISPOSITION

In August 2005, the city moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that the governmental immunity doctrine barred the Froling Trust's claims. The city further argued that it was entitled to summary disposition of the Froling Trust's inverse condemnation claim because there was no evidence that the city had taken any direct action against the Frolings' property. In support of its motion, the city presented an affidavit from its engineer, attesting that "[a]ny alleged drainage problems on the Froling property is [sic] not the result of any City sewer or water drainage system."

After hearing oral arguments on the motion, the trial court granted the city's motion for summary disposition. The trial court ruled that the doctrine of governmental immunity barred the Froling Trust's claims against the city. The trial court also agreed with the city that the Froling Trust's inverse condemnation claim failed because the complaint did not allege any direct action that the city took against the Frolings' property. Accordingly, the trial court dismissed the city from the action with prejudice.

E. THE NEIGHBORS' MOTIONS FOR SUMMARY DISPOSITION

In March 2006, the neighbors moved for summary disposition under MCR 2.116(C)(7), (8), and (10), argu-

ing that the three-year period of limitations, which began to run at the time that the Frolings first noted flooding on their property in 1989, barred the Froling Trust's trespass and nuisance claims. In connection with this argument, citing *Garg v Macomb Co Community Mental Health Services*,[3] they further contended that the "continuing wrongs" doctrine has been abrogated in Michigan.

After hearing oral arguments on the motion, the trial court first found that a claim for flooding, like the Froling Trust alleged, accrues at the time the land was first visibly damaged. The trial court explained that damages that accrue at a later date do not renew the limitations period or give rise to a new cause of action. Quoting this Court in *Horvath v Delida*,[4] the trial court stated that " 'a continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act.' " The trial court then concluded that the evidence established that the Frolings knew that the land was first visibly damaged in 1989; thus, the court stated that it needed to address the evidence that supported a continuing act separately with regard to each defendant. The trial court ruled that the Froling Trust had failed to produce evidence that the Kiriluks and the Williamses made any recent changes to the land in the three years preceding the complaint that could give rise to a finding of a new tortious act. With respect to the Smiths, however, the trial court concluded that a genuine issue of material fact remained regarding whether the Smiths' installation of a new outlet pipe on their property had contrib-

[3] *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005).

[4] *Horvath v Delida*, 213 Mich App 620, 627; 540 NW2d 760 (1995) (emphasis in *Horvath*).

uted to flooding on the Frolings' property. Accordingly, the trial court granted summary disposition to the Kiriluks and the Williamses, but denied summary disposition with regard to the Smiths.

The Smiths later renewed their motion for summary disposition under MCR 2.116(C)(7) and (10), again arguing that the statute of limitations barred the Froling Trust's claims. Following a hearing on the motion, the trial court granted the Smiths' motion because further evidentiary discovery supported a conclusion that there was no genuine issue of material fact that the Smiths took no action on their property within the applicable three-year period.

F. THE NEIGHBORS' MOTIONS FOR COSTS AND ATTORNEY FEES

The Kiriluks moved for partial costs and attorney fees in the amount of $35,861.27 with regard to their representation by Potter, DeAgostino, Campbell & O'Dea (the Potter firm), the second of two law firms that represented the Kiriluks. The Kiriluks argued that the Froling Trust's claims were frivolous and that the Kiriluks were entitled to fees and costs under the offer of judgment rule.[5] The Kiriluks also moved for costs in the amount of $146,793.44 with regard to their representation by Honigman Miller Schwartz and Cohn LLP (Honigman Miller), the law firm that initially represented the Kiriluks and also jointly represented the Williamses and the Smiths. The Kiriluks again asserted the offer of judgment rule in support of their motion. Also citing the offer of judgment rule, the Williamses moved for costs in the amount of $89,953.28 with regard to their representation by Honigman Miller.

[5] MCR 2.405.

The trial court held that the Kiriluks and the Williamses were entitled to an award of attorney fees and costs, but the trial court reserved its ruling on the amount of the award pending an evidentiary hearing. After holding an evidentiary hearing on the motion for attorney fees and costs, the trial court awarded the Kiriluks attorney fees and costs in the amount of $35,861.27 related to the Potter firm's representation. The trial court also awarded attorney fees and costs in the amount of $91,076.99 for the Kiriluks and $79,702.66 for the Williamses related to Honigman Miller's representation.

The Smiths, citing the offer of judgment rule, also moved for costs in the amount of $158,630.94 with regard to their representation by Honigman Miller. The trial court held that the Smiths were entitled to an award of attorney fees and costs, and after holding an evidentiary hearing, the trial court awarded $140,181.32 to the Smiths for Honigman Miller's representation.

G. THE PRESENT APPEALS

In January 2007, the Froling Trust appealed the trial court's orders granting the city and the neighbors summary disposition and the trial court's orders ruling that the neighbors were entitled to attorney fees and costs under MCR 2.405. In May 2007, the Froling Trust appealed as of right the trial court's order awarding the Kiriluks attorney fees and costs related to the Potter firm's representation. And in May 2007, the Froling Trust appealed as of right the trial court's order awarding the neighbors attorney fees and costs related to Honigman Miller's representation, and the neighbors cross-appealed.

II. MOTIONS FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a statute of limitations bars the claim. MCR 2.116(C)(7) also provides that a party may move for summary disposition on the ground that governmental immunity bars the claim. Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. And under MCR 2.116(C)(10), a party may move for summary disposition on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law.

Although review under MCR 2.116(C)(8) allows only consideration of the pleadings, our review under MCR 2.116(C)(7) and (10) also must include consideration of all documentary evidence submitted by the parties.[6] More specifically, under MCR 2.116(C)(7), the plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation.[7] Under MCR 2.116(C)(10), the moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[8] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[9]

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[6] MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Johnson v Detroit*, 457 Mich 695, 701; 579 NW2d 895 (1998).

[7] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997); *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[8] MCR 2.116(G)(3)(b); *Maiden*, *supra* at 120.

[9] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

We review de novo a trial court's rulings on a motion for summary disposition,[10] whether a cause of action is barred by a statute of limitations,[11] and the applicability of governmental immunity.[12]

B. THE NEIGHBORS' MOTIONS FOR SUMMARY DISPOSITION

1. STATUTE OF LIMITATIONS AND THE CONTINUING WRONGS DOCTRINE

Claims of property damage are subject to a three-year period of limitations. Specifically, MCL 600.5805 states:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

And, according the accrual statute, the period of limitations begins to run from the time the claim accrues, which is "the time the wrong upon which the claim is based was done regardless of the time when damage results."[13]

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[10] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[11] *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

[12] *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

[13] MCL 600.5827.

The Michigan Supreme Court, however, has long recognized an exception to the application of a statutory period of limitations "[w]here there are continuing wrongful acts . . . ."[14] Under the doctrine, sometimes referred to as the "continuing wrongs doctrine," when the nuisance is of a continuing nature, the period of limitations does not begin to run on the occurrence of the first wrongful act; rather, the period of limitations will not begin to run until the continuing wrong is abated.[15] This Court later confirmed that the doctrine applied in nuisance and trespass cases.[16]

In light of this doctrine, the Froling Trust contends that when it filed this case in November 2004, it presumed that the continuing wrongs doctrine barred the application of the pertinent statute of limitations. The Froling Trust goes on to concede, however, that in May 2005, the Michigan Supreme Court issued its opinion in *Garg v Macomb Co Community Mental Health Services*.[17]

In *Garg*,[18] the Michigan Supreme Court overruled *Sumner v Goodyear Tire & Rubber Co*[19] with respect to its application of the "continuing violations" doctrine. In *Sumner*, the Court followed federal precedent and applied a "continuing violations" doctrine to a civil rights employment discrimination action.[20] But, in

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[14] *Defnet v Detroit*, 327 Mich 254, 258; 41 NW2d 539 (1950).

[15] *Horvath*, *supra* at 626; *Hodgeson v Genesee Co Drain Comm'r*, 52 Mich App 411, 413; 217 NW2d 395 (1974).

[16] *Moore v City of Pontiac*, 143 Mich App 610, 614; 372 NW2d 627 (1985); *Heisler v Rogers*, 113 Mich App 630, 636; 318 NW2d 503 (1982).

[17] *Garg*, *supra*.

[18] *Id*. at 266, 284.

[19] *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986).

[20] *Id*. at 536.

Garg, the Court held that the doctrine was contrary to the statute of limitations in MCL 600.5805(10).[21] According to the Court, the Legislature expressly chose to limit commencement of claims for adverse employment actions to within three years of each action by a defendant:

> Section 5805 does not say that a claim outside this three-year period can be revived if it is somehow "sufficiently related" to injuries occurring within the limitations period. Rather, the statute simply states that a plaintiff "shall not" bring a claim for injuries outside the limitations period. Nothing in these provisions permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as "continuing violations." To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature.[22]

The neighbors argue that the holding in *Garg* completely abrogated the use of the continuing wrongs doctrine in Michigan. However, as the Froling Trust points out, *Garg* and *Sumner* dealt with employment discrimination claims. And, the Froling Trust notes, in *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*,[23] this Court appeared to suggest in a footnote that *Garg*'s abrogation of the "continuing wrongs" doctrine was limited to the civil rights context. In *Bulk Petroleum Corp*, after stating that the continuing wrongs doctrine has only been applied in the limited context of nuisance, trespass, and civil rights cases, the Court then noted in a footnote that *Garg* abrogated the use of the doctrine in "claims filed under the Civil Rights Act, MCL 37.2101 *et seq*., and the Persons With

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[21] *Garg*, *supra* at 282, 284-285, 290.

[22] *Id*. at 282.

[23] *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 667 n 3; 741 NW2d 857 (2007).

Disabilities Civil Rights Act, MCL 37.1101 *et seq*."[24] Therefore, the Froling Trust argues, *Garg* was a limited decision and does not apply to bar this present cause of action for nuisance and trespass.

The law relating to the current viability of the continuing wrongs doctrine in the context of nuisance and trespass claims is hopelessly confused.[25] Notably, this confusion might be due to the fact that several different terms have been used to refer to the same doctrine, including, for example, "continuing wrongs doctrine," "continuing violations doctrine," "continuing-wrongful-acts doctrine," and "continuing tort doctrine."

Since the issuance of *Garg*, numerous panels of this Court have had the opportunity to consider continuing wrongs arguments. However, most of these decisions have been unpublished,[26] and unpublished deci-

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[24] *Bulk Petroleum Corp, supra* at 667 n 3.

[25] See *Sumner*, *supra* at 524.

[26] *Edwards v 17th Dist Court*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket Nos. 269664 and 269873); *Dedivanaj v DaimlerChrysler Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2007 (Docket No. 266769); *Nelski v Ameritech*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2007 (Docket No. 273728); *Romeo Investment Ltd v Michigan Consolidated Gas Co*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2007 (Docket No. 260320); *Schultz v Dep't of Environmental Quality*, unpublished opinion per curiam of the Court of Appeals, issued February 20, 2007 (Docket No. 271285); *Pueblo v Crystal Lake Improvement Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued February 13, 2007 (Docket No. 263231); *Ramanathan v Wayne State Univ Bd of Governors*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 266238); *Hill v PBG Michigan, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 10, 2006 (Docket No. 268692); *Hicks Family Ltd Partnership v 1st Nat'l Bank of Howell*, unpublished opinion per curiam of the Court of Appeals, issued October 3, 2006 (Docket No. 268400); *Ferguson v Hamburg Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2006 (Docket No. 267597); *Wilkerson v Univ of Michigan*, unpublished opinion per curiam of the Court of

sions have no precedential value.[27] Besides the *Bulk Petroleum Corp* panel, only three other panels of this Court have issued published opinions addressing the doctrine.

Six months before this Court released *Bulk Petroleum Corp* in September 2007, a panel of this Court decided and issued an unpublished decision in *Schaendorf v Consumers Energy Co* in March 2007. *Schaendorf* was approved for publication in May 2007.[28] In that case, this Court cited *Garg* and concluded that "the continuing-wrongful-acts doctrine is no longer viable with respect to claims arising beyond the period of limitations."[29] Accordingly, the panel held that the trial court erred by not dismissing the plaintiffs' nuisance claim.[30]

Appeals, issued July 25, 2006 (Docket No. 265220); *Somers v Cowell*, unpublished opinion per curiam of the Court of Appeals, issued June 27, 2006 (Docket No. 259598); *Allen v Estate of Dr Paul Jerome Treusch*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2006 (Docket No. 259737); *Hughes v Gen Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued March 7, 2006 (Docket No. 263688); *Detroit Edison Co v Augustin*, unpublished opinion per curiam of the Court of Appeals, issued February 2, 2006 (Docket No. 256728); *Spink v Macsteel Michigan*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2005 (Docket No. 263140); *Commercial Coin Laundry Sys v McGraw*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2005 (Docket No. 256026); *Mitchell v Policherla*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2005 (Docket No. 255476); *Greenshields v Plymouth Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 4, 2005 (Docket No. 261544); *Shepherd v Gen Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2005 (Docket No. 260171); *Beauchamp v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 256175).

[27] See MCR 7.215(C)(1).

[28] *Schaendorf v Consumers Energy Co*, 275 Mich App 507; 739 NW2d 402 (2007).

[29] *Id*. at 517.

[30] *Id*.

On April 15, 2008, a panel of this Court decided and issued an unpublished opinion in *Dep't of Environmental Quality v Waterous Co*. *Waterous Co* was approved for publication on June 24, 2008.[31] In that case, the panel concluded that the continuing wrongs doctrine applied to an action alleging a recurrent nuisance.[32]

Meanwhile, on April 22, 2008, another panel of this Court issued a published opinion in *Terlecki v Stewart*.[33] In *Terlecki*, this Court addressed the plaintiffs' claims for nuisance and trespass as a result of flooding on their property.[34] The defendants argued that the plaintiffs' claims were time-barred because the conduct that allegedly caused the flooding occurred more than three years before the plaintiffs filed their lawsuit in October 2005.[35] The plaintiffs countered that the continuing wrongs doctrine saved their claims.[36] The defendants responded, arguing first that *Horvath* made clear that the doctrine did not apply when the alleged wrongful acts are finite and only continuing harmful effects remained.[37] The defendants then argued alternatively that, in light of *Garg*, the continuing wrongs doctrine no longer existed in Michigan.[38]

In considering the parties' arguments, the *Terlecki* panel examined *Garg* and concluded that *Garg* was not

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[31] *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346; 760 NW2d 856 (2008).

[32] *Id*. at 383-386.

[33] *Terlecki v Stewart*, 278 Mich App 644; 754 NW2d 899 (2008).

[34] *Id*. at 646-647.

[35] *Id*. at 646.

[36] *Id*. at 650.

[37] *Id*. at 651, citing and quoting *Horvath*, *supra* at 627 (" '[A] continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act.' ") (emphasis in *Horvath*).

[38] *Terlecki, supra* at 651-652.

limited to discrimination cases because in that case the Court was looking at the plain text of the limitations and accrual statutes when it held that the " 'the doctrine has no continued place in the jurisprudence of this state.' "[39] Therefore, applying *Garg*, the *Terlecki* panel concluded that the continuing wrongs doctrine did not apply and that the timeliness of the plaintiffs' claims needed to be determined under the plain text of MCL 600.5805(10) alone.[40] The Court additionally concluded that, even applying the continuing wrongs doctrine, the defendants had correctly argued that, under *Horvath*, the plaintiffs' claim was barred when the last cognizable tortious act occurred more than three years before the plaintiffs filed their lawsuit, regardless of any subsequent harmful effects.[41]

As can been seen from the line of recent published cases addressing the continuing wrongs doctrine, there is a clear conflict regarding its continued viability in cases alleging nuisance and trespass. Despite this conflict, we follow the holding and rationale of *Schaendorf* and *Terlecki* to the extent that they adopt *Garg* as applying beyond the context of civil rights claims to completely abrogate the continuing wrongs doctrine in trespass and nuisance actions as well. Under the "first out" rule of MCR 7.215(J)(1), we must follow the rule of law established by a prior published opinion of this Court issued on or after November 1, 1990. Therefore, the *Bulk Petroleum Corp* and *Waterous Co* panels should have followed *Schaendorf* or declared a conflict under MCR 7.215(J)(2). Because neither *Bulk Petroleum Corp* nor *Waterous Co* declared such a conflict, *Schaendorf* is the controlling precedent, and we are

[39] *Id*. at 654, quoting *Garg*, *supra* at 290.

[40] *Terlecki, supra* at 657-658.

[41] *Id*. at 656-657.

obligated to reject *Bulk Petroleum Corp* and *Waterous Co* to the extent that they conflict with the complete abrogation of the continuing wrongs doctrine in the jurisprudence of this state.

The Froling Trust also argues that *Garg* and its progeny should not apply because they were not issued until after the Froling Trust filed this cause of action. The neighbors point out that decisions are retroactive unless " 'exigent circumstances' justify the 'extreme measure' of prospective-only application."[42] The Froling Trust nevertheless counters that MCL 600.5869 precludes us from following *Garg*. MCL 600.5869 states that "[a]ll actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry." According to the Froling Trust, "the law under which the right accrued" in this case was the continuing wrongs doctrine.

However, the Michigan Supreme Court recently abolished another common-law modification of the Legislature's statutory scheme of periods of limitations and, in so doing, gave its decision retroactive application despite the language of MCL 600.5869. In *Trentadue v Buckler Automatic Lawn Sprinkler Co*,[43] the Court considered whether the common-law discovery rule (which allowed tolling of the statutory period of limitations when a plaintiff could not have reasonably discovered the elements of a cause of action within the limitations period), could toll the period of limitations under MCL 600.5805(10), or whether MCL 600.5827, the accrual statute, alone governed the time of accrual. The Court ultimately concluded that MCL 600.5827

[42] *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 400; 738 NW2d 664 (2007) (citation omitted).

[43] *Id*. at 382.

alone controlled "because the statutory scheme is exclusive and thus precludes this common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply."[44] In so holding, the Court specifically rejected the application of MCL 600.5869 to allow lower courts to continue using the discovery rule.[45] The Court explained that MCL 600.5869 "does not *require* use of the rule . . . . Rather, the rule is judge-made law that has been applied on a case-by-case basis."[46] Moreover, allowing lower courts to continue using the discovery rule "would render [the Court's] opinion paradoxically meaningless because [its] holding would not apply to events occurring any time before the day [it] decided this case; although a claim that accrues tomorrow will be subject to the relevant statutory period and exceptions, a claim that accrued in 1986 may be brought at any time in the future, indefinitely."[47] After noting the general rule of retroactive application, the Court then explained:

> Even when a decision meets the threshold criterion for prospective application because it clearly establishes a new principle of law, we must consider: "(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." Here, prospective-only application is inappropriate. First, the very purpose of our holding is to respect limits the Legislature has placed on plaintiffs' abilities to revive suits relying on events occurring in the distant past; prospective application is therefore directly opposed to our resolve to honor the Legislature's policy choice. Moreover, as we already explained, the very nature of the discovery rule defies any reliance on its operation.

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[44] *Id*. at 389.

[45] *Id*. at 399.

[46] *Id*. at 400 (emphasis in original).

[47] *Id*.

> Finally, the administration of justice is not significantly affected because the rights and interests of plaintiffs and defendants are opposed in these matters; although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence.[48]

The same rationale applies with regard to the continuing wrongs doctrine. The purpose of the holdings in *Garg* and its progeny was to respect the limits the Legislature has placed on a plaintiff's ability to revive a suit by relying on events occurring in the distant past for which only the damaging effects remain. Further, the nature of the continuing wrongs doctrine, in direct conflict with the statute of limitations and the accrual statute, defies any reliance on its operation. Finally, just as with the discovery rule, the administration of justice is not significantly affected because the rights and interests of plaintiffs and defendants are opposed in these matters. Although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence.

Accordingly, we conclude that *Garg* and its progeny completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases. Therefore, the Froling Trust's arguments fail to the extent that it relies on that doctrine to save its claims.

2. APPLYING THE PLAIN LANGUAGE OF MCL 600.5805(10)

The Froling Trust nevertheless argues that, even in the event that we interpret *Garg* as requiring the application of the plain language of MCL 600.5805(10),

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[48] *Id*. at 400-401 (citation omitted).

the trial court erred by dismissing its claims because, under subsection 10, a plaintiff may file a claim anytime within three years following the "time of the . . . injury . . . ." And the Froling Trust claims that the flooding in May 2004, the time of the Froling Trust's last alleged "injury," would be the proper point at which to begin the running of the period of limitations. According to the Froling Trust, caselaw interpreting the accrual statute confirms that the period of limitations begins to run when damage is done, rather than when the conduct transpired.

As stated, MCL 600.5805 provides:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, *after the claim first accrued* to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (10) The period of limitations is 3 years *after the time of the* death or *injury* for all other actions to recover damages for the death of a person, or for injury to a person or property. [Emphasis added.]

And, according to the accrual statute, a period of limitations begins to run from the time the claim accrues, which is "the time the wrong upon which the claim is based was done regardless of the time when damage results."[49]

In *Trentadue*, the Court explained that because under MCL 600.5827 " '[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted,' " the statute was "perfectly consistent" with

[49] MCL 600.5827.

MCL 600.5805(10).[50] This statement stems from the Court's decision in *Stephens v Dixon*,[51] in which it stated: "We have held that the term 'wrong,' as used in the accrual provision, refers to the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently." In other words,

> [o]nce all of the elements of an action for . . . injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred.[52]

The operation of these principles can be seen in a case with similar factual circumstances. In *Terlecki*, the defendants' last negligent conduct was in 2001 when they capped a pipe running through a culvert near the plaintiffs' property.[53] That same year, the plaintiffs began experiencing flooding and tree damage on their property.[54] Applying the plain language of MCL 600.5805(10) and MCL 600.5827 to the plaintiffs' cause of action for nuisance and trespass, this Court concluded that, despite the fact that the plaintiffs continued to suffer flooding and tree damage after 2001, the last possible date that the plaintiffs' claim could have accrued was in 2001, when both the last conduct and first, subsequent corresponding injury occurred.[55] Ac-

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[50] *Trentadue*, *supra* at 387 n 8, quoting *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003), citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995).

[51] *Stephens*, *supra* at 534-535, citing *Connelly v Paul Ruddy's Equip Repair & Service Co*, 388 Mich 146; 200 NW2d 70 (1972).

[52] *Connelly*, *supra* at 151.

[53] *Terlecki*, *supra* at 647.

[54] *Id*.

[55] *Id*. at 657-658.

cordingly, contrary to the Froling Trust's interpretation of the statutes, its claims are still time-barred.

Here, William Froling's testimony revealed that the Kiriluks' last action with regard to drainage of water on their lot was in November 1998. (Throughout their brief the Kiriluks claim that the last act was done in 1997; however, William Froling testified that, to his knowledge, the Kiriluks had not "done anything else with regard to [their] property . . . since November 18th of 1998.") The Smiths' last allegedly wrongful conduct occurred in 1995 or 1996, and the Williamses' last allegedly wrongful conduct occurred in 1997. Therefore, William Froling's testimony established that the last act of any of the three neighboring defendants at issue occurred in 1998. And the Froling Trust alleged that the Frolings next experienced flooding in June 2001. Therefore, it was during this June 2001 flooding that the Froling Trust suffered its first harm from the neighbors' last negligent act. In other words, after the last of the neighbors allegedly acted negligently in 1998, the harm first occurred, or accrued,[56] in June 2001. Accordingly, the subsequent flooding in May 2004 could only have been the continued result of the neighbors' completed conduct. Subsequent claims of additional harm caused by one act do not restart the claim previously accrued. For the purposes of accrual, there need only be one wrong and one injury to begin the running of the period of limitations. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the "wrong is done."

Here, the Froling Trust's last claim first accrued with the flooding in June 2001. Thus, to be timely, the Froling Trust needed to file its claim by June 2004. But

[56] See MCL 600.5805(1) (specifically referring to the when "the claim *first* accrued") (emphasis added).

because it did not file its claim until November 2004, the Froling Trust's claims were time-barred. Accordingly, we conclude that, applying the plain language of MCL 600.5805(10), the trial court properly granted the neighbors summary disposition on the ground that the Froling Trust's claim was untimely.

3. DISCOVERY NOT YET COMPLETE

The Froling Trust argues that the trial court erred by dismissing the Froling Trust's claims against the Smiths and the Williamses because it was not given the opportunity to depose them regarding whether they approved the Country Club's actions in 2001 and 2002 of tying its drainage pipes to the pipes that flowed into the Smith/Williams pond.

Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete.[57] However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position.[58] In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence.[59] The party opposing summary disposi-

[57] *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

[58] *Id*.

[59] *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994); see also MCR 2.116(H)(1) ("A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure.").

tion must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions.[60]

Here, the Froling Trust argues that it should have been allowed to conduct further discovery so that it could determine whether the Smiths and the Williamses had any involvement in the Country Club's 2001 and 2002 conduct of tying in pipes to flow into the Smith/Williams pond. However, the Froling Trust has not shown that there was a fair chance that further discovery would have revealed any evidence of the Smiths' or the Williamses' involvement with the Country Club and its conduct. Significantly, the Froling Trust fails to offer an affidavit that supports the contention that any such evidence even exists. Indeed, to the contrary, the Smiths and the Williamses have provided affidavits in which they attest that they had no knowledge of the Country Club's conduct.

Accordingly, we conclude that the trial court did not err by granting the Smiths and the Williamses summary disposition because there is no merit to the Froling Trust's argument that summary disposition was premature.

C. THE CITY'S MOTION FOR SUMMARY DISPOSITION

1. GOVERNMENTAL IMMUNITY

The Froling Trust argues that the trial court erred by dismissing the Froling Trust's claims against the city

[60] *Coblentz v City of Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006) (concluding that the plaintiffs could not complain that summary disposition was premature because they did not offer the required MCR 2.116[H] affidavits indicating the probable testimony of witnesses whose affidavits in support of the plaintiffs' contentions could not be procured).

on the basis of governmental immunity[61] because the trial court failed to consider the "sewage disposal system event" exception to governmental immunity.[62] However, as the city argues, and as counsel for the Froling Trust conceded at oral argument, the Froling Trust waived this argument regarding the sewage disposal system event exception by not properly preserving it in the lower court proceedings. Accordingly, we conclude that there is no merit to the Froling Trust's argument that the trial court erred by granting the city summary disposition on the ground of governmental immunity.

2. INVERSE CONDEMNATION

The Froling Trust argues that the trial court erred by dismissing the Froling Trust's inverse condemnation claim against the city because it erred by determining that the Froling Trust failed to allege any affirmative action by the city directed at the Frolings' property.

A taking for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property.[63] When such a taking occurs, the Michigan Constitution entitles the property owner to compensa-

[61] MCL 691.1401; MCL 691.1407; *Jackson Co Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 284; 717 NW2d 391 (2006); *Warda v Flushing City Council*, 472 Mich 326, 331-332; 696 NW2d 671 (2005); *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003); *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 595; 363 NW2d 641 (1984).

[62] MCL 691.1416; MCL 691.1417; *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008); *Linton v Arenac Co Rd Comm*, 273 Mich App 107; 729 NW2d 883 (2006).

[63] *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993).

tion for the value of the property taken.[64] A plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages.[65] For a taking to occur, "there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of property."[66] In other words, the plaintiff must prove that the government's actions were a substantial cause of the decline of the value of the plaintiff's property and must establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.[67] In determining whether a taking occurred, the form, intensity, and deliberateness of the governmental actions toward the injured party's property must be examined.[68]

For example, in *Attorney General v Ankersen*, this Court concluded that the state's licensing of a person or corporation to conduct a private business could not be regarded as a taking of private property for public use and that the state's alleged misfeasance in licensing and supervising the operation did not constitute affirmative actions directed at the property.[69] Likewise, in *Hinojosa v Dep't of Natural Resources*,[70] this Court concluded that the state's failure to compensate neighboring property owners for damage caused by fire that spread from

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[64] *Jack Loeks Theatres, Inc v Kentwood*, 189 Mich App 603, 608; 474 NW2d 140 (1991), vacated in part on other grounds 439 Mich 968 (1992).

[65] *Heinrich v Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979).

[66] *Charles Murphy*, *supra* at 56.

[67] *Heinrich*, *supra* at 700.

[68] *Id*. at 698.

[69] *Attorney General v Ankersen*, 148 Mich App 524, 561-562; 385 NW2d 658 (1986).

[70] *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548-550; 688 NW2d 550 (2004).

a state-owned abandoned house was not an unconstitutional taking because the state took no direct action toward the plaintiffs' properties.

Here, the Froling Trust argues that the city has taken the Frolings' property for public use because the city has refused to construct a drainage system to cure their private water problems and because the city approved the Kiriluks' construction plans. However, the Froling Trust's claim must fail because it has not alleged any affirmative action by the city directly aimed at the Frolings' property. Further, because the Froling Trust's claim is without merit, the trial court did not err by not giving the Froling Trust another opportunity to amend its complaint.[71]

Accordingly, we conclude that the trial court did not err by dismissing the Froling Trust's inverse condemnation claim because there is no merit to its claim since it failed to allege any affirmative action by the city directed at the Frolings' property.

III. ATTORNEY FEES AND COSTS

A. STANDARD OF REVIEW

We review for clear error the findings of fact underlying an award of attorney fees.[72] "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."[73] We review de novo underlying questions of

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[71] *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 660; 213 NW2d 134 (1973) (stating that a court need not entertain a futile amendment).

[72] *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

[73] *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002).

law,[74] and we also review de novo the interpretation and application of the offer of judgment rule.[75]

B. THE NEIGHBORS' ENTITLEMENT TO ATTORNEY FEES AND COSTS UNDER MCR 2.405

Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract.[76] Under MCR 2.405, the offer of judgment rule, a party may serve on his or her opponent a written offer to stipulate the entry of a judgment.[77] The purpose of the offer of judgment rule is to avoid protracted litigation and encourage settlement.[78] If the offeree rejects the offer and the adjusted verdict is more favorable to the offeror than the average offer, the offeror may recover actual costs from the offeree.[79] An offer is rejected if not accepted as required by the court rule, including the failure to respond.[80] A judgment resulting from a grant of summary disposition is a verdict for purposes of imposing sanctions pursuant to MCR 2.405.[81]

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[74] *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

[75] *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007).

[76] *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005); *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004); *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007).

[77] MCR 2.405(B).

[78] *Hanley v Mazda Motor Corp*, 239 Mich App 596, 603; 609 NW2d 203 (2000).

[79] MCR 2.405(D); *Freeman v Consumers Power Co*, 437 Mich 514, 516; 473 NW2d 63 (1991).

[80] MCR 2.405(C)(2); *Best Financial Corp v Lake States Ins Co*, 245 Mich App 383, 388; 628 NW2d 76 (2001).

[81] MCR 2.405(A)(4)(c); *Freeman*, *supra* at 518.

The Froling Trust argues, in pertinent part, that MCR 2.405(A)(1) was not properly applied in this case because the neighbors' offer was not an offer of *judgment* as the court rule defines, but rather an offer of *settlement*. The neighbors' offer stated:

> Pursuant to MCR 2.405, Defendants Alan Kiriluk and Marilynne Kiriluk, Roger B. Smith and Barbara Smith, and Gregg Williams and Cindi Williams offer to resolve all of the claims brought in Plaintiff's Complaint by entry of a judgment in the amount of $100.00 against Defendants Alan Kiriluk and Marilynne Kiriluk, Roger B. Smith and Barbara Smith, and Gregg Williams and Cindi Williams and in favor of Plaintiff. This offer is made to compromise and settle disputed claims and shall not be construed as an admission of any allegation or liability on any claim. Further, no judgment entered pursuant to this offer shall operate as an adjudication of the merits of any allegation or claim.

This Court has explained that an offer of settlement is not the same as an offer of judgment.[82]

> An agreement to settle does not necessarily result in a judgment. Although it usually results in a stipulated order of dismissal with prejudice, such an order does not constitute an adjudication on the merits. It merely "signifies the final ending of a suit, not a final judgment on the controversy, but an end of that proceeding." The plain language of MCR 2.405(A)(1) clearly requires an offer of judgment, not just an offer to settle.[83]

"Unlike the traditional settlement process that involves negotiations between the parties as well as compromise, an offer of judgment is a unilateral attempt to conclude a lawsuit without necessarily exercising arms length negotiations."[84]

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[82] *Haberkorn v Chrysler Corp*, 210 Mich App 354, 378; 533 NW2d 373 (1995).

[83] *Id*. at 378 (citation omitted).

[84] *Hanley*, *supra* at 604.

> [An] MCR 2.405 offer of judgment is more akin to adjudication and entry of judgment based on the merits.
>
> [A]n offer of judgment more nearly emulates a judgment after a trial rather than a form of settlement. . . . [T]he key defining point is that private party settlement or mediation involve collective consideration of the facts favoring each party, discussion of the issues, arms-length negotiation and compromise, and contemplation of both entry of judgment and dismissal of the action, whereas an offer of judgment is a unilateral act seeking final resolution of a controversy with sanction of a court by entry of an enforceable judgment. This unilateral act results from a party's independent evaluation of the merits of the case with an eye toward complete resolution of the matter.[85]

"[A] judgment entered pursuant to the acceptance of an offer of judgment under MCR 2.405 functions as a full and final adjudication on the merits . . . ."[86] Further, "[r]es judicata applies to consent judgments."[87]

Here, the record demonstrates that the neighbors' offer was a unilateral attempt, based on their independent evaluation of the merits of the case, to conclude the lawsuit without the need for engaging in arms-length negotiation and compromise. And the neighbors clearly offered to resolve the pending claims for a sum certain "by entry of a judgment in the amount of $100.00 against" them.[88] However, this was not the complete offer. Rather, the following conditions were attached: "This offer is made to compromise and settle disputed claims and shall not be construed as an admis-

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[85] *Id*. at 606.

[86] *Id*. at 606.

[87] *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001).

[88] See MCR 2.405(A)(1) (" 'Offer' means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a *sum certain*, which is deemed to include all costs and interest then accrued.") (emphasis added).

sion of any allegation or liability on any claim. Further, no judgment entered pursuant to this offer shall operate as an adjudication of the merits of any allegation or claim."

The effect of these conditions leaves open the possibility of future lawsuits because the language effectively bars the application of res judicata in the future. What the neighbors were seeking was not truly entry of a "judgment" as contemplated by MCR 2.405(A)(1), which judgment has all the attributes of a judgment after full litigation, is considered a final adjudication on the merits, and implicates the doctrine of res judicata. The neighbors' offer was in actuality a disguised attempt simply to enter a stipulated order of dismissal. The offer did not reflect a willingness to stipulate the entry of a real judgment. Rather, the offer only reflected a willingness to pay the Froling Trust $100 without the strings or attributes of a true judgment being attached. We therefore conclude that the offer failed to meet the requirements of MCR 2.405(A)(1). It would undermine the function of MCR 2.405 to allow a defendant to offer an entry of a judgment but condition such offer on the judgment not having the effect of an ordinary judgment on the merits.

Accordingly, we conclude that the trial court erred by concluding that the neighbors were entitled to an award of attorney fees and costs under MCR 2.405.

C. THE FROLING TRUST'S REMAINING ARGUMENTS

Given our conclusion on the Froling Trust's argument raised in Docket No. 275580, that the trial court erred by awarding attorney fees and costs to the neighbors under MCR 2.405, we conclude that the trial court similarly erred by awarding attorney fees and costs in Docket No. 277438. Therefore, we need not further

address the Froling Trust's arguments in Docket No. 277438 regarding the trial court's award of attorney fees and costs, specifically with respect to the Kiriluks, including the portion awarding more than $35,000 in attorney fees to the Kiriluks for the Potter firm's representation. Because we also conclude that the trial court similarly erred by awarding attorney fees and costs in Docket No. 278383, we need not further address the Froling Trust's arguments in Docket No. 278383 regarding the trial court's award of attorney fees and costs with respect to the neighbors, including the portion awarding more than $310,000 in attorney fees to Honigman Miller.

D. THE NEIGHBORS' ARGUMENTS ON CROSS-APPEAL

Given our conclusion on the Froling Trust's argument raised in Docket No. 275580, that the trial court erred by awarding attorney fees and costs to the neighbors under MCR 2.405, we need not further address the Smiths' and the Williamses' arguments on cross-appeal in Docket No. 278383 regarding the trial court's award of attorney fees and costs to them. Similarly, we need not further address the Kiriluks' arguments on cross-appeal in Docket No. 278383, regarding the trial court's award of attorney fees and costs to them.

Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

MURPHY, P.J. (*concurring*). I concur in affirming in part and reversing in part. Summary disposition in favor of defendants was appropriate because the period of limitations had expired, *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005); *Terlecki v*

Stewart, 278 Mich App 644; 754 NW2d 899 (2008), and the claim was untimely under MCL 600.5805(10). Further, I agree with the majority that summary disposition under the facts presented was not premature. I also agree with the majority's discussion regarding governmental immunity and inverse condemnation, as well as its analysis of the attorney fee and cost issues. I fail to see any point, however, in citing unpublished opinions in this appeal when published opinions with precedential value exist.

PEOPLE v JOHNSON

Docket No. 279163. Submitted October 7, 2008, at Lansing. Decided April 14, 2009, at 9:00 a.m.

The Kent County Prosecuting Attorney charged Robert L. Johnson in the Kent Circuit Court with breaking and entering a building with intent to commit a felony or larceny and with larceny in a building. The defendant, at the time the charged offenses were committed, was on parole from a sentence imposed for larceny from the person. Although the court, Paul J. Sullivan, J., set bail, the defendant was not released from jail because of a parole detainer. The defendant pleaded no contest to the charges. At sentencing, the court revoked parole, imposed prison sentences for the new offenses, and granted sentence credit for time spent in jail awaiting sentencing against the sentence from which the defendant had been paroled, but denied a similar credit against the sentences imposed for the new convictions. The defendant appealed by delayed leave granted, challenging the denial of credit against the sentences for the new convictions.

The Court of Appeals *held*:

The trial court did not err by denying sentence credit against the sentences for the new convictions.

1. Under MCL 769.11b, whenever a person has served time in jail before sentencing because of being denied or being unable to furnish bond for the offense of which the person is convicted, the sentencing court must grant credit against the sentence for such time served in jail. However, when a parolee is arrested for a new criminal offense, he or she is held on a parole detainer until convicted of the new offense and is not entitled to credit for time served in jail against the sentence for the new offense. Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence for which parole was granted. Credit is not available to a parole detainee for time spent in jail attendant to the new offense because bond is neither set nor denied when a defendant is held in jail on a parole detainer. In the case where, as here, the trial court errs by setting bond, the erroneously granted possibility of posting bond does not secure a parole detainee any rights under MCL 769.11b.

2. The manner in which the sentence credit was applied did not result in "dead time." Under MCL 768.7a(2), if a person is convicted and sentenced to imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the prison term imposed for the previous offense. Under MCL 791.238(1), (2), and (6), a defendant on parole, while physically released from the confines of prison, remains in the legal custody of the Department of Corrections and continues to serve out the sentence originally imposed. When a person on parole commits another felony and is arrested and detained, the time of detention continues to accrue toward the fulfillment of the original sentence. If parole is not revoked, the defendant continues to accrue time toward his or her ultimate discharge for the conviction upon which he or she enjoys parole. MCL 791.238(6). If parole is revoked, the defendant is obligated to serve out the balance of the maximum sentence for the conviction that formed the basis for parole. The only time a defendant stops accruing time toward his or her ultimate discharge from the Department of Corrections is when a parolee has a warrant issued for a parole violation and the parolee remains at large. MCL 791.238(2).

Affirmed.

PAROLE — SENTENCES — DETENTIONS FOR OFFENSES COMMITTED WHILE ON PAROLE — SENTENCE CREDITS.

Time spent in jail by a parolee awaiting sentencing for an offense committed while on parole is to be credited, if parole is revoked, against the sentence for which parole was granted; credit against the sentence for the new offense is not available under the statute that provides for sentence credit for time spent in jail because of a denial of bond or an inability to post bond inasmuch as the parolee's detention is pursuant to a parole detainer and bond is neither set nor denied in that situation (MCL 768.7a[2], 769.11b, and 791.238[1], [2], [6]).

David G. Grunst, P.C. (by *David G. Grunst*), for the defendant.

Before: SERVITTO, P.J., and DONOFRIO and FORT HOOD, JJ.

DONOFRIO, J. In Kent Circuit Court Docket No. 05-010285-FH, defendant pleaded no contest to a charge of breaking and entering a building with intent to commit

a felony or larceny, MCL 750.110. The trial court sentenced defendant as an habitual offender, second offense, to a prison term of 2 to 15 years. In Kent Circuit Court Docket No. 05-011628-FH, defendant pleaded no contest to a charge of larceny in a building, MCL 750.360, and the trial court sentenced him to a concurrent prison term of $1\frac{1}{2}$ to 4 years. Defendant now appeals by delayed leave granted, challenging only the trial court's refusal to award him sentence credit for the time he served in the county jail while he was awaiting sentencing. Because defendant was on parole at the time he committed the current offenses, he was not entitled to sentence credit against the sentence for the new offenses. Rather, defendant was entitled to credit against only the prior sentence on the offense for which he enjoyed parole. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

In 1997, defendant was convicted of larceny from the person, MCL 750.357, and sentenced on December 3, 1997, to 5 to 10 years' imprisonment. After serving a portion of his sentence, he was granted parole. While still on parole, on September 28, 2005, defendant was arrested and charged with breaking and entering a building with intent to commit a felony or larceny, MCL 750.110. Defendant was additionally charged on an earlier offense of larceny in a building, MCL 750.360. After his arrest on the instant offenses, defendant was lodged in the county jail and not granted bail because of a parole detainer.

Defendant ultimately pleaded no contest to the instant charges and remained in jail awaiting sentencing. Defendant served 293 days in the county jail awaiting sentencing. At sentencing, because defendant was on parole for his prior conviction at the time he committed

the instant offenses, the trial court declined to grant defendant sentence credit against the sentences for the instant convictions for the time he served in the county jail. Parole was revoked on the 1997 conviction, credit of 293 days was applied against the sentence on the conviction for which parole was revoked, and defendant has now served his maximum sentence on that conviction. Defendant now challenges the trial court's refusal to grant jail credit of 293 days served in the county jail against the sentences for the instant convictions. He essentially challenges the concept of "dead time," i.e., time not credited to his current prison sentences.

II. PAROLE DETAINEE'S ENTITLEMENT TO JAIL CREDIT

A. STANDARD OF REVIEW

The question before us is whether the trial court erred as a matter of law by denying defendant, a parole detainee, 293 days of jail credit against the instant sentences. We review de novo questions of law concerning statutory interpretation. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).

B. ANALYSIS

Defendant contends that he is entitled to sentence credit against the sentences for the instant offenses pursuant to MCL 769.11b, which provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

The primary goal in construing a statute is "to ascertain and give effect to the intent of the Legislature."

People v Pasha, 466 Mich 378, 382; 645 NW2d 275 (2002). To achieve this goal, the Court must begin by examining the plain language of the statute. *Id*. If the language of the statute is clear and unambiguous, it is assumed that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). In discerning legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). The Court must avoid construing a statute in a manner that renders statutory language nugatory or surplusage. *Id*. " 'We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.' " *Id*., quoting *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001).

Here, defendant was on parole at the time he committed the instant offenses. In *Seiders*, this Court held that when a parolee commits a new offense while on parole, credit for time served in jail before sentencing on the new offense is not available. The Court explained that credit is available only when the defendant is "*denied or unable to furnish bond*" and that when a defendant is held in jail on a parole detainer, bond is neither set nor denied. *Seiders, supra* at 707 (emphasis in original). Furthermore, this Court in *People v Filip*, 278 Mich App 635, 640; 754 NW2d 660 (2008),[1] quoting *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), held:

> " 'When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in

[1] In *Filip*, our Supreme Court denied leave to appeal as moot because the defendant had been discharged from parole. *People v Filip*, 482 Mich 1118 (2008).

> jail on the sentence for the new offense.' [*Seiders*, *supra* at 705, citing MCL 791.238(2).] Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. *Id*. Credit is not available to a parole detainee for time spent in jail attendant to a new offense 'because bond is neither set nor denied when a defendant is held in jail on a parole detainer.' *Id*. at 707."

Defendant argues that *Seiders* is distinguishable because bond was set in these cases, but not posted. He relies on the reasoning of the Genesee Circuit Court in *Filip* in which the trial court granted credit. However, this Court rejected that reasoning and reversed the circuit court in *Filip, supra* at 643. As explained in *Filip*, MCL 791.238(1) provides that parole violators are not eligible for bond pending resolution of parole violation proceedings. Time served pending resolution of the parole proceedings is part of the sentence for the paroled offense and is to be credited against that sentence. Where, as here and in *Filip*, the trial court errs by setting bond, "the erroneously granted possibility of posting bond did not secure [defendant] any rights under MCL 769.11b." *Id*. at 642. Under those circumstances, a defendant awaiting trial or sentencing "shall remain incarcerated." MCL 769.11b.

C. RELATIONSHIP BETWEEN MCL 768.7a(2) AND MCL 791.238(1), (2), AND (6)

Despite the foregoing, defendant argues that the manner in which the trial court credited the time he served awaiting sentencing resulted in "dead time." Defendant, as well as other parolees, continues to argue that when parole is revoked or not revoked, parolees fail to receive jail credit for time served while in custody in jail awaiting sentence, a parole detainer notwithstanding. Here, defendant, like the defendant in *Filip*, claims

that he is entitled to 293 days jail credit against the instant sentences by virtue of MCL 769.11b. In other words, defendant contends that failure to credit this jail time against the 2005 sentences at issue, rather than the previous 1997 sentence for which he was on parole, results in "dead time." The concept of "dead time," however, is a misnomer because defendant properly received credit against the sentence on which parole was granted and, as such, there is no "dead time." The interplay of MCL 768.7a(2) and MCL 791.238(1), (2), and (6) fully explains that the jail time is credited for defendant and is neither forfeited nor "dead" as he suggests.

MCL 768.7a(2) provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

The relevant portions of MCL 791.238 provide in pertinent part:

> (1) Each prisoner on parole shall remain in the legal custody and under the control of the department. The deputy director of the bureau of field services, upon a showing of probable violation of parole, may issue a warrant for the return of any paroled prisoner. Pending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated.
>
> (2) A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an

> institution shall not be counted as time served. The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution.
>
> * * *
>
> (6) A parole shall be construed as a permit to the prisoner to leave the prison, and not as a release. While at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court and, if he or she is eligible for good time, shall be entitled to good time the same as if confined in a state correctional facility.

A defendant on parole, while physically released from the confines of prison, remains in the legal custody of the Department of Corrections. He or she continues to serve out the sentence as originally imposed by the sentencing court. And, if eligible for good time, he or she is entitled to continue to accrue such time as if confined to prison. When a person on parole commits another felony and is arrested and detained, the time of detention continues to accrue toward the fulfillment of the originally imposed sentence because at no time has the convict been released. MCL 791.238(1), (2), and (6).

A defendant convicted of a felony while on parole shall have the sentence for the later conviction commence upon the expiration of the remaining portion of the former paroled offense. MCL 768.7a(2). This section does not implicate the imposition of the original maximum sentence. However, should the deputy director of the Bureau of Field Services seek a defendant's return by issuing a warrant for the defendant's return to prison and a hearing on a charge of parole violation, the defendant shall be treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum sentence. MCL 791.238(2).

The liability for the maximum term of imprisonment is made manifest by revocation of parole. Revocation of parole, except for certain enumerated crimes, is discretionary.[2] MCL 791.240a(1). If parole is not revoked, the defendant continues to accrue time toward his or her ultimate discharge for the conviction upon which the defendant enjoys parole. MCL 791.238(6). If parole is revoked, the defendant is obligated to serve out the balance of the maximum sentence for the conviction that formed the basis for parole. MCL 791.238(5) and MCL 791.234.

The only time a defendant stops accruing time toward his or her ultimate discharge from the Department of Corrections is when a parolee has a warrant issued for a parole violation and the parolee remains at large. After a warrant is issued, "[t]he time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served." MCL 791.238(2).

In the case at bar, defendant was convicted of two felonies while on parole. Concomitantly with conviction and sentencing for the current offenses on July 18, 2006, parole was revoked, and the 293 days defendant served in the county jail awaiting disposition of his new felony charges was credited against the sentence for which he had enjoyed parole. Defendant then commenced serving his sentences consecutively on the 1997 conviction as well as the instant felony convictions. At the time of the instant convictions, defendant expected to be discharged from parole on September 29, 2006. Defendant remains in prison and has now completed the maximum of his sentence for his 1997 crime.

[2] See MCL 791.240a(2) for enumerated drug crimes and violent felonies, as defined in MCL 791.240a(12) incorporating MCL 791.236. MCL 791.236(10) enumerates drug offenses, and MCL 791.236(19) enumerates violent felonies.

Because defendant's maximum sentence for his conviction of breaking and entering a building with intent to commit a felony or larceny is 15 years, his maximum discharge date extends to October 26, 2021.[3]

In *Filip*, the defendant was also convicted of a felony while on parole. But his parole was not revoked. The jail credit there was the same as in this case because the jail time the defendant served awaiting disposition of the subsequent offense was not credited toward his later conviction, but credited against the conviction for which he was on parole. Upon sentencing for the subsequent conviction, the defendant started accruing time immediately. Serving time for the prior conviction and subsequent conviction ran concurrently from the date of sentence. And the Offender Tracking and Information System reveals that the defendant was discharged from the Department of Corrections before serving any maximum sentence.

Thus, regardless of whether parole was revoked, in neither case is the time served awaiting a subsequent conviction not credited. Hence, there is no "dead time."[4]

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[3] However, defendant's earliest release date according to the Offender Tracking and Information System, was July 17, 2008, the anniversary of the two-year minimum that defendant served on the instant offenses.

[4] Recidivist parolees assert support for their arguments regarding "dead time" from two dissents, *People v Wright*, 474 Mich 1138 (2006), and *People v Conway*, 474 Mich 1140 (2006). The argument articulated is that the method used by the Department of Corrections for applying sentence credit may be arbitrary or result in a denial of equal protection. In *Wright*, the facts suggest that parole was not revoked. In *Conway*, it is impossible to determine if parole was revoked. Clearly, in the situation where parole is revoked, there can be no issue on credit because of consecutive sentencing following the statutory imposition of the maximum sentence. Also, the application of credit is neither arbitrary nor unequal for defendants similarly situated. For all defendants experiencing revocation of parole, all time served awaiting disposition is credited against the maximum sentence on the conviction for which parole was revoked. If the maximum term of sentence is extinguished with jail credit

III. CONCLUSION

Because defendant suffered a revocation of parole, defendant has not established error with regard to the trial court's failure to award jail credit against his current sentences.

We affirm.

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remaining, the remaining credit will apply to the later sentence. A sentence so served is served strictly in conformity with the statutory mandate and is fixed with certainty. Such a crediting scheme is therefore neither arbitrary nor unequal for all defendants so affected.

PEOPLE v BEYDOUN

Docket No. 280122. Submitted December 3, 2008, at Detroit. Decided April 14, 2009, at 9:05 a.m.

The Wayne County Prosecuting Attorney charged Adnan Beydoun in the 20th District Court with two counts of violating MCL 205.428(3) of the Tobacco Products Tax Act. The district court, Mark J. Plawecki, J., bound the defendant over to the Wayne Circuit Court for trial on both charges. The defendant moved to suppress evidence of the tobacco products seized in an administrative search and to dismiss the charges, arguing that the warrantless search violated his Fourth Amendment rights. The circuit court, Helen E. Brown, J., granted the motions. The prosecution appealed.

The Court of Appeals *held*:

1. While the Fourth Amendment prohibition of unreasonable searches and seizures applies to administrative inspections of private commercial property, an exemption exists for administrative inspections of pervasively regulated industries.

2. When applying the "pervasively regulated industry" doctrine, a court should consider (1) the existence of express statutory authorization for searches or seizures, (2) the importance of the governmental interest at stake, (3) the pervasiveness and longevity of regulation of the industry, (4) the inclusion in statutes and regulations of reasonable limitations on searches, (5) the government's need for flexibility in the time, scope, and frequency of inspections in order to achieve reasonable levels of compliance, (6) the degree of intrusion occasioned by a particular regulatory search, and (7) the degree to which a business person impliedly consented to warrantless searches as a condition of doing business, so that the search does not infringe on reasonable expectations of privacy.

3. Michigan's tobacco businesses fall within the parameters of the pervasively regulated industry exception to the warrant requirement. All seven factors weigh in favor of the state's need to enforce the Tobacco Products Tax Act. The act has several provisions expressly authorizing searches and seizures. Courts have long and consistently recognized the strong or significant

governmental interest in revenue collection. The act has detailed definitions, licensing and stamping requirements, recordkeeping and document maintenance obligations, schedules of tax rates, civil and criminal penalties for violations, procedures concerning seized property, and a delineation of tobacco tax disbursements for various purposes, and administrative rules covering those matters exist as well. Statutes regulating and taxing tobacco products have been in effect for more than 50 years. The statutes and regulations limit searches to business hours and to particular records and products in order to ascertain compliance with the act. The search in this case was not excessive or unnecessary. Allowing unannounced searches conceivably fosters greater compliance with the act, particularly in light of the lack of significant incentives for those who violate the act or the beneficiaries of the violations to report those violations. Given the long history of comprehensive regulation of tobacco products and the defendant's familiarity with the licensing process and regulations, the defendant impliedly consented to warrantless searches as a condition of participating in the tobacco business. No warrant was required for inspecting the defendant's business and seizing the unstamped tobacco found there, and the circuit court erred by dismissing the charges.

4. The defendant consented to the subsequent warrantless search of his house and the seizure of the tobacco products found there. The defendant fully cooperated with the police officers and voluntarily gave them cases of tobacco he had placed in his basement. The defendant's consent to the search and seizure at his home was unequivocal, specific, and freely and intelligently given and thus did not violate his rights under the Fourth Amendment or Const 1963, art 1, § 11.

Reversed and remanded for reinstatement of the charges and further proceedings.

SEARCHES AND SEIZURES — ADMINISTRATIVE INSPECTIONS — PERVASIVELY REGULATED INDUSTRIES — TOBACCO PRODUCTS TAX ACT.

The Fourth Amendment prohibition of unreasonable searches and seizures applies to administrative inspections of private commercial property, but an exemption exists for administrative inspections of pervasively regulated industries; when applying the "pervasively regulated industry" doctrine, a court should consider (1) the existence of express statutory authorization for searches or seizures, (2) the importance of the governmental interest at stake, (3) the pervasiveness and longevity of regulation of the industry, (4) the inclusion in statutes and regulations of reasonable limita-

> tions on searches, (5) the government's need for flexibility in the time, scope, and frequency of inspections in order to achieve reasonable levels of compliance, (6) the degree of intrusion occasioned by a particular regulatory search, and (7) the degree to which a business person impliedly consented to warrantless searches as a condition of doing business, so that the search does not infringe on reasonable expectations of privacy.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Jessica L. Hodgson*, Assistant Attorney General, for the people.

Richard M. Lustig, P.C. (by *Richard M. Lustig*), for the defendant.

Before: BORRELLO, P.J., and DAVIS and GLEICHER, JJ.

GLEICHER, J. This appeal focuses on the validity of a warrantless administrative search of a business owned by defendant Adnan Eddi Beydoun. After the administrative search and a subsequent seizure of tobacco products, a district court bound defendant over for trial on two charges of violating the Tobacco Products Tax Act (TPTA), specifically MCL 205.428(3) (possessing, acquiring, transporting, or offering for sale in violation of the act 3,000 or more tobacco products with an aggregate wholesale price of $250 or more). Defendant moved to suppress evidence of the seized tobacco and dismiss the charges, arguing that the warrantless searches violated his Fourth Amendment rights. The circuit court granted defendant's motions, and the prosecution now appeals as of right. We reverse and remand.

I

At defendant's preliminary examination, state police detective Michael Foley testified that in 2005 he was

working as a specialist with the state police's tobacco tax team. Foley described the tax team's responsibilities as including the performance of administrative inspections to ascertain whether establishments possessed state-mandated licenses to sell tobacco, pre-licensing activities, and "check[ing] on . . . counterfeit tobacco products and tobacco products brought into the state legally and illegally." Foley further explained that "we would check for tobacco tax stamps [on cigarettes or] an OTP Stamp, which is other tobacco products stamp on cases," as mandated by Michigan's tobacco tax statutes.

Foley recounted that on September 23, 2005, he went to defendant's Dearborn Heights business, the Arabian Market at 26018 Ford Road, intending to conduct an administrative inspection after having received an anonymous tip concerning the presence of illegal tobacco products at the market. When Foley entered the market, defendant identified himself as the store owner, prompting Foley to "explain[] to him who I was and who I was with that we were there to conduct [an] administrative inspection." Foley requested "to see four months [sic] worth of invoices for all tobacco products on the premise[s]. . ., the tax ID of the store and any other licenses that he possessed." According to Foley, defendant gave him invoices for the tobacco in the market and "a sales tax license for the store" and told him that he possessed a federal tobacco-related license. But Foley recalled that with respect to a Michigan tobacco tax license necessary for possessing or selling tobacco in Michigan, defendant denied having one, although he averred that "he had recently applied for one."

Foley recalled that he reviewed the invoices defendant presented, intending to compare the listed tobacco products with those inside the Arabian Market. At least

one invoice identified the purchaser of some tobacco "from the Middle East" as Starco Import & Export, L.L.C., which defendant explained was "a business that he owns . . . that . . . runs out of the same building that we were at."[1] Foley related that he contacted the Department of Treasury and learned that the Arabian Market, Starco, and defendant did not hold Michigan tobacco tax licenses. When Foley inquired concerning the whereabouts of more than "two thousand cases of Molasses Tobacco that had been shipped to the United States" according to one invoice, defendant took Foley to a storeroom that contained more than 300 cases of molasses tobacco, which is considered "OTP" tobacco. Foley recounted defendant's explanation that he had sold some of the tobacco shown on the invoice. None of the cases of tobacco stored at the Arabian Market bore Michigan tobacco tax stamps.

Foley testified that he and other agents seized the 300 plus cases of tobacco, valued at $84 a case, because defendant unlawfully possessed the tobacco without a Michigan tobacco tax license and the required state tobacco tax stamps. Foley averred that he gave defendant "a notice of seizure and an inventory of everything that was seized," then placed the tobacco in police storage. Foley added that on October 20, 2005, a civil hearing occurred to examine the lawfulness of the Arabian Market tobacco seizure, that defendant disclosed at the hearing that the remaining number of about 2000 cases of tobacco listed on the molasses tobacco invoice "were at . . . a building that he owns" next door to the Arabian Market, and that defendant

[1] Foley's subsequent investigation revealed that Starco held a current federal license permitting it "to import tobacco." Starco had also filed an application, signed by defendant on September 6, 2005, with the Michigan Department of Treasury to obtain "a Tobacco Products Tax License."

and his counsel "agreed to turn it over to us at that time." Around noon on October 21, 2005, after defendant's counsel apprised Foley that the remaining tobacco was located at defendant's Dearborn Heights residence, Foley went there to retrieve the remaining cases of tobacco. Foley recounted that defendant "invited us in, . . . took us to his basement and showed us where the remainder of the product was," and "also showed us around the whole house to show that there was no other product anywhere else in the garage or any other bedrooms" and that the police "took out one thousand seven hundred and seventeen cases of Molasses Tobacco from his residence," also worth $84 a case. The district court bound defendant over on the two charged counts, reasoning that "[MCL] 205.428 seems pretty clear, he's got to have a license."

In the circuit court, defendant moved to quash the charges.[2] Defendant additionally moved for an evidentiary hearing on the constitutionality of the September 23, 2005, warrantless seizure of tobacco from the Arabian Market. Defendant argued that "the search of [his] premises was not for administrative purposes but actually was intended for criminal purposes and the administrative subterfuge used by the Michigan State Police was a violation of the Fourth Amendment." The prosecution responded that (1) "the TPTA and the product it seeks to regulate are part of a pervasively regulated industry," rendering valid the warrantless "administra-

[2] In this motion, defendant theorized that because he undisputedly possessed a federal license authorizing him to import and export tobacco products, and because Michigan's tobacco licensing statutes directly conflicted with the federal licensing scheme, "pursuant to the Supremacy Clause of the United States Constitution the Federal Licensing statute should apply based on the Interstate Commerce Clause which grants Congress exclusive power to regulate the channels of interstate commerce." Defendant has not raised this issue on appeal.

tive search of the Arabian Market," (2) the state police had probable cause supporting the search of the Arabian Market in light of the anonymous tip they received about a large quantity of "illegal contraband OTP," together with defendant's admissions at the market that strengthened the reliability of the anonymous tip, and (3) the state police lawfully seized the tobacco products from defendant's house on October 21, 2005, because (a) they had probable cause to believe they would find the tobacco products there after defendant admitted possessing additional cartons and (b) defendant consented to the police search of his home and the seizure of the additional "unstamped OTP cartons."

At a hearing in July 2007, Detective Foley and Sergeant Angela Fleming, another trooper who participated in the inspection of the Arabian Market on September 23, 2005, offered testimony largely mirroring Foley's description of events at defendant's preliminary examination while clarifying several points: no one obtained an administrative warrant or a search warrant supporting the administrative search, which occurred during the store's business hours, despite the lack of exigent circumstances; no one explained to defendant before questioning him at the Arabian Market the criminal consequences that potentially could arise from the search; and the troopers did not place defendant in custody but permitted him to conduct store business during the inspection, which took about three hours. Foley and Fleming did not believe that they needed any kind of warrant to conduct the inspection.

The circuit court issued a bench ruling, explaining that it would grant defendant's motions to suppress all the seized tobacco:

> Now, in these situations with an anonymous tip—I mean, [defense counsel] has indicated that this appears to

be a pretext. And I think that when you look at all the facts and circumstances here, the administrative inspection was clearly a pretext for a criminal case. There was an anonymous tip. This gave rise to probable cause for a warrant. No warrant was issued. Quite a few people arrived. They arrived after their usual business hours but during the business hours of the store. Again, that's part of the pretext. They began the search before all of the invoices were provided and all of the investigation was conducted in terms of questions of Mr. Beydoun.

Mr. Beydoun was never advised that there could be any criminal consequences here. And, clearly, from the licenses that he held and had applied for, Mr. Beydoun obviously had an intent to comply with the law, and may have made a mistake, and the price of that mistake has been that civil forfeiture.

At the very minimum, an administrative warrant could have been received based upon reasonable cause based upon the anonymous tip. But we cannot bootstrap the requirement under the Fourth Amendment for a search warrant based upon the consent to the civil inspection, or the hearing; nor can we bootstrap the requirements for a search warrant or an administrative warrant based upon Mr. Beydoun's compliance with the so-called administrative inspection which took place.

But I think that when you look at all of the facts and circumstances here—and I'm not by any means suggesting that the officers here had any kind of malicious intent. They may be mistaken. But the role of government is to remember, in part, that defendants are also people of the State of Michigan, and we all are entitled to the protections. At a very minimum, Mr. Beydoun should have been advised that there could be criminal consequences to this inspection. But the inspection, even in the testimony today, the officers were assuming, in their minds, that they were just doing civil inspections. And I frankly don't think they thought there would ever be criminal charges here. But now that there are, we have to look back on what they did, what they knew, and what they should have done.

> They knew, because of the anonymous tip, that they had enough for a warrant. And they certainly knew when they got there and did their quote, administrative inspection, that the product was there, and could have gotten a warrant at that point. There was absolutely no risk of flight, no risk of destruction of product. They had the ability to guard it and to get it. And they didn't. So the motion is granted.

In each circuit court file, the circuit court that same day entered form orders granting defendant's motion for "suppression of evidence" and separate orders dismissing the charges against him.

II

A. STANDARD OF REVIEW

The prosecution maintains that the circuit court erred by granting defendant's motions to suppress the seized tobacco and dismiss the charges against him because the searches that occurred had justification in exceptions to the general search warrant requirement. When reviewing a bindover decision, the following standards apply:

> A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed [de novo] for error, and a decision to bind over a defendant is reviewed for abuse of discretion. In reviewing the district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion. . . . Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. [*People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997) (citations omitted).]

This Court also considers de novo questions of constitutional law. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009).

B. GOVERNING LEGAL PRINCIPLES

"It is well settled that both the United States Constitution and the Michigan Constitution 'guarantee the right of persons to be secure against unreasonable searches and seizures.' " *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004) (citation omitted). "A search without a warrant is unreasonable per se and violates both the Michigan Constitution and the United States Constitution unless the search is shown to be within an exception to the general rule." *People v Barnes*, 146 Mich App 37, 40-41; 379 NW2d 464 (1985). "While it is well established that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to administrative inspections of private commercial property, an exemption from the search warrant requirement exists for administrative inspections of closely regulated industries." *Gora v City of Ferndale*, 456 Mich 704, 715; 576 NW2d 141 (1998). Whether the exemption applies is primarily determined by the pervasiveness and regularity of the regulation and the effect of such regulation upon an owner's expectation of privacy. *Id*. at 715-716.

Our Supreme Court delineated the contours of the "pervasively regulated industry" doctrine in Michigan in *Tallman v Dep't of Natural Resources*, 421 Mich 585; 365 NW2d 724 (1984). After carefully surveying federal and sister state caselaw analyzing the pervasively regulated industry doctrine elsewhere, which our Supreme Court viewed as "persuasive," the Court summarized as follows the features of Michigan's pervasively regulated industry doctrine:

> We conclude that conflicts arising under art 1, § 11 of the Michigan Constitution between the enforcement needs of governmental agencies and the privacy interests of regulated commercial actors should be resolved by balancing the following factors:
>
> (1) the existence of express statutory authorization for search or seizure;
>
> (2) the importance of the governmental interest at stake;
>
> (3) the pervasiveness and longevity of industry regulation;
>
> (4) the inclusion of reasonable limitations on searches in statutes and regulations;
>
> (5) the government's need for flexibility in the time, scope, and frequency of inspections in order to achieve reasonable levels of compliance;
>
> (6) the degree of intrusion occasioned by a particular regulatory search; and
>
> (7) the degree to which a business person may be said to have impliedly consented to warrantless searches as a condition of doing business, so that the search does not infringe upon reasonable expectations of privacy. [*Id*. at 617-618.]

The Supreme Court described the seven-factor balancing test as "a rational approach" in attempting to address the "meaningful distinction between regulatory or administrative searches and those conducted for the purpose of discovering the fruits or instrumentalities of crime." *Id*. at 618. The Supreme Court then summarized some of the meaningful distinctions:

> The administrative inspector must be equipped with investigatory techniques which differ from those available to peace officers because regulatory misconduct differs from criminal misconduct. Most administrative code violations occur in areas not readily subject to public oversight, and hence go unreported and must be sought out. Criminal

> acts, on the other hand, are often committed in public places or directly involve a victim with a high incentive to report a loss or injury. Code enforcement generally involves repeated detections of numerous minor violations; enforcement of criminal statutes often requires extensive investigation of a single flagrantly illegal act. [*Id*. at 618-619.]

C. ANALYSIS OF SEARCH AND SEIZURE AT ARABIAN MARKET

1. FACTOR ONE

Applying the seven *Tallman* factors to the tobacco tax team's search and seizure at the Arabian Market on September 23, 2005, we observe with respect to the first factor that the TPTA contains several provisions expressly authorizing both the search and the seizure. In MCL 205.426, the Legislature imposed voluminous recordkeeping requirements on multiple tobacco-related actors and included the following provision authorizing inspection of records:

> (5) All statements and other records required by this section shall be in a form prescribed by the department and shall be preserved for a period of 4 years and offered for inspection at any time upon oral or written demand by the department or its authorized agent by every wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, and retailer.

The TPTA section governing tobacco tax stamps and stamping requirements, MCL 205.426a, contains several relevant legislative grants of authority to the department or its agents:[3]

> (5) The department or its authorized agents may inspect or conduct an inventory of a wholesaler's or unclassified

[3] Pursuant to MCL 205.428(9), "[a]t the request of the department or its duly authorized agent, the state police and all local police authorities shall enforce the provisions of this act."

> acquirer's stock of cigarettes, tobacco products other than cigarettes, and stamps during regular business hours and inspect the related statements and other records required in [MCL 205.426].
>
> (6) The department or its authorized agents may inspect the operations of a secondary wholesaler, vending machine operator, or retailer, or the contents of a specific vending machine, during regular business hours. This inspection shall include inspection of all statements and other records required by [MCL 205.426], of packages of cigarettes and tobacco products other than cigarettes, and of the contents of cartons and shipping or storage containers to ascertain that all individual packages of cigarettes have an affixed stamp of proper denomination as required by this act. This inspection may also verify that all the stamps were produced under the authority of the department.
>
> (7) A person shall not prevent or hinder the department or its authorized agents from making a full inspection of any place or vending machine where cigarettes or tobacco products other than cigarettes subject to the tax under this act are sold or stored, or prevent or hinder the full inspection of invoices, books, records, or other papers required to be kept by this act.

The TPTA additionally contemplates seizure, in relevant part in MCL 205.429(1):

> A tobacco product held, owned, possessed, transported, or in control of a person in violation of this act, and a vending machine, vehicle, and other tangible personal property containing a tobacco product in violation of this act and any related books and records are contraband and may be seized and confiscated by the department as provided in this section.

These provisions expressly and plainly show the Legislature's intent to invest the department and its agents, including state and local police, with search and seizure authority under the TPTA.

2. FACTOR TWO

With respect to the second *Tallman* factor, "the importance of the governmental interest at stake," *Tallman*, 421 Mich at 617, this Court has observed that the TPTA "is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded." *People v Nasir*, 255 Mich App 38, 42; 662 NW2d 29 (2003). Michigan courts have long and consistently recognized the strong or significant governmental interest in revenue collection. The Michigan Supreme Court restated the important nature of revenue collection in *Wikman v City of Novi*, 413 Mich 617; 322 NW2d 103 (1982), explaining that the

> "object of that law, as it is of this, is to enable the government to collect its revenues without delay. The obligations of the government must be met promptly, and it is better that the citizen should resort to his common-law remedies to secure his rights, so far as a mere payment of what he claims may be an illegal tax is concerned, than the government should be embarrassed in the collection of revenues necessary to defray its expenditures.
>
> " 'Courts have frequently remarked upon the impossibility of the government calculating with any certainty upon its revenues, if the collection of taxes was subject to be arrested in every instance in which a tax-payer or tax collector could make out *prima facie* a technical case for arresting such collection, and it is justly said to be much better to let the individual pay to the government the demands it makes upon him, and, if he considers them in whole or in part illegal, apply for the refunding of the money, with interest afterwards.' Cooley, Taxation (2d ed), p 762."
>
> * * *
>
> The significant public interest underlying the collection of revenues by the government resulted in limitations upon

> a taxpayer's ability to contest tax assessments and obtain refunds of general revenue taxes. [*Id*. at 626-627, quoting *Eddy v Lee Twp*, 73 Mich 123, 129-130; 40 NW 792 (1888).]

See also *Detroit v Nat'l Exposition Co*, 142 Mich App 539, 547; 370 NW2d 397 (1985) (holding that MCL 213.291 serves the "important governmental interest of revenue collection at a fairly insignificant risk to the private property owner"). The state thus undisputedly has a substantial and important interest in collecting the tax revenues generated under the TPTA.

3. FACTOR THREE

Regarding *Tallman* factor three, "the pervasiveness and longevity of industry regulation," *Tallman*, 421 Mich at 617, the TPTA can aptly be described as a pervasive group of tobacco product regulations. The TPTA, which is codified at MCL 205.421 through MCL 205.436, 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. Several administrative rules further govern tobacco products. Mich Admin Code, R 205.451 *et seq*. And statutory tobacco product regulation and taxation in Michigan constitutes a tradition extending back more than half a century. In 1947, our Legislature enacted a comprehensive and detailed act imposing regulations and levying taxes on cigarettes, 1947 PA 265, which became 1948 CL 205.501 *et seq*. Similar detailed cigarette tax acts remained in effect through subsequent compilations, 1970 CL 205.501 *et seq*. and 1979 CL 205.501 *et seq*., until the Legislature repealed the cigarette tax act in favor of the TPTA. 1993 PA 327,

effective March 15, 1994. In summary, detailed and pervasive tobacco regulation and taxation have had a long history in our state.

4. FACTORS FOUR AND SIX

Considering *Tallman* factor four, "the inclusion of reasonable limitations on searches in statutes and regulations," *Tallman*, 421 Mich at 618, we note that the TPTA contains several relevant sections addressing the department's and its agents' authority to inspect and search. Pursuant to MCL 205.426(5),

> [a]ll statements and other records required by this section shall be in a form prescribed by the department and shall be preserved for a period of 4 years and *offered for inspection at any time upon oral or written demand by the department or its authorized agent* by every wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, and retailer. [Emphasis added.]

Although this subsection contemplates that various participants in cigarette distribution in Michigan must supply records "for inspection at any time upon oral or written demand by the department or its authorized agent," the records subject to inspection are limited to the records required under MCL 205.426.

The provisions that the prosecution relies on for justifying the search of the Arabian Market in this case include the following relevant subsections of MCL 205.426a:

> (5) *The department or its authorized agents may inspect or conduct an inventory* of a wholesaler's or unclassified acquirer's *stock of cigarettes, tobacco products other than cigarettes, and stamps during regular business hours and inspect the related statements and other records required in* [*MCL 205.426*].

> (6) *The department or its authorized agents may inspect the operations* of a secondary wholesaler, vending machine operator, or retailer, or the contents of a specific vending machine, *during regular business hours*. *This inspection shall include inspection of all statements and other records required by* [*MCL 205.426*], *of packages of cigarettes and tobacco products other than cigarettes, and of the contents of cartons and shipping or storage containers to ascertain that all individual packages of cigarettes have an affixed stamp of proper denomination as required by this act. This inspection may also verify that all the stamps were produced under the authority of the department*. [Emphasis added.]

As reflected in the clear and unambiguous language of MCL 205.426a(5) and (6), the Legislature inserted the significant limitation that searches of the various named tobacco dealers may occur only in the course of regular business hours. And MCL 205.426a(5) and (6) further limit potential inspections to the records mandated under MCL 205.426, cigarettes and other tobacco products, and tobacco stamps and, under subsection 6, inspections to determine whether "all individual packages of cigarettes have an affixed stamp of proper denomination as required by this act."

One more noteworthy section of the TPTA concerning searches and seizure is MCL 205.429(2):

> *If an authorized inspector of the department or a police officer has reasonable cause to believe and does believe that a tobacco product is being acquired, possessed, transported, kept, sold, or offered for sale in violation of this act for which the penalty is a felony, the inspector or police officer may investigate or search the vehicle of transportation in which the tobacco product is believed to be located*. If a tobacco product is found in a vehicle searched under this subsection or in a place of business inspected under this act, the tobacco product, vending machine, vehicle, other than a vehicle owned or operated by a transportation company otherwise transporting tobacco products in com-

> pliance with this act, or other tangible personal property containing those tobacco products and any books and records in possession of the person in control or possession of the tobacco product may be seized by the inspector or police officer and are subject to forfeiture as contraband as provided in this section. [Emphasis added.]

MCL 205.429(2) conditions a search on reasonable cause that a felony violation of the TPTA has occurred.

In summary, the TPTA imposes substantial limitations on searches performed by the department and its agents, primarily that the searches take place in the course of normal business hours and that the searches remain focused on TPTA-mandated records and various tobacco products to ascertain whether they comply with the TPTA.

Regarding related *Tallman* factor six, the available evidence in this case reflects that "the degree of intrusion occasioned by [the] particular regulatory search" did not qualify as excessive or unnecessary. *Tallman*, 421 Mich at 618. Several tax team members accompanied Detective Foley to the Arabian Market in the midafternoon of September 23, 2005, during the market's regular business hours. Shortly thereafter, defendant supplied Foley with his identification, tobacco license information, and other tobacco-related documentation, including invoices. Foley ascertained from the state of the documentation that neither defendant nor his corporate entity that purchased some molasses tobacco possessed a Michigan tobacco license, which he then confirmed by calling the Department of Treasury. He also confirmed that the company that sold Starco the tobacco did not have a Michigan tobacco license. With defendant's guidance, Foley and other agents entered a storeroom and observed that multiple cartons of molasses tobacco did not bear the Michigan tobacco tax stamp mandated by the TPTA, prompting them to

seize approximately 300 cartons of tobacco. Foley estimated that the search and seizure took approximately three hours, during which defendant and an assistant continued operating the market. No indication exists that the September 23, 2005, inspection or search exceeded the reasonably circumscribed search authority granted the tax team members by the TPTA.

5. FACTOR FIVE

Turning to *Tallman* factor five, "the government's need for flexibility in the time, scope, and frequency of inspections in order to achieve reasonable compliance," *Tallman*, 421 Mich at 618, we note that two prior decisions of this Court offer helpful guidance. In *Barnes*, this Court considered the propriety of a warrantless search and seizure that took place at the defendant's automobile salvage yard, which was subject to statutory regulation. *Barnes*, 146 Mich App at 39-40. The Court carefully applied the *Tallman* factors to reach its determination concerning the validity of the search, noting with regard to factor five that the

> government's need for flexibility in conducting searches without warrants is apparent. A person who knowingly buys or sells stolen automobile parts is not likely to complain to the police. A person who innocently buys stolen automobile parts would have no occasion to do so. Trafficking in stolen automobile parts is, to that extent, a victimless crime, the only victim being the owner of the property that was originally stolen. Stolen automobile parts are much less readily identifiable than the stolen automobiles themselves. . . . Further, we suspect that even the vast majority of automobile parts dealers who are not knowingly dealing in stolen parts might nevertheless become somewhat casual in their record keeping and purchasing practices if they are not exposed to the potential of a search without a warrant. [*Id*. at 46-47.]

This Court more recently discussed *Tallman* factor five in the context of the former Michigan Liquor Control Act, MCL 436.1 *et seq.*:

> The next factor is focused on the government's need for flexibility in the time, scope, and frequency of the inspections. This factor is necessarily related to the nature of the industry and the extent to which the industry is pervasively regulated. In the case of the liquor industry, the potential for violation is extremely high and the danger occasioned by certain violations may be severe. In order to offer incentive to licensed business owners to comply with the provisions of the Liquor Control Act, it is somewhat necessary to enforce the provisions under the fear of an unannounced search of the premises. Moreover, the nature of the violation in the case at hand is such that an announced search would arguably lead to destruction of the evidence and thereby frustrate the purpose of the regulatory scheme. [*People v Thomas*, 201 Mich App 111, 119-120; 505 NW2d 873 (1993).]

With this guidance in mind, we observe that the incentive for a violator of the TPTA, or the beneficiary of a TPTA violation, to report those violations appears *de minimis* at best, especially because only the state falls victim to the lost tobacco tax revenue that TPTA compliance would have generated. The easy transferability or disposability of cigarettes and other tobacco products also gives rise to the concern noted in *Thomas* "that an announced search would arguably lead to destruction of the evidence and thereby frustrate the purpose of the regulatory scheme." *Id.* at 120. And as this Court has also deemed relevant, the potential for an unannounced search or inspection conceivably would foster greater compliance with the TPTA's regulations by those engaged in the tobacco business. *Id.*; *Barnes*, 146 Mich App at 47. In conclusion, we find that the state has a legitimate and strong need for flexibility

in the time, scope, and frequency of inspections in order to achieve reasonable compliance with the TPTA.

6. FACTOR SEVEN

We lastly must address *Tallman* factor seven, "the degree to which a business person may be said to have impliedly consented to warrantless searches as a condition of doing business, so that the search does not infringe upon reasonable expectations of privacy." *Tallman*, 421 Mich at 618. Several details of this case lead us to conclude that defendant impliedly acceded to warrantless searches as a condition of participating in the tobacco business. As we observed earlier, comprehensive and pervasive tobacco regulation and taxation have a long statutory history in Michigan, which would tend to undercut the reasonableness of any notion that defendant should not have anticipated warrantless inspections of his business premises under the plain language of the TPTA authorizing such searches. *Barnes*, 146 Mich App at 47 (emphasizing that "[g]iven the long duration of comprehensive Michigan regulation of [the automobile salvage yard] business, defendant cannot claim any reasonable expectation of privacy regarding the search involved here"); see also *Thomas*, 201 Mich App at 121 (observing that "[g]iven the extensive regulation of the liquor industry and the decreased expectation of privacy in certain commercial property, we believe that defendants should have reasonably expected a search without a warrant to occur on the premises") (citation omitted). The TPTA additionally sets forth expressly that persons who purchase, possess, acquire for resale, or sell tobacco in Michigan must have a Michigan tobacco license, MCL 205.423(1). *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215; 575 NW2d 95 (1997) (noting "the deeply rooted rule that ignorance of the law or a mistake of law is no defense

to a criminal prosecution"). Furthermore, at the time of the warrantless search on September 23, 2005, defendant (1) had engaged in the sale of tobacco and possessed large quantities of molasses tobacco, (2) had founded Starco to import and export tobacco products, (3) held a federal license authorizing him to import tobacco, and (4) had submitted an application for a Michigan tobacco tax license. We conclude that defendant impliedly consented to warrantless searches as a condition of his participation in the tobacco business because Michigan has comprehensively regulated tobacco for decades, defendant had substantial familiarity with the tobacco licensing process and other tobacco regulations, and the plain and unambiguous language of the TPTA authorized the department and its agents to review tobacco-related documentation and inspect tobacco products.

7. CONCLUSION CONCERNING CONSTITUTIONAL VALIDITY OF ARABIAN MARKET SEARCH

Our examination of the *Tallman* factors, all of which weigh in favor of the state's need to enforce the TPTA, leads us to conclude that the state's interest in performing warrantless inspections and searches in the limited manners set forth in the TPTA outweighs the privacy expectations of those who engage in tobacco transactions in Michigan and that Michigan's tobacco businesses thus "fall[] within the parameters of the pervasively regulated industry exception to the warrant requirement." *Tallman*, 421 Mich at 630-631. Consequently, Detective Foley and his colleagues need not have secured any form of warrant before inspecting the Arabian Market on September 23, 2005, and seizing the unstamped tobacco found there in violation of the TPTA. The search and seizure at the Arabian Market

thus did not violate either the Fourth Amendment or Const 1963, art 1, § 11. The circuit court incorrectly applied the law in finding the search invalid.

Defendant offers no authority specifically supporting his assertion "that the search of the premises was not for administrative purposes but actually was intended for criminal purposes and the administrative subterfuge used by the Michigan State Police [thus] was a violation of the Fourth Amendment." Furthermore, defendant either miscomprehends or misrepresents the nature of the appeals in *Barnes* and *Thomas*. In both *Barnes* and *Thomas*, just as in this case, the defendants faced felony charges stemming from warrantless searches of places of business. *Barnes*, 146 Mich App at 39-40 (three counts of receiving and concealing stolen property worth more than $100, former MCL 750.535, which carried possible sentences of up to five years' imprisonment and a $2,500 fine);[4] *Thomas*, 201 Mich App at 114-115 (counts of possessing 50 grams or more but less than 225 grams of cocaine with intent to deliver it, MCL 333.7401(2)(a)(*iii*), which at that time required imprisonment of 10 to 20 years). This Court in both *Barnes* and *Thomas* held the warrantless searches constitutionally valid under the principles set forth in *Tallman* and upheld or reinstated the felony charges against the defendants. *Barnes*, 146 Mich App at 40-47; *Thomas*, 201 Mich App at 117-122. With respect to defendant's related suggestion that the administrative inspection was invalid because it amounted to a pretext for finding a criminal violation, we observe that the record contains no evidence giving rise to a reasonable inference that Foley and his colleagues searched the Arabian Market while in reality entertaining the subjec-

[4] These charges constituted felonies under MCL 750.535(1) before the Legislature's 1998 amendment of MCL 750.535 by 1998 PA 311.

tive intent to establish defendant's commission of a felony. The record simply reveals nothing to support that Foley and the other search participants arrived to inspect the Arabian Market with the "primary purpose . . . to detect evidence of ordinary criminal wrongdoing." *Indianapolis v Edmond*, 531 US 32, 38; 121 S Ct 447; 148 L Ed 2d 333 (2000).

In summary, the circuit court misapplied the law in reversing the district court's bindover determinations.

III. VALIDITY OF LATER SEARCH OF DEFENDANT'S RESIDENCE

The subsequent warrantless search of defendant's home and the seizure of tobacco from the home were valid because defendant gave his consent. "A consent to search permits a search and seizure without a warrant when the consent is unequivocal, specific, and freely and intelligently given." *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). At the civil administrative hearing, defendant, who was represented by counsel, revealed that he had possession of many additional cases of molasses tobacco. Defendant and his counsel agreed to turn the tobacco over to the department and made arrangements for the pickup of the tobacco to take place at defendant's home on October 21, 2005. No evidence suggests that the department or its agents coerced defendant at his home to admit having additional tobacco, to allow officers to search his home for the tobacco, or to surrender the tobacco. To the contrary, the available record establishes that defendant fully cooperated with Detective Foley and his colleagues when they arrived at his house, freely showed them around, and voluntarily gave them the nearly 2,000 cases of tobacco he had placed in his basement. We conclude that defendant freely, intelligently, unequivocally, and specifically consented to the

search and seizure that occurred at his home, which therefore did not violate either his Fourth Amendment rights or his rights under Const 1963, art 1, § 11.

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

BRAUSCH v BRAUSCH

Docket No. 282985. Submitted October 8, 2008, at Grand Rapids. Decided April 14, 2009, at 9:10 a.m.

Candice N. Brausch obtained a divorce from Michael T. Brausch in the Kalamazoo Circuit Court, Family Division, Curtis J. Bell, J., which entered a consent judgment that awarded the plaintiff sole legal and physical custody of the parties' child and awarded the defendant reasonable parenting time as agreed between the parties. The judgment additionally provided that the child's Michigan residence could be changed with no limitation on the distance between the Michigan residence and a new residence and without prior court approval, as long as the defendant was provided with an opportunity for reasonable parenting time. After the plaintiff moved to Toronto, Canada, with the child, the defendant moved for a modification of legal custody, for the restoration of parenting time to what it had been before the move, and for an ex parte order prohibiting the removal of the child from Michigan. The court denied ex parte relief and entered an interim order regarding the defendant's parenting time. After a hearing, the court ordered the child's return to Kalamazoo County, awarded the parties joint legal custody of the child, and ordered a specific parenting time schedule for the defendant. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by ordering the child's return to Michigan. MCL 722.31(1) provides that a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order was issued. However, MCL 722.31(2) provides that a parent's change of a child's legal residence is not restricted by MCL 722.31(1) if the other parent consents to, or if the court, after considering the factors outlined in MCL 722.31(4), permits, the residence change. MCL 722.31(2) also provides that MCL 722.31 does not apply if the order governing the child's custody granted sole legal custody to one of the child's parents. Under MCR 3.211(C), an order awarding child custody must provide that (1) the child's domicile or residence may not be

moved from Michigan without the approval of the judge who awarded custody or that judge's successor, (2) the person awarded custody must promptly notify the friend of the court in writing when the minor is moved to another address, and (3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with MCL 722.31. Reading MCL 722.31 and MCR 3.211(C) together, when a parent with sole legal custody of a child desires to relocate, the parent must first obtain the trial court's approval, but the factors codified in MCL 722.31(4) do not apply to the request. In this case, the trial court tacitly approved the child's move to Canada when it denied the defendant's ex parte motion for relief and ordered specific parenting time for the defendant.

2. The trial court erred by entering a judgment of divorce that dispensed with the requirement in MCR 3.211(C) of prior court approval for a change in the child's domicile or residence. That part of the judgment was unenforceable and must be stricken.

3. The trial court erred in its application of MCL 722.31 to this case when it ruled that the 100-mile rule of MCL 722.31 applied only to moves within the state and that the factors listed in MCL 722.31(4) must be considered for moves outside Michigan regardless of which parent has legal custody.

4. The trial court erred by faulting plaintiff for following provisions of the divorce judgment that it approved but are improper. An erroneous judgment is binding until it is set aside. The trial court also erred by believing that Canadian courts would not enforce the trial court's orders. Canada is a "state" for the purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1101 *et seq*., has been a signatory to the Hague Convention since 1988, and has adopted specific and far-reaching legislation protecting the rights of noncustodial parents, including those who are not Canadian citizens.

5. The trial court abused its discretion by changing the custody provisions of the divorce judgment. The defendant failed to satisfy the threshold requirement of showing proper cause or a change in circumstances that warrants revisiting the custody order. Not all geographic moves alter a child's established custodial environment. It is possible to have a domicile change that is more than 100 miles away from the original residence without having a change in the established custodial environment. The modified custody order must be reversed, and the case must be remanded for further proceedings.

Reversed and remanded.

1. PARENT AND CHILD — CHILD CUSTODY — LEGAL CUSTODY — CHANGES OF CHILD'S DOMICILE OR RESIDENCE.

A parent awarded sole legal custody of a child in a divorce action needs the trial court's approval for any change of the child's domicile or residence; the court, in considering such a request, need not consider the factors codified in MCL 722.31(4) (MCL 722.31; MCR 3.211[C]).

2. JUDGMENTS — ERRONEOUS JUDGMENTS.

A judgment that is entered in error is valid and binding for all purposes until it is set aside.

3. PARENT AND CHILD — CHILD CUSTODY — WORDS AND PHRASES — PROPER CAUSE NECESSARY FOR REVISITING CUSTODY ORDERS — BEST-INTEREST FACTORS.

A movant seeking to establish "proper cause" necessary to revisit a child custody order under MCL 722.27(1)(c) must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court; an appropriate ground should be relevant to at least one of the 12 statutory best-interest factors, MCL 722.23, and must be of such magnitude that it has a significant effect on the child's well-being.

4. PARENT AND CHILD — CHILD CUSTODY — WORDS AND PHRASES — CHANGE OF CIRCUMSTANCES NECESSARY FOR REVISITING CUSTODY ORDERS — BEST-INTEREST FACTORS.

A movant seeking to establish a "change of circumstances" necessary to revisit a child custody order under MCL 722.27(1)(c) must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed; the relevance of the facts presented should be gauged by reference to the statutory best-interest factors outlined in MCL 722.23.

Rathert Law Offices, P.C. (by *Kenneth A. Rathert*), for the plaintiff.

Vlachos & Vlachos, P.C. (by *Nicholas A. Vlachos*), for the defendant.

Before: MARKEY, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM. Plaintiff appeals by right the custody modification order entered by the trial court following a

two-day evidentiary hearing. Plaintiff argues that the trial court failed to enforce the parties' agreement and the judgment of divorce regarding custody and change of residence, that the trial court erroneously applied MCL 722.31 and MCR 3.211(C) to the instant case, and that the trial court abused its discretion by modifying the custody order. We reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were married on October 30, 1999, and their only child was born on January 28, 2004. The parties separated on June 24, 2005, and plaintiff filed a complaint for divorce on July 27, 2005. While the divorce was pending, plaintiff and the child resided with plaintiff's parents in Portage, Michigan. During that time, the child attended half-day sessions at day care. Defendant claimed that he frequently picked up the child from day care and took her to day care the following day. Generally, the child spent Tuesdays, Thursdays, and alternate weekends with defendant; however, defendant conceded that there was no regular or consistent parenting time schedule. Additionally, plaintiff frequently traveled out of town or out of the country, often with the child.

The parties ultimately stipulated that "this matter may stand on the pleadings filed herein, without further notice to the defendant, and the court may enter a judgment of divorce so long as it bears defendant's signature." The trial court entered the judgment of divorce on February 6, 2006, determining that plaintiff had presented satisfactory proof that the material facts contained in her complaint were true and that there was a breakdown of the marital relationship. In the judgment, the trial court awarded plaintiff sole legal

and physical custody of the child and provided that "defendant shall have reasonable parenting time as agreed to by the parties." The trial court also approved two provisions in the judgment of divorce that indicated that there were no prohibitions against moving the child out of state or more than 100 miles:

> It is further ordered that the minor child is currently domiciled in Michigan. However, the domicile or residence of the minor child can be moved from Michigan without obtaining prior approval of the court so long as the non-custodial parent is aware of the location of the child and is provided with the opportunity for reasonable parenting time with the child.
>
> * * *
>
> It is further ordered that, pursuant to MCL 722.31, the prohibition against moving the minor child does not apply to this case, as the plaintiff has sole legal custody of the child.

According to defendant, his parenting time became less regular after June 2006 when plaintiff removed the child from day care. In October 2006, plaintiff and the child moved to Toronto, Ontario, where they resided with plaintiff's new boyfriend.[1] Plaintiff claimed that defendant knew of and acquiesced to her move; however, defendant denied that he knew, indicating that he only learned about the move on April 5, 2007, after pressing plaintiff about his decreased parenting time.

On May 25, 2007, instead of filing a motion for enforcement of, or for specific, parenting time, defendant moved to modify legal custody and to restore his parenting time to what he alleged was the *status quo ante*. Defendant also moved for an ex parte order prohibiting the removal of the child from the state of

[1] Plaintiff and her boyfriend are now married.

Michigan. At the hearing on July 9, 2007, the trial court denied ex parte relief, concluding that defendant had failed to demonstrate specific facts that irreparable injury, loss, or damage would result. The trial court also entered an interim order providing that the child would spend the third weekend of every month, from Thursday to Sunday, with defendant. It further stated that it would hold a hearing:

> Specifically we're going to deal with the issue of economics,[2] so if you guys don't have that figured out in terms of support. Also in terms of what we're going to do from here in terms of visitation, et cetera. I am a very large proponent of having both parents deeply involved in these children's lives—or this child's life . . . .
>
> * * *
>
> [I]f he is willing to step up to the plate now and do it, you should embrace that and let him live the words that he says he's going to do. Because it's very, very important for you and your child to make that happen, okay? So trust—trust him at his word, let it try to happen and we'll see where we go from here, all right?

The hearing was scheduled for November 16, 2007. By then the child had been living with plaintiff in Canada for over a year. Before the hearing, the trial court expressed its dissatisfaction with plaintiff's move to Canada, largely because of its experience with another, unidentified case. It took under advisement plaintiff's request that the trial court only address parenting time and the move to Canada. The trial court then proceeded to conduct a full evidentiary hearing on the issue whether an established custodial environment existed, and, after applying the best interest factors of the Child Custody Act, MCL 722.21 *et seq.*, whether the

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[2] Defendant was not paying child support, and no order had been entered requiring him to do so.

custody provisions of the judgment of divorce should be modified. The trial court did not determine whether plaintiff had met the threshold for changing custody or whether any established custodial environment existed.[3]

At the evidentiary hearing, defendant explained that his parenting time had decreased and that he wanted to return to his previous parenting time schedule. He alleged that plaintiff had frequently denied his parenting time, claiming illness or vacation. Defendant asserted that he "enjoyed parenting time with the minor child consistently every other weekend and every Tuesday and Thursday or, alternately, two other week nights on an overnight basis each week, to the extent that the minor child ended up spending nearly half of her time in defendant's care." Defendant believed that plaintiff would relocate to Florida, but because he traveled regularly to Florida, he could still maintain a relationship with his child if she moved. Defendant argued that the parties should be awarded joint legal custody of their child, that the child should not be removed from the state of Michigan without the trial court's approval or the parties' agreement, that the parties be prohibited from moving the child more than 100 miles, and that defendant should be awarded parenting time of alternate weekends, two overnight stays a week, alternate holidays, and a "school schedule" under which defendant would have more parenting time during the summer, spring break, and Christmas.

Plaintiff responded that defendant never exercised regular parenting time and that he frequently went

[3] A party seeking a change in the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change in circumstances. *Killingbeck v Killingbeck*, 269 Mich App 132, 146; 711 NW2d 759 (2005).

several weeks without contacting their child. Plaintiff claimed that "defendant was enjoying his new found bachelorhood and rarely ever inquired as to parenting time with the child." Plaintiff asserted that she had to initiate contact between defendant and the child. Further, plaintiff claimed that defendant knew that she and the child moved to Canada in October 2006. Plaintiff informed defendant that she planned to enroll in a Toronto university and to work for her father's business in Canada. Plaintiff resides only six hours from Kalamazoo.

After the hearing, the trial court concluded that the provisions in the judgment of divorce that waived a parent's rights to a hearing on the child's removal from Michigan and waived the 100-mile rule were unenforceable. The trial court again expressed concern over plaintiff's move to Canada because it believed that defendant's ability to exercise parenting time would inappropriately be contingent on plaintiff's cooperation. Further, the trial court found that a de facto joint legal custodial environment existed; thus, "the provisions of MCL 722.31 Section 11(4) must be adhered to." Finally, the trial court opined that "clear and convincing evidence has been shown that a change in legal custody and specific parenting time is in the best interests of the minor child." The trial court ordered:

> (a) The minor child be returned to Kalamazoo County, Michigan within the next 30 days.
>
> (b) The plaintiff and defendant are awarded joint legal custody.
>
> (c) That the father resume parenting time on alternate weekends from Friday at 5 p.m. until Sunday at 6 p.m. and Tuesday and Thursdays from 3:30 p.m. until 7:00 p.m.; the parties alternate all major holidays, excluding New Year's, and including Halloween; Memorial Day, and Labor Day, shall be long holiday weekends. The parties will alternate

> spring break and split Christmas break. Each party shall have two uninterrupted weeks during summer break; the child shall be with plaintiff the first week after school ends and the Thursday preceding the commencement of school. The parties must notify one another, in writing, by April 15, of what two weeks they intend to take for the summer. The balance of the summer vacation shall be on a weekly rotation. The child's birthday shall be alternated, and the child shall always be with mother on Mother's Day and the father on Father's Day.

Plaintiff appeals by right.

II. STANDARDS OF REVIEW

Pursuant to MCL 722.28, "[t]his Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction. *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007). In a child custody context, "[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, *supra* at 705. Clear legal error occurs "[w]hen a court incorrectly chooses, interprets, or applies the law." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Additionally, we review de novo a trial court's resolution of issues of law, including the interpretation of statutes and court rules. *Hill v L F Transportation, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008).

This matter also requires us to interpret a statute and a court rule. In interpreting a statute or court rule, we accord every word or phrase of a statute or court rule its plain and ordinary meaning. *Spires v Bergman*, 276 Mich App 432, 439; 741 NW2d 523 (2007).

III. MOVING MORE THAN 100 MILES

On appeal, plaintiff first argues that the trial court clearly erred when it failed to honor the language of the judgment of divorce, which awarded plaintiff sole legal custody of the child and also contained a domicile clause, and when it ordered the child be returned to Michigan. While we disagree that the pertinent provisions of the judgment of divorce were enforceable, we agree that the trial court erred in ordering the child be returned to Michigan.

A. APPROVAL OF COURT

MCL 722.31(1) provides in relevant part that "[a] parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." But MCL 722.31(2) provides:

> A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4),[4]

[4] MCL 722.31(4) provides several criteria to be considered when a court contemplates a change of domicile of over 100 miles, including whether the residence change will improve the quality of life for the child and the relocating parent, the degree to which each parent has complied with or utilized ordered parenting time and whether the motivation for the move is to defeat or frustrate the other parent's parenting time, whether parenting time for the other parent can be modified to preserve and

> permits, the residence change. *This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents.* [Emphasis added.]

Thus, the plain unambiguous language of the statute provides that a parent with sole legal custody is not restricted in the same manner as a parent with joint legal custody. Parents with joint legal custody must obtain consent from the other parent, or permission from the trial court after a review of certain factors, before moving a child more than 100 miles. Neither consent nor consideration of the factors is necessary when a parent has sole legal custody. *Spires*, *supra* at 437-438.

MCR 3.211(C) provides, however:

> A judgment or order awarding custody of a minor must provide that
>
> (1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor,
>
> (2) the person awarded custody must promptly notify the friend of the court in writing when the minor is moved to another address, and
>
> (3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act, MCL 722.31.

At first glance, it would appear that the provisions of MCL 722.31 and MCR 3.211(C) conflict. They do not. Simply stated, when a parent with sole legal custody desires to relocate, he or she must first obtain the trial

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foster the relationship between the child and both parents, whether the parents are likely to comply with any modifications, whether the requested change is motivated by a desire to secure a financial advantage with respect to support obligations, and any instances of domestic violence.

court's approval, but the factors set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), and codified in MCL 722.31(4) do not apply to the request. Accordingly, pursuant to the court rule, plaintiff was required to obtain court approval of her potential move with the parties' child to Canada. We note, however, that the trial court tacitly approved the move on July 9, 2007, when it denied defendant's ex parte request for relief, concluding that defendant had failed to demonstrate specific facts indicating that irreparable injury, loss, or damage would result, and then ordering defendant specific parenting time.

B. JUDGMENT OF DIVORCE WAIVER

Plaintiff argues that the parties waived the approval requirement, so no approval was necessary. Plaintiff claims the issue is one of contract law. But contract law does not govern child custody matters. *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). More importantly, courts must enforce agreements as written "absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). Here, the attempt to contract away the court's responsibility violated a controlling court rule; consequently, it cannot be enforced. *Id.*

The provision permitting plaintiff to move without prior court approval clearly contravenes MCR 3.211(C)(1). The plain meaning of "MCR 3.211(C)(1) mandates that custody orders contain language requiring the court to approve a proposed interstate move." *Spires*, *supra* at 439. The provision was not enforceable and should be stricken. The trial court erred in approving it when it entered the judgment of divorce. Even as

the child's sole legal custodian, plaintiff was required to obtain the court's approval for the proposed change of residence.

With respect to the provision indicating that because plaintiff had sole custody, the prohibition against moving the minor child did not apply, we agree that the provision is a correct statement of the law and was properly included in the judgment of divorce. MCL 722.31; *Spires*, *supra* at 437 ("[W]hen the parent seeking the change of domicile has sole legal custody of the child, MCL 722.31 does not apply."). And the wording of this provision, unlike that in *Delamielleure v Belote*, 267 Mich App 337, 338; 704 NW2d 746 (2005), does not constitute an express waiver of MCL 722.31; consequently, the provision has no legal effect in this case.

We reject plaintiff's argument that if defendant wanted the waiver provisions removed from the judgment of divorce, he should have moved to set aside or amend the divorce judgment pursuant to MCR 2.611 or MCR 2.612, and that even if defendant had so moved, the motions would have been untimely. We need not review this unpreserved claim of error because plaintiff failed to include the issue in her statement of questions presented. MCR 7.212(C)(5); *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000). Nevertheless, another panel of this Court has previously rejected a similar argument and deemed harmless any error that may have occurred. See *Delamielleure*, *supra* at 344. More importantly, "insertion of language mandated by court rule constitutes a correction of an error arising from oversight, which may be corrected at any time, including on the court's own initiative under MCR 2.612(C)(1)." *Id.* In the instant case, the challenged provisions were ineffective because the judgment of divorce was required to contain the language of MCR 3.211(C)(1).

C. THE TRIAL COURT'S APPLICATION OF MCL 722.31

Plaintiff argues that the trial court erroneously applied MCL 722.31 to the instant case. We agree. The trial court should have addressed separately the questions whether plaintiff, as sole legal custodian, could move the child to Canada and whether defendant was entitled to a modification of his parenting time or the custody order. *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009). The trial court blurred these issues. Moreover, in its opinion and order, the trial court erroneously concluded that the Michigan Legislature intended the 100-mile rule of MCL 722.31 to apply only to moves within the state and that MCR 3.211(C) explicitly applied to moves out of state. It further concluded that all the factors listed in MCL 722.31(4) must still be considered for moves outside Michigan regardless of which party has legal custody.[5] As previously discussed, the rules of statutory interpretation apply to both court rules and statutes. The court rule and the statute that apply in this case can be read harmoniously, and their plain language cannot be interpreted as distinguishing between interstate and intrastate moves. Any other conclusion violates the rules of statutory construction. Also, the factors listed in MCL 722.31(4) simply do not apply when one party, here plaintiff, has sole legal custody. MCL 722.31(2); *Spires*, *supra* at 437. The applicability of the provisions does not hinge on the

[5] Apparently recognizing that a strict application of MCL 722.31 would preclude it from considering the factors for a change of domicile as set out in MCL 722.31(4), the trial court proceeded to find that the parties actually had de facto legal custody. Thus, the factors nevertheless had to be considered for that reason, and the trial court had to grant plaintiff permission before she could move the minor child. The trial court's rulings in regard to this issue were without legal basis and constitute error.

location of the proposed move. In order to interpret the statute and the court rule as the trial court did, i.e., ruling that the 100-mile rule of MCL 722.31 is inapplicable to moves outside Michigan and applying the change of domicile factors to all moves outside Michigan, this Court would have to "read" provisions and meanings into the statute and the court rule that are not explicitly or patently so worded. We cannot do that. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

It was undisputed that the trial court did not grant the parties joint legal custody until its December 17, 2007, opinion and order. If the trial court had done so earlier, it would have been required to comply with MCL 722.31 and to consider the MCL 722.31(4) factors in deciding whether to grant or deny a motion to change domicile. *Spires*, *supra* at 444 n 3. Conversely, because there was no joint legal custody at the time of the proceedings, the trial court erred by considering the factors. The trial court clearly erred in its application of MCL 722.31 to the instant case. *Fletcher, supra* at 881.

D. PLAINTIFF'S MOVE TO CANADA

While the provisions in the judgment of divorce were unenforceable, we cannot fault the plaintiff for not initially seeking the trial court's approval of her move to Canada. It is well settled that a court only speaks through written judgments and orders. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *Stackhouse v Stackhouse*, 193 Mich App 437, 439; 484 NW2d 723 (1992). While the trial court itself erred by including the two improper provisions in the judgment of divorce, plaintiff was entitled to rely on them until they were set aside. As we held in *Altman v Nelson*, 197 Mich App 467, 473; 495 NW2d 826 (1992), "errors or irregularities in the proceedings, however grave, al-

though they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, do not render the judgment void; until the judgment is set aside, it is valid and binding for all purposes." The trial court erred by faulting plaintiff for following provisions in a judgment of divorce that the trial court itself, although erroneously, had approved.

We also note that the trial court made significant errors regarding Canadian law simply because it believed that Canadian courts would not enforce its orders. In the event the issue arises on remand, we remind the trial court that Canada is a "state" for the purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1101 *et seq.*, see *Atchison v Atchison*, 256 Mich App 531, 537; 664 NW2d 249 (2003), has been a signatory to the Hague Convention since 1988, and has adopted specific and far-reaching legislation protecting the rights of noncustodial parents, including those who are not Canadian citizens. See generally *Overview and Assessment of Approaches to Access Enforcement*, Department of Justice, Canada, 2001-FCY-8E. Moreover, to the extent that the trial court was influenced by problems in a different, unidentified case, it erred. Parties to a custody dispute are entitled to individual consideration based on the law and facts applicable to their case, not on anecdotal experiences of the trial court.

IV. CHANGE OF CUSTODY

Finally, plaintiff contends on appeal that the trial court abused its discretion by changing the custody provisions in the judgment of divorce. We agree.

The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances. *Foskett v Foskett*,

247 Mich App 1, 6; 634 NW2d 363 (2001). A trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Accordingly, a party seeking a change in child custody is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change in circumstances. *Killingbeck v Killingbeck*, 269 Mich App 132, 146; 711 NW2d 759 (2005). If a party fails to do so, the trial court may not hold a child custody hearing.[6]

This Court has explained the meaning of "proper cause" and "change of circumstances":

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors.
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> * * *
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> [I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's

[6] Alternatively, if the moving party succeeds in making this threshold showing, the court must then determine if the child has an established custodial environment with one parent or both. Once the court makes a factual determination regarding the existence of an established custodial environment, which determines the burden of proof to be applied, the court must weigh the statutory best interest factors of MCL 722.23 and make a factual finding regarding each factor in the context of a child custody hearing. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999).

> well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Vodvarka*, *supra* at 512-514 (emphasis in original).]

Although the threshold consideration of whether there was proper cause or a change of circumstances might be fact-intensive, and while the court need not conduct an evidentiary hearing on the topic, *id*. at 512, it *must first* address this threshold question. Again, in making this determination, a trial court must determine if the moving party has shown "that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513.

After reviewing the record, we believe that defendant failed to demonstrate a change of circumstances sufficient to warrant an evidentiary hearing.[7] While a change in

[7] The trial court never made any determination regarding whether an established custodial environment existed with either party or both parties. "Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests." *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). An established custodial environment exists if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort," MCL 722.27(1)(c), and "the relationship between the custodian and the child is marked by qualities of security, stability, and permanence," *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). When a trial court fails to make a finding

residence can change a custodial environment, here, the trial court never made the determination that the custodial environment had, in fact, been altered. Not all geographic moves alter a child's established custodial environment. *Brown v Loveman*, 260 Mich App 576, 590; 680 NW2d 432 (2004) ("[I]t is possible to have a domicile change that is more than one hundred miles away from the original residence without having a change in the established custodial environment."); *DeGrow v DeGrow*, 112 Mich App 260, 267; 315 NW2d 915 (1982) ("The custodial environment was not disturbed by the move from Michigan to Ohio."); *Pierron, supra* at 250 (move would not be a substantial barrier to father's continued parenting time). Again, as stated in *Vodvarka, supra* at 513-514, "not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child."

At the time of the evidentiary hearing, the child had been living with plaintiff in Canada for over a year. Defendant produced no evidence of any kind that this

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regarding the existence of a custodial environment, this Court will generally remand for such a finding unless sufficient information exists in the record for this Court to make a de novo determination of this issue. See *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). Although the trial court never made this determination, sufficient evidence exists in the record to establish that the child had an established custodial environment with plaintiff. Plaintiff had been awarded sole legal and physical custody of the child in the judgment of divorce; the child had always lived with plaintiff and had naturally looked to plaintiff for guidance, discipline, the necessities of life, and parental comfort. *Mogle*, *supra* at 197. There is no need to remand for a finding in this regard. *Jack*, *supra*.

change of residence had any effect on her, let alone a negative effect. There was no attempt to establish, and the trial court did not demand, the requisite showing that the residence change had a "*significant* effect on the child's well-being." *Vodvarka*, *supra* at 513 (emphasis in original). According to defendant's testimony, he was not even aware of the move for approximately six months and still exercised parenting time, although not with the same regularity that he claimed he previously enjoyed. The evidence also established that defendant continued to have a close relationship with his daughter, visited her, and wanted specific parenting time. He was also able to cooperate with plaintiff on issues of child care, e.g., tonsil surgery. With the exception of the move to Canada, plaintiff did not exclude defendant from participating in important decisions affecting the child. In fact, that change of residence was specifically, although wrongfully, permitted by the judgment of divorce. But the remedy for this statutory violation is not a change in custody. At most, defendant's sole complaint was that he did not have specified parenting time, which the trial court could have addressed at any time upon a properly filed petition. The issue involving defendant's parenting time was insufficient to show that it had "a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511.

In short, we can find no sufficient change in circumstances that would have permitted the trial court to revisit the original custody order. Instead, now, because of the trial court's errors, the child has been uprooted from what no one disputes was a stable environment in Canada with her mother and stepfather. Defendant's concerns could have been and were allayed with a specific parenting time schedule, *Pierron, supra*. In fact, we would note that after the trial court finally entered

one, there were no disputes over the schedule. The unwarranted and significant changes in the child's custodial environment were not caused by the parties, but rather inadvertently by the trial court despite its implicit approval of the move when denying defendant's ex parte motion for the child's return. The trial court erred by failing to determine whether defendant met the threshold requirement, failed by determining the established custodial environment and whether it had been significantly altered, and erred in its ultimate decision to change the original custodial order.

Accordingly, we reverse the modified custody order and remand for further proceedings. We recognize that during the pendency of this appeal, plaintiff has returned to Michigan, and she and the child may still reside with plaintiff's parents in Portage. Moreover, the child's established custodial environment may have changed, so any further proceedings must consider these court-ordered changes. But, on remand, we urge the trial court to carefully apply the law to prevent any further unwarranted and disruptive changes unless the most compelling circumstances have first been established. *Foskett, supra* at 6.

We reverse and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

PEOPLE v CHAPO

Docket No. 281172. Submitted February 4, 2009, at Detroit. Decided April 14, 2009, at 9:15 a.m.

A jury in the Wayne Circuit Court convicted Steven C. Chapo of fourth-degree fleeing or eluding a police officer, MCL 257.602a(2). A police officer had stopped the defendant's truck after the officer saw the defendant drive over a fire hose that firefighters were using to extinguish a building fire. When asked to produce his driver's license, vehicle registration, and proof of insurance, the defendant threw his driver's license at the officer and informed the officer that he had to leave but would return to accept the officer's citation. As the truck began to move, the officer ordered the defendant to stop and get out of the truck. When the defendant did not comply with the officer's command, the officer stepped on the truck's running board and attempted to fire a Taser at the defendant, but gave up when the defendant began to drive away. After he was convicted, the defendant moved for a new trial, claiming ineffective assistance of counsel, or for a directed verdict, claiming that there was insufficient evidence that the officer was lawfully performing his duties before the defendant's flight. The court, Helen E. Brown, J., denied the motion. The defendant appealed.

The Court of Appeals *held*:

1. The defendant was not denied due process of law. The information filed against the defendant gave him adequate notice that the charge under MCL 257.602a(2) was predicated on his failure to comply with an order to stop from a police officer who was acting in the lawful performance of his duties. There was also sufficient evidence at trial to establish that the officer was lawfully performing his duties when the defendant fled. Driving over an active fire hose, without the consent of the fire department, is a civil infraction. A police officer who witnesses a civil infraction may stop and temporarily detain the offender for purposes of issuing a citation.

2. The trial court, when denying the defendant's posttrial motion, correctly ruled that the police officer properly could have arrested the defendant for the felony offense of obstructing a

person who the offender knows or has reason to know was performing his or her duties, MCL 750.81d. Because the defendant refused to obey the officer's lawful command, the officer could have made a proper arrest without a warrant, given that there was probable cause to believe that the defendant had committed a felony.

3. The defendant was not denied the effective assistance of counsel at trial. Counsel's failure to develop an argument predicated on the lack of probable cause to make an arrest for obstruction and failure to request a jury instruction on probable cause did not constitute deficient representation, nor did they result in prejudice to the defendant. The fleeing and eluding charge did not require proof that the police officer had probable cause to arrest the defendant. Trial counsel was not ineffective for failing to object to the prosecutor's remarks at closing argument concerning the lack of an excuse for the defendant's criminal conduct. The prosecutor was free to argue the evidence and all reasonable inferences arising from it as they related to the theory of the case. Counsel was not ineffective for not developing and requesting jury instructions on duress as a defense. The defendant's testimony did not support a duress defense based on a fear of impending death or serious bodily harm and the need to commit the charged offense to avoid harm, because he testified that he could have prevented the police officer's deployment of the Taser by complying with the officer's demand to stop and get out of the truck.

4. Because the defendant's counsel affirmatively approved the jury instructions that were given, the defendant waived any error associated with the trial court's failure to instruct the jury on duress and failure to provide additional instructions on whether the police officer lawfully performed his duties. The trial court's remark to the jury that appellate courts "will review everything in the record to see if I'm making any mistakes" did not affect the defendant's substantial rights. The remark did not suggest a diminished responsibility by the jury to reach a verdict.

Affirmed.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

James D. Brittain for the defendant.

Before: WILDER, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM. Following a jury trial, defendant was convicted of fourth-degree fleeing or eluding a police officer, MCL 257.602a(2), for which he was sentenced to three years' probation. He appeals as of right. We affirm.

I

Defendant drove a pickup truck over a fire hose that firefighters were using to extinguish a fire at a thrift shop. Flat Rock Police Officer Glen Hoffman activated the overhead flashers of his patrol vehicle and stopped defendant's truck. Officer Hoffman recognized the driver as defendant, but asked for his driver's license, proof of insurance, and vehicle registration, because he intended to cite defendant for driving over the fire hose. According to Officer Hoffman, defendant was upset and said that he was in a hurry to take his son to his mother's home. After Officer Hoffman requested defendant's driver's license three or four times, defendant threw it to the officer through a partially opened window and said something like, "Here you go, bozo." Defendant told Officer Hoffman that he was going to leave and would be back later for the ticket. Defendant drove a few feet, Officer Hoffman ordered him to stop, and defendant did stop but continued to say that he was going to leave. Officer Hoffman then ordered defendant to step out of the vehicle and told him he would be arrested if he continued to leave. Defendant refused Officer Hoffman's demands to get out of the truck. Officer Hoffman testified that it was his intention to arrest defendant for hindering or obstructing an officer,

if he did not comply with his order to get out of the vehicle. Officer Hoffman warned defendant that he had a Taser, and he stood on the truck's running board while attempting to shoot the Taser at defendant's chest. Officer Hoffman jumped off the running board as defendant drove off. Defendant testified that he drove off only after Officer Hoffman "went berserk" and shot something at him.

Following defendant's conviction, he moved for a new trial, asserting ineffective assistance of counsel, or, alternatively, for a directed verdict of acquittal, claiming that there was insufficient evidence to establish that Officer Hoffman was lawfully performing his duties before defendant's flight. The trial court denied the motion.

II

Defendant argues that the evidence was insufficient to establish the lawful performance element of the offense of fleeing or eluding a police officer. In connection with this issue, defendant argues that he was denied "procedural due process" because, in response to his posttrial motion, the prosecution responded that it was proceeding under a theory that this element could be proven by evidence that there was probable cause to arrest defendant for obstruction under MCL 750.81d. We find no basis for relief.

We review de novo defendant's challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "Taking the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). The prosecution need not negate every theory

consistent with innocence, but is obligated to prove its own theory beyond a reasonable doubt, in the face of whatever contradictory evidence the defendant may provide. *Id.* at 423-424. Due process commands a directed verdict of acquittal where the evidence is insufficient. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

Defendant's claim that he was denied notice of the prosecution's theory was not raised below and, therefore, is unpreserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Due Process Clause of the Fourteenth Amendment mandates that a state's method for charging a crime give a defendant fair notice of the charge against the defendant, to permit the defendant to adequately prepare a defense. *Koontz v Glossa*, 731 F2d 365, 369 (CA 6, 1984). "[I]t is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him." *People v Darden*, 230 Mich App 597, 601; 585 NW2d 27 (1998). Prejudice is essential to any claim of inadequate notice. *Id.* at 602 n 6.

The information in this case gave defendant notice that the charge under MCL 257.602a(2) was predicated on his failure to comply with Officer Hoffman's order to stop his vehicle, while Officer Hoffman was acting in the lawful performance of his duties, on December 1, 2006. This case is distinguishable from *Olsen v McFaul*, 843 F2d 918, 931 (CA 6, 1988), in which a theft indictment was so indefinite that it provided no assistance to the defendant in determining what property he was charged with stealing and how the theft was committed. The information in this case provided fair

notice that the charge against defendant was based on a particular event on December 1, 2006.

Further, defendant has not shown that he was prejudiced by the fact that the information did not state his alleged offense with greater specificity. It is apparent from the trial record that defendant clearly knew the acts for which he was being tried. Before jury selection, defense counsel used the police report to argue an evidentiary matter, and counsel explained to the trial court that there would be a divergence between the parties' evidence regarding what happened after defendant produced his driver's license. Consistent with Officer Hoffman's trial testimony, the police report indicates that Officer Hoffman decided that he could arrest defendant for hindering or obstructing a police officer during the traffic stop. Further, trial counsel expressed no surprise when the prosecutor argued to the jury, during closing argument, that the element of lawful performance was established, by evidence that defendant was stopped for the civil infraction of driving over the fire hose, and that the traffic stop had not concluded when defendant drove off. Consistent with his earlier remarks, defense counsel instead argued to the jury that defendant's testimony established that Officer Hoffman overreacted and that defendant drove off because of the Taser.

We find no basis in the record for concluding that defendant did not have adequate notice of the charge against him. We also find no support for defendant's claim that the prosecution attempted to change its theory, for purposes of opposing defendant's posttrial motion for a directed verdict. At best, the record indicates that the prosecution responded to defendant's own attempt to recast his actions as an escape from an attempted arrest rather than an avoidance of a lawful

traffic stop. The prosecution's response did not create any procedural due process concerns.

We also reject defendant's argument that the evidence was insufficient to establish that Officer Hoffman was lawfully performing his duties when defendant fled. MCL 257.602a(1) provides, in part:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, *acting in the lawful performance of his or her duty*, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. [Emphasis added.]

Viewed in a light most favorable to the prosecution, the evidence that Officer Hoffman was attempting to detain defendant for the purpose of issuing a citation for driving over the fire hose was sufficient to enable the jury to find, beyond a reasonable doubt, that Officer Hoffman was acting in the lawful performance of his duties. Driving over an active fire hose, without the consent of the fire department, is a civil infraction. MCL 257.680. A police officer who witnesses a civil infraction may stop and temporarily detain the offender for the purpose of issuing a written citation. MCL 257.742(1). Because the traffic stop was incomplete when defendant fled, the evidence was sufficient to sustain the conviction, regardless of whether Officer Hoffman also had probable cause to arrest defendant for obstruction. See *People v Laube*, 154 Mich App 400, 407; 397 NW2d 325 (1986) (whether reasons other than a civil infraction justify the police action is irrelevant).

We also reject defendant's claim that Officer Hoffman's testimony established that he lacked probable cause to arrest defendant for obstruction. 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. MCL 764.15; *People v Dunbar*, 264 Mich App 240, 250; 690 NW2d 476 (2004). "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." *Id.* The standard is an objective one, applied without regard to the intent or motive of the police officer. *People v Holbrook*, 154 Mich App 508, 511; 397 NW2d 832 (1986).

Here, in denying defendant's posttrial motion, the trial court determined that Officer Hoffman could have arrested defendant for obstruction, under a city ordinance, MCL 750.81d, or MCL 750.479. On appeal, defendant focuses his argument on MCL 750.81d. Defendant's failure to challenge the other two bases of the trial court's decision constitutes a waiver that precludes appellate relief. See *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (failure to brief a necessary issue precludes appellate relief). Nonetheless, even limiting our consideration to MCL 750.81d(1), it is clear that there was evidence to support a finding of probable cause.

Under MCL 750.81d(1), an individual who obstructs a person who the individual knows or has reason to know is performing his or her duties, is guilty of a felony. "Obstruct" includes "a knowing failure to comply with a lawful command." MCL 750.81d(7)(a). As defendant concedes on appeal, Officer Hoffman testified that defendant refused to comply with an order to get out of the vehicle:

> He continued to say he was going to leave the scene before his violation. And I kept telling him no. He wanted to argue with me. I told him at that point to exit the vehicle, that I was going to place him under arrest if he was going to continue to leave.
>
> * * *
>
> I continue to ask him to exit the vehicle. He's refusing to. He had his juvenile son in the vehicle with him hollering at him, stop dad, listen to him.

A police officer may order occupants to get out of a vehicle, pending the completion of a traffic stop, without violating the Fourth Amendment's proscription against unreasonable searches and seizures. *Pennsylvania v Mimms*, 434 US 106, 111; 98 S Ct 330; 54 L Ed 2d 331 (1977); *Maryland v Wilson*, 519 US 408, 414-415; 117 S Ct 882; 137 L Ed 2d 41 (1997). Therefore, considering the evidence that defendant refused to obey Officer Hoffman's lawful commands, we agree with the trial court's posttrial ruling that probable cause for an arrest without a warrant developed during the course of the traffic stop. Accordingly, while we conclude that the evidence was sufficient to sustain defendant's conviction, regardless of whether Officer Hoffman acquired probable cause to make a felony arrest during the traffic stop, we nonetheless reject defendant's argument that Officer Hoffman was acting unlawfully when he informed defendant of his intention to arrest him.

III

Next, defendant argues that he was denied the effective assistance of counsel. The trial court rejected this same argument without conducting a *Ginther*[1] hearing, and this Court previously denied defendant's motion to

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

remand for a *Ginther* hearing. Further, we are not persuaded that defendant has demonstrated any issue for which further factual development would advance his claim. See MCR 7.211(C)(1)(a); *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Accordingly, we limit our review to the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

A defendant seeking a new trial with a claim of ineffective assistance of trial counsel has a heavy burden of proof. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). The defendant must show that trial counsel's representation fell below an objective standard of reasonableness and must also show resulting prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra* at 600.

Defendant argues that even if a directed verdict was not warranted, trial counsel was ineffective because counsel failed at trial to challenge the lawfulness of Officer Hoffman's conduct and, in fact, agreed during closing argument that Officer Hoffman was lawfully performing his duties. Defendant contends that trial counsel should have developed an argument predicated on the lack of probable cause to make an arrest for obstruction. He also argues that trial counsel should have requested an instruction requiring the jury to decide if there was probable cause for an arrest. As we have already determined, however, the fleeing or eluding charge did not require proof that Officer Hoffman had probable cause to arrest defendant. "Trial counsel is not required to advocate a meritless position." See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, we will not second-guess trial counsel's strategy of conceding certain elements of the charge

at trial. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Therefore, defendant has not demonstrated deficient performance or prejudice.

Defendant also argues that trial counsel was ineffective for not objecting to the prosecutor's remarks during closing argument. After reciting the elements of the offense and commenting on defendant's testimony that he drove off because he was afraid, the prosecutor remarked, "[T]here's nothing in this instruction that gives you that exception. There's no exception that says, guilty unless you get tasered and you drive away." Defendant asserts that the prosecutor impermissibly suggested that Officer Hoffman's deployment of the Taser was not relevant.

A prosecutor's remarks are examined in context and evaluated in light of defense arguments and their relation to the trial evidence. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). The thrust of the challenged remarks was that the evidence did not show anything to excuse defendant's criminal behavior. The prosecutor is "free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36 (2004). Therefore, trial counsel was not ineffective for failing to object to the prosecutor's characterization of the Taser evidence. To the extent that the prosecutor stated her position as an expression of law, any prejudice was cured when the trial court instructed the jury to follow the law according to the trial court's instruction. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Furthermore, we note that trial counsel responded to the prosecutor's closing argument by challenging Of-

ficer Hoffman's credibility and arguing that it was appropriate for defendant to leave under the circumstances explained in defendant's testimony. Trial counsel argued that defendant complied with each order to stop known to him and that defendant exercised common sense when he fled the scene to avoid being tasered. The particular elements of the charge challenged by trial counsel, as set forth in the trial court's jury instructions, required proof of a known order to stop the vehicle and defendant's refusal to obey it by trying to flee or avoid being caught.

We also reject defendant's argument on appeal that trial counsel was ineffective for not developing and requesting jury instructions for a duress defense. Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.* A duress defense requires some evidence from which the jury could find the following elements:

> "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> "B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> "C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> "D) The defendant committed the act to avoid the threatened harm." [*People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997), quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

Further, the threatening conduct or compulsive act must be present, imminent, and impending. *Lemons, supra* at 247. It must arise without the negligence or

fault of the person claiming the defense. *Id.* The defense reflects a social policy that it is better for a person to chose to commit a crime than to face a greater evil threatened by another person. *Id.* at 246.

Defendant's testimony did not support a duress defense. The circumstances of this case involved a traffic stop, in which Officer Hoffman could lawfully order defendant to get out of his truck. Defendant acknowledged in his own testimony that he was asked five or six times to get out of his truck by Officer Hoffman and that, nevertheless, he attempted to leave the scene before Officer Hoffman attempted to fire the Taser at him.

Because defendant's own testimony established that he could have prevented Officer Hoffman's deployment of the Taser by complying with the officer's lawful demand to get out of the truck, we agree with the trial court that trial counsel was not ineffective for failing to pursue a duress defense. We find no basis for concluding that a claim of duress would have provided a substantial defense to the charge of fleeing or eluding a police officer. If anything, it might have emphasized the weakness of trial counsel's argument that the deployment of the Taser justified defendant's flight. Counsel's choice between weak defenses does not suggest deficient performance or prejudice. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

IV

Defendant next argues that the trial court's failure to instruct the jury regarding duress, or to provide additional instructions concerning whether Officer Hoffman lawfully performed his duties, constituted plain error. After the trial court instructed the jury, defense counsel indicated that the defense was "satisfied" with the instructions. Counsel's affirmative expression of

satisfaction with the trial court's jury instruction waived any error. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant also argues that the trial court erred by giving a pretrial instruction advising the jury that appellate courts "will review everything on the record to see if I'm making any mistakes." Having reviewed defendant's unpreserved claim under the plain error rule of *Carines*, we find no basis for relief.

We agree with defendant that it is improper for a trial court to comment to the jury on matters of appeal. *People v Fiorini*, 85 Mich App 226, 234; 271 NW2d 180 (1978). However, unlike *Caldwell v Mississippi*, 472 US 320; 105 S Ct 2633; 86 L Ed 2d 231 (1985), this case does not involve any prosecutorial argument or a sentencing matter; rather, it involves the trial court's instructions before testimony began. The trial court had authority to give appropriate pretrial instructions. MCR 6.414(A). "We review jury instructions in their entirety to determine if error requiring reversal occurred." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.*

The trial court's brief remark regarding appellate review of its mistakes did not suggest any diminished responsibility on the part of the jury in reaching a verdict. To the contrary, the trial court properly instructed the jury on the importance of its role before it heard the testimony, and the trial court reiterated the jury's role in the final instructions before deliberations. Considering the trial court's instructions in their entirety, the trial court's brief reference to appellate review did not affect defendant's substantial rights.

Affirmed.

PEOPLE v HARRISON

Docket No. 279264. Submitted April 7, 2009, at Detroit. Decided April 14, 2009, at 9:20 a.m.

A Cheboygan Circuit Court jury convicted Kenneth R. Harrison of possession of counterfeit bank bills, possession of counterfeiting tools, and two counts of using a computer to commit a crime. The court, Scott L. Pavlich, J., entered a judgment consistent with the verdict. The defendant appealed, contending that his use of a computer, scanner, and printer to produce counterfeit bills on resume paper was not the use of a "tool" for counterfeiting in violation of MCL 750.255.

The Court of Appeals *held*:

1. The language of MCL 750.255, which prohibits a person from adapting a tool to make counterfeit bills, includes within its meaning the use of computers to make counterfeit bills. The statute speaks broadly of tools, instruments, or implements used to counterfeit currency. Computers, scanners, and printers are each a "tool" because they are used as a means of accomplishing a task. The defendant admitted that he adapted the tools that he used for forging counterfeit bills.

2. The evidence supports the conclusion that the defendant possessed counterfeit bills with the "intent to utter or pass the same, or to render the same current as true," in violation of MCL 750.254.

3. A rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt.

Affirmed.

1. FRAUD — BILLS, NOTES, AND CHECKS — COUNTERFEITING — COMPUTER TECHNOLOGY USED FOR COUNTERFEITING.

The phrase "other tool" in the statute that prohibits a person from adapting a tool to make counterfeit bills or notes encompasses a defendant's use of a computer, scanner, printer, and resume paper to make counterfeit bills or notes (MCL 750.255).

2. CRIMINAL LAW — COUNTERFEITING — POSSESSION OF COUNTERFEIT BILLS OR NOTES — WORDS AND PHRASES — UTTER AND PUBLISH — RENDERING COUNTERFEIT BILLS OR NOTES.

A conviction of possession of a counterfeit bill or note requires the prosecution to show that the defendant possessed a counterfeit bill or note and that the defendant intended to utter or pass or render the bill or note as true while knowing that the bill or note was counterfeit; to "utter" means to put something into circulation; to "utter and publish" means to offer something as if it is real, whether or not anyone accepts it as real; to "render" is to transmit or deliver (MCL 750.254).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Catherine M. Castagne*, Prosecuting Attorney, and *William E. Molner*, Assistant Attorney General, for the people.

Daniel J. Rust for the defendant.

Before: ZAHRA, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of possession of counterfeit bank bills, MCL 750.254, possession of counterfeiting tools, MCL 750.255, and two counts of using a computer to commit a crime, MCL 752.796, MCL 752.797(3)(d), and MCL 752.797(3)(e).[1] Our disposition of this matter requires

[1] MCL 750.255 served as the predicate offense for one of defendant's convictions under MCL 752.796, while defendant's conviction under MCL 750.254 served as the predicate offense for defendant's second conviction under MCL 752.796. MCL 752.796(1) provides:

> A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person *to commit a crime*. [Emphasis added.]

MCL 752.797(3) provides the terms of imprisonment for a person guilty of violating MCL 752.796 depending on the punishable term of the underlying offense.

us to determine whether the language of MCL 750.255, which prohibits a person from adapting a "tool" to make counterfeit bills, includes within its meaning the use of computers to make forged bills. We hold that it does, and we affirm.

I. BASIC FACTS

In October 2005, Brian Keiser was driving his coworker, Andrew Gerrity, home from work. Keiser asked for money to pay for gas and Gerrity gave him a $100 bill. Keiser then stopped for fuel, but when he produced the $100 bill the cashier determined that the bill was counterfeit. The manager of the store called the police. When a police officer arrived at the scene, Gerrity identified defendant as the source of the bill. Gerrity stated that he took the $100 bill from defendant's wallet the previous evening because he thought defendant owed him money. The police confirmed that the bill was counterfeit because it did not have a security strip, imbedded fibers, or a watermark.

Gerrity agreed to cooperate with the police in the ensuing investigation. In a recorded telephone conversation between Gerrity and defendant, defendant indicated that he was capable of making counterfeit money and described the process he used to make the bills. Defendant referred to a previous incident when defendant had given Gerrity a fake bill to pay for gas and the store clerk had accepted it. Defendant also spoke of printing $6,000 to $7,000 in counterfeit bills over the ensuing weekend to use at a casino. Subsequently, defendant admitted in a police interview that he had printed $20 and $100 bills, but had only kept one of the $100 bills as "bait money" to catch someone he thought was stealing from him.

Defendant was charged and the matter went to trial. Gerrity's mother testified that defendant had told her

that he only needed a computer to make the fake money and that he had done it before. Defendant's previous roommate, Mike Hyde, testified that defendant told him that he had made the money on the computer and had admitted making some $20 and $100 bills, because he had debt and a gambling addiction. Defendant's friend, Nicole Hatton, had seen in defendant's bedroom a printer that was producing what looked like sheets of money. A police detective testified that digital images of $5, $20, and $100 bills were found on defendant's seized computer and that they were last accessed three times in October 2005. In addition, eight torn-up counterfeit $20 bills recovered from defendant's wastebasket were admitted into evidence.

Defendant also testified at trial. He admitted making counterfeit bills at his home, using resume paper, a scanner, a computer, and a printer to create the bills. Defendant testified that he had made these bills "to catch" a thief who had taken things from his home. Previously, defendant's wallet and "hundreds" of pain pills had allegedly disappeared from defendant's home in the summer of 2005. According to defendant, he planned to identify the thief by luring him with the fake bill and, then, the thief would get caught using the bill at a store. At the close of trial, the jury convicted defendant of all four counts.

II. STANDARDS OF REVIEW

The thrust of defendant's argument is that the evidence did not sufficiently support his convictions. We review claims of insufficient evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). In doing so, we must view all the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential

elements of the crimes were proven beyond a reasonable doubt. *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007). The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt. *Schumacher*, *supra* at 167.

We also review de novo matters of statutory construction. *People v Holley*, 480 Mich 222, 226; 747 NW2d 856 (2008). In doing so, our primary goal is to discern and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The first step in determining legislative intent is to examine the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The meaning plainly expressed is presumed to be the intent of the Legislature. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). Judicial construction is only appropriate if the statute is ambiguous. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000).

III. ANALYSIS

Due process requires that the prosecutor prove all the elements of the crimes charged beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005) (opinion by KELLY, J.). Defendant's contention is that the prosecutor failed to do so in his case because there was insufficient evidence of intent and because MCL 750.255 does not contemplate the use of a computer. We disagree.

A. MCL 750.255

Before considering defendant's argument regarding intent, we first consider the meaning of the language in MCL 750.255 and whether it applies to defendant. Defendant asserts that the evidence was insufficient to support his conviction under this provision, and his derivative conviction under MCL 752.796(1), because the language of the statute does not contemplate the use of a computer to make a counterfeit bill. Defendant contends that the statute prohibits a person from making a tool specifically designed for producing counterfeit money. Because his computer was not specifically designed to make counterfeit money, it follows that the statute does not contemplate it. We disagree with defendant's interpretation.

We note that the statute at issue was enacted early in Michigan's statehood. 1846 RS, ch 155, § 9. As defendant notes, the statute has not been substantially altered since that time and now reads, in pertinent part:

> Any person who shall engrave, make or mend, or begin to engrave, make or mend, any plate, block, press or other tool, instrument or implement, or shall make or provide any paper or other material, adapted or designed for the forging and making any false or counterfeit note, certificate or other bill of credit . . . issued by lawful authority . . . and any person who shall have in his possession any such plate or block, engraved in whole or in part, or any press or other tool, instrument or implement, or any paper or other material, adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used in forging or making any such false or counterfeit certificates, bills or notes, shall be guilty of a felony . . . . [MCL 750.255.]

Thus, to sustain a conviction under this provision, the prosecutor must show that defendant has "engrave[d], ma[de] or mend[ed]" a tool, or made or provided paper,

or has in his possession such a tool that is "adapted or designed for the forging and making [of] . . . counterfeit note[s,] . . . with [the] intent to use the same . . . in forging . . . counterfeit certificates . . . ." While it is clear to us that the intent of this language is to criminalize the production of a copy or imitation of official, negotiable currency, it is also obvious that the Legislature that drafted the bill could not have anticipated the development of computer technology, let alone how it could be adapted to produce counterfeit currency. It is also true that the named tools in the statute are all things that are physically manipulated in the process of producing an image. Nonetheless, as originally drafted—and still to the present day—the statute speaks broadly of tools, instruments, or implements used to counterfeit currency. And, a computer, scanner, and printer, which defendant used in this case, are each a "tool" because they are "used as a means of accomplishing a task . . . ." *Random House Webster's College Dictionary* (1997). Accordingly, we hold that the phrase "other tool," as used within MCL 750.255, plainly encompasses defendant's use of his computer, scanner, printer, and resume paper as tools, instruments, other implements, and paper adapted for counterfeiting.

In rejecting defendant's argument, we note that his position focuses on implements *designed* for such a purpose and ignores instruments *adapted* for such a purpose. The verb "adapt" means, in part, to "adjust or modify fittingly." *Random House Webster's College Dictionary* (1997). Using an existing computer, scanner, and printer to counterfeit money involves modifying the normal intended uses of these tools to achieve the goal of creating counterfeit currency.

Further, the evidence presented was sufficient to support defendant's conviction under this provision. Defendant admitted using his computer, scanner, and

printer to produce false bills. Defendant said that he scanned images of authentic currency with his scanner, and a detective found images of authentic currency on defendant's computer hard drive. Defendant then adapted the printer and paper to produce counterfeit bills by printing the images on the resume paper. It is plain under these facts that defendant adapted tools that he intended to use, and did use, for forging counterfeit bills.

B. MCL 750.254

Defendant's argument that the evidence was insufficient to support his conviction under MCL 750.254 because he did not intend to pass the bills as legal tender also fails.[2] MCL 750.254, which requires that the prosecutor prove intent beyond a reasonable doubt, provides, in relevant part:

> Any person who shall bring into this state, or shall have in his possession, any false, altered, forged or counterfeit bill or note in the similitude of the bills or notes payable to the bearer thereof, . . . with intent to utter or pass the same, or to render the same current as true, knowing the same to be false, forged or counterfeit, shall be guilty of a felony . . . .

Thus, the prosecutor must show that defendant had in his possession a counterfeit bill or bills, and that he intended to "utter" or "pass" or "render" those bills as true, while knowing that those bills are counterfeit. MCL 750.254. "To utter means to put something into circulation. To utter and publish means to offer something as if it is real, whether or not anyone accepts it as real." CJI2d 22.22. To "render" is "[t]o transmit or deliver." Black's Law Dictionary (8th ed).

[2] Defendant's argument with respect to intent is only directed toward his conviction under MCL 750.254.

Contrary to defendant's position, the evidence and reasonable inferences arising therefrom support the conclusion that defendant possessed counterfeit bills with the "intent to utter or pass the same, or to render the same current as true," MCL 750.254. Defendant recounted in the recorded telephone call with Gerrity the process that he used to make counterfeit bills, implying more than a one-time interest in the subject. Gerrity's mother testified that defendant had said that he had counterfeited money in the past, and defendant's friend testified that she once saw defendant printing out what looked like sheets of money. Defendant's computer revealed that he accessed images of the bills at least three times in October 2005. On the tape, defendant and Gerrity also talked of making money to pass at a casino, with defendant asserting that he could produce $6,000 to $7,000 over the weekend. Defendant also recalled how Gerrity had successfully passed a different counterfeit $100 bill that defendant had given Gerrity to pay for gas. Additionally, defendant's past roommate stated that defendant admitted counterfeiting money because of debts resulting from a gambling addiction and overspending. A trier of fact can infer a defendant's intent from his words, acts, means, or the manner used to commit the offense. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). All this evidence sufficiently shows defendant's intent to pass the counterfeit money as legal tender.

While defendant did provide an alternative explanation for his actions, i.e., he created the forged bills to trap an alleged thief, it is for the trier of fact to assess the credibility of witnesses and the weight to be given the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). We note that even if the jury had believed defendant's testimony, the evidence would still be sufficient to support his convictions. This is because

his testimony revealed his intent to introduce the counterfeit bills into the stream of commerce and to use his computer, printer, and scanner to make the forged bills. Defendant elaborated that his plan was for the person who was stealing from him to take the false bill that he planted, use it, and get caught. The plan was to first pass the bill from himself to the targeted thief. Secondly, the thief was then expected to inject it into the stream of commerce. While defendant hoped that the thief would be stopped and caught, he had no plan that would aid or assure bringing about that outcome. Regardless of whether the supposed thief were caught, it was defendant's intent that the bill be passed and uttered twice. Thus, viewing the evidence in the light most favorable to the prosecution, it is clear that a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt, and we decline to grant the relief requested.

Affirmed.

TEAL v PRASAD

Docket No. 283647. Submitted April 7, 2009, at Detroit. Decided April 14, 2009, at 9:25 a.m.

Carol Teal, as personal representative of the estate of her deceased husband, Dennis Teal, brought a medical-malpractice action in the Lenawee Circuit Court against Manish Prasad, M.D., Paul D. Thielking, M.D., Mark Levine, M.D., P.C., and Herrick Memorial Hospital, Inc., alleging that their negligence caused Teal to commit suicide. The decedent had been involuntarily admitted to the hospital for psychiatric care following a suicide attempt and committed suicide eight days after his release. The plaintiff alleged that the defendants committed malpractice by failing to properly diagnose and treat the decedent and by discharging him prematurely without a proper treatment plan. The defendants moved for summary disposition, arguing that the plaintiff had not established a causal link between their actions and the decedent's suicide. The court, Timothy P. Pickard, J., granted the defendants' motions, and the plaintiff appealed.

The Court of Appeals *held*:

The trial court did not err by granting the defendants summary disposition. A medical-malpractice plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the defendant's negligence. Proximate cause includes both cause in fact and legal cause. An act or omission generally is a cause in fact of an injury only if the injury could not have occurred but for that act or omission. It need not be the sole catalyst of the injury, but the plaintiff must introduce evidence that the act or omission was a cause. A plaintiff cannot satisfy this burden by showing only that the defendant may have caused the injury. The plaintiff must set forth in evidence specific facts that support a reasonable inference of a logical sequence of cause and effect. The evidence need not negate all other possible causes but must exclude other reasonable hypotheses with a fair amount of certainty. Testimony that establishes only a correlation between conduct and injury is not sufficient to establish cause in fact. A plaintiff cannot establish causation if the connection made between the defendant's conduct and the plaintiff's injuries is

speculative or merely possible. The evidence presented in this case contained scant information concerning the decedent's mental state, moods, thoughts, whereabouts, and suicidal tendencies following his release or whether he continued taking the medication prescribed for him during that time. The plaintiff presented no evidence indicating how the decedent's discharge, premature or not, triggered a chain of events leading to his suicide. It is not evident that but for the defendants' decision to discharge the decedent, he would not have killed himself eight days later. The testimony of the plaintiff's expert witness failed to establish a causal connection between the defendants' actions and the suicide. The claim that the defendants' alleged malpractice caused the decedent's death, therefore, constitutes mere speculation. Moreover, a court must find that a defendant's negligence was the cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries. Because the plaintiff failed to establish that the defendants' actions were a cause in fact of the decedent's death, she also failed to establish that their actions were a proximate cause of the death.

Affirmed.

NEGLIGENCE — MEDICAL MALPRACTICE — PROXIMATE CAUSE — CAUSE IN FACT — EVIDENCE OF CAUSE IN FACT.

An act or omission is generally a cause in fact of an injury only if the injury could not have occurred but for that act or omission; the act or omission need not be the sole catalyst of the injury, but the plaintiff must introduce evidence that it was a cause; the plaintiff cannot satisfy this burden by showing only that the defendant may have caused his or her injuries, but must set forth in evidence specific facts that support a reasonable inference of a logical sequence of cause and effect; the evidence need not negate all other possible causes, but must exclude other reasonable hypotheses with a fair amount of certainty; testimony that establishes only a correlation between conduct and injury is not sufficient to establish cause in fact; the plaintiff cannot establish causation if the connection made between the defendant's negligent conduct and the plaintiff's injuries is speculative or merely possible.

Sommers Schwartz, P.C. (by *Samuel A. Meklir* and *Richard G. Brewer*), for Carol Teal.

Kerr, Russell and Weber, PLC (by *Patrick McLain* and *Daniel J. Ferris*), for Manish Prasad, M.D.

Magdich & Associates, PC (by *Karen W. Magdich*), for Paul Thielking, M.D.

O'Connor, DeGrazia, Tamm & O'Connor, P.C. (by *Julie McCann O'Connor* and *Richard M. O'Connor*), for Mark Levine, M.D., P.C.

Tanoury, Corbet, Shaw, Nauts & Essad, P.L.L.C. (by *Linda M. Garbarino* and *Anita Comorski*), for Herrick Memorial Hospital, Inc.

Before: ZAHRA, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM. Plaintiff, Carol Teal, the personal representative of the estate of Dennis Teal, deceased, appeals as of right the trial court's orders granting summary disposition to defendants Manish Prasad, M.D., Paul D. Thielking, M.D., Mark Levine M.D., P.C. (the P.C.), and Herrick Memorial Hospital, Inc. (the hospital), and dismissing her cause of action for medical malpractice. We affirm.

The decedent, Dennis Teal, had a history of depression and alcohol abuse. Plaintiff was Teal's wife, but she had started divorce proceedings in the weeks before his suicide. When this occurred, Teal began drinking more heavily and stopped taking his antidepressant medication. On March 18, 2004, Teal attempted suicide by trying to poison himself with carbon monoxide in his garage. The police found him and sent him to the emergency room at the University of Michigan Hospital for evaluation and treatment, where he was certified for involuntary admission. Teal was transferred to Herrick Memorial Hospital, a hospital providing psychiatric care in Lewanee County, on March 19, 2004.

Defendant Manish Prasad conducted the initial evaluation of Teal and admitted him to the in-patient

unit for monitoring. Dr. Prasad noted that Teal was uncooperative and revealed little information, and he instructed that Teal be monitored for depression symptoms and suicidal intentions and placed Teal back on antidepressants. Dr. Prasad continued to monitor and treat Teal during his time at the hospital.

Defendant Paul Thielking was the on-call physician the weekend that Teal was in the hospital. He first saw Teal on March 20, 2004. When Dr. Thielking assessed Teal, he noted that Teal was much more cooperative and apologized for his lack of cooperation the day before. He discussed wanting to get back on his medication and resume attending Alcoholics Anonymous (AA) meetings. When Dr. Thielking saw Teal again on March 21, Teal stated that he did not have suicidal intentions and acknowledged that he needed treatment and therapy.

Dr. Prasad discharged Teal from the hospital on March 22, 2004.[1] Teal was instructed to continue taking a combination of 150 milligrams of Wellbutrin SR and 20 milligrams of Prozac daily, as well as 50 milligrams of

[1] Dr. Luven Tejero, the attending physician, noted in Teal's discharge report that after Teal was placed back on antidepressants and encouraged to participate in individual and group therapy sessions,

> [h]e became much more pleasant and cooperative as well as future oriented. His sleep and appetite normalized and he felt much more hopeful about the future. He was able to express appropriate remorse and regret for his recent actions stating that it was "not a good thing" referring to his suicide attempt. He also felt very grateful to the friend who had interrupted the process and also reported talking to him on the phone and thanking him for doing that. The patient also stated that he planned to get back to work as well as continue to remain on his medication. He states [sic] that he wanted to get back in therapy with his counselor and also stated that he would work on getting a psychiatrist to continue his treatment. The patient's participation in individual and group therapy sessions improved greatly and he denied having any further suicidal ideations.

trazodone as needed, to live with either his mother or his sister, and to continue his treatment with follow-up appointments with his therapist and, if necessary, a psychiatrist. On the day of his discharge, Teal signed a safety plan agreeing, among other things, to attend AA meetings.

As part of his discharge plan, Teal was provided with treatment at Livingston Community Center Mental Health (the center). On March 29, 2004, social worker Sarah Berntsen evaluated Teal at the center. At the evaluation, Teal acknowledged that he had on-going thoughts and feelings of suicide, but had no desire or intent to act on them. Teal agreed that he would contact Berntsen if he was contemplating suicide, and she told him to return the following day for a clinical appointment with nurse practitioner Judy Gentz. Teal returned to the center the following day, and Gentz gave him a prescription for trazodone and told him to return for a dual-diagnosis evaluation. Teal left the center and filled the prescription.

Later that day, Teal contacted his daughter, Tracey Hillier, multiple times. During his final phone call to Hillier, he told her that he loved her, that he was going to attempt to call his wife one more time, and that if she didn't answer he "was done" because he "couldn't do it anymore." After she got off the phone with her father, Hillier contacted Teal's sister and asked her to check on Teal. Hillier also called the police, telling them that she was concerned that Teal would try to commit suicide. As these events occurred, Teal committed suicide. By the time the police and Teal's sister arrived at his residence, Teal had hanged himself.

Plaintiff filed a complaint on June 30, 2006, alleging that Drs. Manish Prasad, Luven Tejero, and Paul Thielking had committed malpractice by failing to properly

diagnose and treat Teal and by discharging him from the hospital prematurely and without formulating a proper treatment plan that would address Teal's depression and alcoholism. Plaintiff alleged that the P.C. and the hospital failed to provide physicians and staff members who were competent, skilled, and adequately trained to provide Teal with psychiatric care in accordance with the standard of care. Plaintiff claimed that defendants' negligence caused Teal to commit suicide.

Plaintiff's expert, Gerald Shiener, M.D., testified that defendants violated the standard of care by inadequately diagnosing Teal's condition and providing treatment and follow-up care that did not adequately address his alcoholism and depression. If defendants had done so, Dr. Shiener claimed, it was more likely than not that Teal would not have committed suicide. According to Dr. Shiener, the defendants should have made a better assessment regarding whether Teal was suicidal and should have recognized that Teal's increasingly positive outlook on life over the course of his time at the hospital was an act. Dr. Shiener opined that Teal's decision to end his life arose from his illness and was not a conscious decision, but he also admitted that Teal "was conscious when he made the decision and he had some intent, but his motivation and his choice of that solution arose out of his illness."

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), claiming that plaintiff had failed to establish a causal link between their actions and Teal's suicide. The trial court granted defendants' motions for summary disposition, recognizing that the causation element had not been established.

On appeal, plaintiff challenges the trial court's orders granting summary disposition to defendants, arguing that Dr. Shiener's testimony established a question

of material fact regarding whether defendants' allegedly negligent decision to discharge Teal on March 22, 2004, directly resulted in his suicide. In particular, she argues that the trial court should have recognized that Dr. Shiener's expert testimony created a question of material fact regarding whether defendants' malpractice was the proximate cause of Teal's death. Plaintiff also contends that defendants discharged Teal without properly treating his alcoholism and depression and with the knowledge that he did not have an appropriate support system at home, thereby placing him in a situation in which it was more probable than not that he would commit suicide. We disagree with plaintiff's assertions of error and conclude that summary disposition was appropriate in this case. Teal's suicide was too remote in time, and likely too influenced by intervening factors, to establish a question of material fact regarding the causation element. We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(8) and (10).[2] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

"In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an

[2] A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. A motion for summary disposition under MCR 2.116(C)(8) "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). "A trial court tests the factual support of a plaintiff's claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10)." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The court's task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial." *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). Documentary evidence submitted by the parties is viewed in the light most favorable to the nonmoving party. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

injury that more probably than not was proximately caused by the negligence of the defendant or defendants." MCL 600.2912a(2). " 'In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal.' " *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003), quoting *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995).

" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). In *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), our Supreme Court defined these terms as follows:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. [Citations omitted.]

"As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." *Craig*, *supra* at 87.

The *Craig* Court explained cause in fact and legal causation in more detail:

> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his

> injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.
>
> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while " '[t]he evidence need not negate all other possible causes,' " this Court has consistently required that the evidence " 'exclude other reasonable hypotheses with a fair amount of certainty.' " [*Id.* at 87-88 (emphasis in original; citations omitted).]

The *Craig* Court then noted that testimony that only establishes a correlation between conduct and injury is not sufficient to establish cause in fact because "[i]t is axiomatic in logic and in science that correlation is not causation." *Id.* at 93. Therefore, a plaintiff cannot establish causation if the connection made between the defendant's negligent conduct and the plaintiff's injuries is speculative or merely possible. *Id.*

Plaintiff fails to establish that defendants' decision to discharge Teal early and without a discharge plan was the "but for" cause of Teal's suicide. Admittedly, if defendants had locked Teal away for the rest of his life without access to a piece of rope or cord, he likely would not have hanged himself at his home on March 30, 2004. But this Court cannot determine whether defendants were the cause in fact of Teal's suicide by imagining every possible scenario and determining whether the likelihood of Teal's death would have diminished in each situation. Instead, the requirement is affirmative: plaintiff must provide sufficient evidence to establish " 'a reasonable inference of a logical sequence of cause and effect,' " *Craig*, *supra* at 87, quoting *Skinner*, *supra*

at 174, and not merely speculate, on the basis of a tenuous connection, that Teal would not have committed suicide if he had not been discharged on a given day more than a week before.

In this case, Teal's suicide occurred eight days after his discharge from the hospital psychiatric ward. The evidence presented to the trial court established that Teal had been discharged after he realized that suicide was not the answer to his problems, received medication, and recognized the need to resume attending AA meetings and to receive treatment for his mental condition and alcoholism. When he was discharged, Teal agreed to live with a family member, continue taking psychiatric medications, resume AA meetings, and attend follow-up meetings with a therapist and, if necessary, a psychiatrist. Yet after his discharge, Teal's whereabouts were largely unknown until March 29, 2004. The parties presented no conclusive information regarding Teal's mental state during this time, his changing moods over this time, or whether he was taking the medication prescribed for him on his release from the hospital. Plaintiff also presented no evidence indicating how Teal's discharge, whether premature or not, triggered a chain of events leading to Teal's suicide. In the absence of such evidence, plaintiff's claim that defendants' alleged malpractice caused Teal's death eight days later constitutes mere speculation.

The parties dispute whether an intervening cause, such as the failure of Berntsen or Gentz to detain Teal when he came to the center for treatment or his wife's failure to take Teal's telephone calls just before his death, broke the chain of causation linking defendants' alleged negligence to Teal's death. Yet this debate merely illustrates the speculation to which the parties resorted in order to identify the cause of Teal's suicide.

One might speculate that Teal might not have committed suicide if the center had detained him on March 29 or 30, but the parties do not provide evidence identifying the grounds on which this detention could have occurred.

And that is just the point. Any arguments regarding the causes of Teal's suicide are speculative, because there is scant evidence establishing Teal's mental state, thoughts, and suicidal tendencies after his discharge from the hospital. This is not a situation in which defendants knew that Teal was suicidal and would kill himself as soon as he had the chance, yet discharged him and watched as he collected rope, made a noose, and hanged himself from a nearby tree. It was not evident in this case that but for defendants' decision to discharge Teal on March 22, Teal would not have killed himself on March 30. Plaintiff failed to establish a reasonable inference, based on a logical sequence of cause and effect, that defendants' actions triggered the causal chain leading to Teal's suicide.

Dr. Shiener was plaintiff's only expert witness, and the evidence he provided did not establish "but for" causation. Expert testimony is generally required in medical-malpractice cases. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005); *Locke v Pachtman*, 446 Mich 216, 231-232; 521 NW2d 786 (1994). In *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1986), this Court specifically held that expert testimony is required to establish causation in an action for medical malpractice. However, an "expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury." *Skinner*, *supra* at 173. Instead, plaintiffs must "set forth specific facts that would support a reasonable inference of a logical

sequence of cause and effect." *Id.* at 174. " '[T]here must be facts in evidence to support the opinion testimony of an expert.' " *Id.* at 173 (citation omitted). " 'The evidence need not negate all other possible causes,' " but the evidence of causation " 'must exclude other reasonable hypotheses with a fair amount of certainty.' " *Id.* at 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442.

Dr. Shiener's testimony failed to establish a causal connection between defendants' actions and Teal's suicide. Dr. Shiener admitted that he had not been given much information regarding Teal's whereabouts between March 22 and 29, 2004. Dr. Shiener noted that the intake report compiled by the center on March 29 merely indicated that after his discharge on March 22, Teal had been attempting to resume his carpentry work to occupy his thoughts and time but had trouble focusing and that he had been contacting friends as needed. Teal also denied having a suicidal intent at the time. Dr. Shiener maintained that defendants' decision to discharge Teal led to his suicide, but he could not refer to any facts or establish a causal chain of events that would support his opinion. Consequently, Dr. Shiener's testimony does not establish that defendants' actions were the cause in fact of Teal's suicide.

Because plaintiff has failed to establish that defendants' actions were a cause in fact of Teal's suicide, plaintiff has also failed to establish that defendants' actions are a proximate cause of Teal's death. See *Craig*, *supra* at 87. Because plaintiff failed to establish the causation element of her medical-malpractice claim, we uphold the trial court's order granting defendants' motions for summary disposition.

Affirmed.

VELEZ v TUMA

Docket No. 281136. Submitted April 7, 2009, at Detroit. Decided April 16, 2009, at 9:00 a.m.

Myriam Velez brought a medical malpractice action in the Wayne Circuit Court against Martin Tuma, M.D., alleging that the defendant's failure to timely and properly diagnose and treat her acute vascular insufficiency condition resulted in the amputation of her left leg below the knee. The jury rendered a verdict in favor of the plaintiff, and the court, Cynthia D. Stephens, J., entered a judgment for the plaintiff. The defendant appealed.

The Court of Appeals *held*:

1. The plaintiff alleged that the defendant's negligence resulted in an actual, physical injury and did not plead a loss of an opportunity to avoid physical harm or to obtain a more favorable result. The evidence was sufficient for the jury to conclude that the plaintiff proved the elements of a medical malpractice claim. The defendant was not entitled to a judgment notwithstanding the verdict on the ground that the plaintiff did not sufficiently establish proximate causation.

2. The trial court did not abuse its discretion by denying the defendant's tardy motion for summary disposition that alleged that the plaintiff's notice of intent to file a claim lacked the specificity required by statute.

3. The trial court properly set off from the jury verdict the amount that the plaintiff had already received from other settling tortfeasors. The court was not required to take the setoff from the final judgment after the statutory cap on noneconomic damages was applied. The trial court's application of the common-law setoff rule was proper.

4. The court properly applied the noneconomic damages cap in effect at the time of the final judgment rather than the one in effect at the time the complaint was filed.

5. The trial court did not err by awarding prejudgment interest on the award of past noneconomic damages and not on an apportioned ratio consistent with the award of past noneconomic damages and the award of future noneconomic damages that was set aside.

6. Case evaluation sanctions were properly awarded to the plaintiff, under the facts of this case, on the basis of the defendant's rejection of a case evaluation award in her original lawsuit against the defendant and the other tortfeasors who reached a settlement, which suit was dismissed without prejudice in an order that stated that the plaintiff could refile her lawsuit against the defendant and discovery would carry over and continue.

Affirmed.

1. DAMAGES — MEDICAL MALPRACTICE — JOINT AND SEVERAL LIABILITY — SETOFFS — COMMON-LAW SETOFF RULE.

The common-law setoff rule applies in medical malpractice cases where joint and several liability is imposed; the setoff is properly applied to the jury verdict and does not apply to, and directly reduce, the amount of the final judgment.

2. DAMAGES — MEDICAL MALPRACTICE — NONECONOMIC DAMAGES CAP.

The amount of the statutory cap in effect at the time a judgment is entered is the cap that is applied to an award of noneconomic damages in a medical malpractice action, not the amount in effect at the time that the complaint was filed (MCL 600.1483, 600.6098[1], 600.6304).

Mark Granzotto, P.C. (by *Mark Granzotto*), and the *Thurswell Law Firm* (by *Judith A. Susskind*) for the plaintiff.

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

Before: CAVANAGH, P.J., and FORT HOOD and DAVIS, JJ.

CAVANAGH, P.J. Defendant appeals as of right a judgment in plaintiff's favor following a jury trial in this medical malpractice action. We affirm.

This action arises from defendant's alleged failure to timely and properly diagnose and treat the acute vascular insufficiency condition that plaintiff presented with on February 1, 2000, which resulted in her left leg being amputated below the knee on February 13, 2000.

On appeal, defendant first argues that he was entitled to a judgment notwithstanding the verdict (JNOV) because plaintiff did not establish proximate cause in this purported "lost opportunity" medical malpractice action. After a review de novo of the trial court's decision, and viewing the evidence and all legitimate inferences in the light most favorable to plaintiff, we disagree with defendant. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

To establish medical malpractice, a plaintiff must prove the following elements: (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997). Thus, plaintiff must prove that defendant's negligence proximately caused her injuries. *Id*. at 647. To establish proximate cause, plaintiff must prove the existence of both cause in fact and legal cause. *Id*., citing *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). To prove cause in fact, " 'the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.' " *Weymers*, *supra* at 647-648, quoting *Skinner*, *supra* at 164-165. To prove legal cause, "the plaintiff must show that it was foreseeable that the defendant's conduct 'may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable.' " *Weymers, supra* at 648, quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Defendant argues that "*Fulton v* [*William*] *Beaumont Hosp*, 253 Mich App 70 [655 NW2d 569] (2002) requires plaintiffs to prove a loss of opportunity of

greater than 50 percentage points to establish causation in medical malpractice cases like this one alleging damages caused by a delay in treatment. Plaintiff failed to do so here." But, as in *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), this plaintiff did not plead a loss of opportunity claim. Plaintiff sued defendant, alleging that his negligence resulted in an actual, physical injury—the loss of her left leg below the knee. Accordingly, the "lost opportunity doctrine" is not applicable to plaintiff's claim.

A "lost opportunity" cause of action was first recognized in *Falcon v Mem Hosp*, 436 Mich 443; 462 NW2d 44 (1990), a wrongful death case in which the decedent, after giving birth, suffered from an amniotic fluid embolism that caused her death. The subsequent medical malpractice case was premised on the fact that, although this complication was unpreventable, the defendants' failure to start an intravenous line to the decedent before the event occurred deprived the decedent of a 37.5 percent chance of surviving the complication. Thus, although the defendants caused the decedent some harm, more probably than not they did not cause her death. She only had a 37.5 percent chance of surviving even if the intravenous line had been placed, i.e., even if the alleged negligence had not occurred. Nevertheless, the *Falcon* Court noted, the plaintiff was deprived of that opportunity, and the Court held: "We thus see the injury resulting from medical malpractice as not only, or necessarily, physical harm, but also as including the loss of opportunity of avoiding physical harm." *Id*. at 461 (opinion by LEVIN, J.). The *Falcon* Court continued:

> A number of courts have recognized, as we would, loss of an opportunity for a more favorable result, as distinguished from the unfavorable result, as compensable in medical malpractice actions. Under this approach, damages

> are recoverable for the loss of opportunity although the opportunity lost was less than even, and thus it is not more probable than not that the unfavorable result would or could have been avoided.
>
> Under this approach, the plaintiff must establish more-probable-than-not causation. He must prove, more probably than not, that the defendant reduced the opportunity of avoiding harm. [*Id*. at 461-462.]

Accordingly, the *Falcon* Court recognized that the loss of a substantial opportunity of avoiding physical harm was actionable and that the loss in that case, of a 37.5 percent opportunity of living, was actionable. *Id*. at 469-470.

The *Stone* Court, in particular Chief Justice TAYLOR, whose opinion was joined by Justices CORRIGAN and YOUNG, further explained the *Falcon* decision:

> Under this [loss-of-opportunity] theory, a plaintiff would have a cause of action *independent of that for the physical injury* and could recover for the malpractice that caused the plaintiff to go from a class of patients having a "good chance" to one having a "bad chance." Without this analysis, the plaintiff in *Falcon* would not have had a viable claim because it could not have been shown that the defendant more probably than not caused the physical injury. Until *Falcon*, medical-malpractice plaintiffs alleging that the defendant's act or omission hastened or worsened the injury (such as by failing to diagnose a condition) had to prove that the defendant's malpractice more probably than not was the proximate cause of the injury. [*Stone, supra* at 154-155 (emphasis supplied).]

Justice CAVANAGH, whose opinion in *Stone* was joined by Justices WEAVER and KELLY, similarly explained the holding in *Falcon*:

> In sum, when *Falcon* adopted the loss-of-opportunity doctrine, it recognized that the injury of loss of an oppor-

> tunity was distinct from the injury of suffering the associated physical harm—which, in that case, was death. [*Id*. at 168.]

In response to the *Falcon* decision, *Weymers*, *supra* at 649, the Legislature amended MCL 600.2912a by adding subsection 2912a(2), which provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

As our Supreme Court recognized in *Stone*, the proper interpretation of this statutory language is subject to considerable debate. Chief Justice TAYLOR, joined by Justices CORRIGAN and YOUNG, would hold: "the first sentence of subsection 2 requires plaintiffs in every medical-malpractice case to show the defendant's malpractice proximately caused the injury while, at the same time, the second sentence refers to cases in which such proof not only is unnecessary, but is impossible." *Stone*, *supra* at 157. On the ground that the two sentences created an incomprehensible paradox, *Stone*, *supra* at 157-159, these justices would hold that the statute was unenforceable as written. Justice CAVANAGH, joined by Justices WEAVER and KELLY, disagreeing with that interpretation of the second sentence, would hold that the statute was enforceable and "merely sets the threshold for invoking the loss-of-opportunity doctrine" that *Falcon* adopted. *Id*. at 172. That is, "[i]t requires that a plaintiff's premalpractice opportunity to survive or achieve a better result was greater than 50 percent." *Id*. Thus, the plaintiff in *Falcon* would not have met the threshold because his decedent only had a 37.5 percent chance of surviving the complica-

tion even if the defendants had not been negligent. Justices CAVANAGH, WEAVER, KELLY, and MARKMAN in *Stone* "would hold that loss of the opportunity is, by itself, a compensable injury, although the opportunity must be 'lost'—that is, the bad result must occur—in order for a claim to accrue." *Id*. at 164 (opinion by TAYLOR, C.J.).

Here, defendant relies on the case of *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), for his argument that plaintiff was required, and failed, to prove a loss of opportunity claim. We note the statement in *Stone*, that "[a]ll seven justices believe that *Fulton*'s analysis is incorrect or should be found to no longer be good law, though their reasons for doing so vary." *Stone*, *supra* at 164 (opinion by TAYLOR, C.J.). But because a majority of the *Stone* Court held that the *Stone* case was not a lost-opportunity case, the correctness of *Fulton* could not be reached and it remains undisturbed. *Id*. Thus, we turn to *Fulton*.

In *Fulton*, the medical malpractice claim was premised on the theory that the defendants' failure to properly diagnose and treat the decedent's cervical cancer resulted in a loss of her opportunity to survive. *Fulton, supra* at 73. Thus, like in *Falcon*, the claimed injury specifically pleaded was the loss of opportunity to survive, not a physical injury like the decedent's death. A medical malpractice plaintiff " 'has the burden of proving that he or she suffered an injury . . . .' " *Wickens v Oakland Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001), quoting MCL 600.2912a(2). The issue, then, was the burden of proof with regard to causation; specifically, the proofs that were required to show that it was more probable than not that the defendants deprived the decedent of an opportunity to

survive. The *Fulton* Court noted that it had to decide whether the second sentence of MCL 600.2912a(2) required the plaintiff to show that the decedent's initial opportunity to survive before the alleged malpractice was greater than 50 percent, or that the opportunity was reduced by greater than 50 percent after the alleged malpractice. *Fulton, supra* at 77-78. The *Fulton* Court concluded that it was the magnitude of the lost opportunity that was the proper consideration; thus, the opportunity lost because of the defendants' negligence had to be greater than 50 percent. *Id*. at 83.

The case before us is factually distinguishable from *Fulton* and *Falcon*. The claimed injury here is a physical injury—the loss of plaintiff's leg below the knee. This was not a case in which plaintiff was claiming a loss of opportunity of any kind; she claimed that defendant's negligence more probably than not directly caused her to lose her leg below the knee. In other words, this is a traditional case of malpractice. In *Falcon*, the decedent's estate could not bring a traditional medical malpractice case because it could not be established that the defendants' negligence more probably than not caused the decedent's death. In *Fulton*, it appears that, because the theory specifically pleaded by the plaintiff was a loss of the opportunity to survive, *Fulton, supra* at 73, the *Fulton* Court did not consider whether the case could have been treated as one of ordinary medical malpractice, as Chief Justice TAYLOR in *Stone*, *supra* at 164 n 14, opined. Again, the issue before the *Fulton* Court was how to analyze the causation element when the claimed injury is a loss of opportunity. Thus, the holding in *Fulton* does not support defendant's claim that plaintiff in this case was required to prove a loss of opportunity claim. See MCR 2.111(B)(1); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999).

Defendant refers us to the case of *Klein v Kik*, 264 Mich App 682; 692 NW2d 854 (2005), in support of his argument that plaintiff's cause of action was a loss of opportunity case. In that wrongful death case, the decedent's estate brought an action premised on the theory that the defendants' failure to properly diagnose the decedent's lung cancer caused the decedent's death. This Court recognized, however, as in the cases of *Falcon* and *Fulton*, that the injury caused by the defendants' alleged malpractice was the loss of an opportunity to survive. *Id*. at 686. Again, *Klein* is factually distinguishable from the case before us; in our case plaintiff suffered a physical injury, the loss of her leg, because of defendant's alleged negligence.

Defendant also refers us to *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518; 687 NW2d 143 (2004), in support of his position. In that case, the plaintiff suffered a stroke and brought his malpractice action (the plaintiff's wife also brought a claim for loss of consortium) premised on the theory that, if he had been administered a particular drug within a certain time, he would not have suffered paralysis. *Id*. at 521-522. The defendants claimed that the plaintiff could not establish that the failure to administer the drug more probably than not caused the loss of an opportunity to achieve a better result. *Id*. at 522. This Court agreed. The plaintiff's expert's testimony was extremely equivocal. *Id*. at 533-537. He testified that, if the medication had been given, more likely than not it would have had some effect on the plaintiff's condition, but he could not estimate the extent of that effect. *Id*. at 522. He also testified that, without the medication, only 20 percent of stroke victims achieve a full cure. *Id*. at 533. But, when the medication was administered, the cure rate was between 31 percent and, perhaps, as high as 50 percent. *Id*. at 533, 537. This Court concluded that the

plaintiff failed to establish that it was more probable than not that the defendants' alleged malpractice deprived the plaintiff of an opportunity to achieve a better result. *Id*. at 539. The plaintiff only had, possibly, a 31 to 50 percent chance of a better result, even if there had been no negligence. Again, *Ensink* was not a traditional medical malpractice case.

The case before us is more like *Stone* than like the cases relied on by defendant. In *Stone*, the plaintiffs claimed that, if the defendants had properly diagnosed Carl Stone's condition—an abdominal aortic aneurysm, he would not have had to undergo emergency surgery for its rupture, would not have had to have both legs amputated, and would not have suffered additional medical complications. *Stone, supra* at 148 (opinion by TAYLOR, C.J.). Six of the justices held that, despite the defendants' arguments to the contrary, *Stone* was not a lost-opportunity case; rather, it was a claim of "ordinary" or "traditional" medical malpractice. *Id*. at 164-165 (opinion by TAYLOR, C.J.), 185 (opinion of MARKMAN, J., dissenting).

In particular, Chief Justice TAYLOR, whose opinion was joined by Justices CORRIGAN and YOUNG, agreed with the plaintiffs' characterization of the case as "a simple case of physical injury directly caused by negligence." *Id*. at 151. Chief Justice TAYLOR also agreed with the plaintiffs' definition of a loss of opportunity case, which was a case " 'where a plaintiff cannot prove that the defendant's acts or omissions proximately caused his injuries, but can prove that the defendant's acts or omissions deprived him of some chance to avoid those injuries.' " *Id*. at 151. The elements of an "ordinary" or "traditional" medical malpractice claim require the plaintiff to establish that the "defendants' negligence more probably than not caused plaintiff's injuries." *Id*.

at 163. Justice CAVANAGH's opinion, joined by Justices WEAVER and KELLY, began: "I agree with Chief Justice TAYLOR that the evidence presented in this case supports a traditional medical-malpractice claim; thus, I concur that the jury's verdict should be upheld." *Id*. at 165. The primary disagreement between Chief Justice TAYLOR's and Justice CAVANAGH's opinions concerned whether the second sentence of MCL 600.2912a(2) was "incomprehensible and unenforceable." Six justices agreed that the *Stone* case was not a "lost-opportunity" case, and only Justice MARKMAN disagreed with that conclusion.

As in *Stone*, plaintiff's injury in this case was not the loss of an opportunity to avoid physical harm or the loss of an opportunity for a more favorable result; instead, plaintiff suffered the physical harm, the unfavorable result. See *Stone*, *supra* at 148 (opinion by TAYLOR, C.J.); *Falcon*, *supra* at 461 (opinion by LEVIN, J.). And plaintiff established, as she was required to, the traditional elements of a medical malpractice claim—defendant's negligence more probably than not caused her left leg below the knee to be amputated. Plaintiff's expert, Dr. Wayne Gradman, testified that when defendant first saw plaintiff at 9:00 a.m. on February 1, 2000, there was a 70 to 80 percent chance of saving her leg. In light of plaintiff's condition, surgery should have been performed by noon that day. Instead of performing emergency surgery to remove blood clots as the standard of care directed, defendant did nothing for 36 hours before performing surgery on February 2, 2000, at about 11:00 p.m. Dr. Gradman testified that there was no explanation regarding why defendant would wait so long to do the necessary surgery. Dr. Gradman further opined that, if defendant had complied with the standard of care, plaintiff would not have lost her leg. This evidence

was sufficient for the jury to conclude that the causation and injury elements were met.

In summary, defendant was not entitled to JNOV on the ground that plaintiff did not sufficiently establish proximate causation. This was not a "lost opportunity" medical malpractice action; thus, *Fulton* and its progeny are not applicable to this case. The burden of proof set forth in the second sentence of MCL 600.2912a(2), as analyzed by *Fulton*, does not apply here. In light of the evidence presented, the jury could have concluded that plaintiff suffered a physical "injury that more probably than not was proximately caused by the negligence of the defendant," and would not have occurred absent that negligence. MCL 600.2912a(2); *Stone*, *supra* at 163 (opinion by TAYLOR, C.J.). Thus, this issue is without merit.

Next, defendant argues that he was entitled to either JNOV or a new trial because the version of M Civ JI 30.20, the "loss of opportunity" jury instruction, read to the jury was the version that predated the *Fulton* decision and did not indicate that plaintiff had to establish that her chance of receiving a better result fell more than 50 percentage points. However, because we have concluded that this is not a "loss of opportunity" medical malpractice case, this jury instruction was not applicable. See MCR 2.516(D)(2); *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002). We note, though, that defendant did not object to the instruction as read by the trial court and, thus, failed to preserve the issue for appeal. See MCR 2.516(C); *Ward v Consolidated Rail Corp*, 472 Mich 77, 86 n 8; 693 NW2d 366 (2005). Further, the special jury verdict form actually did state, as question three: "[D]id the plaintiff lose an opportunity to achieve a better result of greater than 50 percent as a result of

[defendant's] professional negligence?" And the jury responded in the affirmative. In any case, appellate relief is not warranted. See MCR 2.613(A).

Next, defendant argues that his motion for summary disposition should have been granted because plaintiff's notice of intent to file a claim lacked the specificity required by MCL 600.2912b. We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In his argument on appeal, defendant does not even address the trial court's reason for denying his motion for summary disposition—it was untimely and in violation of the trial court's pretrial scheduling order. Plaintiff's notice of intent was filed on March 16, 2001, when she brought a lawsuit against this defendant, Detroit Receiving Hospital, Harper Hospital, and Dr. Lawrence Schwartz. Subsequently, the parties, except for this defendant, reached a settlement agreement. Thereafter, the trial court entered a stipulated order to dismiss that previous case without prejudice, stating that plaintiff could refile her lawsuit against this defendant and discovery would carry over and could continue.

On January 26, 2004, plaintiff did file this case against defendant only. A pretrial order entered by the trial court on June 27, 2005, stated: "All dispositive dispositions and motions in limine are due by 10/01/05. Motions filed after that date will not be considered." On October 11, 2006—over a year after all dispositive motions were due—defendant filed his motion for summary disposition challenging, for the first time, the sufficiency of plaintiff's notice of intent that had been filed five years and seven months earlier. Noting the lengthy history of this case, as well as the deadline for motions set by a pretrial order, the trial court refused to

hear the motion. Defendant does not address in what manner this decision allegedly constituted an abuse of discretion. See *Kemerko Clawson, LLC v RxIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005). Under MCR 2.401(B)(2), a trial court has the authority to set deadlines for the filing of motions. The trial court also has the discretion to decline to consider motions filed after the deadline. *Kemerko*, *supra*. Defendant has not addressed and, thus has not established, grounds for reversal of the trial court's discretionary decision to decline to consider his very tardy motion for summary disposition. Thus, this issue is without merit.

Next, defendant argues that the trial court erred in its application of the common-law setoff rule because it subtracted the amount of the previous settlement from the jury verdict, instead of from the amount of the final judgment after the statutory cap had been applied. We disagree. Issues concerning setoff are reviewed de novo. *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249; 660 NW2d 344 (2003).

It is undisputed that joint and several liability still exists in medical malpractice cases where the plaintiff is without fault, as in this case. MCL 600.6304(6)(a); *Markley*, *supra* at 251-252. Thus, "where the negligence of two or more persons produce a single, indivisible injury, the tortfeasors are jointly and severally liable . . . ." *Id*. at 252. That is, each tortfeasor is potentially liable for the full amount of a plaintiff's damages, regardless of a particular tortfeasor's degree of fault. *Id*. at 253; see, also, *Maddux v Donaldson*, 362 Mich 425, 433-434; 108 NW2d 33 (1961). The underlying purpose of joint and several liability "is to place the burden of injustice, if injustice is inevitable, on the wrongdoer instead of on the innocent plaintiff." *Bell v Ren-Pharm, Inc*, 269 Mich App 464, 471; 713 NW2d 285 (2006).

Thus, a defendant is jointly and severally liable even for damages caused by the fault of a person not a party to an action. *Id*. at 470-472.

Under MCL 600.2925d(b), before the tort reform legislation, prior settlements reached by joint tortfeasors before a verdict was reached were credited—or set off—against the jury verdict, reducing the verdict by the settlement amounts. *Rittenhouse v Erhart*, 424 Mich 166, 181-183; 380 NW2d 440 (1985). "Accordingly, by the time of trial, the 'claim' of each plaintiff against the nonsettling tortfeasors was an amount equal to the total damages minus the settlements." *Id*. at 182, citing *Mayhew v Berrien Co Rd Comm*, 414 Mich 399, 410; 326 NW2d 366 (1982). This conclusion made logical sense because, after a settlement agreement is reached with a joint tortfeasor, only part of a plaintiff's "claim" remained—the unsettled part of the claim. In *Kaminski v Newton*, 176 Mich App 326; 438 NW2d 915 (1989), this Court explained that, in cases of joint and several liability where the tortfeasors are liable for a single indivisible injury,

> "[t]he adjudication of the amount of the loss . . . has the effect of establishing the limit of the injured party's entitlement to redress, whoever the obligor may be. This is because the determination of the amount of the loss resulting from actual litigation of the issue of damages results in the injured person's being precluded from relitigating the damages question." [*Id*. at 331, quoting Restatement Judgments, 2d, § 50,comment *d*, p 43.]

So, to arrive at the value of the unsettled, adjudicated part of the plaintiff's claim, the amount of a previous settlement had to be subtracted from the plaintiff's total amount of loss as determined by the finder of fact.

The effect of the setoff was to eliminate a recovery by a plaintiff that was in excess of the actual loss sustained

as determined by the finder of fact. For example, if the loss sustained by a plaintiff was determined to be $100, and the plaintiff had already settled part of his or her claim with a joint tortfeasor for $90, the remaining defendant who had not settled would only be potentially liable for $10. But, if the loss sustained was valued at $100, and the plaintiff had settled part of his or her claim with a joint tortfeasor for $10, the remaining defendant who had not settled would be potentially liable for $90. This reduction of the jury award, like the application of the collateral source rule, MCL 600.6303, recognized that a plaintiff was already compensated, in part, for his or her damages. See *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 299-300; 549 NW2d 47 (1996). That is, although the plaintiff was entitled to the full amount of the damages the jury determined proper, the source of payment could be split between the defendant and another. *Id*.

The former language of MCL 600.2925d(b) was eliminated by amendment and, with it, the statutory right to set off the amount paid to the plaintiff for the same injury by a settling tortfeasor. However, this Court in *Markley*, *supra* at 256-257, held that the common-law setoff rule applies in medical malpractice cases where joint and several liability is imposed. In concluding that the common-law setoff rule applies in medical malpractice cases, the *Markley* Court explained:

> With tort reform and the switch to several liability, it is logical to conclude that common-law setoff in joint and several liability cases remained the law, where the new legislation was silent, where application of the common-law rule does not conflict with any current statutes concerning tort law, and where a plaintiff is conceivably overcompensated for its injury should the rule not be applied. Considering the general nature and tone of tort reform legislation, we conclude that the Legislature did not

> intend to allow recovery greater than the actual loss in joint and several liability cases when it deleted the relevant portion of § 2925d, but instead intended that common-law principles limiting a recovery to the actual loss would remain intact.
>
> Here, a jury determined that plaintiff was entitled to $300,000 in total damages for wrongful death; however, plaintiff already received $220,000 for wrongful death. Without reduction of the jury verdict, plaintiff receives $520,000 in compensation for a $300,000 harm. If we were to allow such a recovery, we would defeat the principle underlying common-law setoff, that being that a plaintiff can have but one recovery for an injury. [*Id*. at 256-257.]

The issue in this case is whether the settlement amount that plaintiff received from the settling tortfeasors should be set off against the jury verdict, as the trial court decided, or the final judgment after the noneconomic cap is applied, as defendant argues. We agree with the trial court and conclude that the setoff was properly applied to the jury verdict.

We can discern no reason why the same principles that applied to the statutory right to setoffs should not apply to the common-law right to setoffs when joint and several liability is imposed for a single indivisible injury. Here, the jury determined that plaintiff's actual loss for her injury totaled $1,524,831.86. See MCL 600.6304(1)(a). Defendant and the settling tortfeasors were jointly and severally liable for that single indivisible injury. Because a portion of that actual loss was previously paid by the joint tortfeasors through a settlement agreement, plaintiff remains entitled to a potential recovery from this defendant for the remainder of that loss—$1,329,831.86. Under principles of joint and several liability—whose purpose, as stated in *Bell, supra* at 471 is "to place the burden of injustice . . . on the wrongdoer instead of on the innocent plaintiff"—defendant would be liable for the remainder of the dam-

ages but for the application of the collateral source rules and the statutory cap on noneconomic damages. This result is consistent with the purpose underlying common-law setoff—plaintiff is not overcompensated for her injury in that her potential recovery is not greater than her actual loss and she would only be entitled to one recovery for her single injury.

Defendant is correct, though, that the determination of the amount of loss a plaintiff sustained is distinguishable from the amount of loss that is recoverable by force of a final judgment. However, we conclude that the application of the setoff rule to the jury verdict, rather than the final judgment, is proper. When a matter is adjudicated, the plaintiff is exercising his or her constitutional right to have a trier of fact decide the case, including the matter of damages. See *Zdrojewski v Murphy*, 254 Mich App 50, 75-76; 657 NW2d 721 (2002). In cases where joint and several liability is imposed, the trier of fact's determination of damages sets the limit regarding the amount a plaintiff can recover for his or her loss. The common-law rule of setoff is applied to protect and enforce the trier of fact's decision—that is its ultimate purpose. By its application, a plaintiff is entitled to recover only that amount, in total, and not more; but not less either, at least not by operation of this rule of setoff. Again, the purpose of the setoff rule is to ensure that a plaintiff is not *overcompensated* for his or her actual loss as determined by the trier of fact. A single indivisible injury can lead to only a single recovery, even when joint tortfeasors combine to cause that injury and even though each tortfeasor is potentially liable for the entire amount of a plaintiff's damages. Thus the setoff rule applies to the trier of fact's determination of damages, and does not apply to, and directly reduce, the amount of the final judgment.

Here, the jury determined that plaintiff's actual loss totaled $1,524,831.86. To ensure that plaintiff is not overcompensated for her injury, as determined by the jury, the setoff rule applies and the partial payment of $195,000 is subtracted from the jury verdict. In accordance with the imposition of joint and several liability, defendant remained potentially liable to plaintiff for $1,329,831.86, an amount that is not in excess of her actual loss. Defendant's argument that he did not receive a "benefit" from the application of the setoff amount is unavailing. And characterizing this plaintiff's actual recovery of $394,200—as opposed to the jury's award of $1,524,831.86—as a "windfall" is outlandish. Unlike in *Markley*, the jury in this case found that plaintiff suffered actual harm that far exceeded the previously negotiated settlement amount paid by the joint tortfeasors. Because defendant is jointly and severally liable for those damages, he is potentially liable for that remaining amount of the loss. Therefore, the trial court's application of the common-law setoff rule was proper.

Next, defendant argues that the amount of the noneconomic cap in effect at the time plaintiff filed her complaint should have been applied to the final judgment, rather than the cap in effect at the time the judgment was entered. After review de novo of this issue of law, we disagree. See *Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 739; 641 NW2d 567 (2002).

Several statutes contain provisions regarding the application of the statutory cap on awards of noneconomic damages in medical malpractice actions. MCL 600.1483 provides, in relevant part:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of

damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000:

* * *

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index.

MCL 600.6304 provides, in relevant part:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

* * *

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a [impairment defense] or 6303 [collateral

> source benefits], and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.
>
> * * *
>
> (5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

And MCL 600.6098(1) provides:

> A judge presiding over an action alleging medical malpractice shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483.

Our primary goal in interpreting statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). We first turn to the language of the statute. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). If the plain and ordinary meaning of the language is clear, judicial construction is not permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

To the extent that the applicable statutes relate to the same subject matter or share a common purpose, they are *in pari materia* and are read together as one law. See *Sinicropi v Mazurek*, 273 Mich App 149, 157;

729 NW2d 256 (2006). Read together, the statutes clearly provide that the cap on noneconomic damages applies to an *award* of noneconomic damages. MCL 600.6304(5). An award of noneconomic damages does not exist until the finder of fact renders such a verdict. MCL 600.1483(2), 600.6304(1)(a); see, also, *Jenkins v Patel*, 471 Mich 158, 172; 684 NW2d 346 (2004); *Zdrojewski*, *supra* at 76-77. A plaintiff awarded damages by the finder of fact has no right to enforce the award until a judgment is entered. See MCR 2.601, 2.602; see, also, *Heinz*, *supra* at 298. A trial court cannot enter a judgment on the award until the statutory cap on noneconomic damages is applied, if necessary. MCL 600.1483(1), 600.6304(5), 600.6098(1). The statutory cap is applied, if at all, at the time the judgment is entered, and not when the complaint is filed. Thus, the amount of the statutory cap in effect at the time the judgment is entered is the cap that applies to an award of noneconomic damages. Until that time, a plaintiff has no right to enforce a verdict awarding noneconomic damages. See *Wessels v Garden Way, Inc*, 263 Mich App 642, 653; 689 NW2d 526 (2004). Therefore, in this case, the trial court properly applied the noneconomic damages cap in effect at the time the judgment was entered.

Next, defendant argues that the trial court erred in its calculation of prejudgment interest because the court awarded prejudgment interest on the entire award of past noneconomic damages, and not on an apportioned ratio consistent with the past and future noneconomic damages awarded by the jury. After a review de novo of this issue of statutory interpretation, we disagree with defendant. See *Jenkins*, *supra* at 162.

MCL 600.6013(1) provides that the payment of interest is allowed on a money judgment recovered in a civil

action, but not on future damages. Here, the jury awarded plaintiff $480,000 in past noneconomic damages and $920,000 in future noneconomic damages for the years 2007 through 2029. The jury also awarded plaintiff $28,880 in past economic damages and $95,951.86 for future economic damages. In entering its judgment on the verdict, the trial court adjusted the total verdict by the prior settlement award, then reduced the entire economic damages award to zero because of the collateral source rule, MCL 600.6303, and finally reduced the noneconomic damages award to $394,200 because of the noneconomic damages cap, MCL 600.1483.

On appeal, defendant argues that the reduced award of noneconomic damages must be considered and treated, for purposes of a prejudgment interest calculation, as a ratio of both past and future noneconomic damages because the jury awarded both types of damages. Defendant claims that "[i]gnoring the jury's decision to assign noneconomic damages to both past and future damages would improperly inflate the prejudgment interest award." Defendant's argument is unpersuasive. For the same reason that applying the noneconomic damages cap to reduce the jury's award from $1,400,000 to $394,200 is not considered "ignoring" the jury's decision, applying the cap to only the award of past noneconomic damages is not considered "ignoring" the jury's decision; it is merely the application of the law.

As discussed earlier, a trial court cannot enter a judgment on a verdict until the statutory cap on noneconomic damages is applied, if necessary. MCL 600.1483(1), 600.6304(5), 600.6098(1). The statutory cap is applied, if at all, at the time the judgment is entered. The entry of such a judgment is governed by MCL 600.6306, which provides, in relevant part:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> (a) All past economic damages, less collateral source payments as provided for in section 6303.
>
> (b) All past noneconomic damages.
>
> (c) All future economic damages . . . .
>
> (d) All future medical and other health care costs . . . .
>
> (e) All future noneconomic damages . . . .
>
> (f) All taxable and allowable costs . . . .

Thus, according to the plain language of the statute, the trial court was required to enter a judgment on all past noneconomic damages before it entered a judgment on all future noneconomic damages. Here, the jury awarded plaintiff $480,000 in past noneconomic damages and that award was required to be reduced to a judgment before the entry of a judgment on the jury's award of $920,000 in future noneconomic damages.

However, MCL 600.6098(1), as set forth above, requires the trial court, in actions alleging medical malpractice, to apply the limitation on noneconomic damages as provided in MCL 600.1483, if necessary, so as to "set aside *any* amount of noneconomic damages in excess of the amount specified . . . ." (Emphasis supplied.) Because, under MCL 600.6306, past noneconomic damages are considered first and the award of $480,000 in past noneconomic damages exceeds the statutory cap of $394,200 in effect at the time of the judgment, the amount of past noneconomic damages set aside is $85,800. The award of $920,000 in future noneconomic damages is also set aside. Because the

award of future noneconomic damages was set aside, the trial court's award of prejudgment interest was not erroneous.

Finally, defendant argues that the trial court improperly awarded plaintiff case evaluation sanctions under MCR 2.403(O) because, purportedly, there was no case evaluation award rendered in this case. As the trial court held, this argument is wholly without merit because a case evaluation did occur and defendant rejected the award.

Plaintiff originally brought a lawsuit in 2001 against this defendant, Detroit Receiving Hospital, Harper Hospital, and Dr. Lawrence Schwartz. A case evaluation was conducted, and defendant rejected the award. Following case evaluation, a settlement agreement was reached with all others, except this defendant. Thereafter, a stipulation and order to dismiss that case without prejudice was entered, which stated that plaintiff could refile her lawsuit against this defendant and discovery would carry over and could continue. After this action was filed, it was scheduled for case evaluation. Defendant responded by filing a motion, arguing that, although case evaluation is mandatory, there was good cause to make an exception under MCR 2.403(A)(2) because "the parties have already gone through case evaluation in the 2001 filing, and submitting the matter for a second case evaluation would only result in undue burden and expense upon the parties." At the hearing on the motion, defense counsel appeared and stated on the record: "This case has previously been filed and it's [sic] previously been case evaluated." The motion was granted.

After the jury rendered a verdict in plaintiff's favor, plaintiff sought case evaluation sanctions. Defendant objected. At the hearing on the objection, the trial court,

which presided over the previous case before it was dismissed by stipulation, indicated that the parties had agreed that another case evaluation did not have to be conducted. Accordingly, the trial court ruled that, when defendant requested that this case be excepted from another case evaluation, it was with the understanding that the previous case evaluation would "apply for whatever purpose a case evaluation would be beneficial." Thus, defendant's objection to the imposition of case evaluation sanctions was denied. In light of the record evidence, including defendant's actions, and the mandatory nature of MCR 2.403(A)(2), as well as the trial court's unique perspective with regard to the pretrial proceedings, we agree with the trial court's decision. See *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005).

Affirmed. Costs to plaintiff as the prevailing party. MCR 7.219(A).

CAPITOL PROPERTIES GROUP, LLC v 1247 CENTER STREET, LLC

Docket No. 281112. Submitted February 3, 2009, at Lansing. Decided April 16, 2009, at 9:05 a.m.

Capitol Properties Group, LLC, brought an action in the Ingham Circuit Court against 1247 Center Street, LLC, and Thomas Donall, seeking the abatement of an alleged nuisance and alleged violations of city of Lansing noise ordinances with respect to loud music from a nightclub operated by the defendants and adjoining the plaintiff's residential and commercial rental property in an area zoned for commercial use. The defendants counterclaimed tortious interference with business expectancy. The court, Joyce Draganchuk, J., granted summary disposition for the defendants. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court correctly granted summary disposition of the nuisance per se claim. A nuisance per se is an act, occupation, or structure that is a nuisance at all times and under any circumstances, regardless of location or surroundings. A nightclub producing excessive noise only at certain hours is not a nuisance at all times and under any circumstances.

2. The trial court correctly granted summary disposition of the public nuisance claim. A public nuisance is an unreasonable interference with a common right enjoyed by the general public. Unreasonable interference includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. In this case, only the private claim of plaintiff and its tenants has been presented. There was no showing of interference with the public's health, safety, peace, comfort, or convenience.

3. The trial court correctly granted summary disposition of the private nuisance claim. One is liable for a private nuisance if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii)

unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. In this case, the plaintiff failed to show that it suffered significant harm or unreasonable interference.

4. The trial court correctly ruled that Lansing Ordinances, §§ 654.07(a) and 654.07(h), did not apply to this case. Section 654.07(h)—which prohibits a place of public entertainment from playing a radio, television, phonograph, drum, musical instrument, sound amplifier, or a similar device so as to exceed a sound level of 55 decibels on a residential real property boundary—does not apply because the properties of the plaintiff and the defendants were in an area zoned for commercial use. Section 654.07(a), a more general provision relating to the loudness of sound production and reproduction systems, does not apply because a reasonable lawmaker would not have expected it to apply to this case, given the possible application of § 654.07(h), which is a more specific provision that applies to places of public entertainment.

Affirmed.

M. J. KELLY, J., concurring in part and dissenting in part, agreed with the result but not the reasoning behind the majority's decision to affirm the summary disposition of the claims based on ordinance violation and public nuisance. He dissented from the decision to affirm the summary disposition of the claim based on private nuisance. The plaintiff established a factual question concerning whether the defendants' operation of the nightclub substantially and unreasonably interfered with the plaintiff's use and enjoyment of its property. The question must be resolved by the trier of fact at a trial, not by the trial court in a motion for summary disposition.

1. NUISANCE — NUISANCE PER SE.

A nuisance per se is an act, occupation, or structure that is a nuisance at all times and under any circumstances, regardless of location or surroundings.

2. NUISANCE — PUBLIC NUISANCES.

A public nuisance is an unreasonable interference with a common right enjoyed by the general public; unreasonable interference includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights.

3. NUISANCE — PRIVATE NUISANCES.

One is liable for a private nuisance if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct.

4. STATUTES — JUDICIAL CONSTRUCTION — ABSURD-RESULTS RULE.

A statute should be construed in a manner that avoids an absurd result; a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result.

Abood Law Firm (by *Andrew P. Abood*) for the plaintiff.

The Gallagher Law Firm, PLC (by *Byron P. Gallagher, Jr.*), for the defendants.

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

SERVITTO, J. Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

Defendant Thomas Donall is the president of defendant 1247 Center Street, LLC, a company that owns X-Cel, a nightclub located in the city of Lansing. Plaintiff owns a building containing residential and commercial units immediately adjacent to X-Cel. According to plaintiff, X-Cel plays music at levels that exceed those allowed by local ordinances and, among other things, constitutes a nuisance and interferes with plaintiff's right to the quiet enjoyment of its property. Plaintiff initiated this action seeking an abatement of the alleged nuisance or to enjoin defendants from operating X-Cel in violation of the applicable city ordinances. Defendant essentially denied the allegations and brought a counterclaim against plaintiff for tortious interference with

a business expectancy. After an evidentiary hearing, the trial court denied plaintiff's motion to abate the alleged nuisance, taking judicial notice that the area concerned is zoned G-1 or "business." The trial court later granted summary disposition in defendants' favor, opining that defendants were not in violation of Lansing noise ordinances. The trial court stated that plaintiff's claims of nuisance are based on a violation of such ordinances and that, failing to establish a violation, plaintiff's claims fail as a matter of law. This appeal followed.

Although defendants' motion for summary disposition was premised on MCR 2.116(C)(8), the court looked beyond the pleadings in granting the motion. We will thus treat the motion as having been alternatively granted under MCR 2.116(C)(10). *Sharp v City of Lansing*, 238 Mich App 515, 518; 606 NW2d 424 (1999).

A grant of summary disposition based on a failure to state a claim is reviewed de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The pleadings alone are considered in testing the legal sufficiency of a claim under a MCR 2.116(C)(8) motion. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). It is well established that for purposes of a motion under MCR 2.116(C)(8), all factual allegations in support of the claim are accepted as true and viewed in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 119. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

"Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469

Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule C(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Plaintiff first contends that the trial court erroneously dismissed its complaint in that it did not accept the factual statements in the complaint as true. Plaintiff specifically asserts that the trial court should have accepted as true that defendants were violating local ordinances as alleged in the complaint. However, whether defendants violated a local ordinance is not a "fact" or even a reasonable inference drawn from the facts; it is a conclusion of law. A statement of plaintiff's conclusions, unsupported by allegations of fact, does not suffice to state a cause of action. See *Churella v Pioneer State Mut Ins Co* (*On Remand*), 258 Mich App 260, 272; 671 NW2d 125 (2003). While plaintiff did allege that defendants produced more than 55 decibels of sound, a fact that must be accepted as true, whether defendants violated the noise ordinances is a legal conclusion based on the decibel levels and on interpreting where the local ordinance applies (see later discussion). The legal conclusion is insufficient to state a cause of action. Summary disposition with regard to an ordinance violation claim was thus proper, and any amendment of plaintiff's complaint concerning the violation would be futile.

Plaintiff also directs us to several paragraphs in its complaint, which it asserts, when taken as true, properly plead causes of action for nuisance. For example, plaintiff alleged in its complaint that "defendants' noise production at decibel levels above those [permitted] by

law constitute[s] an act, occupation, and structure which [is] a nuisance at all times and under any circumstances." According to plaintiff the above demonstrates a nuisance per se. Again, however, whether defendants violated an ordinance proscribing certain decibel levels is a legal conclusion. Moreover, a nuisance per se is "an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings," *Ypsilanti Charter Twp v Kircher* 281 Mich App 251, 269 n 4; 761 NW2d 761 (2008). Here, plaintiff claimed that the noise was a nuisance solely because of the club's location (next to residential loft apartments) and surroundings. A club producing excessive noise only at certain hours, or in the middle of the desert would not necessarily be a nuisance and, as such, is not a nuisance at all times and under any circumstances. Summary disposition was thus appropriate with respect to the nuisance per se claims, and any amendment of plaintiff's complaint concerning nuisance per se would be futile.

Plaintiff also asserts that it stated a claim for public nuisance in alleging that "defendants are interfering with the public's health, safety, peace, comfort, and convenience by producing noise in excess of 55 decibels" and "defendants' noise pollution is known or should have been known to defendants to be of a continuing nature that produces a permanent or long-lasting, significant effect on the public's health, safety, peace, comfort, and convenience."

Public nuisance is defined in *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995), as an "unreasonable interference with a common right enjoyed by the general public."

> The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health,

> safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. [*Id*. (citation omitted).]

We agree that plaintiff's complaint set forth sufficient allegations of fact that, when taken as true, constitute a public nuisance. As previously indicated, plaintiff alleged that defendant's production of noise at levels in excess of 55 decibels interfered with the public health and that plaintiff's tenants, who resided next to defendants' club, have suffered significant "physical, emotional and financial harms" as a result of the noise level. Plaintiff also alleged that defendants knew or should have known that its production of noise at the level that was produced would cause a significant, long-lasting effect on the public's health, safety, peace, comfort, or convenience. Contrary to defendants' argument otherwise, these allegations are not dependent on a finding that the noise level violated local ordinances. Plaintiff alleged, in generic terms throughout the complaint, that the noise level interfered with its tenants' rights and that they suffered harm as a result. Defendants have directed us to no law that requires a showing of an ordinance violation with respect to noise levels in order to state a cause of action for public nuisance. Regardless of the precise decibel level, the level of noise that constitutes a nuisance is largely a subjective matter. Plaintiff having sufficiently alleged an action for public nuisance, this claim survives summary disposition under MCR 2.116(C)(8).

The same is true with respect to plaintiff's claim of private nuisance. One is subject to liability for a private nuisance if

> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct [*Cloverleaf Car Co, supra* at 193.]

Plaintiff alleged in its complaint that it owned property adjacent to defendants' property and that plaintiff and its tenants had rights and privileges with respect to the use and enjoyment of plaintiff's property. Plaintiff further alleged that it and its tenants suffered physical, emotional, and financial harm as a result of defendants' noise production. Plaintiff also alleged that defendants' conduct was intentional and reckless. Accepting these allegations as true, as we are required to do when considering a motion premised on MCR 2.116(C)(8), plaintiff properly pleaded a cause of action for private nuisance. Defendant has provided no authority suggesting that, absent an ordinance violation, a certain noise level could not be considered a nuisance. Thus, irrespective of an ordinance violation, plaintiff may claim the existence of a nuisance.

That plaintiff has sufficiently alleged claims of public and private nuisance does not, however, end our inquiry. In ruling on plaintiff's motion to abate the alleged nuisance, the trial court specifically stated:

> There are elements of a public nuisance, and those have to be met. And one of them is, it significantly interferes with the public's safety, peace, comfort or convenience. And Plaintiff, at least in the Plaintiff's brief, points to all the other people who own residences or commercial property in the area. . . . But there is lack of any evidence as to other people in general being or having their safety, peace, comfort or convenience interfered with. Furthermore, because this is zoned G-1 for business, it's not evidence that

> loud music is going to interfere with other people's safety, peace, comfort or convenience in the area. I've heard about other businesses in the area, Brannigan's The Firm, Kelly's, Decker's . . . it's not people trying to sleep."

In essence, the trial court determined that there were no questions of material fact concerning the existence (or, more accurately, the nonexistence) of a public nuisance. Before deciding defendants' motion for summary disposition, the trial court conducted a rather lengthy evidentiary hearing on plaintiff's motion to abate the alleged nuisance. The trial court, therefore, had already been presented with considerable evidence concerning whether the complained-of noise constituted a nuisance as a matter of fact. We agree with the trial court that the prior evidence, taken with the additional evidence offered in support of the summary disposition motion (and response), establishes no question of material fact concerning the claim of a public nuisance.

Nuisance-abatement proceedings brought in the circuit court are generally equitable in nature. MCL 600.2940(5). Equitable decisions are reviewed de novo, but the findings of fact supporting those decisions are reviewed for clear error. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). A finding is clearly erroneous if it leaves this Court with the definite and firm conviction that a mistake has been made. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008).

As stated previously, a public nuisance involves unreasonable interference with public rights and an unreasonable interference is conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of

a continuing nature that produces a permanent or long-lasting, significant effect on these rights. *Cloverleaf Car Co*, 213 Mich App at 190. In this case, plaintiff did not demonstrate that its grievance extends to the public, beyond the walls of its building. There are many entertainment establishments, such as defendants', in this area that attract the public rather than harm it. There was no evidence demonstrating that the public has been adversely affected. Only the private claim of plaintiff and its tenants has been presented. The circuit court ruled that "there is [a] lack of any evidence as to other people in the area that would constitute the public in general being or having their safety, peace, comfort or convenience interfered with." This finding was not clearly erroneous.

The trial court also determined that defendant's actions did not constitute a private nuisance:

> There is also an argument made that it's a private nuisance, and that also has elements that have to be met. One of them is the invasion resulting in significant harm. . . . Property depreciation alone is not enough to constitute a nuisance. . . . Now, I understand there are tenants, two of whom we have heard from, that are suffering as a result of the noise. But his is an action with the property owner, and the issue is whether there could be a private nuisance. So it's harm to the property owner for terms of a private nuisance, and not to tenants who testified . . . again, having covered this is a business district, it is to be an expected noise that will occur late into the nighttime. . . . I can't find, on this record, that the requirement of a private nuisance is met.

The elements of a private nuisance are satisfied if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either

(i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. *Cloverleaf Car Co*, 213 Mich App at 193. To prove a nuisance, significant harm to the plaintiff resulting from the defendant's unreasonable interference with the use or enjoyment of property must be proven. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 490; 608 NW2d 531 (2000).

In the instant case, plaintiff has not proven either significant harm or unreasonable interference. The harms alleged are financial in nature: plaintiff has not been able to obtain rental rates at market prices for its property. However, evidence of the market rates for rental property connected to a nightclub were not established to show a loss of value. Secondly, the rental value of plaintiff's property had not been established because the nightclub was operating long before plaintiff converted a portion of the property into apartments. Consequently, it is difficult to discern if plaintiff's rentals had lost value. Further, our Supreme Court has held that property depreciation alone is insufficient to constitute a nuisance. *Adkins v Thomas Solvent Co*, 440 Mich 293, 312; 487 NW2d 715 (1992). Additionally, the circuit court found that, despite the playing of music next door, plaintiff had been able to rent its units. Finally, upon information and belief, plaintiff is converting part of the building at issue into a bar, which will likely produce some noise itself. This fact may also affect the rental rate of plaintiff's apartments.

The circuit court also found that the noise produced by defendant was intentional, but not unreasonable. In the context of nuisance, "unreasonable" does not refer to defendants' conduct; it means that the interference with plaintiff's rights must be unreasonable. *Id*. at 305.

The court spoke of the nature of the area as a business district and plaintiff's knowledge that it was constructing apartments next to a nightclub. The court also remarked that it was expected that the businesses in this district would produce sound late into the night. These findings were not clearly erroneous and support a conclusion that defendants' intrusion of sound, to the extent shown by plaintiff, was not unreasonable.

Plaintiff next asserts that the trial court erred in ruling that Lansing Ordinances, § 654.07(h), is inapplicable to defendants. A trial court's interpretation of an ordinance is a question of law that is reviewed de novo. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000).

Section 654.07(h) of the codified ordinances of Lansing prohibits sound levels in excess of 55 decibels in certain circumstances:

> *Places of Public Entertainment.* Operating or playing or permitting the operation or playing of any radio, television, phonograph, drum, musical instrument, sound amplifier or similar device which produces, reproduces or amplifies sound in any place of public entertainment so as to produce a maximum sound level of fifty-five dBA on a residential real property boundary[.]

Plaintiff asserts that defendants' music produced sound at prohibited decibel levels, as measured by its sound expert and a tenant, across the boundary between the dance club and plaintiff's apartments, a residential real property boundary. Defendants' position is, and the trial court agreed, that the residential real property boundary in the ordinance refers only to boundaries in areas zoned for residential use. As plaintiff and defendants are both located in a district zoned for business, defendants' music did not intrude upon a residential boundary. On its face the ordinance is

equally susceptible to both meanings and, accordingly, is ambiguous. See *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008) (indicating that a statute is ambiguous if it is equally susceptible to more than one meaning).

The rules of statutory construction also apply to ordinances. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 568 n 15; 737 NW2d 476 (2007). The primary goal of judicial interpretation of statutes is to determine and effectuate the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The first factor in determining legislative intent is the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). Judicial interpretation is not necessary or permitted if the plain and ordinary meaning of the statutory language is clear. *People v Bell*, 276 Mich App 342, 345; 741 NW2d 57 (2007). If a statute is ambiguous, however, judicial construction is appropriate. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000).

Section 654 provides definitions for "real property" and "residential area":

> *Real property* means an imaginary line along the ground surface, and its vertical extension, which line separates the real property owned by one person from that owned by another person, but not including intra-building real property divisions.
>
> * * *
>
> *Residential area* means any area designated as an A, A-1, B, C, DM-1, DM-2, DM-3 or DM-4 Zoning District, pursuant to the Zoning Code or upon any plan or district map promulgated thereunder. [Lansing Ordinances, § 654.03.]

If the statute defines a term, that definition controls. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488

(2007). The circuit court relied on the definition of "residential area" in determining that § 654.07(h) did not apply to the subject properties, which are both located in a G-1 business district. Because the ordinance uses the term "residential" to refer to zoning areas by definition, we agree.

Further, the provisions of a statute must be read in the context of the entire statute so as to produce a harmonious whole. *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008). In the findings of fact section of the noise ordinance, the city detailed its reasons for enacting such an ordinance as follows:

> The making, creation or maintenance of such excessive, unnecessary, unnatural or unusually loud noises, which are prolonged, unusual and unnatural in their time, place and use, effect and are a detriment to the public health, comfort, convenience, safety, welfare and prosperity of the residents of the City. [Lansing Ordinances, § 654.01(b).]

The ordinance was intended to address noises that are unusual and unnatural in their time, place, and use. Certainly, a dance club playing loud music at night at an entertainment destination in a business district is an anticipated and expected time, place, and use of musical noise. In contrast, music played loudly at a party in a residential area, where the city residents would not naturally and usually expect it, is the type of harm that the ordinance seems to address.

Plaintiff also contends that defendants violated another section of the noise ordinances, 654.07(a), which provides:

> *Sound Production and Reproduction Systems.* The playing, using or operating, or permitting the playing, using or operating, of any television or radio receiving set, musical instrument, phonograph or other machine or device for producing, reproducing or amplifying sound in such a

> manner as to create a noise disturbance, or at any time with a louder volume than is necessary for convenient hearing for the persons who are in the room, chamber, vehicle or other place in which such an instrument, machine, set or device is operated and who are voluntary listeners thereto. The operation of any such television or radio receiving set, instrument, phonograph, machine or device between 11:00 p.m. and 7:00 a.m. of the following day in such a manner as to be plainly audible at a distance of fifty feet from the building, structure, vehicle or other place in which it is located shall be prima-facie evidence of a violation of this section. This subsection shall not apply to noncommercial speech.

The circuit court, while not specifically stating findings regarding this ordinance provision, did state that "the applicable section is paragraph H, places of public entertainment, which is the very specific section that would apply to the more general warnings that come before that."

Arguably, the plain language of § 654.07(a) could be considered to apply to defendant's nightclub so that plaintiff would have stated a claim simply by indicating that defendants played music in the nightclub at a louder than necessary volume. Again, however, statutory language " 'must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . .' " *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003), quoting *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). The existence of a specific ordinance provision for places of public entertainment (which obviously would include nightclubs), i.e., § 654.07(h), calls into question whether the more general provision of § 654.07(a) would apply to places of public entertainment even if the two provisions do not literally conflict.

Any ambiguity may be resolved by application of the principles that a statute should be construed in a manner that avoids an absurd result, *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008), and that "a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result," *id.* at 675. It would seem absurd to literally apply § 654.07(a) to a nightclub to bar music from being played there at "a louder volume than is necessary for convenient hearing" for people in the nightclub, given that as a matter of common knowledge (both presently and when § 654.07 was adopted on December 22, 1986) many nightclubs routinely play music at substantially louder than "necessary" levels as part of the entertainment they provide. In light of this consideration and the adoption of a particular provision in § 654.07(h) for places of public entertainment, we conclude that a reasonable lawmaker would not have expected § 654.07(a) to apply to a nightclub. The trial court did not err by ruling that § 654.07(a) is inapplicable to the instant matter.

Affirmed.

SAWYER, P.J., concurred.

M. J. KELLY, J. (*concurring in part and dissenting in part*). Although I do not join in the majority's reasoning, I agree with its conclusion that the trial court properly granted summary disposition of plaintiff Capitol Properties Group, LLC's (Capitol), complaint to the extent that it stated claims based on an ordinance violation and public nuisance. However, because I conclude that Capitol established a question of fact regarding whether defendants' operation of the club at issue substantially and unreasonably interfered with Capitol's use and

enjoyment of its property, I must respectfully dissent from the majority's decision to affirm the dismissal of Capitol's claim premised on private nuisance.

It is well-settled that a property owner's unreasonable generation of noise can constitute a nuisance. See *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526, 537; 158 NW2d 463 (1968); *Grzelka v Chevrolet Motor Car Co*, 286 Mich 141, 146; 281 NW 568 (1938) (noting that the trial court properly instructed the jury on the plaintiff's theory that vibration and noise constituted a nuisance). Generally, whether the generation of noise constitutes a nuisance is a question of fact that must be determined after considering the totality of the circumstances:

> No one is entitled, in every location and circumstance, to absolute quiet, or to air utterly uncontaminated by any odor whatsoever, in the use and enjoyment of his property; but when noises are unreasonable in degree, considering the neighborhood in which they occur and all the attending circumstances, or when stenches contaminate the atmosphere to such an extent as to substantially impair the comfort and enjoyment of adjacent premises, then an actionable nuisance may be said to exist; and in applying these tests the question presented is one of fact rather than law. [*de Longpre v Carroll*, 331 Mich 474, 476; 50 NW2d 132 (1951).]

As the majority notes, Capitol adequately stated a claim for relief premised on private nuisance. Nevertheless, the majority concludes that the trial court properly dismissed that claim, given the trial court's factual findings concerning the harm to Capitol and whether the level of noise was reasonable. I do not agree that the trial court could properly grant summary disposition based on its factual findings. Capitol presented evidence that, if believed, demonstrates that defendants' operation of the club caused both substantial and unreason-

able interference with Capitol's use of the property. Hence, to the extent that there were factual disputes, the trial court should not have resolved the disputes on a motion for summary disposition. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) ("'The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."); MCR 2.116(C)(10).

Moreover, it appears that the trial court erroneously determined that Capitol failed to make out a claim for nuisance based on noise because the noise did not interfere with its use, but rather interfered with its tenants' use. Capitol leases its property to commercial and residential tenants—that is, its use and enjoyment is derived from its ability to make its property attractive to potential and current tenants. Capitol presented evidence that its current tenants are not happy about the volume of noise coming from defendants' property and that this interfered with Capitol's ability to satisfy its tenants' needs. Capitol also presented evidence that, because of the noise, it cannot lease its property at the going market rate. Although it is true that a mere depreciation in property value is insufficient to constitute a nuisance, this is because the diminution in value does not normally constitute interference with the use and enjoyment of property. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 311-315; 487 NW2d 715 (1992) (holding that depreciation in value caused by *unfounded* fears cannot, *by itself*, constitute an actionable nuisance). In this case, Capitol has not relied on a mere depreciation in its property value based on the existence of a club next door; rather, it has presented evidence that defendants' unreasonable operation of the club caused actual and substantial harm to its ability to lease its property for commercial and residential purposes. The diminished revenue from the property and com-

plaints by tenants are evidence that Capitol's use of the property has been affected by the noise emanating from the club.

The trial court also appears to have erroneously determined that Capitol could not make out a claim for nuisance because a club had existed at that location for some time and—presumably—had always generated noise. Capitol presented evidence from which a trier of fact could conclude that the noise generated by the club is excessive under the totality of the circumstances. See *de Longpre*, 331 Mich at 476. Specifically, Capitol presented evidence that the noise generated by the club causes vibrations on Capitol's property, causes lights to flicker, and physically affects Capitol's tenants. The trial court apparently discounted the evidence concerning the degree of disruption caused to Capitol's property because the club and its predecessor have generated noise for some years. But it does not follow from the fact that this club or its predecessor has generated noise in the past—and may properly generate some level of noise now—that it may generate noise whenever it wishes and to whatever degree that it wishes. See *Smith*, 380 Mich at 537, citing *Warren Twp School Dist No 7 v Detroit*, 308 Mich 460; 14 NW2d 134 (1944) (noting that an airport is not a nuisance per se, but that it can be a nuisance if improperly operated); *Waier v Peerless Oil Co*, 265 Mich 398, 401; 251 NW 552 (1933) ("But extraordinary or unnecessary noises or smells which introduce serious annoyances, above those which arise from the ordinary and proper conduct of the business, are actionable."); *McMorran v Cleveland-Cliffs Iron Co*, 253 Mich 65, 69; 234 NW 163 (1931) (stating that whether a business's operations constituted a nuisance depended on whether the "dust, noise, and vibration are more than merely incident to the proper and skilful operation of the business"). Defen-

dants only have the right to operate their club in a reasonable manner—not any manner that they deem fit. Likewise, Capitol is not without redress merely because the club existed before Capitol decided to lease its property. See *McMorran*, 253 Mich at 69 (stating that a plaintiff who comes to the nuisance is not deprived of all redress—the plaintiff need only submit to the noise incident to the *proper* operation of the business) (emphasis added). Hence, if the noise generated by the club is in excess of that necessary to its proper operation, Capitol would be entitled to relief.

The trial court erred when it granted summary disposition of Capitol's complaint to the extent that it stated a claim based on private nuisance. Capitol has adequately alleged and supported that claim and, for that reason, is entitled to have a trier of fact determine whether defendants' operation of the club has substantially and unreasonably interfered with Capitol's use of the property after a full trial on the merits. For these reasons, I would reverse the trial court's order granting summary disposition and remand for trial on the merits consistent with this opinion.

DETROIT CITY COUNCIL v MAYOR OF DETROIT

Docket Nos. 291394 and 291399. Submitted April 14, 2009, at Detroit. Decided April 17, 2009, at 9:00 a.m.

The Detroit City Council brought an action in the Wayne Circuit Court against the mayor of Detroit after the mayor vetoed a city council resolution disapproving the transfer of the Cobo Convention Center to the Detroit Regional Convention Facility Authority under the Regional Convention Facility Authority Act, MCL 141.1351 *et seq*. The court, Isidore Torres, J., granted the Detroit Building Authority's motion to intervene as a defendant. The court issued a declaratory judgment, ruling that the act did not permit the mayor to veto the city council's resolution. The mayor and the building authority appealed separately, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

The trial court correctly concluded that the act does not provide for a mayoral veto of the city council's resolution disapproving the transfer. Under MCL 141.1369(1), only the legislative body (in this case the city council) may disapprove the transfer. The act delineates several powers of the local chief executive officer (in this case the mayor), and those do not include the power to veto the legislative body's disapproval. Recognizing a mayoral veto power in this context would nullify the only provision of the act that confers power on the city council. Only the legislative body has the power to disapprove the transfer. Under the plain language of the act, if a majority of the city council affirmatively votes to disapprove a transfer, the transfer does not occur. While the Detroit City Charter grants the mayor the power to veto city council resolutions, ordinances are subject to the laws of the state. If a city charter conflicts with a statute, the statute prevails. MCL 141.1379(2) specifically preempts any charter provision that is contrary to the act. The charter provision concerning mayoral veto conflicts with the act with respect to the city council's authority to disapprove the transfer.

Affirmed.

MUNICIPAL CORPORATIONS — CITY COUNCILS — MAYORS — VETO POWER OF MAYORS — REGIONAL CONVENTION FACILITY AUTHORITY ACT — TOURISM.

The Regional Convention Facility Authority Act gives the legislative body of a local government the exclusive authority to disapprove the transfer of a qualified convention center to a regional convention facility authority; the legislative body's disapproval will prevent the transfer, and the local chief executive officer lacks the authority to veto the legislative body's disapproval (MCL 141.1369[1]).

David D. Whitaker, Marcel Hurt, and *Adam Shakoor & Associates, PC* (by *Adam A. Shakoor*), for the Detroit City Council.

Krystal A. Crittendon, Corporation Counsel, and *Jeffrey S. Jones* and *Joanne D. Stafford*, Assistant Corporation Counsels, for the Mayor of Detroit.

Barris, Sott, Denn & Driker, PLLC (by *Eugene Driker, Morley Witus*, and *Rebecca Simkins*), for the Detroit Building Authority.

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

TALBOT, P.J. In these consolidated and expedited appeals, defendant Kenneth V. Cockrel, Jr., in his capacity as mayor of the city of Detroit, and intervening defendant Detroit Building Authority appeal by right the declaratory judgment in plaintiff's favor entered by the circuit court. Plaintiff Detroit City Council sought a declaration that the Regional Convention Facility Authority Act, MCL 141.1351 *et seq*., did not authorize a mayoral veto of its resolution disapproving the transfer of the Cobo Convention Center to the Detroit Regional Convention Facility Authority. The circuit court ruled that the mayoral veto was null and void under the plain language of the act. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Cobo Convention Center (Cobo), near the center of downtown Detroit, was built more than half a century ago. In 1985, the Legislature enacted Public Act 106, the State Convention Facility Development Act, MCL 207.621 *et seq*., which levied a tri-county hotel tax and liquor tax to generate revenue. The development act provided a funding source for a multitude of purposes, including the improvement of convention facilities owned by local governments.[1] The tax was used for security on bonds to pay for a $180 million Cobo renovation, which was completed in 1989. Under 1985 PA 106, the outstanding bonds are to be fully retired in 2015; the hotel and liquor tax distributions will also terminate at that time. MCL 207.629; MCL 207.630.

In light of that sunset date and the current condition and size of Cobo, state and tri-county officials began negotiations for legislation to improve the state's convention centers. In December 2008, the Michigan Legislature enacted Senate Bill 1630. Governor Jennifer Granholm approved the bill in January 2009. The Regional Convention Facility Authority Act, 2008 PA 554, became effective on January 20, 2009. The act provides for the creation of regional convention facility authorities[2] to oversee regional convention centers, including Cobo.[3] To qualify for

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[1] See *Detroit Edison Co v Detroit*, 180 Mich App 145, 151; 446 NW2d 615 (1989), overruled on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109 (2006).

[2] Such authorities "shall possess the powers, duties, and jurisdictions vested in the authority under this act and other laws." MCL 141.1357(1).

[3] The act defines a "convention facility" as

> all or any part of, or any combination of, a convention hall, auditorium, arena, meeting rooms, exhibition area, and related adjacent public areas that are generally available to the public for lease on a short-term basis for holding conventions, meetings, exhibits, and similar events, together with real or personal property, and easements above, on, or under the surface of real or personal property,

improvement under the act, convention facilities are required to be publicly owned, have at least 600,000 square feet, and be located within a qualified city, which is defined as a city with a population exceeding 700,000. MCL 141.1355(i) and (k). As written, the act currently applies only to Cobo,[4] although it may be applied in the future to any qualifying convention facility in a qualifying metropolitan area in Michigan.

In enacting 2008 PA 554, the Legislature recognized that promoting tourism and convention business in Michigan is in the best interests of both the state and local governments. The Legislature found that improving existing regional convention facilities would aid in that endeavor. The Legislature noted that a regional convention facility authority would serve a public purpose. MCL 141.1353. Such an authority could be established in any area that meets the definition of a "qualified metropolitan area."[5] The act created the Detroit Regional Convention Facility Authority (the Authority) as of January 20, 2009, the effective date of the act.[6]

> used or intended to be used for holding conventions, meetings, exhibits, and similar events, together with appurtenant property, including covered walkways, parking lots, or structures, necessary and convenient for use in connection with the convention facility. Convention facility includes an adjacent arena with a seating capacity not exceeding 10,000. Convention facility does not include an adjacent arena with a seating capacity exceeding 10,000. [MCL 141.1355(c).]

[4] The qualified convention facility consists of Cobo Hall, Cobo Convention Center and certain nearby parking garages.

[5] The statute defines a "qualified metropolitan area" as "a geographic area of this state that includes a qualified city, a qualified county, and the 2 counties bordering the qualified county with the largest populations according to the most recent decennial census." MCL 141.1355(*l*). It is undisputed that the city of Detroit is the qualified city in the qualified county of Wayne and the two bordering counties are Macomb and Oakland counties.

[6] The validity of the creation of the Authority is conclusively presumed because an original action was not filed with this Court within 60 days of January 20, 2009. MCL 141.1357(6).

The act specifies that the transfer of control over a qualified convention center would occur 90 days after an authority's creation, or in this case on April 20, 2009. MCL 141.1355(m). The transfer would only occur, however, "if the transfer is not disapproved as provided under [MCL 141.1369(1)]." *Id.* MCL 141.1369(1) provides, in pertinent part:

> Within 45 days of the effective date of this act . . . and prior to a transfer date, the *legislative body of the qualified city in which a qualified convention facility is located may disapprove the transfer of the qualified convention facility to the authority by adopting a resolution disapproving the transfer.* If the transfer is not disapproved, the qualified convention facility is transferred to the authority on the ninetieth day after the effective date of this act or the date on which a convention facility becomes a qualified convention facility. [Emphasis added.]

The act defines a "legislative body" as "the elected body of a local government possessing the legislative power of the local government." MCL 141.1355(f). In this case, the legislative body at issue is plaintiff Detroit City Council, which had a deadline of March 6, 2009, to disapprove the transfer of Cobo to the Authority. The transfer to the Authority would occur by operation of law on the ninetieth day after the effective date of the act, April 20, 2009, unless the transfer was disapproved.

On February 24, 2009, the city council passed a resolution to disapprove the transfer. On March 4, 2009, the mayor vetoed the resolution. The city council did not override the veto.[7]

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[7] Under § 4-119 of the Detroit City Charter, the city council may reconsider a resolution vetoed by the mayor only at a regular meeting within one week of the mayor's veto. A two-thirds majority vote is required for an override.

The city council filed a complaint for injunctive and declaratory relief.[8] The city council maintained that it had the exclusive power to disapprove the transfer, arguing that the act's grant of exclusive power to it superseded the executive veto power provided to the mayor under the Detroit City Charter. Additionally, the city council stated that subjecting the disapproval resolution to mayoral veto would nullify the Legislature's intent to grant the power to disapprove exclusively to the city council.

The mayor answered that the Legislature did not intend to preclude the exercise of the mayoral veto power because it did not expressly do so. The mayor also relied on MCL 141.1359 of the act, where the Legislature expressly precluded the local legislative body from interfering with the local chief executive officer's power to appoint a board member to the Authority, to support his argument that the Legislature did not intend to preclude his exercise of a veto. The mayor argued that the legislative intent to allow a mayoral veto accords with the city's powers under the Home Rule City Act, MCL 117.1 *et seq*.

The circuit court granted the motion to intervene filed by the Detroit Building Authority, which owns substantial portions of Cobo. The Detroit Building Authority argued in part that the city council's disapproval resolution never became effective because of the mayor's veto and the city council's failure to override the veto.

After failed attempts to facilitate settlement between the parties, the circuit court issued a declaratory judgment that the mayor's veto was null and void. The circuit court ruled that, under the plain language of the

[8] Pursuant to discussions in chambers with the circuit judge, the parties agreed to argue only the request for a declaratory ruling.

act, if the city council rejects by resolution the transfer of authority, then the transfer does not occur. The circuit court relied on the doctrine of *expressio unius est exclusio alterius*, or inclusion by specific mention excludes what is not mentioned. The court noted that the act mentioned certain powers of the local chief executive, but did not mention the veto power. The court concluded:

> Thus, applying this maxim to the Act leads to the conclusion that the Legislature did not mean to provide the chief executive officer with the veto power over disapproval resolutions since, while the Act delineates several duties or powers of the chief executive officer, none of these include the power to veto a disapproval resolution, and the Act expressly confers on the legislative body alone the power to disapprove the transfer.

II. THE PARTIES' ARGUMENTS

In Docket No. 291394, the mayor argues on appeal that the circuit court erred in construing the Legislature's silence as negating the existence of the mayoral veto power. The Legislature clearly stated that existing local government powers should be undisturbed and thus did not intend to disrupt the balance of existing legislative/executive branch powers. The circuit court should have liberally construed the act with a view toward harmonizing its provisions.

In Docket No. 291399, the Detroit Building Authority (DBA) contends that where the statute has no express provision to counter the mayoral veto power, the Legislature intended to preserve that power. The DBA argues that when the Legislature wanted to exclude a process of local government in the act it did so explicitly. Therefore, the DBA asserts that the resolution was nullified by the mayoral veto, which was never

overridden, and further argues that the act reflects the public policy of the state to promote tourism to the benefit of the state's residents.

The city council has filed a single response in both cases, asserting that the plain language of the act grants the city council exclusive power to disapprove the transfer. The act preempts local law, including the mayor's veto power.

III. ANALYSIS

Whether the act grants a local chief executive officer the power to veto the disapproval by a legislative body is a question of law. This Court reviews statutory interpretation issues, which are questions of law, under a de novo standard. *New Properties Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 138; 762 NW2d 178 (2009). Further, we review de novo questions of law arising from a declaratory judgment action. *Guardian Environmental Services Inc v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 5-6; 755 NW2d 556 (2008).

In interpreting statutes, courts give effect to the intent of the Legislature by reviewing the plain language of the statute itself. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). When reviewing a statute, this Court considers the statutory language to determine if an ambiguity exists. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997). Where statutory language is ambiguous, judicial construction is permitted. *Deschaine v St Germain*, 256 Mich App 665, 669; 671 NW2d 79 (2003). Judicial construction is neither necessary nor permitted, however, where the statutory language is clear and unambiguous. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 667; 760 NW2d 565 (2008). " 'In statutory interpretation,

the primary goal must be to ascertain and give effect to the Legislature's intent, and the judiciary should presume that the Legislature intended a statute to have the meaning that it clearly expresses.' " *McClellan v Collar (On Remand)*, 240 Mich App 403, 409; 613 NW2d 729 (2000) (citation omitted).

The question before this Court involves the act's delineation of power to the legislative body (the city council) and to the local chief executive officer (the mayor).[9] MCL 141.1369(1) specifies the single power of the legislative body—it may disapprove the transfer:

> Within 45 days of the effective date of this act . . . and prior to a transfer date, the *legislative body of the qualified city in which a qualified convention facility is located may disapprove the transfer of the qualified convention facility to the authority by adopting a resolution disapproving the transfer*. If the transfer is not disapproved, the qualified convention facility is transferred to the authority on the ninetieth day after the effective date of this act or the date on which a convention facility becomes a qualified convention facility. [Emphasis added.]

In contrast, the act delineates several powers for the local chief executive officer. By way of example, the local chief executive officer of the city may appoint an individual to the five-member board of directors of the Authority. MCL 141.1359(1)(b). The local chief executive officer of a local government (which includes the city) is empowered to execute the relevant instruments and documents to accomplish the transfer of the qualified convention facility from the local government to the Authority. MCL 141.1369(3). Further, the local chief executive officer is required to take reasonable steps to terminate certain agreements between the government

[9] The act defines a "local chief executive officer" as including the mayor of a city. MCL 141.1355(g).

and others relating to the qualified convention facility. MCL 141.1369(12). Notably absent from this list of delineated powers is the authority to veto the legislative body's disapproval of the transfer.

Defendants ask this Court to interpret the Legislature's silence as bestowing a mayoral veto power that is not described in the statute. Should we adopt defendants' arguments and recognize a mayoral veto power over the city council's resolution, we would be nullifying MCL 141.1369(1), the only provision of the act that confers power on the city council. It is a well-established rule of statutory construction "that courts should avoid any construction that would render statutory language nugatory." *Flint City Council v Michigan*, 253 Mich App 378, 394; 655 NW2d 604 (2002). We therefore do not construe the statute in a manner that would render MCL 141.1369(1) a nullity.

We read the plain language of MCL 141.1369 to mean that the transfer is exclusively conditioned on the actions of the city council. If the city council does not disapprove the transfer, then the transfer will occur. Under the clear terms of the act, if a majority of the city council affirmatively votes to disapprove the transfer, then the transfer does not occur. Hence, once the majority of the city council voted to disapprove the transfer, the transfer could not be effectuated. Because the city council's vote was dispositive, the mayoral veto was, in essence, irrelevant. We therefore must reject defendants' argument that the mayoral veto invalidated the city council's resolution.

As quoted earlier, MCL 141.1369(1) provides that the appropriate "legislative body," in this case the city council, may disapprove the transfer. MCL 141.1369, the only section of the act involving disapproval, expressly provides only one entity, the legislative body,

with the power to disapprove the transfer. The sole statutory section relating to disapproving the transfer refers to the legislative body alone; it does not refer to the local chief executive officer. The Legislature presumably was aware that mayors often have general veto powers under their respective city charters or other local laws. Had the Legislature intended to give the local chief executive officer the power to veto the disapproval of the legislative body, it would have expressly done so. Similarly, had the Legislature intended for a mayoral veto, it would not have granted disapproval power solely to the city council.

Although defendants argue that, under this reasoning, the Legislature would have had to specify each and every power that the local chief executive officer could exercise related to the act, we disagree. The significance of the power to disapprove the transfer cannot be overstated: where disapproved, the transfer is null and does not occur. Given the importance of this power, we cannot assume that the Legislature overlooked the role of the local chief executive officer. The omission of a reference to a mayoral veto clearly indicates that the Legislature did not intend to provide for such a veto.

Defendants argue that no question exists that the Detroit City Charter grants the mayor the right and power to veto the city council's resolution. The Detroit City Charter provides in § 4-119 (Veto):

> Every ordinance or resolution of the city council, except quasi-judicial acts of the city council including any under section 9-302, appointments by the city council or action taken under section 2-107(2-3), 4-102, 4-105, 4-108, 4-109, 4-120, 7-1006, 12-110 of this Charter, shall be presented by the city clerk to the mayor within four (4) business days after adjournment of the meeting at which the ordinance or resolution is adopted.

Defendants argue that the mayor has the power to veto the resolution of the city council pursuant to this section of the charter.

However, the charter also provides for a limitation of powers:

> The city has the comprehensive home rule power conferred upon it by the Michigan Constitution, *subject only to the limitations on the exercise of that power contained in the Constitution or this Charter or imposed by statute.* The city also has all other powers which a city may possess under the Constitution and laws of this state. [Detroit Charter, § 1-102 (emphasis added).]

The charter itself thus recognizes that it is subject to limitations imposed by statute.

Further, the city of Detroit is organized and operates under the Home Rule City Act. See Detroit Charter, § 1-101. The Michigan Constitution provides certain powers to home rule cities:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Const 1963, art 7, § 22.]

Our Supreme Court has stated that this provision "specifically provides that ordinances are subject to the laws of this state, i.e., statutes." *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003). Similarly, under the Home Rule City Act, the laws and ordinances relating to a home rule city's municipal concerns are

subject to the general laws of Michigan. See MCL 117.4j(3) (providing that a home rule city's ordinances are "subject to the constitution and general laws of this state"). In other words, where a city charter conflicts with a state statute, the statute controls in matters that are not solely a local concern. *Bd of Trustees of the Policemen & Firemen Retirement Sys of Detroit v Detroit*, 143 Mich App 651, 655; 373 NW2d 173 (1985).

Likewise, the principle of preemption demonstrates that ordinances may not conflict with statutes:

> "A municipality may not enact an ordinance if (1) the ordinance directly conflicts with the state statutory scheme, or (2) the state statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. Preemption may be established (1) where state law is expressly preemptive; (2) by examination of the legislative history; (3) by the pervasiveness of the state regulatory scheme, although this factor alone is not generally sufficient to infer preemption; or (4) where the nature of the subject matter regulated demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." [*Fraser Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289, 293-294; 715 NW2d 89 (2006) (citation omitted).]

Consequently, to the extent that the charter conflicts with the statute, the statute must prevail.[10]

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[10] We also note that the mayoral veto power is not the only charter provision preempted by the act. The act also preempts § 4-112 of the Detroit City Charter, which provides: "Except as otherwise provided by this Charter, the city may not sell or in any way dispose of any property without approval by resolution of the city council." MCL 141.1369(10)(a) of the act preempts the city council's powers regarding the sale or disposal of property: "A local government . . . shall . . . [r]efrain from any action to sell, transfer, or otherwise dispose of a qualified convention facility . . . without the consent of the authority."

Indeed, the Regional Convention Facility Authority Act itself specifically preempts any charter provision contrary to the statute. MCL 141.1379(2) provides:

> The powers conferred in this act upon any authority or local government shall be in addition to any other powers the authority or local government possesses by charter or statute. *The provisions of this act apply notwithstanding any resolution, ordinance, or charter provision to the contrary.* [Emphasis added.]

Thus, while the first sentence of MCL 141.1379(2) does not restrict the powers conferred on the local government, the second sentence indicates that its provisions "apply notwithstanding any resolution, ordinance, or charter provision," which would include the Detroit City Charter. The act thereby prevails over the charter pursuant to its own terms. We also are not convinced, as argued by defendants, that the first sentence of MCL 141.1379(2) preserves any power for the mayor. It is limited to "any authority or local government." The act specifically defined each of those entities, neither of which definitively includes the mayor; the mayor instead falls under the definition of "local chief executive officer." Because the first sentence of MCL 141.1379(2) is silent with respect to preserving any mayoral powers, defendants' argument on this point fails.

It follows that, if the charter provision conflicts with or contravenes the act, then the charter is subject to the act. The charter provision regarding the veto conflicts with the act, which provides that only the city council has the authority to disapprove the transfer and provides no authority to the mayor to veto the disapproval resolution. The charter cannot override the act—by its own terms, the charter is subject to "limitations on the exercise of . . . power . . . imposed by statute." Detroit Charter, § 1-102. Additionally, in the event of a conflict,

the act, as a statute more specific to the transfer of authority, prevails over the Home Rule City Act, a general statute. " '[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls.' " *Odom v Wayne Co*, 482 Mich 459, 471; 760 NW2d 217 (2008) (citation omitted).

Defendants argue that the circuit court's application of the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) was in error. The doctrine of *expressio unius est exclusio alterius* "does not subsume the plain language of the statute when determining the intent of the Legislature." *Tuggle v Dep't of State Police*, 269 Mich App 657, 664; 712 NW2d 750 (2006). It has been described as "a rule of construction that is a product of logic and common sense." *Hoerstman Gen Contracting Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). The doctrine characterizes the general practice that " 'when people say one thing they do not mean something else.' " *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990) (opinion by RILEY, C.J.), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. The act expressly gives the city council authority to disapprove the transfer. Nowhere in the statute is there a similar provision that grants the mayor comparable authority. In other words, under the doctrine of *expressio unius est exclusio alterius*, the Legislature's expression of the city council's disapproval power operates to exclude a mayoral veto power of that disapproval.

In support of their position, defendants rely on MCL 141.1359(4), which provides an example where the Legislature expressly discussed the interplay between the mayor and the city council:

> Each officer [which includes a local chief executive officer] appointing a board member under this section shall file the appointment with the secretary of state and the county clerk of each county in the qualified metropolitan area. *Notwithstanding any law or local charter provision to the contrary, appointments by an officer are not subject to approval or rejection by a legislative body.* [Emphasis added.]

The Legislature thus explicitly directed that the city council did not have the authority to approve or reject the mayor's selection for appointment. Defendants argue that, had the Legislature wished to curb the mayor's power, it would have done so in a similar passage in MCL 141.1369. Where the Legislature did not do so, defendants reason, the mayor's veto power stands. While it is true that statutory provisions are to be read in total to produce a "harmonious whole," *Hill v L F Transportation, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008) (citation omitted), to adopt defendants' reading would serve to negate MCL 141.1369(1).

We also cite as persuasive the dissent in *Raven, Inc v City of Southfield*, 69 Mich App 696; 245 NW2d 370 (1976), rev'd for the reasons stated in the dissent 399 Mich 853 (1977). The plaintiff in *Raven* sought a declaration that the mayor of Southfield did not have the authority to veto the city council's approval of a class C liquor license. The statute governing liquor licenses provided at that time that approval was to be by "the local legislative body in which said applicant's place of business is located before being granted by the commission . . . ." MCL 436.17.[11] The circuit court construed the statute as rendering invalid the mayor's veto. A majority of this Court reversed, with Judge DANHOF dissenting. *Raven*, 69 Mich App at 702. The

[11] That statute was repealed by 1998 PA 58. See MCL 436.2301(a).

Michigan Supreme Court reversed for the reasons provided in the dissent. *Raven, Inc v City of Southfield*, 399 Mich 853 (1977). Judge DANHOF opined in that dissent that the statutory language was clear and unambiguous and thus not subject to construction, observing that "[n]othing could be plainer than the term 'legislative body,' as employed in this context." *Raven*, 69 Mich App at 703. Judge DANHOF observed that, although the Legislature could have used the terms "local unit of government" or "local legislative body and executive," the Legislature did not do so. *Id*. at 703-704. He reasoned that the term "legislative body" has only one plain meaning, to which the Court was bound to adhere. *Id.* at 704.

We find that reasoning to be sound. In this instance, not only does the statute employ the plain and unambiguous term "legislative body," it also clearly defines that term as the "elected body of a local government possessing the legislative power of the local government." MCL 141.1355(f). It is undisputed that the city council is the relevant legislative body in this case. The statute specifically confers on the legislative body the authority to disapprove the transfer. It does not confer the power to disapprove to both the legislative body and the executive. In accordance with the dissent in *Raven*, this Court is bound by the plain statutory language.

Likewise, in *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116; 673 NW2d 763 (2003), the mayor of Livonia vetoed the city council's approval of a waiver use petition brought by the plaintiff. The plaintiff sought a declaratory judgment regarding the veto; the circuit court ruled that the veto was valid as the council's attempt to override it was one vote short. This Court observed that the Livonia Charter granted broad veto power to the mayor, while the Livonia Zoning

Ordinance was silent regarding the role of the mayor in the approval process. *Id*. at 132-135. Further, the zoning ordinance provided that the planning commission must first review an application for waiver use, then make a recommendation to the city council for the ultimate decision. *Id*. at 135.

This Court ruled that two sections of the Livonia Zoning Ordinance, when read together, demonstrated that the city council was the ultimate decision maker regarding waiver uses. Admittedly, the charter granted broad veto power to the mayor, but the zoning ordinance did not expressly provide for a mayoral veto. This Court decided that the trial court had erred in concluding that the mayor had veto power where the city council did not provide for a mayoral veto when enacting the pertinent ordinances. *Id.* at 136-137.

This Court went on to note the legislation's "complete silence" regarding the mayoral veto:

> The complete silence of the [Livonia Zoning Ordinance] regarding mayoral veto power of the waiver use decision of the Livonia City Council requires a judicial adherence to the state statute on the matter before this Court. The city officials in Livonia may wish to specifically provide for mayoral veto power in the future. But, the stark omission of such power is in sharp contrast with the specificity required by MCL 125.584a(1)(a) and (c)[12] with which the Livonia City Council adhered consistently. [*Id.* at 137.]

In comparison, the Regional Convention Facility Authority Act plainly provides that the legislative body makes the ultimate decision regarding disapproval of the transfer. The act does not explicitly provide for a mayoral veto with regard to the disapproval, despite the fact that the Detroit City Charter affords broad veto power to the mayor. Where the Legislature did not

[12] 2006 PA 110 repealed MCL 125.584a. See MCL 125.3702(1)(a).

provide for a mayoral veto in the act, the circuit court here correctly concluded that the mayor did not have the authority to veto the city council's disapproval.

We do not find persuasive the cases relied on by defendants: *Harbor Telegraph 2103, LLC v Oakland Co Bd of Comm'rs*, 253 Mich App 40; 654 NW2d 633 (2002), and *Oakland Co Comm'r v Oakland Co Executive*, 98 Mich App 639; 296 NW2d 621 (1980). *Harbor* involved the Oakland County Executive's veto of the board of commissioners' resolution to schedule a detachment election. This Court reversed the circuit court's determination that the veto was invalid, ruling that the Legislature had explicitly restricted the county executive's veto power to four limited instances. Those restrictions clearly reflected a legislative intent that the county executive otherwise had broad authority to veto the commissioners' resolutions. *Harbor*, 253 Mich App at 54-55. In contrast, the legislative intent here is reflected in the grant to the city council of the sole authority to disapprove the resolution. No statutorily authorized veto power exists: unlike the *Harbor* county executive's veto power, which was granted by statute, here the mayoral veto power exists by city charter. When the state statute otherwise is silent regarding the mayoral veto power, we cannot recognize a power that the Legislature clearly did not provide.

The Court in *Oakland Co Comm'r* was not faced with a conflict between a statutory enactment and veto powers bestowed by a city charter. Indeed, the Court found no conflict whatsoever between the competing provisions. As described at length earlier, a conflict exists here. Moreover, the concurring judge in that case noted that the contested veto power was the result of the Legislature's "explicit consideration," *Oakland Co*

Comm'r, 98 Mich App at 656 (DANHOF, C.J., concurring), which is not the situation before this Court.

Our decision that the mayor did not have the statutory authority to veto the city council's disapproval makes unnecessary further analysis of the public policy issues raised by defendants. We merely note that the question posed in this case is not whether the transfer "should," as a matter of public policy, occur on April 20, 2009; rather, the sole question before the Court is whether the act permits a mayoral veto given the plain language of the statute. Despite the stated policy aims of the statute, we cannot rule on policy grounds in contravention of the plain language of the statute. To the extent that the issues presented relate to public policy matters, the making of social policy generally is for the Legislature, not the courts. *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

IV. CONCLUSION

We conclude that the circuit court did not err in deciding that the act does not provide for a mayoral veto of the city council's resolution to disapprove the transfer. We are constrained to abide by the plain terms of the act and thus cannot provide the broad reading of the statute proffered by defendants. We decline defendants' invitation to read into the statute a power that is not expressly stated.

Affirmed.

PEOPLE v WADE

Docket No. 281566. Submitted March 10, 2009, at Detroit. Decided April 21, 2009, at 9:00 a.m.

A jury in the Wayne Circuit Court, Annette J. Berry, J., convicted Michael J. Wade of involuntary manslaughter and possession of a firearm during the commission of a felony. The defendant had been charged and tried for first-degree murder. The defendant appealed.

The Court of Appeals *held*:

1. The defendant was deprived of his constitutional right to a jury trial because the verdict form did not give the jury an opportunity to return a general verdict of not guilty or not guilty of the lesser-included offenses of second-degree murder and involuntary manslaughter.

2. The trial judge did not err by denying the defendant's motion to disqualify her from presiding over the trial after she made a negative comment about security guards. The comment was directed at the general class of security guards, not to the defendant specifically, and the trial judge stated that she was not biased against the defendant personally and that she could be fair and impartial. The defendant failed to note any instance of the trial judge's alleged bias and therefore failed to overcome the presumption of impartiality.

Reversed and remanded

1. CRIMINAL LAW — JURY INSTRUCTIONS — CONSTITUTIONAL LAW — RIGHT TO JURY TRIAL.

A criminal defendant is deprived of the constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty.

2. JUDGES — DISQUALIFICATION OF JUDGES — CRIMINAL TRIALS — BIAS OF JUDGES.

A judge's general hostility toward those in a criminal defendant's profession, by itself, does not require the judge's disqualification for bias.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Janet A. Napp*, Assistant Prosecuting Attorney, for the people.

Frederick W. Lauck and *Kevin S. Gentry* for the defendant.

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

PER CURIAM. Defendant appeals as of right from his jury-trial convictions of involuntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We reverse and remand.

I. FACTS

On August 10, 2006, defendant was working as a security guard at a Detroit Police Department impound yard in the city of Detroit. That evening, the victim's cousin dropped the victim off at the impound yard, and the victim entered the yard through a hole in a fence, carrying a duffel bag full of tools. The victim had a history of breaking into the lot and stealing. Defendant became aware that an intruder was in the impound yard. He grabbed a shotgun, loaded it with a bean-bag round, followed by a Brenneke slug, and he pursued the intruder. Defendant eventually found the victim in the passenger seat of a car, tearing out the dashboard.

When defendant yelled "Freeze," the victim threw a tire iron at defendant. The victim then reached into his waistband for an item (which later turned out to be a flashlight) and ran away from defendant. Defendant fired the bean-bag round, which missed the victim.

Defendant then fired a warning shot,[1] which apparently struck the victim, although the victim continued to run from defendant. Defendant waited for several minutes and then walked toward where the victim ran to make sure that the victim was gone. Defendant found the victim dead. Defendant then removed the body from the scene to a dirt road in Salem Township.

II. VERDICT FORM

Defendant argues that the trial court erred in presenting the jury with an improper verdict form. We agree.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). And even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

During jury instructions, defense counsel objected to the verdict form, arguing that it did not comply with the standard jury form because the jury was not given the option of finding defendant generally not guilty or not guilty of the lesser-included offenses. The trial court disagreed. The next day, defense counsel again raised the issue, and the trial court again disagreed. The jury was presented with the following verdict form:

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[1] The parties dispute whether the slug ricocheted before striking the victim. Defendant contends that he fired the shot into the ground, and his ballistics expert supported his contention. However, the medical examiner concluded that the victim's wounds were caused by two direct shots and one ricochet.

POSSIBLE VERDICTS

YOU MAY RETURN ONLY ONE VERDICT FOR EACH COUNT.

COUNT 1 — HOMICIDE — MURDER FIRST DEGREE — PREMEDITATED (EDWARD BROWDER, JR)

___NOT GUILTY

___GUILTY

OR

___GUILTY OF THE LESSER OFFENSE OF — HOMICIDE — MURDER SECOND DEGREE (EDWARD BROWDER, JR.)

OR

___GUILTY OF THE LESSER OFFENSE OF — INVOLUNTARY MANSLAUGHTER — FIREARM INTENTIONALLY AIMED (EDWARD BROWDER, JR.)

COUNT 2 — WEAPONS—FELONY FIREARM

___GUILTY

___NOT GUILTY

The jury was also instructed, and reinstructed, by the trial court about the verdict form as follows:

> You understand keenly in the verdict form, as to Count 1, the defendant, Mr. Wade, is charged with . . . Homicide, Murder in the First Degree, Premeditated.
>
> You can either—this is what this instruction is, either Not Guilty or Guilty or you can then consider the lesser offense of . . . Homicide Murder in the Second Degree, if you find the evidence supports that.
>
> If you don't find the evidence supports that and you want to consider the lesser offense, you may go on down to—you may consider the Involuntary Manslaughter, okay. That is—those are your options.
>
> You're only going to check one box. Okay.

* * *

This is the verdict form, ladies and gentlemen, that you're going to be getting.

The first box, under Count 1, Homicide Murder in the First Degree is Not Guilty.

If you find the evidence supports a finding of Not Guilty, you check that box, and then, that's it for Count 1. Got it?

If you don't, however, find that it supports that finding, and you want to go—continue, you go down to the lesser offense of Second Degree Murder.

If you don't find the evidence supports that, you don't check that box.

Go down to the third—if you find that the evidence supports Involuntary Manslaughter, then so be it. If you don't, you don't check that box. It's very simple. Okay.

After deliberations, the jury returned a verdict of guilty of involuntary manslaughter and felony-firearm. The following exchange occurred during the reading of the verdict:

Court Clerk: How do you find the defendant, Michael Wade, as to Count 1?

Foreperson: Not guilty.

C*ourt Clerk*: As to Count 2, Felony Firearm?

Foreperson: I'm sorry. We've got portions of.

The Court: Go ahead.

Foreperson: Okay. Count 1, Homicide Murder First Degree, Not Guilty to—

The Court: Which box did you check, sir?

Foreperson: The bottom box, Guilty of the Lesser Offense of Involuntary Manslaughter.

The Court: Okay. So, that's the box that all the members of the jury checked?

Foreperson: Yes.

The Court: Okay. You only checked one box?

Foreperson: Yes, for that Count.

The Court: Okay. That's what we're asking you to read.

Foreperson: Okay.

The Court: Thank you.

Foreperson: Guilty of the Lesser Offense of Involuntary Manslaughter, Firearm Intentionally Aimed, Edward Browder, Jr.

The Court: Okay. Thank you.

Court Clerk: And as to Count 2, Felony Firearm?

Foreperson: Guilty.

Defendant moved to set aside the jury verdict or for a judgment notwithstanding the verdict (JNOV), arguing that the verdict form was flawed. The trial court denied defendant's motion in a written opinion and order. The trial court concluded that defendant's argument was not properly supported by authority and that the verdict form in this case was "self-explanatory" and provided the jury with the appropriate options.

" 'A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.' " *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006), quoting *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). Further, a criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty. *People v Clark*, 295 Mich 704, 707; 295 NW 370 (1940); *People v White*, 81 Mich App 335, 339 n 1; 265 NW2d 139 (1978).

In *People v Garcia*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 1988 (Docket No. 94233), this Court reversed the defen-

dant's second-degree murder conviction because of a defective verdict form. The verdict form in *Garcia* noted that only one verdict could be returned by the jury and gave the jury the following options: not guilty of first-degree felony murder, guilty of first-degree felony murder, or guilty of the lesser-included offenses of second-degree murder or armed robbery. *Id*. at 9. This Court concluded that the verdict form was defective, requiring reversal, because it did not give the jury the opportunity to return a general verdict of not guilty. Although this unpublished case is not binding precedent under MCR 7.215(C)(1), our Supreme Court implicitly approved this decision in a subsequent decision, *People v Garcia*, 448 Mich 442; 531 NW2d 683 (1995). Although the issue before the Supreme Court in *Garcia* was collateral estoppel, the basis of the defendant's argument was the jury verdict form. The Supreme Court went so far as to publish the offending jury verdict form, which is very similar to the jury verdict form in the present case. *Id*. at 445 (opinion by RILEY, J.).

Here, we likewise conclude that the verdict form was defective, requiring reversal, because it did not give the jury the opportunity to return a general verdict of not guilty. We note that the verdict form would not have been defective if it had included a box through which the jury could have found defendant not guilty of second-degree murder and not guilty of involuntary manslaughter. Despite the trial court's efforts to clarify the verdict form with its instructions, because of the way the verdict form was set up, the jury was not given the opportunity to find defendant either generally not guilty or not guilty of the lesser-included offenses such that his constitutional right to a trial by jury was violated. Accordingly, we reverse defendant's conviction and remand this case for a new trial.

III. JUDICIAL DISQUALIFICATION

Defendant argues that the trial judge erred in refusing to disqualify herself from this case. We disagree.

This Court reviews a trial court's factual findings on a motion for disqualification for an abuse of discretion, but the application of the law to the facts is reviewed de novo. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

On January 26, 2007, defense counsel engaged in an after-court conversation with the trial judge. During that conversation, defense counsel alleges, the judge said, "Put a badge on a security guard and they think they're God." A few minutes later, the trial judge also commented that security guards beat people and then lie about it and deny it. Defense counsel, bothered by the statement, took it up with the trial judge at a side bar exchange on February 2, 2007. The trial judge responded on the record that her personal opinion would not influence the proceedings and she would be impartial. Defendant filed a motion to disqualify the trial judge on the basis of bias and prejudice against defendant and his profession, as well as her bias and prejudice against defense counsel. The trial judge denied defendant's motion.

A judge is disqualified if she cannot impartially hear a case, which includes: (1) when she is personally biased or prejudiced for or against a party or attorney; (2) when she has personal knowledge of disputed facts; (3) when she has been involved in the case as a lawyer; (4) when she was a partner of a party or lawyer within the preceding two years; (5) when she knows that she or a relative has an economic interest in the proceeding or a party to the proceeding; (6) when she or a relative is a party or an officer, director, or trustee of a party; (7) when she or a relative is acting as counsel in the

proceeding; or (8) when she or a relative is likely to be a material witness in the proceeding. MCR 2.003(B); *Armstrong*, *supra* at 596.

Further, as a general rule, a showing of actual, personal prejudice is required to disqualify a judge under MCR 2.003. *Armstrong*, *supra* at 597. However, our Supreme Court has acknowledged that " 'there might be situations in which the appearance of impropriety on the part of the judge . . . is so strong as to rise to the level of a due process violation.' " *Id*. at 599, quoting *Cain v Dep't of Corrections*, 451 Mich 470, 503, 512 n 48; 548 NW2d 210 (1996). Therefore, a showing of actual bias is not necessary when the judge (1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact-finder, or initial decision maker. *Armstrong*, *supra* at 599. Lastly, a trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption. *Cain*, *supra* at 497.

Here, the trial judge did admit to making an extrajudicial comment about security guards. However, this comment did not evidence an actual bias against defendant. Indeed, generalized hostility toward a certain class of claimants does not present disqualifying bias. *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44, 65; 539 NW2d 382 (1995) (CORRIGAN, J., concurring), citing *Aetna Life Ins Co v Lavoie*, 475 US 813, 820-821; 106 S Ct 1580; 89 L Ed 2d 823 (1986) (holding that a judge's "general hostility" toward insurance companies did not require disqualification). Here, the trial judge's comment was directed at a general class to which defendant belongs—security guards; her comments

were not directed at defendant specifically. The trial judge explicitly stated that she was not biased against defendant personally and that she could be fair and impartial in this case. And defendant has failed to note any instance in which the alleged bias exhibited itself at trial. Because defendant has failed to overcome the presumption of impartiality, *Cain*, *supra* at 497, the trial judge did not err in failing to disqualify herself.

We have reviewed defendant's remaining issues on appeal and find that they are not outcome-determinative. However, we do note, should the issue arise on remand, that the trial court should not allow expert testimony without conducting a hearing to determine its reliability.

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

PEOPLE v STEELE

Docket No. 280509. Submitted April 14, 2009, at Grand Rapids. Decided April 21, 2009, at 9:05 a.m.

A Montcalm Circuit Court jury convicted Larry D. Steele of eight counts of first-degree criminal sexual conduct and six counts of second-degree criminal sexual conduct for sexual activity involving three victims he described as his adopted grandchildren. The defendant described the victims' grandmother as his common-law wife or girlfriend. Before trial, the court, Charles H. Miel, J., had granted the prosecution's motion to exclude the testimony of a defense expert witness and ruled that the prosecution could introduce under MRE 404(b) evidence of several acts involving the victims' mother and their aunt. The court also denied the defendant's motion for an adjournment after the prosecution disclosed that it would not call the grandmother as a witness. After the defendant presented character witnesses, the prosecution offered rebuttal testimony that included the defendant's reputation. At sentencing, the defendant objected to the scoring of offense variable (OV) 8 (asportation of the victim), OV 10 (exploitation of a victim's vulnerability), and OV 19 (covering, in part, interference with the administration of justice). The court did not revise the points assessed for those OVs and sentenced the defendant to prison terms of 18 years and 9 months to 50 years for the first-degree criminal sexual conduct convictions and 10 to 15 years for the second-degree criminal sexual conduct convictions. The defendant appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by admitting the evidence of prior bad acts. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if (1) the proponent seeks to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act and does not offer the evidence to prove the person's character in order to show action in conformity with that character, (2) the evidence is relevant to an issue of fact that is of consequence at trial, and (3) under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. To support an inference of a common plan, scheme, or system, there must be such a concurrence of common features

between the charged offense and the similar misconduct that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design. Distinctive and unusual features are not required to establish the existence of a common design or plan. The testimony of the victims' mother and their aunt about defendant's engaging in sexual acts and less extensive forms of sexual touching involving them are logically seen as part of a general plan, scheme, or design.

2. The trial court did not abuse its discretion by excluding the testimony of the defendant's expert witness. The expert would have testified that he tested the defendant and that the defendant did not fit the profile, or display the characteristics, of having a personality consistent with pedophilia or being a sexual predator. The proposed testimony regarding the defendant's sex-offender profile, as developed from psychological testing, was neither sufficiently scientifically reliable nor supported by sufficient scientific data. The proposed testimony would not have assisted the jury to understand the evidence or determine a fact at issue, and the danger of unfair prejudice substantially outweighed any arguable probative value. Excluding the evidence did not deny the defendant his constitutional right to present a defense.

3. MCR 767.40a(1) requires the prosecution to attach to the information a witness list that includes the names of known witnesses who might be called at trial and all res gestae witnesses known to the prosecution or the investigating officers. Under MCL 767.40a(4), the prosecution may add a person to, or delete a person from, the list upon leave of the court for good cause shown. The trial court allowed the prosecution to delete the grandmother from the list, and the defendant, who did not object on the record, failed to prove that good cause was lacking.

4. MCL 767.40a(5) requires the prosecution or the investigative law enforcement agency to provide a defendant reasonable assistance as necessary to locate and serve process on a witness. The request, however, must be in writing and made no less than 10 days before trial unless the court directs otherwise. The defendant's counsel did not request assistance until four days before trial, despite having been notified 14 days before trial that the prosecution would not be calling the grandmother as a witness. The trial court did not abuse its discretion when it declined to direct the prosecution to assist the defendant in locating the grandmother.

5. The trial court did not abuse its discretion by denying the defendant's motion for an adjournment. Defense counsel admitted that he had unsuccessfully tried to locate the grandmother months

before and failed to show how an adjournment would have helped him find her.

6. The defendant was not denied a fair trial by the trial court's refusal to give CJI2d 5.12, the jury instruction concerning a missing witness. The instruction is appropriate if the prosecution fails to secure the presence at trial of a listed witness who has not been properly excused. Because the trial court did not err when it permitted the prosecution to strike the grandmother from its witness list, declining to give the instruction was also not error.

7. Once a defendant presents testimony or other evidence that he or she has a good character trait, the defendant has opened the door to further testimony, and the prosecution may rebut the defendant's evidence with contrary evidence. The trial court did not abuse its discretion by allowing the rebuttal testimony.

8. The defendant sought to admit the testimony of his sister to impeach the victims' mother. The testimony in question was that the victims' mother and their father had expressed concern that the grandmother was spending the grandmother's money on the defendant. This evidence would have supported the defense theory that the mother had the victims falsely accuse the defendant so that the defendant would no longer be able to receive money from the grandmother. This extrinsic evidence did not involve a collateral matter, so it was admissible as a matter of law, and the trial court abused its discretion by excluding it. The error was merely evidentiary error, however, and did not rise to the level of a deprivation of the defendant's constitutional right to present a defense. The defendant was able to present the defense by cross-examining witnesses, and the error was harmless in light of the strong evidence against him.

9. The scoring of the offense variables did not violate the defendant's due process rights. There was evidence supporting the points assessed. With regard to OV 8, the defendant asported the victims to places, or situations, of greater danger. With regard to OV 10, the defendant exploited the victims' vulnerability. They were readily susceptible to injury and persuasion because of their tender ages and his authority as their grandparent. The defendant engaged in less intrusive and less highly sexualized forms of sexual touching to desensitize them to future sexual contact. With regard to OV 19, the defendant told the victims not to disclose his acts or he would go to jail. MCL 777.49 does not require a threat to a victim before points can be assessed for OV 19. The defendant's admonitions to the victims were a clear and obvious attempt to diminish their willingness and ability to obtain justice.

Affirmed.

1. EVIDENCE — OTHER-ACTS EVIDENCE — PRIOR BAD ACTS — COMMON PLAN, SCHEME, OR DESIGN BY A DEFENDANT.

For evidence of prior acts to be admissible under MRE 404(b)(1) to prove a plan, scheme, or system in doing an act, there must be such a concurrence of common features that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design; the evidence of the uncharged acts need only support the inference that the defendant employed a common plan in committing the charged offense; distinctive and unusual features are not required to establish the existence of a common design or plan.

2. WITNESSES — CRIMINAL LAW — RES GESTAE WITNESSES — PROSECUTING ATTORNEY'S DUTY TO ENDORSE WITNESSES — DELETING WITNESSES FROM PROSECUTION'S ENDORSED LIST.

The prosecution must attach to the information a witness list that includes the names of known witnesses who might be called at trial and all res gestae witnesses known to the prosecution or the investigating law enforcement officers; the prosecution may add a person to, or delete a person from, that list at any time upon leave of the court for good cause shown or by stipulation (MCL 767.40a[1], [4]).

3. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE — THREATS MADE TO VICTIMS.

A court scoring offense variable 19 under the sentencing guidelines, which concerns in part interference or attempted interference with the administration of justice, need not find that the defendant threatened a victim before points can be assessed for that variable (MCL 777.49).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Andrea Krause*, Prosecuting Attorney, and *William Molner*, Assistant Attorney General, for the people.

State Appellate Defender (by *Chari K. Grove*) for the defendant.

Before: WILDER, P.J., and METER and SERVITTO, JJ.

PER CURIAM. Defendant appeals by right his convictions, following a jury trial, of eight counts of first-

degree criminal sexual conduct, MCL 750.520b(1)(a), and six counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), all for sexual activity with minors under 13 years of age. Defendant also challenges his sentences. We affirm.

The crimes involved three grandchildren of the woman whom defendant alternately described as his common-law wife and his girlfriend. Defendant described himself as the girls' adopted grandfather.

Before trial, the prosecution filed a motion in limine to exclude the testimony of a defense expert, Dr. Andrew Barclay, who would have testified that he tested defendant and that defendant did not fit the profile, or display the characteristics, of having a personality consistent with pedophilia or being a sexual predator. The prosecution argued that the testimony was inadmissible character evidence. The trial court agreed and granted the motion.

Also before trial, the prosecution filed a notice of intent under MRE 404(b) to present against defendant other acts testimony by the victims' mother and the victims' aunt, as well as evidence of uncharged acts by defendant against the victims. The prosecution argued that these other acts were similar to the charged assaults and that all the other acts were admissible to show defendant's common scheme, intent, and motive. Defendant objected on the ground that the other incidents were not similar. The trial court ruled that some of the proposed other acts evidence was inadmissible, but touching incidents involving the victims' mother and aunt were admissible to show a common plan or scheme.

Five days before trial, defendant filed a motion to adjourn trial because the prosecutor, in the previous week, had disclosed that she no longer intended to call the victims' grandmother as a witness. Defense counsel

argued that he had then hired a process server, but the process server was unable to locate the grandmother. The trial court denied the motion.

At trial, the prosecution presented the testimony of the three victims, who all testified that while they were under 13 years of age, defendant committed multiple acts of sexual conduct against them. Some of the acts related by the victims, and objected to by defendant, had not been charged.

Consistently with the trial court's prior ruling, the victims' aunt and their mother testified about "other acts" committed by defendant. The victims' aunt testified that when she was about 18, defendant came into her bathroom and put his hand up the back of her shirt and down her pants and that four years before, defendant had taken her bathing suit top and squeezed water out of it while she was wearing it. The aunt also recalled another incident when she and defendant were riding a dirt bike and he had his hands on her thighs, very near her genitalia. The victims' mother testified that in 2002, when she was sick with influenza, defendant sat on the couch with her, rubbed her arms and legs, and tried to put his hands up her shirt.

On cross-examination, the defense asked the victims' mother if she had ever expressed concern to defendant's sister that defendant was only after the grandmother for her money. The victims' mother denied having said that, but explained conversations she had had with the sister concerning what part money played in the relationship between defendant and the grandmother. The defense also cross-examined the victims' mother about how much money the grandmother had spent on defendant.

The victims' father testified that the grandmother had inherited $500,000, that she had loaned defendant a great deal of money, and that she had spent about

$30,000 making improvements to his property. Defendant cross-examined the victims' father regarding the inheritance, the grandmother's gifts to the victims' family, and the grandmother's gifts to defendant.

In his case-in-chief, defendant presented witnesses attesting to his allegedly good character. In rebuttal, the prosecutor offered testimony from the victims' mother that defendant, when living in his previous city of residence, had gained a reputation in his church for inappropriate contact with young girls in the congregation and that the victims' mother and her sisters considered him a sexual deviant. The trial court overruled defendant's objections to this testimony.

The jury returned guilty verdicts on all 14 counts. At sentencing, the trial court overruled defense objections to the scoring of three offense variables and sentenced defendant to multiple terms of 18 years and 9 months to 50 years of imprisonment for the first-degree criminal sexual conduct crimes and terms of 10 to 15 years for the second-degree criminal sexual conduct crimes.

We first consider whether the admission of prior acts evidence denied defendant a fair trial and find no error. This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The abuse of discretion standard of review applies to decisions regarding admission of similar acts evidence. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). Questions of law are reviewed de novo. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009). Questions whether a defendant was denied a fair trial, or deprived of his liberty without due process of law, are reviewed de novo. See *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

MRE 404(b)(1) provides, in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of* motive, opportunity, intent, preparation, *scheme, plan, or system in doing an act*, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

For evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b)(1), the proponent of the evidence must show three things: (1) that the other acts evidence is for a proper purpose (other than to show character and action in conformity therewith), (2) that the evidence is relevant to an issue of fact that is of consequence at trial, and (3) that, under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

In *Sabin*, our Supreme Court held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 63. There must be *such a concurrence of common features* that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design. *Id*. at 63-64. The evidence of uncharged acts "needs only to support the inference that the defendant employed the common plan in committing the charged offense." *People v Hine*, 467 Mich 242, 253; 650 NW2d 659 (2002). "[D]istinctive and unusual features are not required to establish the existence of a common design or plan." *Id*. at 252-253.

Here the other acts evidence had a concurrence of common features so that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design. One aspect of defendant's scheme, plan, or system was to engage in touching women and girls, usually less extensive forms of sexual touching, even when in public areas where it might be seen. Some of the other acts evidence consisted of other sexual acts in these kinds of public areas, including in the living room, the bathroom, or the bedroom, where there were spaces in the door through which others might see. While there were *some* dissimilarities between the charged acts and the other bad acts, a high degree of similarity is not required, nor are distinctive or unusual features required to be present in both the charged and the uncharged acts. *Id.* at 252-253. Accordingly, the trial court did not abuse its discretion in admitting the evidence under MRE 404(b).

Defendant also contends that he was denied his constitutional right to present a defense when the trial court excluded his defense expert. We find no error.

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude expert witness testimony. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). This Court also reviews for an abuse of discretion a trial court's decision on an expert's qualifications. See *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *People v Peterson*, 450 Mich 349, 363 n 8, 379; 537 NW2d 857 (1995). This Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense. See *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

MRE 702 governs the admissibility of expert testimony and provides:

> 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.

Under MRE 702, a trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable. *Gilbert v Daimler-Chrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). "MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony —*including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data*—is reliable." *Id*. at 779 (emphasis added). "[R]eference in MRE 702 to 'scientific' evidence 'implies a grounding in the methods and procedures of science,' and the rules's reference to 'knowledge' 'connotes more than subjective belief or unsupported speculation.' " *Id*. at 781 (citations omitted).

This Court addressed this same issue, also involving Dr. Barclay, and essentially the same criminal charges in *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007). In that case, the trial court excluded Dr. Barclay's testimony "because it found a lack of scientific reliability in the process of identifying sex offenders through psychological testing and because the testimony would not assist the jury in its function of deliberating on the issue of guilt . . . ." *Id*. at 93. This Court also concluded that Dr. Barclay's proposed testimony regarding the defendant's sex-offender profile, as developed from psychological testing, was neither sufficiently scientifically reliable nor supported by sufficient scientific data. *Id*. at 94-95. Further, the panel

concluded that Dr. Barclay's proposed testimony would not have assisted the trier of fact to understand the evidence or to determine a fact in issue. *Id*. at 95. "[R]ather, any arguable probative value . . . would be substantially outweighed by the danger of unfair prejudice to the prosecution, confusion of the issues, or misleading the jury." *Id*. at 95. After extensive and detailed analysis, *Dobek* concluded that the trial court did not err by granting the prosecution's motion to exclude Dr. Barclay's proposed testimony. *Id*. at 92-104.

By the same token, the prosecution here filed a pretrial motion in limine to exclude the similar testimony of Dr. Barclay, who would have testified about the same things: that he tested defendant and that defendant did not fit the profile, or display the characteristics, of having a personality consistent with pedophilia or being a sexual predator. Although *Dobek* had not yet been decided when the trial court made its ruling in this case, the trial court was prescient, and reached the same conclusion. *Dobek* is on point and indistinguishable. We find no abuse of discretion.

Defendant asserts that he was denied a fair trial when the trial court permitted the prosecution to delete the victims' grandmother from its witness list. We disagree. This argument is unpreserved because defendant did not object on the record to the prosecution's deletion, nor did he bring a motion for a posttrial evidentiary hearing or for a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).

Statutory construction presents an issue of law that this Court reviews de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007). A trial court's decision to permit the prosecution to delete a witness from its endorsed witness list is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537

NW2d 813 (1995). Finally, "an unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

Michigan law requires the prosecution to attach a witness list to the information and to include in it the names of known witnesses who might be called at trial and all res gestae witnesses known to the prosecution or to investigating law enforcement officers. MCL 767.40a(1). The prosecution may add a person to, or delete a person from, that witness list at any time "*upon leave of the court and for good cause shown* or by stipulation . . . ." MCL 767.40a(4) (emphasis added).

The prosecution was granted permission by the trial court, in chambers, to remove the witness from its witness list at the pretrial conference on April 25, 2007. The permission to remove the witness from its list constitutes the "leave of the court" required by MCL 767.40a(4). Moreover, defendant makes the conclusory argument that the prosecution did not show good cause in support of its request to remove the witness from its list and fails to present proof that good cause was lacking. Therefore, we reject defendant's argument that the trial court abused its discretion by permitting the witness to be deleted from the prosecution's witness list. In addition, because there was no error, there was also no plain error affecting defendant's substantial rights. *Pipes*, 475 Mich at 274.

Defendant next argues that he was denied a fair trial when the trial court failed to require the prosecution to assist the defense in locating the victims' grandmother so that the defense could subpoena her to testify as a witness in the case. We disagree.

The "prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or

defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness." MCL 767.40a(5). However, the "request for assistance *shall* be made *in writing* by defendant or defense counsel *not less than 10 days before the trial* of the case or at such other time as the court directs." *Id.* (emphasis added).

Defendant did not request assistance from the prosecution in locating the witness until May 5, 2007, four days before trial. While defendant was not advised until April 25, 2007, that the prosecution would not be calling the witness in its case-in-chief, this advice constituted notice 14 days in advance of trial. Rather than request the assistance of the prosecution at that time, defendant instead expressed his intention to secure his own process server to subpoena the witness for trial. Accordingly, the trial court did not abuse its discretion when it declined to direct the prosecution to assist the defendant in locating the witness, given that the request for this assistance was made only four days before trial.

Defendant next contends that he was denied a fair trial when the trial court denied his motion to adjourn trial to allow him additional time to locate the victims' grandmother and subpoena her to testify at trial. We disagree. A trial court's rulings on motions for a continuance are reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

Defense counsel admitted to the trial court that he had unsuccessfully attempted to locate the witness months before requesting the adjournment. Defendant fails to show how an adjournment of trial would have assisted him in finding a witness whom he had previously had no success in locating. Accordingly, we find that the trial court did not abuse its discretion by denying the motion to adjourn, and further find that

defendant has failed to show plain error affecting his substantial rights. *Pipes*, 475 Mich at 274.

Even if the trial court abused its discretion in denying the motion to adjourn, the evidence in support of defendant's guilt was very strong. The testimony of the victims, in particular, was specific and powerful. And defendant's proposed defense, that the victims' mother influenced her children to make false accusations of abuse in order that the grandmother would not spend more of her inheritance on defendant, is so implausible that no reasonable jury would have accepted it in the face of the convincing testimony of the victims. Accordingly, any such error was harmless and not error affecting defendant's substantial rights.

Defendant also argues that he was denied a fair trial when the trial court denied his request for the missing witness instruction, CJI2d 5.12. We disagree. This Court reviews for an abuse of discretion a trial court's determination whether the missing witness instruction is appropriate. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

The missing witness instruction may be given "if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused." *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). Since we have concluded that there was no error when the trial court permitted the prosecution to strike the witness from its list, we also conclude that there was no error when the trial court declined to give the missing witness instruction.

Next, defendant claims that the admission of "surprise" rebuttal evidence regarding defendant's character deprived defendant of a fair trial. We find no error.

We do not disturb a trial court's decision regarding the admission of rebuttal testimony absent an abuse of

discretion. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). We review questions of law, and constitutional questions, de novo. *Swafford*, 483 Mich at 7; *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We also review de novo questions whether a defendant was denied a fair trial or deprived of liberty without due process of law. See *Schumacher*, 276 Mich App at 176 (due process claim).

MRE 803(21) is a hearsay exception that allows admission of evidence of a person's reputation regarding character among associates or in the community. Accordingly, there is no hearsay basis for reversing the trial court's admission of the testimony in question.

Further, once the defendant presents testimony or other evidence that he or she has a good character trait, the defendant has opened the door; the prosecutor may then walk through it, armed with contrary evidence, on rebuttal, and the fact that the contrary evidence is damaging to the defense does not equate with error. *Lukity*, 460 Mich at 498-499. A prosecutor is fully entitled to challenge a defendant's evidence of good character, either on cross-examination or through extrinsic evidence in rebuttal. *People v Bouchee*, 400 Mich 253, 262; 253 NW2d 626 (1977). Here defendant opened the door. Accordingly, the trial court did not abuse its discretion by allowing the rebuttal testimony.

Defendant's argument that the prosecution should have presented the testimony regarding his bad reputation in his former church community in its case-in-chief lacks merit. Defendant had not yet opened the door on that issue. And that evidence was not specific and definite enough for the prosecution to have admitted it as evidence of other crimes, wrongs, or acts under MRE 404(b).

Finally, regarding this issue, defendant argues that the prosecution should have disclosed the highly in-

flammatory reputation evidence before the last day of trial. This argument lacks merit. Defendant cannot have been oblivious to the fact that if he introduced evidence of good character, the prosecutor might rebut it. Given this knowledge, defendant could have brought a motion in limine, before trial, to test the admissibility of any contrary evidence to rebut his character evidence, and by failing to do so, ran the risk of such introduction. For these reasons, the trial court did not abuse its discretion by admitting the rebuttal evidence of defendant's reputation or bad character.

Defendant also challenges the trial court's refusal to allow defendant to use extrinsic evidence (testimony by his sister) to impeach a prior witness (the victims' mother) and claims that this refusal deprived him of a fair trial. We disagree.

Evidentiary decisions are reviewed for an abuse of discretion. *Lukity*, 460 Mich at 488. Constitutional questions are reviewed de novo. *LeBlanc*, 465 Mich at 579.

The prosecution concedes that because prior inconsistent statements are not used to prove their truth (that is, are not used for a substantive purpose), but are used to impeach the credibility of the witness, they are not hearsay and are therefore admissible. But the prosecution argues that even if the testimony of defendant's sister regarding alleged statements by the victims' mother evidenced a prior inconsistent statement, to be used for a nonsubstantive purpose (to prove lack of credibility of the mother), the sister's testimony is still inadmissible because it involved a collateral matter, citing *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). This argument by the prosecution lacks merit.

Michigan common law does not define the scope of "collateral matters," nor do our rules of evidence.

Therefore, we repair to a dictionary definition.[1] Because "collateral matter" is a legal term of art, we use a legal dictionary.[2] Black's Law Dictionary (8th ed) defines collateral matter as "[a]ny matter on which evidence could not have been introduced for a relevant purpose." Under this definition, the proposed impeachment of the victims' mother, by the later testimony of defendant's sister, was not on a collateral matter because it was an issue in the case whether the victims' mother had induced her daughters to perjure themselves by falsely accusing defendant.

A criminal defendant has both state and federal constitutional rights to present a defense, which rights include the right to call witnesses. *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008), citing US Const, Am VI and Const 1963, art 1, § 20. The extrinsic evidence in question was testimony by defendant's sister that the victims' mother and father had expressed concern that the victims' grandmother was spending her (the grandmother's) inheritance on defendant. This evidence would have tended to support one of defendant's defenses, namely, that the victims' mother put her children up to falsely accusing defendant of statutory rape so that defendant would no longer be able to receive the largess of the grandmother. While implausible, this was one of defendant's defenses, and he had a right to try to prove it. *Yost*, 278 Mich App at 379. Extrinsic evidence tending to prove his theory is

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[1] Compare *People v Althoff*, 280 Mich App 524, 535; 760 NW2d 764 (2008) ("Every word or phrase of a statute should be accorded its plain and ordinary meaning, but, if the legislative intent cannot be determined from the statute itself, dictionary definitions may be consulted.").

[2] When considering "a legal term of art, resort to a legal dictionary to determine its meaning is appropriate." *People v Jones*, 467 Mich 301, 304-305; 651 NW2d 906 (2002).

not evidence on a collateral matter. Accordingly, this extrinsic evidence was admissible as a matter of law, and the trial court abused its discretion by excluding it.

The next question is whether the error was constitutional error or merely evidentiary error. We hold that the error was merely evidentiary error that did not rise to the level of a constitutional deprivation. Defendant was able to present the defense in question by cross-examining the victims' mother and father. Defendant was not totally precluded from presenting this defense because there was testimony showing, first, that the grandmother had inherited $500,000 and, second, that she was spending substantial sums on defendant. Accordingly, defendant was free to argue to the jury that he was falsely accused, at the behest of the victims' mother, out of financial motives. The exclusion of the extrinsic impeachment evidence was merely evidentiary error.[3] The evidentiary error of excluding the extrinsic evidence was harmless in light of the strong evidence that defendant did repeatedly rape his victims.

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[3] Even if the error had been constitutional error, it would have been nonstructural. A structural error is a fundamental constitutional error that defies analysis by harmless error standards. *People v Miller*, 482 Mich 540, 556; 759 NW2d 850 (2008), quoting *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999). For nonstructural constitutional error, the standard for determining whether reversal is required is whether the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Here, any constitutional error was harmless beyond a reasonable doubt. The defense in question was so implausible that no reasonable jury would have found it persuasive. Any doubt resulting from this particular defense would have been unreasonable (and thus not an adequate basis for an acquittal). What is more, the evidence presented by the prosecution was very strong. The three complainants testified specifically and convincingly about being repeatedly subjected to statutory rape by defendant. Thus, any constitutional error resulting from excluding the proposed extrinsic impeachment evidence was harmless beyond a reasonable doubt.

Finally, defendant asserts that he suffered a deprivation of his liberty without due process of law under the state and federal constitutions because three offense variables were misscored and therefore he was sentenced on the basis of inaccurate information. We disagree.

Constitutional questions are reviewed de novo. *LeBlanc*, 465 Mich at 579. Questions whether a defendant was deprived of liberty without due process of law are reviewed de novo. See *Schumacher*, 276 Mich App at 176. This Court reviews a trial court's scoring decision under the sentencing guidelines " 'to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.' " *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citation omitted). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court reviews "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id*. An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

For offense variable (OV) 8, if a victim was asported to another place, or situation, of greater danger, the sentencing court assigns 15 points. MCL 777.38(1)(a). "Asportation" is not defined in the sentencing guidelines statutes. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). But it does not require the use of force. *Id*.

Defendant took one of his victims to a trailer on his property, where he raped her. Defendant also took one of his victims onto a tree stand, where he sexually

assaulted her. Finally, defendant took one of his victims riding on a dirt bike, far away from the house, where he again assaulted her.

The trailer, the tree stand, and the dirt-bike destination are all places or situations of greater danger because they are places where others were less likely to see defendant committing crimes. Given this evidence, the trial court's scoring decision on OV 8 is upheld. *Id.* at 647-648.

Next, OV 10 was assessed at 15 points for exploitation of a victim's vulnerability because defendant groomed his victims. MCL 777.40(1)(a) requires assessment of 15 points if "[p]redatory conduct was involved." The statute defines "predatory conduct" to mean "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

People v Cannon, 481 Mich 152, 161-162; 749 NW2d 257 (2008), provided a three-part test for predatory conduct:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was the victimization the offender's primary purpose for engaging in the preoffense conduct?
>
> *If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct*.

Here the victims testified about numerous sexual assaults going on for a very long time before disclosure. Accordingly, there was evidence that defendant engaged in preoffense conduct.

Second, defendant engaged in "grooming." Grooming refers to less intrusive and less highly sexualized forms

of sexual touching, done for the purpose of desensitizing the victim to future sexual contact. Defendant's grooming was directed at his victims and not at anyone else. Moreover, defendant's victims, his adoptive grandchildren, suffered from a readily apparent susceptibility to injury and persuasion because of their tender age and his authority over them as a grandparent.

Third, the grooming behavior by defendant was, as the trial court found, for victimization. There was evidence that the purpose of grooming was to desensitize the victims to the impropriety of the sexual contact, in order to escalate it over time. By beginning with milder forms of sexual contact, and then progressing to more intense sexual contact and penetration, defendant demonstrated that his intent and purpose were to victimize the complainants. Thus, there was, at the least, some evidence to support the trial court's scoring decision. Therefore, the trial court's scoring decision on OV 10 is affirmed. See *Endres*, 269 Mich App at 417.

Finally, defendant argues that the trial court incorrectly assessed 10 points for OV 19 (covering, in part, interference with the administration of justice). This score was given because defendant told his victims not to disclose his acts or he would go to jail. Defendant does not deny the statements. Rather, he argues that he stated "an obvious fact" and the statements were "not even a threat." Defendant's arguments lack merit.

MCL 777.49 governs OV 19 and allows for 10 points to be assessed when the "offender otherwise interfered with or attempted to interfere with the administration of justice." The phrase "interfered with or attempted to interfere with the administration of justice" is broad. *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). It includes acts constituting obstruction of justice, but is not limited to those acts. *Id*.

Defendant's argument that he did not threaten the victims is, even if it were true, beside the point. A threat is not required. MCL 777.49. And defendant's argument that he was merely stating a fact to his victims rings hollow. Defendant's unrebutted statements to his victims have an unmistakable meaning: Do not tell anyone. Defendant's admonitions to his victims were a clear and obvious attempt by him to diminish his victims' willingness and ability to obtain justice.

In conclusion, (1) the admission of prior acts evidence did not deny defendant a fair trial, (2) the exclusion of a defense expert did not deny defendant his right to present a defense, (3) defendant was not deprived of a fair trial when the prosecution was permitted to delete a witness from its witness list before trial and was not required to lend assistance to the defendant in locating that witness, (4) defendant was not deprived of a fair trial when the trial court denied his motion to adjourn the trial, (5) defendant was not deprived of a fair trial when the trial court denied his request for the missing witness instruction, (6) the admission of rebuttal evidence regarding defendant's character did not deprive defendant of a fair trial, (7) while the trial court erred by denying defendant the opportunity to impeach a witness with extrinsic evidence that was not on a collateral matter, the error was evidentiary only and was harmless, and (8) defendant's due process rights were not violated by the trial court's scoring of offense variables for purposes of sentencing because there was evidence supporting the scores.

Affirmed.

CITY OF FLINT v CHRISDOM PROPERTIES, LTD

Docket No. 283245. Submitted April 7, 2009, at Detroit. Decided April 21, 2009, at 9:10 a.m.

The city of Flint brought an action in the Genesee Circuit Court against Chrisdom Properties, Ltd, James Crawley, and others, alleging breach of contract and seeking foreclosure of a mortgage extended to Chrisdom and Crawley (hereafter defendants). The defendants counterclaimed breach of contract and slander. The city had loaned the defendants money to fund a redevelopment of two buildings into condominiums, but had delayed issuing a building permit for a year and refused to release from the mortgage condominium units that were ready for sale. The city brought its action when the defendants fell delinquent on their loan payments. In the middle of trial, the court, Archie L. Hayman, J., permitted the defendants to add frustration of purpose and impossibility to their defenses and affirmative defenses. The court ultimately decided to release the defendants from any obligations under the loan agreement or mortgage with the city, and awarded damages to the defendants on their counterclaim. The city appealed.

The Court of Appeals *held*:

1. The trial court did not err by deciding that the city had frustrated the purpose of the loan contract. Frustration of purpose is generally asserted where a change in circumstances makes one party's performance virtually worthless to the other, frustrating that party's purpose in making the contract. The frustration must be so severe that it is not fairly to be regarded as within the risks that the party assumed under the contract and the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. In this case, the city intentionally or incompetently frustrated the purpose of the contract by delaying the issuance of a building permit and refusing to release ready-for-sale condominiums from the general mortgage.

2. The trial court correctly decided that the city breached the loan contract. The city breached the contract for the same reasons it frustrated its purpose.

3. The trial court's award of damages is as close as possible to mathematical precision under the facts of this case.

4. The defendants have not received a windfall in retaining the buildings and being awarded damages. The award of damages was for the defendant's counterclaim while the discharge of the mortgage was an independent equitable award.

Affirmed.

CONTRACTS — FRUSTRATION OF PURPOSE.

Frustration of purpose is generally asserted where a change in circumstances makes one party's performance virtually worthless to the other, frustrating that party's purpose in making the contract; the frustration must be so severe that it is not fairly to be regarded as within the risks that the party assumed and the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

Mantese & Rossman, *P.C.* (by *Gerard V. Mantese* and *Ian M. Williamson*), for the city of Flint.

Harris, Goyette, Winterfield, Penskar & Farrehi (by *Alan D. Penskar*) for Chrisdom Properties, Ltd, and James Crawley.

Before: CAVANAGH, P.J., and FORT HOOD and DAVIS, JJ.

DAVIS, J. Plaintiff/counter-defendant city of Flint (Flint) appeals as of right the trial court's judgment in favor of defendants/counter-plaintiffs Chrisdom Properties, Ltd, and James Crawley (Chrisdom and Crawley).[1] We affirm.

This case arises out of a downtown housing development in the city of Flint. Trial testimony was lengthy and detailed, but, in a nutshell, Flint and Chrisdom entered into a loan agreement under which Flint extended $1.8 million from the federal Department of

[1] For purposes of this appeal, Chrisdom is effectively the corporate alter ego of Crawley. We therefore treat them somewhat interchangeably.

Housing and Urban Development to Chrisdom for the purpose of converting two buildings into condominiums. One of those buildings was already owned by Crawley and 100 percent renter-occupied as a high-end apartment building and the other was an immediately adjacent dilapidated structure that Crawley had to purchase.

The loan agreement was poorly structured from the outset. However, Flint—indeed, the same department of the city that had been responsible for the loan—then inexplicably held up the issuance of a building permit to Chrisdom for 13 months after the Building Code Board of Appeals found that Chrisdom was entirely in compliance. Flint offered no justification for this; however, as a result, construction work could not be performed efficiently. Any possibility that the work could be performed within the timetable of the construction loan was abrogated by Flint.[2]

It is worth noting that Crawley testified without contradiction that he had been involved in contracting in Flint for over 40 years and had been issued hundreds of permits. The normal amount of time to obtain a permit never exceeded two weeks. Also, the State Con-

[2] Crawley explained that building construction was similar to assembly-line construction of an automobile, in that a great many activities had to be coordinated and performed in a controlled sequence, but the lack of a building permit prevented that process from functioning. Crawley described an ongoing pattern of indifference after Mayor Woodrow Stanley was recalled in 2002, after which a succession of department heads and other officials either did not respond to him or treated the project as irrelevant. Glenda Dunlap, who testified that she "was the staff person assigned to to [sic] the project," impliedly supported Crawley's opinion by testifying that, among other things, the "City did not want this project." Michael Anthony Freeman, a financial underwriter specialist later asked by the Genesee County Land Bank and paid by the Mott Foundation to get the project back online, testified that when he submitted various proposals to Mayor Don Williamson, Mayor Williamson's response was an explicit directive to "bust his balls," referring to Crawley.

struction Code requires the issuance of a permit within 15 days after an application. MCL 125.1511. Flint argues that this deadline applies only when the application conforms to the code, but the year-long delay here was *after* the board of appeals determined that the Manhattan Place project *was* in compliance.

Additionally, Flint refused to allow any individual condominium units—some of which, having originally been apartments, were ready for sale—to be released from the general mortgage for sale to potential buyers. The construction loan agreement contained no provision governing such releases, but such releases are common in condominium construction projects, and the documents did imply that they should be granted. Further, the contract between the parties provided that Flint was to receive 100 percent of the condominium sale proceeds until such time as the loan made to the contractor was paid in full, which was an unusually good deal for the lender. Moreover, Flint was repeatedly advised that the only way its loan could be repaid was by selling the individual condominium units. Crawley testified that if he could have sold the existing units, he would have paid off the loan and have enough left over to finish the entire project.

Flint did not at any time attempt to provide any sort of justification for withholding the building permit or individual condominium releases short of asserting that it was not technically required to do so. Ultimately, Crawley and Chrisdom ran out of money, by which time Crawley had spent some $200,000 of his own money on the project and had gone without rental income from the now-empty apartment building for several years.[3]

[3] The apartment building was emptied at Flint's request; because Flint did not want to pay for relocation expenses, Crawley agreed to stop renewing his tenants' leases when the loan was originally discussed.

Flint agreed to, and did, loan Chrisdom an additional $359,465, but it had still not issued a building permit, and Crawley explained that it would still be insufficient to complete the project unless individual condominium units were released from the general lien, which release was again denied.

Flint commenced the instant suit against defendants on November 3, 2004, generally alleging breach of contract and seeking foreclosure of the mortgage. Defendants counterclaimed on March 8, 2005, alleging breach of contract and slander. Midway through the trial, the trial court permitted defendants to amend their defenses and affirmative defenses to include frustration of purpose and impossibility, noting that the addition of those theories would not be prejudicial to Flint.[4] The trial court ultimately agreed with Chrisdom and Crawley that Flint had frustrated the purpose of the contract and breached the contract. The trial court then released Chrisdom and Crawley from any obligations under the loans or mortgages to Flint and awarded an additional cash amount, albeit with the expectation that it would be used to pay at least two known outstanding subcontractor liens. This appeal followed.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court

[4] Counsel for Flint argued that amendment was untimely and improper under the court rules, but did not claim that amendment would be prejudicial to Flint.

reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). This Court reviews de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contractual language is ambiguous. *Klapp v United Ins Group Agency*, *Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Little published caselaw exists in Michigan on the doctrine of "frustration of purpose." The parties agree that the only real leading case on point is *Liggett Restaurant Group*, *Inc v City of Pontiac*, 260 Mich App 127; 676 NW2d 633 (2003). There, this Court explained that "[f]rustration of purpose is generally asserted where 'a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract.' " *Liggett Restaurant Group*, *supra* at 133-134, quoting Restatement Contracts, 2d, § 265, comment a, p 335. Furthermore, " '[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract' " and " 'the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.' " *Id*. at 135, quoting Restatement, § 265, comment a, p 335. It is undisputed that Flint did two things: (1) delayed the issuance of a building permit by more than a year after the Board of Appeals determined that the buildings were actually in compliance, which prevented Chrisdom from proceeding in a timely fashion to meet the contract's time requirements; and (2) refused to release individual ready-to-sell condominium units from the general lien despite being repeatedly advised that there was no other way to pay off the mortgage or to complete the project.

Flint primarily argues that Chrisdom assumed the risk that no building permit would be issued because such delays are predictable and Chrisdom represented

in the loan agreement that it had already obtained the proper permits. Without considering the unrebutted testimony that such averments are standard boilerplate, we are unimpressed given the *actual knowledge* by not only Flint, but by the same department, that Chrisdom did not actually have those permits and, moreover, the actual knowledge *and* explicit agreement in the contract that Chrisdom had not yet actually prepared architectural plans, which the unrebutted evidence explained was a prerequisite to obtaining a building permit. While we agree that there is always some risk of a delay in any permitting process, the unchallenged evidence was that Flint never even conducted an inspection, repeatedly insisted that Chrisdom needed to modify plans that the board of appeals ruled were compliant, and generally gave Chrisdom a runaround for more than a year.

Further, at the same time Flint was inexplicably holding up the necessary building permit, it was paying out construction loan monies to Chrisdom. Indeed, by the time the permit was actually issued, the entire contract amount had been paid out, less sums arbitrarily deducted by the city for interest in advance of loan disbursement and attorney fees, neither of which was provided for in the loan agreement. This dichotomy, by itself, is powerful evidence that while the permit delay was wreaking havoc with Chrisdom's orderly progression of construction, there was no ultimate intent on the part of Flint to deny a permit if it wanted its money back. In short, the evidence does not show that Chrisdom encountered a known, if perhaps unlikely risk; rather, the evidence suggests that Flint *actually interfered* with Chrisdom's acquisition of the building permit, whether through incompetence or through actual malice.

Flint next presents what can best be described as a confused argument to the effect that Chrisdom brought its troubles on itself by performing work out of sequence and inefficiently without the permit. The evidence actually showed that Chrisdom essentially did what it could to keep the project running in the absence of the permit and that its only other alternative would have been to do nothing. The evidence further showed that Chrisdom tried to obtain additional third-party funding, but it could not do so because Flint refused to subordinate its loan position. Interestingly, the type of loan involved here—a HUD "Section 108 loan"—is, according to defendants' financial underwriter expert, specifically intended to be used to attract additional funding from other lenders and to be subordinated to those lenders. The expert also explained that it appeared to him that at some point, Flint inappropriately started treating the loan as its own money.

Finally, Flint refused to allow individual condominium units to be released from the general lien so that they could be sold. Flint's project manager testified that she did not recall being asked about individual lien releases; however, numerous other witnesses testified that Crawley *did* ask for those releases, that the project manager and other officials were indifferent and unresponsive to any attempts at communication, or both. We defer to the superior position of the trial court to evaluate witness credibility. Given the other testimony of incompetence or even active hostility toward the project on the part of Flint and the relevant department, we find overwhelming evidence that Flint intentionally or incompetently prevented its mortgagor from being able to repay the mortgage. The trial court did not commit clear error by ruling that Flint frustrated the purpose of the contract.

We also conclude that the trial court correctly found that Flint breached the contract. Flint raises a number of arguments, none of which we find have any merit. Ultimately, we conclude that Flint breached the contract on the basis of the same evidence that shows Flint frustrated the purpose of the contract: Flint's unjustified refusal to issue a building permit and unjustified refusal to release completed condominium units from the general lien guaranteed the failure of the project. We have not been presented with any evidence or argument to the contrary.

We agree with the trial court that computing the damages in this case is difficult and not easily subject to fine-tuning. We are persuaded to affirm the trial court's award for several reasons. First, the trial court clearly wrestled with the issue and it was in a better position to assess the nuances of this case. Second, at no time did Flint challenge Crawley's testimony on damages or attempt to offer its own proofs on damages. Third, Flint concedes that the total value of the trial court's award is approximately the same as Crawley's estimate. Fourth, damages need not be mathematically precise, and after careful consideration, we are of the view that the trial court's award is as close to precision as possible on these facts.

We briefly address Flint's assertion that Chrisdom and Crawley have reaped a double windfall as a result of the outcome of this matter. Specifically, Flint points out that the cash award is roughly the amount of profit Crawley expected to make from the project, but in addition, not only has he been discharged from the mortgage, he has also received the Manhattan Place properties in an improved, albeit unfinished, state. This argument is only superficially appealing, however. The cash award was for the counterclaim for breach of

contract, and although it amounts to the expected profits had the project gone as it should have, it does not account for Crawley's personal contributions to the project and must be used to pay off any other liens or to complete the project.[5] The discharge of the mortgage was an *independent* equitable award, and Flint concedes that discharging all parties' obligations is proper under the frustration-of-purpose doctrine; moreover, we find no fault in the award given Flint's inequitable behavior.

For the above reasons, we disagree that the trial court erred by denying Flint's posttrial motions. We conclude that the trial court did an admirable job handling and resolving a long, difficult case, and we find no fault with its analysis of what transpired or the resultant remedy.

Affirmed.

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[5] There was some testimony that an incomplete condominium is worthless. Moreover, Crawley's construction business and credit were apparently destroyed, making completion of the project significantly more difficult. Finally, a completed luxury condominium in the present housing market will not be worth as much as it could have at the time the project was commenced.

BEACH v LIMA TOWNSHIP

Docket No. 274920. Submitted April 9, 2008, at Lansing. Decided April 21, 2009, at 9:15 a.m.

Florence Beach brought an action in the Washtenaw Circuit Court against Lima Township and Jeffrey Munger, seeking to quiet title to streets dedicated on a plat recorded in 1835. Other parties were subsequently added as plaintiffs. The township had acquired several of the lots shown on the plat and sought to use the streets for ingress to and egress from a fire station it proposed to build on the lots. The plaintiffs asserted that they had acquired title to the streets by adverse possession. The township brought a counterclaim, asserting that the plaintiffs had to bring an action under the Land Division Act, specifically MCL 560.221 through 560.229, to vacate streets created by a plat. The court, Donald E. Shelton, J., denied the township summary disposition and, following an evidentiary hearing on the adverse possession question, granted the plaintiffs summary disposition. The township appealed.

The Court of Appeals *held*:

1. The plaintiffs were not required to bring their adverse possession action under the Land Division Act. The dedication of the streets in the plat occurred before the act took effect on January 1, 1968. The act does not apply to this case because the plaintiffs did not seek to vacate, correct, or revise a dedication in a recorded plat. Rather, they sought to quiet title to the irrevocable easements created by the private dedications in the plat.

2. A person can adversely possess an easement created by private dedication in a plat. While dedication in a plat recorded before 1968 created an irrevocable easement rather than the fee simple interest created by a dedication on or after January 1, 1968, the heart of an adverse possession claim is that a party is effectively and unlawfully intruding on a real property interest lawfully held by another. To establish adverse possession, the person claiming it must show that his or her possession was actual, visible, open, notorious, exclusive, hostile, under cover of a claim of right, continuous, and uninterrupted for a period of 15 years, which is the period of limitations found in MCL 600.5801(4). That statute makes no exception for dedicated property. Because an easement is involved, however, a

heightened level of scrutiny applies. There must be sufficient evidence showing hostile prevention of the use of the easement or use that is wholly inconsistent with the easement.

3. MCL 600.5821(2), which exempts actions by a municipal corporation for recovery of the possession of highways, streets, alleys, or public grounds from the otherwise applicable periods of limitations, does not preclude the plaintiffs' adverse possession claims. This case involves privately dedicated streets in which the township has interests solely by virtue of its ownership of lots within the subdivision. No public grounds are at issue.

4. The plaintiffs offered sufficient proofs to satisfy all the elements of adverse possession. Their barn, crops, trails, tree plantings, and fences were evidence of acts or uses inconsistent with any right to use the disputed property as roads.

Affirmed.

ADVERSE POSSESSION — EASEMENTS — LAND DIVISION ACT — PLATTED LANDS — DEDICATED PROPERTY IN PLATS.

Adverse possession can apply against easements created by private dedications in a plat recorded before the January 1, 1968, effective date of the Land Division Act (MCL 560.101 *et seq.)*.

Keusch, Flintoft & Conlin, P.C. (by *Peter C. Flintoft*), for Florence Beach.

Reading, Etter & Lillich (by *Victor L. Lillich*) for Lima Township.

Before: WILDER, P.J., and MURPHY and METER, JJ.

WILDER, P.J. In this property dispute, defendant Lima Township (defendant or the township) appeals by right the trial court's order granting plaintiffs' motion for summary disposition. We affirm.

I

A

In 1835, a plat was made for Harford Village and recorded. The plat established 68 lots in six blocks.

Jackson Road, adjacent to the village, is a state public road, and West Street, shown on the plat, is a county public road. The other roads shown on the plat (North, South, East, and Cross streets) were not developed or used as roads.

The northern boundary of plaintiffs' property, known as the Beach farm, is interstate highway 94. The Beach farm includes lots 1 through 14 of block II of the plat (together these lots are known as parcel 1) and lots 1 through 6 of block III of the plat (together these lots are known as parcel 2).

The first recorded conveyance was a deed to William Beach in 1854. William Beach was Florence Beach's great-great-grandfather. Florence Beach's father, Dwight Beach, was born in the farmhouse located on the Beach farm. But the Beach family left the farm in 1922. From 1922 to sometime between 1967 and 1969, none of the Beach family lived or worked on the farm. Instead, a tenant farmer lived and worked there.

In 1954, the township received a conveyance of lots 4 and 11 of block I. The deed was by reference to the recorded plat. This property was and continues to be used for a township hall. In 1967 or 1969, Dwight Beach retired from the service and returned to the farm with Florence Beach, who was 14 years old. They erected fences on the property, extending them into areas designated on the plat as roads.

In 2004, the township acquired lots 5, 6, 7, 12, 13, and 14 of block I by a deed that referred to "the south 25 feet of Lots 12, 13, and 14 deeded for highway purposes." The township's four northerly lots (lots 4, 5, 6, and 7) are bounded by platted but undeveloped roads only, with no direct access to a developed road except through the township's southerly lots (lots 11, 12, 13, and 14) to Jackson Road. The township plans to construct a fire

station on its northerly lots and to use North and Cross streets within the plat for ingress and egress.

In August 2004, according to plaintiffs' complaint, the township breached plaintiffs' boundary fence on the north side of lots 4, 5, 6, and 7 of block I. The township took that action under a claim of right to open the streets, as dedicated in the plat. Plaintiffs responded by claiming that the Beach farm includes the platted streets because such streets were never used, opened, or accepted by the public or by any lot owner. Plaintiffs argued that the platted streets did not exist and that title to the platted but unused streets had merged into the title of the Beach farm by adverse possession and abandonment. The township responded that the dedicated streets on the plat had not been vacated and that, if and when they were vacated, title would have vested in the owners of the lots abutting the vacated streets.

B

Florence Beach brought this action to quiet title to the streets at issue, based on adverse possession claims, and the other plaintiffs were joined later. The township filed a counterclaim to quiet title to the streets. Defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10), claiming that plaintiffs had failed to state a claim because an action to vacate streets created by a plat had to be brought under the Land Division Act (LDA), specifically under MCL 560.221 through 560.229, the provisions concerning plats. Plaintiffs filed a countermotion for summary disposition under subrules C(8), (9), and (10).

The trial court denied defendant's motion, holding that the LDA did not apply. It took plaintiffs' motion under advisement. Defendant filed a motion for recon-

sideration, arguing that the trial court lacked jurisdiction to alter or revise a plat under a quiet title action and that such revision could only occur under an LDA action. The trial court again denied relief and proceeded to hold an evidentiary hearing on the adverse possession question. Following the hearing, the trial court issued an opinion and order granting plaintiffs' motion for summary disposition.

II

The township first argues that the trial court erred by not dismissing plaintiffs' action because plaintiffs' claim was not brought under the LDA. We disagree.

A

We review de novo summary dispositions. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Statutory interpretation, including interpretation of the LDA, is a question of law reviewed de novo. *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004). A claim for adverse possession is equitable in nature. See *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007). And decisions regarding equitable claims, defenses, doctrines, and issues are reviewed de novo. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004). Whether the trial court erred by trying this matter as a quiet title action rather than requiring an action to vacate a road under the LDA is a question of law reviewed de novo. *Hall v Hanson*, 255 Mich App 271, 276; 664 NW2d 796 (2003).

B

This appeal hinges on the interpretation of *Martin* and its companion case, *Little v Hirschman*, 469 Mich

553; 677 NW2d 319 (2004). Also implicated is the Supreme Court's recent decision in *Tomecek v Bavas*, 482 Mich 484; 759 NW2d 178 (2008). Plaintiffs argue that *Martin* is inapplicable because it applies to private dedications filed on or after January 1, 1968, and rely instead on *Little*, which holds that "dedications of land for private use in plats before 1967 PA 288 took effect convey at least an irrevocable easement in the dedicated land." *Little*, 469 Mich at 564. We agree with plaintiffs that *Little* is applicable because the plat dedication at issue here occurred before 1967 PA 288[1] took effect.

Since *Little* is applicable here, we consider whether the *second* holding of *Martin*, "that the exclusive means available when seeking to vacate, correct, or revise a dedication in a recorded plat is a lawsuit filed pursuant to MCL 560.221 through 560.229," is *also* circumscribed by the January 1, 1968, date. *Martin*, 469 Mich at 542-543. We are persuaded that *Martin* and the LDA are not applicable to the present case because plaintiffs did not seek in this action "to vacate, correct, or revise a dedication in a recorded plat." Therefore, the trial court did not err by allowing plaintiffs' quiet title claim to proceed.

Given that the trial court properly allowed plaintiffs' quiet title claim to proceed, we next consider whether private easements dedicated in plats can be adversely possessed. We hold that they can.

The parties are in agreement that the 1835 recording of the plat constituted a private dedication that encompassed, in part, North and Cross streets, which, although platted, were never developed as streets. The township planned to use that section of North Street

[1] 1967 PA 288 was originally titled the Subdivision Control Act, but is now titled the Land Division Act. 1967 PA 288 took effect on January 1, 1968.

located north of an area referred to as block I and that section of Cross Street located east of block I for ingress to and egress from a fire station to be constructed on adjacent lots within block I. The trial court found that plaintiffs had established ownership of the relevant portions of the streets in dispute, under the doctrine of adverse possession.

Reading together the opinions in *Martin* and *Little*, we conclude that private dedications in plats filed on or after January 1, 1968, are expressly recognized and permitted under Michigan law, MCL 560.253(1) (enacted as part of 1967 PA 288), and that private dedications in plats registered before January 1, 1968, such as the dedication here, are likewise legally sound. There is a distinction between pre-1968 private dedications and ones contained in plats filed thereafter, which is that "a private dedication made before 1967 PA 288 took effect conveyed an irrevocable easement, whereas MCL 560.253(1) now indicates that a private dedication conveys a fee interest . . . ." *Martin*, 469 Mich at 548 n 18. But even though a fee simple interest is conveyed, lot owners in the subdivision cannot use the dedicated land for any purpose they desire. Rather, use must be compatible and consistent with the dedicatory language. *Id.* at 549 n 19.

Here, given the plat and dedication date of 1835, an irrevocable easement, as opposed to a fee simple interest, was created in favor of the lot owners. The private dedication became irrevocable on the sale of the lots. *Little*, 469 Mich at 558-559. "[A] private dedication is effective upon the sale of a lot because it is reasonably assumed that the value of that lot, as enhanced by the dedication, is reflected in the sale price. That is, purchasers relied upon the dedications that made the property more desirable." *Id.* at 559. A landowner is

considered to have accepted "any private dedication in a plat when property is purchased pursuant to a deed that references the plat." *Martin*, 469 Mich at 549 n 19.

Stated otherwise, "purchasers of parcels of property conveyed with reference to a recorded plat have the right to rely on the plat reference and are presumed to 'accept' the benefits and any liabilities that may be associated with the private dedication." *Id*. Quoting *Minnis v Jyleen*, 333 Mich 447, 454; 53 NW2d 328 (1952), *Little* stated that the " 'rights granted under the dedicatory clauses in the plat to the owners of lots in the subdivision may not be infringed by one lot owner for his own convenience to the detriment of his fellow lot owners.' " *Little*, 469 Mich at 560.

An easement created by a private dedication cannot be revoked and binds the original owner-plattor and successors. But these principles do not preclude adverse possession of such an easement.

The heart of an adverse possession claim is that a party is effectively and unlawfully intruding on a real property interest lawfully held by another. In other words, the adverse possessor is doing something that the law prohibits and for which the owner has an action. Michigan courts long ago adopted a common-law theory of adverse possession, see, e.g., *Sanscrainte v Torongo*, 87 Mich 69; 49 NW 497 (1891), under which a claim of adverse possession was a positive claim, by the possessor, to actual ownership of disputed property, rather than a statute-of-limitations defense to a real property action by the putative titleholder. In this manner, after a period of open, notorious, and hostile possession, title passes from the putative titled owner to the person who has actually been in possession of the land.

MCL 600.5801 extends, in the statutory context, this longstanding common-law recognition of the doctrine of adverse possession and provides, in pertinent part:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
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> * * *
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> (4) In all other cases under this section [subsections 1 through 3 are not applicable here], the period of limitation is 15 years.

To establish adverse possession, the person claiming it (e.g., the person opposing the real property action by the existing owner, by asserting the limitations-period defense) must show that his or her possession was actual, visible, open, notorious, exclusive, hostile, under cover of a claim of right, continuous, and uninterrupted for the statutory period of 15 years. *Wengel v Wengel*, 270 Mich App 86, 92; 714 NW2d 371 (2006). The elements of adverse possession are not arbitrary requirements; rather, they reflect the logical consequence of a party claiming ownership by adverse possession having the burden to prove that the period of limitations has expired. *Id*. *Wengel*, quoting *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993), further observed:

> "To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. MCL 600.5829. Disseisen occurs when the true owner is deprived of

> possession or displaced by someone exercising the powers and privileges of ownership." [*Wengel*, 270 Mich App at 92.]

We cannot bar an adverse possession claim on the grounds that it would result in an invasion of a legally protected property interest, i.e., an irrevocable easement created by a private dedication,[2] because it is the case with all adverse possession claims that recognition of such a claim would result in an invasion of a legally protected property interest. Adverse possession succeeds when the interest of the owner of record, once afforded protection, is no longer legally shielded because the record owner failed to commence an action within the limitations period in MCL 600.5801(4).

For example, if plaintiffs had actually constructed a house on the disputed area that stood for more than 15 years and blocked entirely any use of the easement, and had the township filed a suit for removal of the house on the basis that it sat within the area of the easement created by the private dedication, then MCL 600.5801(4), *which makes no exception for dedicated property*, would absolutely bar the action because the 15-year period to maintain an action for recovery or possession would have expired. Indeed, the township and other lot owners would no longer be free to "make any entry upon [the] lands . . . ." MCL 600.5801. Under such circumstances, there would be no legal mechanism to prevent plaintiffs' continuing use of the property, which explains why the law of acquiring title by adverse possession arose: an adverse possessor can no longer be removed from the property, nor can the record owner lawfully intrude on the land, so therefore the law will recognize legal title in favor of the adverse possessor.

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[2] We note that plaintiffs' claim was not one seeking revocation of the easement, but one seeking recognition of termination, or extinguishment, of the easement by adverse possession.

This underlying premise cannot be discarded merely because, under the instant circumstances, the alleged acts of adverse possession did not entail construction of a home or because it was plaintiffs, not the township, who brought suit first. Any easement rights in North Street and Cross Street held by the township and the other lot owners had to be invoked within 15 years of disseisen, either by timely pursuit of an action, or as a defense or counterclaim, raised within the limitations period. Otherwise, those rights were subject to being lost, given the statutory mandate that a property owner cannot sit on his or her rights indefinitely. Failing to permit a standalone adverse possession claim would render MCL 600.5801 superfluous and would amount to a judicial end-run around a statute and a doctrine of common law accepted for generations in this state.

The fact that an easement interest is at stake does somewhat alter the evidentiary burden in relation to the adverse possession analysis. "[A]n easement may be enforced at any time up to its extinguishment by adverse possession[.]" *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008), citing *Longton v Stedman*, 196 Mich 543, 545; 162 NW 947 (1917). "In Michigan[,] use of an easement by the owner of the servient estate will not ripen into adverse possession unless such use is inconsistent with the easement." *Nicholls v Healy*, 37 Mich App 348, 349; 194 NW2d 727 (1971). The *Nicholls* Court noted the need for the application of a heightened level of scrutiny in regard to adverse possession of an easement, stating:

> The record reveals extensive use of the easement by defendants and their predecessors in title. Two rows of trees were planted along the length of the easement, a privy was erected on the easement, for a period of time a bathhouse stood on the strip, and prior to the time the land was sold to defendants' predecessor in title a fence was

> constructed along one end of the strip. A careful review of the testimony, however, indicates that none of these uses interfered with plaintiffs' rights of passage. None of the uses seriously blocked passage on the strip. A gate had been put in the fence and was eventually removed. Even if not removed, maintenance of a gate across the right of way if it permitted use of the way "would not constitute an obstruction to the way or result in the loss of the way by ouster or adverse possession." *Greve v. Caron*, [233 Mich 261, 266; 206 NW 334 (1925)].
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> Strictly construing the evidence supporting the claim of adverse possession, as we must . . . , we find that the record here fails to establish acts evidencing hostile prevention of the plaintiffs' rights of passage. [*Id*. at 350.]

In addition, our Supreme Court has indicated that adverse possession of an easement can be established if there is sufficient evidence showing hostile prevention of the use of the easement or use that is wholly inconsistent with the easement. *Harr v Coolbaugh*, 337 Mich 158, 165-166; 59 NW2d 132 (1953); *Greve*, 233 Mich at 266-267. "An easement may terminate by adverse possession, but such termination is difficult to establish." 1 Cameron, Michigan Real Property Law (3d ed), § 6.30, p 241.

Having concluded that a party is lawfully entitled to maintain an adverse possession claim with respect to property subject to an irrevocable easement created by a private dedication in a recorded plat, we further conclude that while there is no *requirement* to do so, an adverse possession claim *may* be brought under the LDA.

The LDA provides that a circuit court may "vacate, correct, or revise all or a part of a recorded plat." MCL 560.221. In general, an LDA complaint must be filed "by the owner of a lot in the subdivision, a person of record claiming under the owner, or the governing body of the municipality in which the subdivision covered by the plat

is located." MCL 560.222. The complaint must identify the land at issue within the plat and state the "plaintiff's reasons for seeking the vacation, correction, or revision." MCL 560.223(a) and (b). MCL 560.224a identifies all the individuals and entities that a plaintiff must join as party defendants in an LDA action. With some enumerated exceptions, "[u]pon trial and hearing of the action, the court may order a recorded plat or any part of it to be vacated, corrected, or revised[.]" MCL 560.226(1).

In *Martin*, 469 Mich at 550, the Court ruled that the plaintiffs' efforts to have a plat dedication of an outlot declared "null and void" required the filing of an LDA action under MCL 560.221 *et seq*. The plaintiffs' lawsuit had sought removal of plat language reserving an outlot for the use of lot owners. *Id.* at 545. The Court concluded that "because plaintiffs were attempting to vacate, correct, or revise the plat, we find that the trial court erred when it allowed this case to proceed as a quiet title cause of action." *Id.* at 551. *Martin* reasoned that requiring an LDA lawsuit ensured that filed plats remained accurate. *Id.* at 551 n 24. The Court specifically held "that the *exclusive* means available when seeking to vacate, correct, or revise a dedication in a recorded plat is a lawsuit filed pursuant to MCL 560.221 through 560.229." *Id.* at 542-543 (emphasis added).

Correctly understanding the full ramifications of *Martin* can only be accomplished by viewing it in conjunction with *Tomecek*. The lead opinion in *Tomecek* defined the parameters of an action under the LDA, stating:

> The LDA provides a process for surveying and marking subdivided property. Property information is compiled on a plat that is then recorded with the local municipality. The LDA allows a circuit court to vacate, correct, or revise a recorded plat. Defendants argue that the LDA permits a court to alter a plat map only to properly reflect existing

> property rights; it cannot affect the substantive rights of the underlying property owners.
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> When construing the LDA, we are mindful that our primary goal is to ascertain and give effect to the Legislature's intent. When determining intent, we consider first the language of a statute. The LDA allows a court to "order a recorded plat or any part of it to be vacated, corrected, or revised . . . ." "Plat" is defined in the act as "a map or chart of a subdivision of land."
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> The LDA defines a plat as a map. A plat is a description of the physical property interests on a particular area of land. A map, by itself, is not a determination of substantive property interests. If one "revises" a map of the United States to show Michigan encompassing half of the country, it does not make it so. The LDA was never intended to enable a court to establish an otherwise nonexistent property right. Rather, the act allows a court to alter a plat to reflect property rights already in existence.
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> In this case, the LDA did not create new substantive property rights when the circuit court altered the plat to reflect that the central easement encompasses utility access. This right existed with respect to the central easement since its inception, when the original grantors recorded the central easement intending it to include utilities. The trial court merely used the LDA as the tool to validate property rights that already existed. [*Tomecek*, 482 Mich at 495-495 (opinion by KELLY, J.) (citations omitted.]

This is the full extent of the Court's discussion of the LDA, and five justices were in agreement with respect to the principles quoted. See *id.* at 505 (opinion by YOUNG, J.).

In our opinion, the following principles can be gleaned from *Tomecek* and *Martin*: (1) the LDA itself does not provide an avenue for the circuit court to alter substantive property rights or to establish such rights if they are not already in existence; (2) the alteration of a plat in a judgment entered by a circuit court pursuant

to the LDA does not effectuate a change in substantive property interests and rights; (3) rather, the alteration of the plat in an LDA judgment is ordered so that the plat accurately reflects and conforms to property interests and rights already in existence; (4) the filing of an action under the LDA is the exclusive means available when seeking to vacate, correct, or revise dedication language in a recorded plat in order to achieve consistency between the plat and existing substantive property rights; (5) an LDA action will generally require the court to identify the nature, character, and scope of existing property rights and, at times, to resolve any underlying disputes on such issues so that the plat map can be properly revised if necessary; and (6) akin to quieting title, resolution of underlying disputes regarding the nature, character, and scope of existing property rights that could potentially lead to plat revisions may be undertaken in the context of an LDA action, but it is not mandatory.

In light of *Tomecek*, we conclude that while the LDA cannot be used as a vehicle to alter or create substantive property interests,[3] an LDA action *can* be used to obtain legal recognition of an alteration of such property interests, accomplished, for example, by way of adverse possession, resulting in a need to alter the plat map. The LDA requires a plaintiff to allege in the complaint the reason a plat alteration is being sought, MCL

[3] Even though the LDA instructs that a court may "vacate, correct, or revise all or a part of a recorded plat," MCL 560.221, this specific authority does not give a court the power to alter or create substantive property interests. Therefore, a party cannot properly file an LDA action demanding, for example, that he or she be given exclusive rights to a privately dedicated subdivision park simply on the basis that MCL 560.221 allows a court to alter a recorded plat. If the party could provide an independent, underlying legal basis establishing the right to exclusive use, the party could use the LDA to have the plat altered to reflect the property interest.

560.223(b), which reason could certainly be that application of the doctrine of adverse possession resulted in a change in existing substantive property interests. In *Gorte v Dep't of Transportation*, 202 Mich App 161, 168-169; 507 NW2d 797 (1993), this Court explained:

> Generally, the expiration of a period of limitation vests the rights of the claimant. It is further the general view with respect to adverse possession that, upon the expiration of the period of limitation, the party claiming adverse possession is vested with title to the land, and this title is good against the former owner and against third parties. Defendant argues the contrary view, that plaintiffs' possession of the property merely gave plaintiffs the ability . . . to raise the expiration of the period of limitation as a defense to defendant's assertion of title. Contrary to defendant's arguments, however, Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought. [Citations omitted.]

Thus, resolution of an adverse possession claim within an LDA action would not entail the circuit court altering existing substantive property interests through use of authority granted in the LDA, which is prohibited. Rather, resolution of an adverse possession claim would simply involve the court determining the nature, character, and scope of existing property rights, which may have been previously altered by operation of law under MCL 600.5801(4) and its associated doctrine of adverse possession.[4]

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[4] Even if it can be said that the court is altering substantive property interests by finding in favor of an adverse possessor, as opposed to merely determining existing property interests that were previously altered by operation of MCL 600.5801(4), the alteration would still be proper within

Tomecek does not preclude a circuit court, within the context of an LDA action, from identifying the particular property interests actually held by the parties and from resolving any disputes on the matter. Indeed, in *Tomecek*, the chief question was whether the scope of a driveway easement described in a plat encompassed a right to run a sewer line through the grounds of the easement.[5] By declaring that the easement could be so utilized, the Court was not altering or creating substantive property rights by way of any LDA provision, but was instead merely formally recognizing or validating existing property rights. In reaching its conclusion, *Tomecek* had to resolve the parties' dispute regarding the scope of the easement, which required an examination of the intent of the original grantors, the plat map labeling of the easement, past use of the easement, the effect of a restrictive covenant on the easement, and other circumstances. *Tomecek*, 482 Mich at 490-496 (opinion by KELLY, J). Accordingly, *Tomecek* allows for a *bifurcated approach*, involving, first, a determination regarding the nature, character, and scope of the existing property interests being disputed by the parties and, second, an alteration of the plat map, if necessary, so that it is consistent with the property interests as determined by the court.

The fact that an adverse possession claim regarding property subject to an easement, held by subdivision lot owners and created by a private dedication in a recorded plat, *may be* part of an LDA action, however, does not require it to be so. One of the foci in *Martin*

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an LDA lawsuit as long as it was based solely on adverse possession principles and not the LDA's provision allowing the court to vacate, correct, or revise a plat, MCL 560.221.

[5] "We must determine if the central easement running from Lake Shore Road to Lot 2 includes utility access, or if its use is strictly limited to ingress and egress." *Tomecek*, 482 Mich at 490 (opinion by KELLY, J).

was whether a private dedication in a plat filed in 1968 or thereafter was legally valid. The LDA issue was of secondary consideration. The plaintiffs in *Martin* expressly requested the court to remove, and to declare null and void, plat language regarding the outlot at issue. *Martin*, 469 Mich at 545. In other words, the plaintiffs specifically asked the court to "vacate, correct, or revise . . . part of a recorded plat." MCL 560.221; *Martin*, 469 Mich at 542-543. We conclude that *Martin* did not intend anything more to be read into its decision regarding the LDA than the unremarkable proposition that the filing of an LDA suit is necessary *when expressly seeking to alter the language in a recorded plat*. Here, plaintiffs did not expressly seek to alter a recorded plat.[6]

III

Defendant also contends that the trial court clearly erred by finding that plaintiffs established adverse possession. We disagree. We review de novo summary dispositions. *Willett*, 271 Mich App at 45. Decisions regarding equitable claims are reviewed de novo, while the trial court's findings of fact are reviewed for clear error. See *Dyball*, 260 Mich App at 703.

A

Defendant first contends that its status as a municipal corporation renders it immune, by statute, from an adverse possession claim to a public street, citing MCL 600.5821(2), which provides: "Actions brought by any municipal corporation for the recovery of the possession of any public highway, street, alley, or any other public

[6] Whether such action may be required following the issuance of this opinion is not expressly before us at this time.

ground are not subject to the periods of limitations." Under this theory, defendant claims that because it is not subject to the limitations period on which adverse possession claims are based, it is not subject to adverse possession claims for public roads, streets, or areas. We disagree.

The Revised Judicature Act, of which MCL 600.5821(2) is a part, does not define "public streets." Thus, this is an issue of statutory construction, and we repair to well-established principles of statutory construction. We begin our analysis by consulting the specific statutory language at issue. *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007). This Court gives effect to the Legislature's intent, as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning. *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006). "When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written." *Id*. at 136. "This Court does not interpret a statute in a way that renders any statutory language surplusage . . . ." *Id*., citing *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

Under the unambiguous language of the statute, defendant's argument lacks merit. Defendant has argued that its rights to Cross Street and North Street arise from the *private* dedication in the plat and that its rights derive from its status as an owner of lots within the subdivision. Accordingly, by defendant's own admission, these are not public streets, and the statute does not apply to them.

The caselaw interpreting and applying MCL 600.5821(2) does not compel a contrary conclusion.

Mason v City of Menominee, 282 Mich App 525, 527; 766 NW2d 888 (2009), involved the application of MCL 600.5821(2) to a dispute involving property owned by a city, but not by virtue of ownership of lots in a subdivision with privately dedicated streets. The opinion does not state how the city came to own the property, but describes the land as a public park. Presumably, therefore, the city owned the park land in fee simple, as public land.

Similarly, *Adams Outdoor Advertising*, *Inc v Canton Charter Twp*, 269 Mich App 365; 711 NW2d 391 (2006), does not compel a contrary result. In that case, the panel considered MCL 600.5821(2) within the context of an action to quiet title. Billboards were erected on the north side of Michigan Avenue, 500 feet east of Canton Center Road. The panel held that the trial court correctly granted the township summary disposition under MCL 600.5821(2). The panel relied on the "public ground" provision in that subsection. Finding that phrase ambiguous, the panel used doctrines for construction of statutes and dictionary definitions, broadly construing the phrase "public ground" to mean publicly owned property *open to the public for common use*. *Id*. at 370-371, 375. The panel held that plaintiffs could not bring an adverse possession claim to the public grounds at issue. *Id*. at 375.

Adams Outdoor Advertising is distinguishable. The case at bar involves privately dedicated streets "owned" by the township by virtue of its ownership of lots in the subdivision. There is no evidence that these streets were ever open to the public. There are no "public grounds" at issue here, and *Adams Outdoor Advertising* does not compel the conclusion that MCL 600.5821(2) bars plaintiffs' adverse possession claims. For the foregoing reasons, MCL 600.5821(2) does not bar plaintiffs'

adverse possession claims against privately dedicated streets owned by defendant only by virtue of its ownership of lots in the subdivision.

B

Defendant next argues that plaintiffs failed to prove the elements of adverse possession sufficiently for summary disposition. Again, we disagree.[7] To establish adverse possession, the claimant must show that his or her possession was actual, visible, open, notorious, exclusive, hostile, under cover of a claim of right, continuous, and uninterrupted for the statutory period of 15 years. *Wengel*, 270 Mich App at 92.

As we recognized earlier, the fact that an easement interest is at stake does raise somewhat the evidentiary burden in relation to the adverse possession analysis. "In Michigan[,] use of an easement by the owner of the servient estate will not ripen into adverse possession unless such use is inconsistent with the easement," thus leading to application of a heightened level of scrutiny in regard to a claim of adverse possession of an easement. *Nicholls*, 37 Mich App at 349.

[7] We note that, while the trial court held its evidentiary hearing under MCR 2.116(I) and then granted summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(10), MCR 2.116(I)(3) permits an immediate trial to resolve any disputed issue of fact only when the grounds asserted in support of summary disposition are based on subrules C(1) through (7). Nevertheless, because the parties have not challenged this procedure used by the trial court, which got right to the heart of the issue in dispute and expedited the resolution of the case, we simply point out the oddity of reviewing an order granting summary disposition under subrule C(10) that was entered only after the trial court made findings of fact integral to its order granting summary disposition. To this end, while our review of equitable claims, such as a claim for adverse possession, is de novo, *Dyball*, 260 Mich App at 703, we will review for clear error the factual findings made by the trial court in regard to the claim of adverse possession, *Grand Rapids v Green*, 187 Mich App 131, 135-136; 466 NW2d 388 (1991).

The evidence indicated that improvements were made to the areas in question. These longstanding improvements would give a titleholder notice that one or more lot owners were adversely possessing the area. For example, plaintiffs' barn partially blocked the area known as North Street. Plaintiffs maintained crops and private trails in the areas in question, planted trees, and maintained fencing along North and Cross streets. These activities and structures were further evidence of acts or uses inconsistent with any right to use the disputed property as a road. In light of the strong evidence of plaintiffs' uses inconsistent with the use of the areas as roads, we conclude that the trial court did not clearly err by finding that plaintiffs established clear and cogent proofs of possession that was actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory 15-year period, hostile, and under cover of claims of right, and judgment in favor of plaintiffs was properly granted.

IV

The trial court did not err as a matter of law by concluding that plaintiffs were not required to bring their adverse possession claims under the LDA. Adverse possession applies against easements created by private dedications in a plat, even if the plat was recorded before January 1, 1968. MCL 600.5821(2) does not preclude plaintiffs' adverse possession claims against privately dedicated subdivision streets in which the township has interests solely by virtue of its ownership of lots within the subdivision. Finally, the trial court did not err by concluding that plaintiffs demonstrated sufficient proofs to satisfy all the elements of adverse possession.

Affirmed. Plaintiff Florence Beach, being the prevailing party, may tax costs pursuant to MCR 7.219.

PEOPLE v BENJAMIN
PEOPLE v HENISER
PEOPLE v ZDYBEL

Docket Nos. 281899, 281900, and 281901. Submitted April 15, 2009, at Detroit. Decided April 21, 2009, at 9:20 a.m.

Terri L. Benjamin, Kimberly J. Heniser, and Julia A. Zdybel each pleaded guilty in the Isabella County Trial Court of possession of less than 25 grams of cocaine. The court, Paul H. Chamberlain, J., pursuant to MCL 333.7411(1), deferred further proceedings and placed the defendants on probation for six months. Upon successful completion of probation, the court discharged the defendants and dismissed the proceedings against them. On motion by the defendants, the court ordered the destruction of their fingerprint and arrest records. The court denied the prosecution's motion for reconsideration, and the prosecution appealed by leave granted.

The Court of Appeals *held*:

The trial court erred by ruling that the defendants were entitled under MCL 28.243(8) to the destruction of their fingerprint and arrest records. MCL 333.7411(2) requires the Department of State Police to keep a nonpublic record of an arrest and discharge or dismissal under MCL 333.7411.

1. MCL 28.243(8) requires the destruction of the fingerprint and arrest records of a person who is found not guilty of an offense. A discharge and dismissal under MCL 333.7411(1) is without an adjudication of guilt. Because a person discharged pursuant to MCL 333.7411(1) has not been found not guilty, the person is not entitled under MCL 28.243(8) to the destruction of his or her fingerprint and arrest records.

2. A main purpose behind the requirement of MCL 333.7411(2) that the Department of State Police keep and make available to a court, police agency, or prosecuting attorney's office a nonpublic record of an arrest and discharge or dismissal pursuant to MCL 333.7411 is to ensure that the person involved receives only the one-time deferral allowed by the statute. Preserving the fingerprint and arrest records of a person discharged under MCL 333.7411 serves that purpose.

Reversed.

CONTROLLED SUBSTANCES — CRIMINAL PROSECUTIONS — DEFERRED CRIMINAL PROCEEDINGS — DISCHARGE AND DISMISSAL OF CRIMINAL PROCEEDINGS — RECORDS — FINGERPRINT RECORDS — ARREST RECORDS.

A first-time offender of certain criminal statutes proscribing the possession or use of controlled substances who pleads or is found guilty, placed on probation, and then discharged upon completion of probation is not entitled to the destruction of his or her fingerprint and arrest records (MCL 28.243[8]; MCL 333.7411[1], [2]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Larry J. Burdick*, Prosecuting Attorney, and *Stuart Black*, Assistant Prosecuting Attorney, for the people.

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

DONOFRIO, J. In these consolidated appeals, the prosecutor appeals by leave granted the trial court's orders granting motions by defendants Terri Lea Benjamin, Kimberly Jane Heniser, and Julia Ann Zdybel for the destruction of fingerprint and arrest cards by the arresting agency or the Michigan State Police. Each defendant pleaded guilty of possession of less than 25 grams cocaine, MCL 333.7403(2)(a)(*v*). The trial court granted all three defendants deferral status under MCL 333.7411 and placed them on probation for six months. Defendants successfully completed the terms and conditions of their probation and, pursuant to MCL 333.7411(1), the trial court dismissed charges against them. Subsequently, the trial court granted defendants' motions for destruction of their fingerprint and arrest cards. The trial court denied the prosecution's motion for reconsideration, and this Court granted leave to appeal. Because the trial court clearly erred by concluding that MCL 333.7411 allowed defendants' fingerprint and arrest cards to be destroyed, we reverse.

The prosecutor argued on motion for reconsideration that MCL 333.7411(2)(a) requires the Department of State Police to keep a nonpublic record of an arrest for individuals who receive deferrals. The prosecution relied on *McElroy v Michigan State Police Criminal Justice Information Center*, 274 Mich App 32; 731 NW2d 138 (2007), in which this Court interpreted a different but similar statutory deferral provision and held that fingerprint and arrest cards must be retained by the police. The trial court determined that MCL 28.243(8) applied. That statute requires the destruction of the fingerprint and arrest cards of a person found not guilty of an offense. The trial court distinguished *McElroy* on the basis that McElroy had pleaded no contest rather than guilty, stating:

> The facts in *McElroy* differ from the facts in these cases. Mr. McElroy entered a plea of no contest to domestic violence and entered into a deferral program under MCL 769.4a. [*McElroy*, *supra*] at 33-34. The Court of Appeals held that because Mr. McElroy was unable to prove his discharge and dismissal was a finding of not guilty under MCL 28.243(8) because he pleaded no contest rather than guilty[,] there was never an adjudication of guilt entered. *Id*. at 38. Therefore, he was not entitled to have his fingerprint and arrest cards destroyed. *Id*.

The trial court ultimately ruled that under MCL 28.243(8), defendants were entitled to the destruction of their fingerprint and arrest cards, reasoning:

> The Court of Appeals [in] *McElroy* footnotes a case deciding when a discharge or dismissal under MCL 333.7411 constitutes a finding of not guilty; the case cited was *Carr v Midland [C]o Concealed Weapons Licensing Bd*, 259 Mich App 428; 674 NW2d 709 (2003). In *Carr*, the Court of Appeals held that a dismissal of a guilty plea after a successful completion of a probation program under MCL 333.7411 did not render the plaintiff in that case guilty of

> a felony because MCL 333.7411(1) provided that her discharge and dismissal was not a conviction. This decision allowed Ms. Carr to apply for a concealed weapons permit because she did not have a conviction on her record.
>
> The facts in the cases above are more like those in *Carr* than in *McElroy*. Each Defendant named above pleaded guilty to the charges against them; therefore, an adjudication of guilt was entered against them. When they successfully completed their probation program they were discharged and a dismissal of a guilty plea was entered. As the court held in *Carr*, Defendants in these cases were found not guilty of an offense. Therefore, they are entitled to have their fingerprint and arrest cards destroyed under MCL 28.243. *McElroy* does not apply to this case because Defendants are able to prove that their discharge and dismissal is a finding of not guilty.
>
> Therefore, People's Motion for Reconsideration is denied because they have failed to demonstrate that this Court has committed palpable error. Further, MCL 333.7411(2) requires that the records and identifications division of the department of state police retain a nonpublic record of an arrest and discharge or dismissal under this section. Destroying the fingerprint and arrest cards does not prevent the state police from maintaining a record of the arrest and discharge or dismissal.

Resolution of this single-issue appeal turns on the interpretation of MCL 333.7411. Issues of statutory interpretation are questions of law, which this Court reviews de novo. *People v Hesch*, 278 Mich App 188, 192; 749 NW2d 267 (2008). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature, which is determined from the language of the statute itself. *McElroy*, *supra* at 36. If the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *Id*. at 37.

On appeal, the prosecutor argues that the police are allowed to keep a nonpublic arrest record of a party's fingerprint and arrest card after the party has successfully completed an MCL 333.7411 deferral for three reasons: (1) the statute specifically states that the police shall retain a nonpublic arrest record for parties who have completed MCL 333.7411 deferral; (2) one of the main purposes behind keeping the nonpublic arrest record is to confirm that the party does not receive another MCL 333.7411 deferral in the future; and (3) MCL 28.243(8) does not apply because a person who completes a deferral does so without an adjudication of guilt and therefore the MCL 28.243(8) triggering language of "not guilty" is not met.

In deferral proceedings under MCL 333.7411(1), an individual either pleads guilty or is found guilty of certain controlled substance offenses. The trial court does not adjudicate guilt when the plea is tendered. Instead, the trial court defers proceedings and places the individual on probation. If the individual complies with the terms of probation, the trial court discharges the individual without an adjudication of guilt and dismisses the proceedings. If the individual fails to fulfill the terms of probation, the trial court enters an adjudication of guilt. MCL 333.7411(1) provides in pertinent part:

> When an individual who has not previously been convicted of an offense under this article or under any statute of the United States or of any state relating to narcotic drugs, coca leaves, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under [MCL 333.7403(2)(a)(*v*)] . . . the court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation . . . . Upon fulfillment of the terms and conditions, the

> court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and, except as provided in [MCL 333.7411(2)(b)], is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section [MCL 333.7413]. There may be only 1 discharge and dismissal under this section as to an individual.

MCL 333.7411(2) requires the Department of State Police to keep a nonpublic record of the arrest and discharge and dismissal, partly for the purpose of determining whether an individual has previously availed himself of an MCL 333.7411 deferral:

> The records and identifications division of the department of state police shall retain a nonpublic record of an arrest and discharge or dismissal under this section. This record shall be furnished to any or all of the following:
>
> (a) To a court, police agency, or office of a prosecuting attorney upon request for the purpose of showing that a defendant in a criminal action involving the possession or use of a controlled substance, or an imitation controlled substance as defined in [MCL 333.7341], covered in this article has already once utilized this section. [MCL 333.7411(2)(a).]

In addressing the prosecutor's motions for reconsideration, the trial court considered the language of MCL 333.7411, but relied on MCL 28.243(8) to conclude that defendants were entitled to have their fingerprint and arrest cards destroyed. Despite the trial court's acknowledgement of the requirements of MCL 333.7411(2), it determined that MCL 28.243(8) applies to this case. MCL 28.243(8) requires the destruction of fingerprint and arrest cards of persons who are found not guilty of an offense:

> [I]f an accused is found not guilty of an offense for which he or she was fingerprinted under this section, upon final disposition of the charge against the accused or juvenile, the fingerprints and arrest card shall be destroyed by the official holding those items and the clerk of the court entering the disposition shall notify the department of any finding of not guilty or not guilty by reason of insanity, dismissal, or nolle prosequi, if it appears that the accused was initially fingerprinted under this section . . . . [MCL 28.243(8).]

No appellate decisions have addressed the retention-of-arrest-record requirement of MCL 333.7411(2), or whether a dismissal under MCL 333.7411 is a finding of not guilty within the meaning of MCL 28.243(8). But, in *McElroy*, this Court considered whether a person who successfully completes a similar deferral program under the spouse abuse act, MCL 769.4a, is entitled to have his fingerprint and arrest card destroyed under MCL 28.243(8). *McElroy*, *supra* at 33.

McElroy was charged with, and pleaded no contest to, domestic violence. He participated in a deferral program under MCL 769.4a, which provides that a person who pleads or is found guilty of assaulting his or her spouse may have proceedings delayed and be placed on probation without the court entering a judgment of guilt. *McElroy*, *supra* at 34. Like under MCL 333.7411, when the terms and conditions of probation are fulfilled, the court must discharge the accused and dismiss the proceeding, and such "[d]ischarge and dismissal . . . shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." MCL 769.4a(5). Also as in MCL 333.7411, a person may use the deferral provision in MCL 769.4a(5) only once, "so the department is required to maintain a nonpublic record of the arrest and dis-

charge or dismissal[.]" *McElroy*, *supra* at 36, citing MCL 769.4a(6). McElroy completed the deferral program in accordance with the terms and conditions of his probation, and the charges against him were dismissed. *Id*. at 35.

McElroy brought in this Court a mandamus action seeking the return or destruction of his fingerprint and arrest card, relying on MCL 28.243(8). *McElroy*, *supra* at 35. He argued that there was no finding of guilt in his domestic violence case. *Id*. This Court denied relief because McElroy failed to show that he was "found not guilty" as required by MCL 28.243(8). This Court explained that the discharge and dismissal of the domestic charges did not constitute a finding of "not guilty":

> McElroy argues that MCL 28.243(8) requires defendant to destroy the enumerated documents because the charges brought against him were ultimately dismissed and, he maintains, the statute requires defendant to destroy these documents unless McElroy was found guilty. To the contrary, nothing in subsection 8 requires defendant to destroy the documents following a dismissal. Rather, subsection 8 plainly states that, in order for McElroy to require defendant to destroy these documents, McElroy must show that he was "found not guilty."
>
> McElroy does not argue, or cite any authority holding, that a dismissal under MCL 769.4a should be construed as a finding of not guilty within the meaning of MCL 28.243(8). Moreover, MCL 769.4a(5) provides that "[d]ischarge and dismissal under this section shall be *without adjudication of guilt* and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." (Emphasis added.) Thus, because no adjudication of guilt was made pursuant to MCL 769.4a(5), McElroy cannot show that he has been "found not guilty," which he must show to require destruction of the enumerated documents under MCL 28.243(8). [*Id*. at 37-38.]

The *McElroy* Court also noted that retention of the arrest records is necessary to ensure that a person receives only one deferral:

> Our holding that McElroy is not entitled to destruction of the documents is reinforced by MCL 769.4a(1), in which our Legislature made it mandatory for a court, before it permits a deferral or probation under these circumstances, to determine whether a person has already benefited from the procedure available under the statute in favor of a diversionary program. Indeed, that subsection provides that "the court *shall* contact the department of state police and determine whether, according to the records of the department of state police, the accused has previously been convicted . . . or has previously availed himself or herself of this section." (Emphasis added.) Without retention of records by the state police, this requirement would be compromised. [*Id*. at 39 n 5.]

Given the similarities between the deferral schemes in MCL 769.4a and MCL 333.7411(1), the same rationale set forth in *McElroy* applies to the present case. MCL 333.7411(1) expressly states that "dismissal under this section shall be without adjudication of guilt[.]" Therefore, defendants cannot establish that they were "found not guilty," which is required for them to be entitled to the destruction of their fingerprint and arrest cards under MCL 28.243(8). The trial court distinguished *McElroy* on the basis that McElroy pleaded no contest rather than guilty, attributing the *McElroy* result to the no-contest plea, stating "there was never an adjudication of guilt entered [and] [t]herefore he was not entitled to have his fingerprint and arrest cards destroyed." But the *McElroy* holding was not based on the fact that McElroy pleaded no contest. The reason that there was no adjudication of guilt was rooted in the plain language of MCL 769.4a(5), which, like MCL 333.7411, expressly provides that "[d]ischarge

and dismissal under this section shall be without adjudication of guilt[.]" *McElroy*, *supra* at 38. We conclude that the trial court erred by ruling that defendants, with the successful completion of their probation and the dismissal of the charges against them, were "found not guilty" for purposes of MCL 28.243(8).

Moreover, the trial court's reliance on *Carr v Midland Co Concealed Weapons Licensing Bd* is misplaced. At issue in *Carr* was whether the dismissal of charges against the plaintiff under MCL 333.7411 rendered the plaintiff "convicted of a felony" for purposes of disqualifying her from obtaining a concealed weapons permit under MCL 28.425b(7)(f). This Court held that it did not, because under MCL 333.7411(1), the plaintiff's discharge and dismissal was "not a conviction." *Carr*, *supra* at 430, 436-438. *Carr* did not hold that the plaintiff was *found* not guilty, only that she was not deemed to have been "convicted of a felony" under the concealed pistol licensing act by virtue of the charge dismissed under MCL 333.7411. *Carr*, *supra* at 429-430.

Although *Carr* involved the application of MCL 333.7411, *McElroy* is more instructive. *McElroy* involved the destruction of the fingerprint and arrest card under MCL 28.243(3) after the accused fulfilled probation and obtained a dismissal of charges. The issue in the present case and in *McElroy* is whether the accused was "found not guilty," whereas in *Carr* the issue was whether the plaintiff had a felony conviction. In *McElroy*, this Court distinguished *Carr* on the basis of the different "triggering" statutory language:

> . . . McElroy's discharge and dismissal was not an adjudication of guilt, and, as previously discussed, in order to have the documents destroyed under MCL 28.243(8), McElroy must show that he was "found not guilty" of the crime charged. Thus, *Carr* is inapplicable because it addressed statutory language triggered by a conviction, while

> the critical statutory language here is triggered by a "finding of not guilty." [*McElroy*, *supra* at 37 n 2.]

Here, the trial court equated a discharge and dismissal under MCL 333.7411(1) with a finding of not guilty, which triggers the MCL 28.243(8) requirement that the fingerprint and arrest card be destroyed. This was error. MCL 333.7411(1) provides that the defendant benefiting from the provision must first either plead guilty or be found guilty of the relevant offense. Here, each defendant pleaded guilty of possession of less than 25 grams of cocaine but was granted deferral status under MCL 333.7411(1). For individuals enjoying deferral status pursuant to MCL 333.7411(1), such as defendants here, there is no record resolution of whether guilt has been established beyond a reasonable doubt upon the successful completion of the terms of probation. In fact, the predicate determination that the defendant is actually guilty of the charged offense becomes, in essence, a nullity. See *Carr*, *supra* at 434-435.

The prosecution also addresses the question whether the "nonpublic record of an arrest" that must be retained under MCL 333.7411(2) includes the fingerprint and arrest card. The statute does not specify what items or information must be included in the "record of arrest." The trial court stated that "[d]estroying the fingerprint and arrest cards does not prevent the state police from maintaining a record of the arrest and discharge or dismissal." The prosecution contends that because a person is entitled to only one deferral under MCL 333.7411, and the express purpose of keeping arrest records is to ensure that a person receives only one deferral, identifying information such as fingerprint and arrest cards are a necessary part of the arrest record. See *People v Cooper (After Remand)*, 220 Mich App 368, 375; 559 NW2d 90 (1996) ("arrest record"

used interchangeably with "fingerprints" and "arrest card"). Because the discharge and dismissal does not amount to a finding of not guilty of the charged drug offenses, defendants here cannot show that they have satisfied the condition precedent to the destruction of these records, and the question of what type of documents could satisfy the directive to retain a "nonpublic record of an arrest and discharge or dismissal under this section," MCL 769.4a(6), is moot.

We will state, however, that while we imagine it would be possible for the state police to "retain a nonpublic record of an arrest and discharge or dismissal" that does not include arrest and fingerprint records, we find that action illogical and contrary to public policy. We agree with the reasoning in *McElroy* that maintaining fingerprint and arrest records is important in meeting the directive that a court shall contact the state police to determine if a defendant had previously been given deferral status under MCL 769.4a(1). *McElroy*, *supra* at 36. Simply maintaining a defendant's name, even with a picture or other subjective description of the individual, but without any other objective identifying information, including a fingerprint card, would not satisfy the express purpose of MCL 333.7411. The express purpose is actual identification so that a person receives only one deferral. Fingerprint and arrest records provide a level of certainty to the identification process. Today's technological world is rife with fraud and identity theft. Moreover, name changes and changes in people's appearance (as a result of advances in medical sciences) are now commonplace. Having the ability to objectively identify a person through fingerprint records is crucial to the clear purpose of MCL 333.7411.

Reversed.

PEOPLE v BILLINGS
PEOPLE v SHIVELY

Docket Nos. 282131 and 284474. Submitted April 8, 2009, at Lansing. Decided April 23, 2009, at 9:00 a.m.

Karen S. Billings and Gordon L. Shively were each charged in the Saginaw Circuit Court with participating in a criminal enterprise, forgery, and uttering and publishing a forged financial instrument. Both defendants pleaded guilty of participating in a criminal enterprise in exchange for the dismissal of the other charges. Before accepting their pleas, the court, Robert L. Kaczmarek, J., advised the defendants that a guilty plea would waive certain rights, including any right to appointed appellate counsel. At the time of the defendant's pleas, *Halbert v Michigan*, 545 US 605 (2005), had been decided. That case had declared MCL 770.3a—which prohibited a court from appointing appellate counsel for a defendant who pleaded guilty, guilty but mentally ill, or no contest except under limited circumstances—unconstitutional. 2006 PA 655 repealed MCL 770.3a effective January 9, 2007. Billings's plea was tendered before MCL 770.3a was repealed, and Shively's plea was tendered after MCL 770.3a was repealed. Billings received a minimum sentence of 72 months of imprisonment, which was reduced to 51 months on resentencing. Shively, who was sentenced pursuant to an agreement complying with *People v Cobbs*, 443 Mich 276 (1993), received a minimum sentence of 78 months. The defendants appealed their convictions and sentences. The Court of Appeals remanded their cases for the appointment of appellate counsel, who were directed to address, among other things, the issue whether a waiver of the right to appointed appellate counsel can be made a condition for the acceptance of a guilty plea.

The Court of Appeals *held*:

1. A trial court may not impose as a condition for a guilty plea a waiver of the right to appointed appellate counsel. *Halbert* held that an application for leave to appeal in the Michigan Court of Appeals is a first-tier review such that an indigent defendant has a right under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the appointment of appellate counsel. For indigent defendants, like Billings, whose

pleas were taken after *Halbert* was issued but before MCL 770.3a was repealed, there can be no finding of waiver because those defendants could not have clearly understood that they had the right to appointed counsel and could not have executed a knowing and intelligent waiver of the right. For indigent defendants like Shively, a waiver of the right to appointed appellate counsel that is imposed as a condition for a guilty plea would violate equal protection and due process. Moneyed defendants, solely on the basis of financial status, would have greater access to first-tier appellate review than indigent defendants. Unrepresented and indigent defendants would be ill-equipped to represent themselves on first-tier review.

2. Billings's claim that offense variable 12, MCL 777.42, was improperly scored is moot in light of the fact that the relief sought has already been granted at her resentencing.

3. Shively's plea was supported by a sufficient factual basis. A conviction for conducting a criminal enterprise requires, among other things, a pattern of racketeering. MCL 750.159g defines "racketeering" to include committing an offense for financial gain that involves one of several statutes. MCL 750.159jj refers to "[a]n offense committed within this state or another state that constitutes racketeering activity as defined in [18 USC 1961(1)]." 18 USC 1961(1) defines "racketeering activity" to include offenses under 18 USC 1344, which proscribes defrauding a financial institution and obtaining money by means of false or fraudulent pretenses, which would necessarily include uttering and publishing, as charged against Shively.

4. Shively is not entitled to a resentencing on the basis of the alleged improper scoring of several prior record variables and offense variables. The prior record variables were correctly scored. One offense variable was improperly scored and another may have been. However, the defendant was sentenced pursuant to a *Cobbs* agreement and the minimum sentence he received pursuant to that agreement is lower than the range that would result from a rescoring of the sentencing guidelines.

Affirmed.

CONSTITUTIONAL LAW — GUILTY PLEAS — APPOINTMENT OF COUNSEL — RIGHT TO APPOINTED APPELLATE COUNSEL — WAIVER OF RIGHT TO APPOINTED APPELLATE COUNSEL.

A trial court may not, as a condition for a guilty plea, impose a waiver of the right to appointed appellate counsel (US Const, Am XIV).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Randy L. Price* and *J. Thomas Horizny*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for Karen S. Billings.

Sturtz & Sturtz, P.C. (by *A. Lee Sturtz*), for Gordon L. Shively.

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

SHAPIRO, J. These consolidated appeals involve defendants who pleaded guilty of crimes after the United States Supreme Court issued *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), which declared MCL 770.3a unconstitutional. In both cases, the trial court elicited an acknowledgement from defendants that they understood they were waiving their right to appellate counsel appointed at taxpayers' expense as a condition of their plea. Both defendants filed pro per and delayed applications for leave to appeal. This Court remanded both cases to the trial court for appointment of counsel and directed appellate counsel to address whether a defendant can waive the right to appointed appellate counsel as a plea condition imposed by the trial court, which right otherwise attaches pursuant to *Halbert*.[1] We hold that a trial court may not impose waiver of appointed appellate counsel as a plea condition. With respect to defendants' other issues, we affirm both convictions and sentences.

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[1] *People v Shively*, unpublished order of the Court of Appeals, entered September 4, 2008 (Docket No. 284474); *People v Billings*, unpublished order of the Court of Appeals, entered June 27, 2007 (Docket No. 277269).

I. FACTUAL BACKGROUND

Defendants Karen Billings and Gordon Shively, sister and brother, were initially charged in a multicount information alleging participation in a criminal enterprise, MCL 750.159j(1), forgery, MCL 750.248, and uttering and publishing a forged financial instrument, MCL 750.249. Each defendant agreed to enter a guilty plea to the criminal enterprise count in exchange for dismissal of the remaining counts. At their separate plea hearings, the trial court informed each of them that in addition to the trial rights they were giving up by entering the guilty plea, they were also "giving up any right you may have to have an attorney appointed at public expense to assist you in filing an application for leave to appeal, or any other post-conviction remedies." Each defendant indicated his or her acknowledgement.

II. WAIVER OF APPELLATE COUNSEL

Defendants argue that the trial court violated their Sixth Amendment right to appellate counsel pursuant to *Halbert* by requiring them to waive their right to appointed appellate counsel in order to plead guilty. We review de novo issues involving questions of constitutional law. *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007).

A. MOOTNESS

The prosecution argues that this Court should not address this issue because it is moot, as defendants have been provided with appellate counsel. As an initial matter, we fail see how this issue is moot, as we specifically ordered appellate counsel to raise it when we remanded for the appointment of counsel. Moreover, even if we were inclined to agree that the issue is moot, we

conclude that the issue should still be addressed "because it is one that pertains to similarly situated defendants, and is capable of repetition, yet may evade judicial review." *People v James*, 272 Mich App 182, 184; 725 NW2d 71 (2006), citing *Federated Publications Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

B. CASELAW

1. *HALBERT v MICHIGAN*

Following a voter-approved constitutional amendment in 1994 that limited appeals by those who plead guilty or nolo contendere to appeals by leave granted by the court, Const 1963, art 1, § 20, our Legislature enacted MCL 770.3a, which prohibited a court "from appointing appellate counsel for a defendant who pleaded guilty, guilty but mentally ill, or nolo contendere, except under limited, specified circumstances." *James*, *supra* at 187. Under MCL 770.3a(4), a trial court was required to advise the defendant that, except under certain circumstances, if the guilty plea was accepted by the court, the defendant waived the right to an attorney appointed at public expense to file an application for leave to appeal or assist the defendant in other postconviction matters.

In 2005, the United States Supreme Court issued *Halbert*, holding that an application for leave to appeal in this Court was a first-tier review such that an indigent defendant had a constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to the appointment of appellate counsel. *Id.* at 610. It further concluded that Halbert had not waived his right to appellate counsel because

> [a]t the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to

> forego. Moreover, as earlier observed, the trial court did not tell Halbert, simply and directly, that in his case, there would be no access to appointed counsel. [*Id.* at 623-624.]

2. *PEOPLE v JAMES*

This Court first addressed *Halbert*'s implications in *James*, *supra* at 184, in which the lower court had denied appellate counsel on the basis of MCL 770.3a before the *Halbert* decision. *James*, *supra* at 184. After *Halbert* was issued, the defendant in *James* requested reconsideration of the denial of appellate counsel. *Id.* at 185. The trial court again denied the defendant's request for counsel, concluding that *Halbert* did not require the appointment of appellate counsel for indigent defendants convicted by plea before *Halbert* was decided. *Id.* The trial court also reasoned that even if *Halbert* applied, the defendant had waived his right to appointed appellate counsel and concluded that the language in *Halbert* regarding waiver was "merely dictum." *Id.* at 193. This Court disagreed, stating that the waiver issue was necessary to the disposition of *Halbert* because there would have been no reason to remand for the appointment of counsel if he had waived the right. *Id.* at 194. "The [Supreme] Court's analysis and conclusion logically reasoned that if no right exists, it follows that one cannot knowingly and intelligently elect to forgo that right." *Id.* This Court concluded that the defendant's situation was identical to that in *Halbert*, and determined that there was no waiver because "there was no recognized right that he could elect to forgo." *Id.* at 195.

3. *PEOPLE v MIMS*

Although *Halbert* was issued on June 23, 2005, the repeal of MCL 770.3a was not effective until January 9,

2007. This led to the confusing result that "despite *Halbert*, a Michigan statute still stated that indigent defendants for the most part had no right to appointed counsel to challenge guilty pleas, at least until the repeal of MCL 770.3a became effective on January 9, 2007." *People v Mims*, unpublished memorandum opinion of the Court of Appeals, issued June 12, 2008 (Docket No. 276601), at 1. In *Mims*, a panel of this Court determined that under these circumstances,

> notwithstanding that the pronouncement in *Halbert* afforded defendant the right to appointed appellate counsel, defendant's presumptive knowledge of that right would at best have been ambiguous when she entered her plea in March 2006. If defendant could not have clearly understood that she had the right to appointed counsel, she obviously could not have executed a knowing and intelligent waiver of this right. [*Id.* at 1-2.]

However, because this opinion was unpublished, it provided no authority for similarly situated defendants.

C. APPLICATION TO DEFENDANTS BILLINGS AND SHIVELY

Here, defendants are differently situated from the defendants in *Halbert* and *James*. Defendant Billings's plea was taken on November 6, 2006, after *Halbert* but before the repeal of MCL 770.3a, placing her in the same position as the defendant in *Mims*. Defendant Shively's plea was tendered on August 21, 2007, after the repeal was effective, at a time when he clearly had the right to the appointment of appellate counsel.

Looking first at defendant Billings, we are persuaded by the reasoning in *Mims* and conclude that for those indigent defendants whose pleas were taken after *Halbert* was issued, but before the repeal of MCL 770.3a, there can be no finding of waiver. Because indigent defendants whose pleas were taken after June 23, 2005,

but before January 9, 2007, could not have clearly understood that they had the right to appointed counsel, they could not have executed a knowing and intelligent waiver of this right.

Regarding defendant Shively, this Court has not yet addressed the situation in which a trial court imposed a waiver of the unambiguous right to appointed appellate counsel as a condition of a defendant's plea. Given the date of Shively's plea, this issue is now squarely before us. We need not look very far for our answer, however. In *Halbert*, the Supreme Court noted:

> We are unpersuaded by the suggestion that, because a defendant may be able to waive his right to appeal entirely, Michigan can consequently exact from him a waiver of the right to government-funded appellate counsel. . . . Many legal rights are "presumptively waivable," . . . and if Michigan were to require defendants to waive all forms of appeal as a condition of entering a plea, that condition would operate against moneyed and impoverished defendants alike. A required waiver of the right to appointed counsel's assistance when applying for leave to appeal to the Michigan Court of Appeals, however, would accomplish the very result worked by Mich Comp Laws Ann § 770.3a (West 2000): It would leave indigents without access to counsel in that narrow range of circumstances in which, our decisions hold, the State must affirmatively ensure that poor defendants receive the legal assistance necessary to provide meaningful access to the judicial system. [*Halbert*, *supra* at 624 n 8 (citations omitted).]

This language unambiguously indicates that the United States Supreme Court would hold unconstitutional the practice of imposing a waiver of appointed appellate counsel as a plea condition.

Our own analysis results in the same conclusion. MCR 6.302 outlines the procedure for taking a guilty plea. Pleas must be "understanding, voluntary, and

accurate." MCR 6.302(A). In order to ensure this standard is met, the court must advise the defendant that he or she is giving up the right to a trial and all the rights associated with it, including the rights to a jury trial, to the presumption of innocence, to proof of guilt beyond a reasonable doubt, to confront and question the witnesses against the defendant, to call witnesses on the defendant's behalf, to remain silent and not have the silence used against the defendant, and to testify at trial. MCR 6.302(B)(3). A defendant must also give up the right to challenge the plea with a claim of coercion or undisclosed threats or promises and the right to an appeal as of right. MCR 6.302(B)(4) and (5). Each of these rights attaches equally to both moneyed and indigent defendants. The same is not true of appointed appellate counsel. Indigent defendants, by definition, cannot afford appellate counsel. Accordingly, moneyed defendants tendering guilty pleas would have greater access to first-tier appellate review than indigent defendants solely on the basis of the moneyed defendants' financial status. This is the very essence of an equal protection violation: "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs . . . ." *Halbert*, *supra* at 610-611 (quotation marks and citations omitted).

The imposed waiver also violates the Due Process Clause. The United States Supreme Court held MCL 770.3a unconstitutional because it recognized that "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves." *Id.* at 617. The Supreme Court noted that attorneys review the record, research issues, and prepare a brief reflecting their analysis—tasks that would be onerous and intimidating for many indigent defendants. *Id.* at 619-621. "Navigating the appellate process

without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments." *Id.* at 621. It also noted that appeals from guilty pleas are not necessarily routine and can involve complex issues and constitutional claims. *Id.* at 621-622. It concluded that even the procedures for seeking leave to appeal in Michigan would be intimidating to those without counsel. *Id.* at 622.

Remarkably, the waiver imposed by the trial court as a condition of defendants' pleas was even broader than the one required by MCL 770.3a. Here, the trial court extracted an absolute waiver of appointed counsel, whereas under MCL 770.3a, there were some exceptions. We fail to understand how imposing a waiver even broader than the one declared unconstitutional in *Halbert* could somehow render it constitutional. We hold that a trial court may not impose a waiver of appointed appellate counsel from a defendant before accepting a guilty plea and that doing so is unconstitutional.

III. DEFENDANT BILLINGS'S REMAINING CLAIM

Defendant Billings's remaining claim on appeal is that the trial court erred in scoring offense variable (OV) 12, MCL 777.42.

Billings was initially sentenced on December 4, 2006. Her trial counsel objected to the scoring of OV 13, MCL 777.43, on the basis of the age and nature of her prior convictions, and the trial court agreed to deduct the 10 points that had been assessed. No objections were made to the other scores, including the 25 points scored under OV 12. Given the OV 13 scoring change, defendant's minimum sentence fell within the D-III range of 57 to

142 months of imprisonment. The trial court sentenced defendant within the guidelines to a minimum sentence of 72 months.

Defendant argued on appeal that OV 12 was improperly scored at 25 points because there was no evidence that defendant ever committed a felonious criminal act against a person, let alone a contemporaneous act within 24 hours of the subject crime. She argued that a score of 5 or 10 points would place her minimum sentence in the D-II range of 51 to 127 months and a score of 1 point would place her minimum sentence in the D-I range of 36 to 90 months. Because both of those ranges were below the erroneous D-III range, she argued she was entitled to resentencing.

However, while this appeal was pending, her appellate counsel moved in the trial court for resentencing, arguing the same improper scoring of OV 12 that she raised in this appeal. The trial court granted the motion. At the resentencing hearing, defendant was scored 10 points for OV 12 and was resentenced within the recalculated D-II guideline range to a prison term of 51 months to 40 years. Because defendant has already received the relief that she requested, this issue is moot. See *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997) ("An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.").

IV. DEFENDANT SHIVELY'S REMAINING CLAIMS

Defendant Shively offers two additional claims on appeal. We note that Shively did not raise these issues in his in pro per application for leave. We are also aware that this Court's order indicated that leave to appeal was granted with respect to the issue raised in the

application. However, in light of the conclusion that Shively was entitled to appellate counsel, we see no reason to limit his appeal to the singular issue of the waiver of appellate counsel raised in his in pro per brief, rather than letting appellate counsel review the record for any potential issues. Moreover, this is precisely what a different panel of this Court permitted for Billings. Rather than grant leave on her pro per brief, the case was remanded for the appointment of counsel such that appointed counsel could file an application for leave to pursue whatever issues it found. *Billings*, *supra*. In light of our power to consider issues not raised on appeal, *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004), we choose to address Shively's other issues.

The first is that there was an insufficient factual basis for his plea. Shively filed a motion to withdraw his plea after sentencing, pursuant to MCR 6.310(B), which the trial court denied. We review a trial court's decision on a motion to withdraw a plea for an abuse of discretion. *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000).

The trial court held:

> Defendant argues that the taking of his guilty plea . . . was not accurate. A guilty plea is "accurate" if the evidence supports a finding that the defendant is guilty of the offense charged. MCR 6.302(D)(1). Having reviewed the record, the Court determines, as it did at the time it accepted the plea, that the evidence offered supports the finding that Defendant is guilty of the offenses to which he pled and was later sentenced. Therefore, the Court finds that no error occurred in the plea-taking which warrants withdrawal of the Defendant's guilty plea.

After reviewing the record, we find no abuse of discretion. A conviction for conducting a criminal enterprise

pursuant to MCL 750.159j(1) and MCL 750.159i(1) requires, among other things, "a pattern of racketeering activity." MCL 750.159g defines "racketeering" to include committing "an offense for financial gain" that involves one of a number of different statutes. Shively argues that none of those statutes involves uttering and publishing. We disagree.

MCL 750.159jj refers to "[a]n offense committed within this state or another state that constitutes racketeering activity as defined in section 1961(1) of title 18 of the United States Code, 18 U.S.C. 1961." 18 USC 1961(1) defines "racketeering activity" to include offenses under 18 USC 1344 (bank fraud), which proscribes defrauding a financial institution and obtaining "any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." This would necessarily include uttering and publishing. Accordingly, there was an adequate factual basis for Shively's plea to the charge of conducting a criminal enterprise.

Shively's remaining claim on appeal is that he is entitled to resentencing on the basis of the erroneous scoring of the guidelines. Shively was sentenced pursuant to a *Cobbs*[2] agreement to a prison term of 78 months to 20 years. He argues that even though he was given the sentence he agreed to at his *Cobbs* hearing, he is entitled to resentencing because there were sentencing errors. Generally, a defendant who voluntarily and understandingly entered into a plea agreement that included a specific sentence waives appellate review of that sentence. *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). However, at least one panel of this

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

Court has held that the rule precluding appellate review of a specific sentence imposed pursuant to a plea agreement "does not apply where the specific sentence was based on an improper scoring of the guidelines." *People v Fix*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2007 (Docket No. 273448), at 1. We conclude that defendant is not entitled to any relief, because even with our corrections to the guidelines scoring, defendant received a sentence that was below the guidelines range.[3]

Shively first argues that prior record variable (PRV) 4, MCL 777.54, was improperly scored at 10 points for adjudications in 1975 and 1978. He concludes that because the date of the offense was May 23, 2006, and the sentencing date was December 3, 2007, a period of more than 10 years had passed such that the convictions could not be used. We disagree. MCL 777.50 provides in relevant part:

> (1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.
>
> (2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge

[3] Thus, we need not consider whether, if Shively presented an argument warranting relief, that argument would have been waived.

> date of the next prior earlier conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain.

Accordingly, the issue is not whether 10 years had passed between the discharge from his 1975 juvenile adjudication and the present offense, but whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of his prior convictions or juvenile adjudications. Our review of the record indicates that no such 10-year period exists. Shively's greatest gap between one discharge and subsequent commission was a discharge in 1997 with a subsequent commission in 2005. Because no gap of 10 or more years ever cut off the progression, all of Shively's juvenile convictions were properly included under the rule.

Shively next argues that PRV 6, MCL 777.56, was improperly scored at 10 points because there was no evidence in the record that he was on parole, probation, or awaiting sentence at the time of the offense. Again, we disagree. MCL 777.56(c) provides for the scoring of 10 points if the defendant is, among other things, "on bond awaiting adjudication or sentencing for a felony," and the presentence investigation report indicates that Shively was on bond for a November 25, 2005, offense at the time he committed the first of these offenses.

We agree with Shively that OV 9, MCL 777.39, was improperly scored. Although OV 9 now includes loss of property, that amendment did not take effect until

March 30, 2007. At the time Shively committed the instant offense, OV 9 only applied to placing people in danger of physical injury. *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006). Accordingly, Shively should have received 0 points for OV 9, not 10.

Shively next challenges his scores for OV 12. He was scored 10 points for three or more contemporaneous felonious criminal acts involving other crimes. Shively argues that because he pleaded guilty to a single count of criminal enterprise and the other charges of uttering and publishing were dismissed, the requirement of 24 hours or separate convictions was not met. We disagree. Given that the other charges of uttering and publishing were dismissed, they meet the requirement that those acts "ha[ve] not and will not result in a separate conviction." MCL 777.42(2)(a)(*ii*). Additionally, the complaint indicates that Shively forged two separate checks and uttered and published them, all on September 28, 2006, the date for which the criminal enterprise was being conducted. Thus, there were four offenses contemporaneous to the criminal enterprise charge.

Finally, Shively argues that OV 14, MCL 777.44, was improperly scored at 10 points because there was no indication that his role was that of a leader. We need not make a determination on this issue, because even if we agree with him and omitted these 10 points, Shively's computed sentencing guidelines range would not change. Removing the 10 points for OV 9 and another 10 points for OV 14, Shively's minimum sentence range, including his status as a fourth-offense habitual offender is E-IV, or 84 to 240 months—the precise guidelines range scored at sentencing. Given that Shively's *Cobbs* agreement provided him a sentence below the guidelines range, he is not entitled to any relief.

V. CONCLUSION

We affirm both defendants' convictions and sentences. We also hold that trial courts may not impose a waiver of appointed appellate counsel as a plea condition.

Affirmed.

KIEFER V MARKLEY

Docket No. 280769. Submitted February 3, 2009, at Lansing. Decided April 28, 2009, at 9:00 a.m.

Marilyn J. and George Kiefer brought a medical malpractice action in the Washtenaw Circuit Court against John M. Markley, M.D., and Center for Plastic and Reconstructive Surgery, P.C., relating to hand surgery performed by Markley. The plaintiffs proposed Frederick A. Valauri, M.D., who devoted 30 to 40 percent of his professional time to hand surgeries, as their expert witness on standard of care. The court, Timothy P. Connors, J., granted the defendant's motion in limine precluding the admission of expert testimony from Valauri, ruling that under MCL 600.2169(1)(b), Valauri had to have devoted 50 percent of his professional time to the specialty of hand surgery in the year before the alleged malpractice in order to qualify as an expert witness on the standard of care applicable to Markley. The plaintiffs appealed.

The Court of Appeals *held*:

MCL 600.2169(1)(b) unambiguously provides that the expert must have spent the majority of his or her time the year preceding the alleged malpractice practicing or teaching the specialty the defendant physician was practicing at the time of the alleged malpractice. To the extent the word "majority" needs explanation, it means more than 50 percent.

Affirmed

O'CONNELL, J., dissenting, stated that the word "majority," as used in MCL 600.2169(1)(b), is ambiguous and should be interpreted to mean the largest percentage of a physician's practice, even if the physician spent less than half of his or her professional time on that specialty, to fulfill the legislative intent of ensuring that an expert witness has the appropriate qualifications and knowledge to testify regarding the appropriate standard of care.

DeNardis, McCandless & Miller, P.C. (by *Linda M. Galante* and *Ronald F. DeNardis*), for the plaintiffs.

O'Connor, DeGrazia, Tamm & O'Connor, P.C. (by *Julie McMann O'Connor*) for the defendants.

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

OWENS, J. Plaintiffs appeal as of right the trial court's order granting defendants' motion in limine to strike plaintiffs' expert witness, Dr. Frederick A. Valauri, pursuant to MCL 600.2169(1)(b). We consider this case without oral argument, pursuant to MCR 7.214(E), and affirm.

Issues of statutory construction are reviewed de novo on appeal. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001); *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004). However, a trial court's ruling regarding a proposed expert's qualifications to testify is reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Wolford* v *Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard*, *supra* at 557, citing *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). When interpreting a statute, the primary goal is to give effect to the Legislature's intent. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007); *Grossman*, *supra* at 598. The language of the statute must first be reviewed. Judicial construction is neither required nor permitted if the statute is unambiguous on its face. It is assumed the Legislature intended the words expressed if the statute is unambiguous. *Brown*, *supra* at 593; *Grossman*, *supra* at 598. Courts may consult dictionary definitions of terms that are not defined in a statute. *Woodard*, *supra* at 561; *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005).

Plaintiffs argue that the trial court erred by finding that the language "devoted a majority of his or her professional time" in MCL 600.2169(1)(b) requires a physician to devote more than 50 percent of his or her professional time to the relevant specialty in order to be qualified to testify as an expert witness. Plaintiffs further argue that the 30 to 40 percent of Dr. Valauri's time that was devoted to hand surgery constituted the majority of his professional time spread among the three different areas in which he practiced (hand surgery, reconstructive surgery of the extremities, and cosmetic surgery) and as such should be sufficient to qualify him to testify for purposes of MCL 600.2169(1)(b). We disagree.

The only issue in this case is whether Dr. Valauri devoted a sufficient amount of time to hand surgery in his practice to qualify as an expert witness under MCL 600.2169, which provides in relevant part as follows:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, *devoted a majority of his or her professional time* to either or both of the following:

> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty. [Emphasis added.]

The "specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold." *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 218; 642 NW2d 346 (2002). In *Woodard*, the Court quoted the language of MCL 600.2169(1)(b), noting:

> Obviously, a specialist can only devote a *majority* of his professional time to *one* specialty. Therefore it is clear that § 2169(1) only requires the plaintiff's expert to match one of the defendant physician's specialties.
>
> * * *
>
> . . . As we explained above, one cannot devote a 'majority' of one's professional time to more than one specialty. [*Woodard*, *supra* at 560, 566 (emphasis in original).] [1]

The plaintiff's expert must have devoted a majority of his or her professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the one most relevant specialty the defendant physician was practicing at the time of the alleged malpractice. *Id*. See also

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[1] In his dissent, our esteemed colleague argues that the term "majority" should refer to "an amount that represents the largest percentage of the whole, even if this amount is less than 50 percent." Let us consider a situation where a doctor spends 40 percent of his time in one area, 40 percent in a second area, and 20 percent in a third. Under our colleague's definition, this hypothetical doctor would then be in the position of devoting the "majority" of his time to two different specialties. Because the *Woodard* Court maintained that this is impossible, it is clear that the *Woodard* Court relied on a definition of "majority" as "an amount that exceeds 50 percent of the total."

Reeves v Carson City Hosp (On Remand), 274 Mich App 622, 630; 736 NW2d 284 (2007) (remanding to the trial court to determine whether the plaintiff's expert spent the *majority* of his time in the active clinical practice of emergency medicine, the instruction of students in the relevant specialty, or as the medical director of emergency services and board member, advisor, and consultant to various entities).

The language in § 2169(1)(b) is unambiguous, and judicial construction is neither required nor permitted. *Brown*, *supra*; *Grossman*, *supra*. The statute states that the expert must have spent the *majority* of his or her time the year preceding the alleged malpractice practicing or teaching the specialty the defendant physician was practicing at the time of the alleged malpractice. MCL 600.2169(1)(b). To the extent the word "majority" needs explanation, it is defined as, "the greater part or larger number; more than half of a total." *Webster's New World Dictionary*, 2d College Ed (1980). MCL 600.2169(1)(b), therefore, requires a proposed expert physician to spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice. Dr. Valauri testified he spent only 30 to 40 percent[2] of his time in the practice of hand surgery, which, being a plurality rather than a majority of his time, is insufficient to qualify him as an expert for purposes of MCL 600.2169(1)(b).

Given the unambiguous language of the statute and the caselaw on this issue, this panel is constrained to affirm the trial court's decision. However, we note that

[2] Our colleague contends that Dr. Valauri spent 40 percent of his time in the practice of hand surgery. However, this was not his testimony. If he only spent 30 percent of his time practicing hand surgery, then even by the dissent's definition of "majority" he still would not have satisfied the requirements of MCL 600.2169(1)(b).

this is not a result we think the Legislature intended. Defendant Dr. John M. Markley was board-certified in plastic surgery with an added qualification in hand surgery, as was Dr. Valauri. We believe that this similarity, coupled with the fact that Dr. Valauri spent more than 50 percent of his time in the area of hand surgery and the closely related area of reconstructive surgery of other extremities, should qualify him as an expert in this situation. Nonetheless, we reluctantly hold that the trial court did not abuse its discretion by granting defendants' motion in limine to strike plaintiffs' expert witness. *Woodard*, *supra* at 557; *Wolford*, *supra* at 637.

We further note that although we believe that Dr. Valauri should qualify as an expert, we do not agree with the dissent's rationale. Using the definition of "majority" advocated by our colleague, an expert could engage in 11 different areas of practice, but because the expert spent 10 percent of his or her time in one area (greater than the amount of time spent in any other) he or she would qualify as an expert in that area. Although admittedly unlikely, this scenario demonstrates that defining "majority" as "an amount that represents the largest percentage of the whole, even if this amount is less than 50 percent," could result in expert opinions being rendered by underqualified individuals.

Affirmed.

WHITBECK, P.J., concurred.

O'CONNELL, J. (*dissenting*). The majority concludes that the words "devoted a majority of his or her professional time" in MCL 600.2169(1)(b) requires a physician to devote more than 50 percent of his professional time to the relevant subspecialty in order to be qualified to testify as an expert witness. I disagree.

Although the majority adopts one credible interpretation of an ambiguous statute, I believe the correct interpretation of the phrase "devotes a majority of his or her professional time" means just that; the doctor spends the majority of his or her professional time as a board-certified plastic surgeon who practices the trade. In this case, in 2003 Dr. Frederick A. Valauri spent all his professional time working in his capacity as a board-certified plastic surgeon, and he spent more time practicing in the subspecialty of hand surgery than in any other subspecialty.[1] This, in my opinion, is sufficient to qualify him to provide expert testimony pursuant to MCL 600.2169(1)(b). In my opinion, putting up impossible barriers and expecting plaintiffs' experts to leap over those barriers was not the intent behind the statute.[2]

In *Casco Twp v Secretary of State*, 261 Mich App 386, 390-391; 682 NW2d 546 (2004), this Court set forth the standard for interpreting an ambiguous statute:

> The primary goal in statutory construction is to ascertain and give effect to the intent of the Legislature. When

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[1] Dr. Valauri spends the rest of his time on reconstructive surgery of the extremities and on cosmetic surgery.

[2] The purpose of MCL 600.2169 is to provide a guideline for the parties and courts to follow to help ensure that an expert witness is properly qualified by knowledge, skill, experience, training, or education to competently testify regarding the standard of care in the defendant doctor's area of specialty or subspecialty. The members of this panel presumably agree that Dr. Valauri meets the minimum qualifications under MRE 702 to testify as an expert in this case. However, the majority believes that MCL 600.2169 blocks the admission of Dr. Valauri as an expert because Dr. Valauri did not devote at least 50 percent of his practice to hand surgery.

Unfortunately, the majority's interpretation of this statute would permit a doctor who does three surgeries a month, two of them being hand surgeries, to testify as an expert in the area of hand surgery, but would bar a doctor who does 50 surgeries each month from testifying if only 24 of them are hand surgeries. Under such a scenario, the purpose of the statute is undermined—some qualified doctors would be unable to testify, while professional witnesses and other licensed physicians who merely dabble in medicine would be qualified to testify.

> a statute's language is clear and unambiguous, we must assume that the Legislature intended its plain meaning and enforce the statute as written. It is only when the statutory language is ambiguous that this Court is permitted to look beyond the statute to determine the Legislature's intent. Statutory language is considered ambiguous when reasonable minds can differ with respect to its meaning. When construing an ambiguous statute, "[t]he court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose, but should also always use common sense." In this regard, courts should seek to avoid a construction that would produce absurd results, injustice, or prejudice to the public interest. [Citations omitted.]

I agree with the majority opinion that the only issue in this case is whether Dr. Valauri devoted a sufficient percentage of his practice to hand surgery to qualify as an expert witness.[3] MCL 600.2169 provides, in relevant part, as follows:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same

[3] In his deposition, Dr. Valauri testified that he devoted the majority of his practice to hand surgery. He is a member of the American Society for the Surgery of Hand. He devotes between 30 and 40 percent of his practice to hand surgery. About one-third of his practice is reconstructive surgery of the extremities, and the remaining quarter or so is cosmetic surgery. Between 1987 and 1993, approximately 80 percent of his practice was hand and extremity surgery. I would conclude that a board-certified plastic surgeon with a subspecialty in hand surgery who spends between 60 and 80 percent of his time operating on extremities and hands would be qualified to testify as an expert in this case.

> specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, *devoted a majority of his or her professional time to either or both of the following*:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

The conceptual difficulty that bedevils the present case is attributable to the use of the term "majority" in the statute and the common understanding of the term "majority" among most people in our society. Years ago, this Court, referring to an opinion by the United States Supreme Court, stated:

> The phenomenon of identical words meaning different things, even in a single document, such as an insurance contract or statute, let alone in two separate documents, is neither unique to the case at bar nor to the elasticity and inherent limitations of the English language. *Nat'l Organization for Women, Inc v Scheidler*, 510 US 249, 258; 114 S Ct 798, 804-05; 127 L Ed 2d 99, 109 (1994) (recognizing that the statutory term "enterprise" in 18 USC 1962 [a] and [b] does not import an economic motive that is required in conjunction with the term "enterprise" in 1962[c] because "enterprise" was used in two different senses in the different subparagraphs). [*Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 341; 535 NW2d 583 (1995).]

The fact that one word may have multiple meanings depending on its use only adds to the confusion. Such is the case with the term "majority." *Random House Webster's College Dictionary* (1997) defines the term

"majority" as follows: "1. the greater part or number; a number larger than half the total. 2. the amount by which the greater number surpasses the remainder (disting. from *plurality*)."[4] Depending on the context and the speaker, the term "majority" can have one of two conflicting meanings. A "majority" could refer to an amount that exceeds 50 percent of the total, as definition 1 indicates. Or, a "majority" could refer to an amount that represents the largest percentage of the whole, even if this amount is less than 50 percent, as definition 2 indicates.

Obviously, the different meanings associated with this term indicate that the proper meaning of the term "majority" often depends on the context in which it is used and, in the absence of contextual clues indicating which definition should be adopted, this term can create ambiguity. For example, what does the sentence "A majority of votes is needed to win" mean in the context of a three-way race for an elected office? Under the first definition of "majority," the winner must receive over half the votes cast. If a candidate receives only 45 percent of the vote, he or she does not win the election, even if the competitors have each received smaller percentages of the total votes cast. But under the second definition, the winner must simply receive the most votes of any candidate; therefore, the candidate with 45 percent of the vote has the majority of votes and wins the election, because he has more votes than either of his competitors.

The Legislature's use of the term "majority" in MCL 600.2169(1)(b) presents the same sort of ambiguity. MCL 600.2169(1)(b) states that a health professional called as an expert witness must have "devoted a

[4] *Random House Webster's College Dictionary* defines "plurality," in pertinent part, as "more than half of the whole; the majority."

majority of his or her professional time" in the preceding year to either the active clinical practice or the teaching of the same health profession or specialty in which the defendant physician is licensed. However, the statute fails to indicate whether an expert witness must spend over half his or her professional time on a particular specialty to be qualified as an expert witness, or whether the expert witness devotes a "majority of his or her professional time" on a particular specialty (and therefore is qualified to be an expert witness) if the expert witness simply devotes a larger percentage of his or her professional time on that specialty than on any other specialty.

In this case, this distinction determines whether Dr. Valauri is qualified to testify as an expert witness. Dr. Valauri devoted up to 40 percent of his practice to hand surgery in 2003, and he did not devote a larger percentage of his practice to any other specialty. Under the majority's interpretation of the statute, Dr. Valauri is not qualified to testify as an expert in this case because he did not devote at least 50 percent of his practice to hand surgery. But this interpretation assumes that the Legislature intended to define "majority" as "a number larger than half the total" when the statute does not make this intent clear. Instead, it is equally plausible that the Legislature intended for a "majority" to refer to the specialty that represented the largest percentage of a physician's practice, even if the physician spent less than half his or her professional time on that specialty. Under such an understanding of this term, Dr. Valauri would be qualified as an expert witness because he spent a majority of his time practicing the same specialty as the defendant, even though he did not devote over half his practice to the specialty.

Accordingly, I believe that the majority should have recognized that MCL 600.2169(1)(b) is ambiguous and

considered the Legislature's intent when interpreting the statute. After considering the object and intent of the statute, which is to ensure that an expert witness has the appropriate qualifications and knowledge to testify regarding the appropriate standard of care, I conclude that the Legislature did not intend for an expert witness to meet an arbitrary threshold in order to testify with regard to the standard of care, but intended that an expert witness is qualified to provide such testimony as long as the expert witness devoted the largest percentage of his or her practice to the same specialty as the defendant.[5] Such an interpretation ensures that the expert is familiar with the necessary standard of care without requiring a party to engage in the difficult, if not impossible, task of finding an expert whose practice paralleled that of the defendant.

I would reverse the decision of the trial court.

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[5] The majority includes in its opinion a hypothetical case in which a doctor who spent 10 percent of his time practicing in one of his 11 areas of specialization would be permitted to testify as an expert if he did not devote a larger percentage of his time to the practice of any other specialty. Admittedly, under my understanding of the statute, this scenario could occur. However, the majority fails to recognize that the doctor in this hypothetical case *also* must pass the MRE 702 threshold to qualify as an expert witness. Under MRE 702, an individual must be "qualified as an expert by knowledge, skill, experience, training, or education" to testify as an expert. If the trial court does not find such a doctor sufficiently qualified to testify, it may not qualify the doctor as an expert. Consequently, a proper application of MRE 702 would prevent the situation described by the majority from occurring if this doctor were, in fact, unqualified to testify as an expert. See *Woodard v Custer*, 476 Mich 545, 572-574; 719 NW2d 842 (2006) (a proffered expert meeting the criteria contained in a subsection of MCL 600.2169 is still subject to scrutiny under MRE 702).

YONO v CARLSON

Docket No. 281268. Submitted January 14, 2009, at Lansing. Decided April 28, 2009, at 9:05 a.m.

Marcus Yono, Livingston Building Company, L.L.C., and Suttons Pointe Development, L.L.C., brought an action in the Livingston Circuit Court against Eric Carlson and Leelanau Enterprise, Inc., alleging and seeking damages for defamation. Carlson, a reporter for the Leelanau Enterprise, a weekly newspaper printed in Leelanau County and owned by Leelanau Enterprise (whose corporate registered office is in Leelanau County), had written in the newspaper about Livingston Building Company's Bay View project in Sutton's Bay, Leelanau County. Yono, a Livingston County resident, was the sole member of Livingston Building Company, which was located in Livingston County. Yono was also a member and manager of Suttons Pointe Development. The court, Stanley J. Latreille J., granted a motion by the defendants for a change of venue to Leelanau County. The plaintiffs appealed by delayed leave granted.

The Court of Appeals *held*:

The trial court correctly granted the motion for change of venue. Venue for this case properly lies in Leelanau County.

MCL 600.1629(1) provides in part that a tort action seeking damages for personal injury or property damage must be filed in the county in which the original injury occurred and where the defendant resides, has a place of business, or conducts business, or where the corporate registered office of a defendant is located. In an action for defamation per se against a periodical or newspaper, the allegedly defamatory statement, by itself, injures the reputation of the plaintiff and damages are presumed. In such a case, the "injury," as contemplated in MCL 600.1629(1)(a), occurs in the county in which the periodical or newspaper was first printed and issued. Here, the injury occurred, and the defendants have their registered corporate office, in Leelanau County.

Affirmed.

VENUE — DEFAMATION — PERIODICALS OR NEWSPAPERS.

"Injury," as contemplated in the venue statute for tort actions, occurs in an action for defamation per se against a periodical or newspaper in the county where the periodical was first printed and issued (MCL 600.1629[1][a]).

Myers & Myers, PLLC (by *Roger L. Myers* and *Eric C. Jones*), for the plaintiffs.

Traverse Legal, PLC (by *Mark G. Clark*) for the defendants.

Before: OWENS, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM. Plaintiffs appeal by delayed leave granted the trial court's order granting defendants' motion for change of venue. We affirm.

The facts submitted established that plaintiff Marcus Yono is a resident of Livingston County. He is also the sole member of plaintiff Livingston Building Company, L.L.C., a construction company based in Livingston County, and is a member and manager of plaintiff Suttons Pointe Development, L.L.C. Livingston Building Company is currently building a project called Bay View in Suttons Bay in Leelanau County. Defendant Eric Carlson is a reporter for the Leelanau Enterprise, a weekly newspaper located in Leelanau County and owned by defendant Leelanau Enterprise, Inc. The newspaper is printed solely in Leelanau County, does not advertise in Livingston County, and mails by subscription to no more than 19 addresses in Livingston County.

The complaint in this action arises out of several allegedly defamatory statements concerning plaintiffs' Bay View project that were published in defendants' newspaper. Plaintiffs allege that such publication damaged their reputation in Livingston County by impugn-

ing their business integrity and raising concerns about their financial solvency. Plaintiffs further allege that as a result of the damage to their reputation, they have suffered economic loss in that some people have cancelled their purchase agreements for condominium units in the Bay View project. On defendants' motion, the trial court transferred venue from Livingston County to Leelanau County after determining that the original injury occurred in Leelanau County.

Plaintiffs claim that because the original injury occurred in Livingston County, venue is proper there and the trial court erred by transferring venue to Leelanau County. We disagree. A trial court's ruling in response to a motion to change improper venue is reviewed for clear error. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* However, this case involves the interpretation of a statute, which is a question of law calling for review de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995). The primary objective of statutory interpretation is to ascertain and give effect to the intent of the Legislature from the plain language of the statute. *Lash v Traverse City*, 479 Mich 180, 186-187; 735 NW2d 628 (2007).

MCL 600.1629 provides, in relevant part:

> (1) Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (*i*) The defendant resides, has a place of business, or conducts business in that county.

(*ii*) The corporate registered office of a defendant is located in that county.

The Michigan Supreme Court recently held that "the location of the original injury is where the first *actual* injury occurs that results from an act or omission of another, not where a plaintiff contends that it first relied on the act or omission that caused the injury." *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 620; 752 NW2d 37 (2008) (emphasis in original). The Court explained, "Reliance creates only a *potential* injury, which is insufficient to state a negligence cause of action . . . ." *Id.* (emphasis in original). In a medical-malpractice case, where death allegedly resulted from a misdiagnosis leading to a ruptured aneurysm, this Court held that "venue rests with the county where the injury resulting in death occurred, and not the place where the death itself took place." *Karpinski v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 544; 606 NW2d 45 (2000). Further, in another medical-malpractice case, which concerned an injury attributed to the misreading of an X-ray, this Court held that "the plaintiff's injury is the corporeal harm *that results from* the defendant's alleged failure to meet the recognized standard of care." *Taha v Basha Diagnostics, PC*, 275 Mich App 76, 79; 737 NW2d 844 (2007) (emphasis in original). The plaintiffs attempt to extend the reasoning of these cases to one alleging defamation by claiming that the publication of statements creates the mere potential for injury, and thus the injury does not occur until the defamed party actually suffers some concrete, adverse consequence of that publication.

However, this is a case of defamation per se, where damages are presumed; therefore it is only logical to equate presumed damages with the initial publication

in Leelanau County. Michigan law distinguishes between defamation per se whereby a defamatory statement is actionable "irrespective of special harm" and defamation per quod, which involves "the existence of special harm caused by publication . . . ." *Frohriep v Flanagan (On Remand)*, 278 Mich App 665, 680; 754 NW2d 912 (2008). Words are defamatory per se if they, "by themselves, and as such, without reference to extrinsic proof, injure the reputation of the person to whom they are applied." Black's Law Dictionary (6th ed), p 417. "Whether nominal or substantial, where there is defamation per se, the presumption of general damages is well settled." *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728; 613 NW2d 378 (2000).

Because this Court has never addressed the issue of original injury in a defamation per se case, it is appropriate to examine other jurisdictions for persuasive authority.[1] According to 50 Am Jur 2d, Libel and slander, § 402, p 796, "[u]nder a statute which prescribes venue in the county where the cause of action accrued, in a case of defamation, the cause of action accrues in the county where the defamation was first published, which in the case of a newspaper is where the newspaper is prepared, edited, and disseminated." Further, "[s]tatutory provisions requiring venue . . . to be laid in the county in which . . . the injury occurred . . . have been construed as allowing venue of an action for libel in a periodical or newspaper to be laid only in

[1] However, as the *Michigan Legal Milestone* case of Theodore Roosevelt v George Newett reveals, even the former President of the United States pursued and prosecuted his libel claim against a Michigan defendant in Marquette County in 1913, where the defamatory words were printed. State Bar of Michigan, *Michigan Legal Milestones* <http://www.michbar.org/programs/milestones.cfm> (accessed March 10, 2009).

the county in which it was first printed and issued, and not in every county in which it was circulated." *Id.*, § 403, pp 796-797.

Defendant Leelanau Enterprise, Inc., has its corporate registered office in Leelanau County. It also prepares and prints its newspaper solely in Leelanau County. In fact, even though plaintiffs claim that the people who cancelled their purchase agreements for the Bay View project were not located in Leelanau County, the project is located in Leelanau County and that is where the economic loss was first experienced. Thus, the original injury occurred in Leelanau County.

Finally, after determining that the original injury occurred in Leelanau County, we must apply in descending order the subparagraphs of MCL 600.1629 that apply to this particular case. See *Massey*, *supra.* MCL 600.1629(1)(a) designates venue in the county where the original injury occurred and where, "(i) [t]he defendant resides, has a place of business, or conducts business in that county," or where "(ii) [t]he corporate registered office of a defendant is located in that county." Defendants are solely located and have their registered office in Leelanau County. But, in *Massey*, the Supreme Court determined that the definite article "the" in MCL 600.1629(1)(a)(i) demonstrates the Legislature's intent to define the phrase "[t]he defendant" as meaning one single defendant. See *Massey*, *supra* at 382-385. Therefore, because there are multiple defendants in this case, MCL 600.1629(1)(a)(i) does not apply.

Moreover, under the same reasoning above, defendants fall within MCL 600.1629(1)(a)(ii) because there are multiple defendants. Accordingly, venue is proper in Leelanau County under MCL 600.1629(1)(a)(ii) because the original injury occurred there when the allegedly

defamatory words were printed, and it is also the location of the corporate registered office of defendant Leelanau Enterprise, Inc.

Affirmed.

In re AP

Docket No. 286431. Submitted January 6, 2009, at Detroit. Decided May 5, 2009, at 9:00 a.m.

Holly Johnson brought a paternity action in the Wayne Circuit Court, Family Division, against Michael Reid. The case was assigned to Judge Arthur J. Lombard of the domestic relations section of the family division, and Reid acknowledged that he was the father of their child, B.J. Judge Lombard granted Johnson sole legal and physical custody of the child. Johnson also had legal and physical custody of another child, A.P., fathered by Gyshawn Presberry. Following complaints of physical abuse of A.P. by Johnson, the Department of Human Services sought temporary wardship of both children. Preliminary, dispositional review, and permanency planning hearings on the petition occurred before referees assigned to the juvenile section of the family division of the Wayne Circuit Court. During this time, Reid achieved complete compliance with his treatment plan. Following a dispositional hearing, B.J. was placed with Reid. Reid subsequently moved for sole custody of B.J. Because Reid filed his motion in the juvenile case pending before the referee rather than the paternity action pending before Judge Lombard, the referee transferred the juvenile case to the docket of Judge Jerome C. Cavanagh of the juvenile section of the family division. Following a dispositional review hearing and a permanency planning hearing, Judge Cavanagh dismissed the court's jurisdiction over B.J., terminated its wardship over him, and awarded Reid sole physical custody and Reid and Johnson joint legal custody of B.J. Johnson appealed.

The Court of Appeals *held*:

1. This case involves two separate and distinct statutory schemes that affect the care and custody of the minor child. Courts are bound by the Child Custody Act (CCA), MCL 722.21 *et seq.*, in actions directly or incidentally involving the legal or physical custody of a child. Under the CCA, the child's best interests are of paramount importance. The juvenile code, MCL 712A.1 *et seq.*, governs a court's involvement in the parent-child relationship when a child's safety is threatened, such as when a parent has abused, neglected, or abandoned the child.

2. A child's parents or other custodians must abide by the terms of a child custody order entered under the CCA. Once a court assumes jurisdiction over a child and the child becomes a ward of the court under the juvenile code, however, the juvenile court's orders supersede all previous orders, including custody orders entered by another court, even if the orders are inconsistent or contradictory. When the juvenile court dismisses its jurisdiction over the child, previous custody orders remain in full force because the court in the domestic relations matter never relinquished its jurisdiction over the custody dispute, nor was it required to do so for the juvenile court to exercise its jurisdiction under a distinct statutory scheme that takes precedence over the CCA.

3. Under MCL 600.1023, when two or more matters within the jurisdiction of the family division of the circuit court that involve members of the same family are pending in the same judicial circuit, the matters are to be assigned whenever practicable to the judge to whom the first matter was assigned. Under MCL 600.1021, a family division judge presiding over a matter under the juvenile code has the same jurisdiction and authority as a family division judge presiding over a domestic relations matter, including the power and authority to hear actions under the CCA. Family division judges must abide by the procedural requirements of the appropriate statute, however, when hearing a custody matter under the CCA or conducting proceedings under the juvenile code. The court must make clear that it is exercising jurisdiction pursuant to article 10 of the Revised Judicature Act, MCL 600.1001 *et seq.*, and the court's exercise of jurisdiction must be consistent with relevant local court rules, such as the Wayne Circuit Court rules establishing juvenile and domestic relations sections of its family division.

4. While Judge Cavanagh was presiding over a proceeding under the juvenile code, he had not yet dismissed the court's jurisdiction over B.J. before he heard Reid's custody motion. It is clear that his determination to grant Reid custody was based on the CCA, not the juvenile code. Both the custody motion and the child protective action were properly before Judge Cavanagh. Judge Cavanagh erred, however, by failing to require that the custody motion be captioned with the appropriate paternity case name and number and then proceeding to decide the motion under the juvenile case number and entering it in a supplemental order involving matters under the juvenile code.

5. Judge Cavanagh erred by failing to consider the best-interest factors of MCL 722.23 before changing custody. Under the CCA, the court may, in the best interests of the child, modify a

custody order for proper cause shown or because of a change of circumstances. The party seeking the custody change must establish this by a preponderance of the evidence. In a dispute between parents, a presumption exists in favor of the established custodial environment. If the court determines that an established custodial environment exists with one parent and not the other, the noncustodial parent has the burden of persuasion to show by clear and convincing evidence that a change in the custodial environment is in the child's best interests. The court must then determine whether a change in the established custodial environment is in the child's best interests by considering the best-interest factors. Judge Cavanagh conclusorily changed custody without making any of the requisite findings. Reid had established that a change of circumstances had occurred since the entry of the custody order by Judge Lombard, and an established custodial environment with Reid existed. Johnson was thus required to show by clear and convincing evidence that a change in the established custodial environment was in the child's best interests. Because Judge Cavanagh failed to make any finding concerning the best-interest factors, appellate review of whether the court's ultimate determination was against the great weight of the evidence is impossible. There must be some indicia on the record showing that the court satisfied itself that its determination was in the child's best interests, both to preserve an adequate record for appellate review and to protect the fundamental rights of the parties to make decisions regarding the care, custody, and control of their children in the absence of a compelling state interest justifying governmental interference. This matter must be remanded for a new evidentiary hearing and articulation of factual findings consistent with the CCA.

Remanded.

1. COURTS — FAMILY DIVISION OF CIRCUIT COURT — JURISDICTION OF FAMILY DIVISION — JUVENILE PROCEEDINGS — DOMESTIC RELATIONS MATTERS.

A family division judge presiding over a matter under the juvenile code, MCL 712A.1 *et seq.*, has the power and authority to hear related domestic relations actions; a court presiding over a juvenile proceeding that faces a matter that has been consolidated with a related domestic relations matter, or a court presiding over a domestic relations proceeding, that faces a matter that has been consolidated with a juvenile matter, must make it clear that it is exercising jurisdiction under chapter 10 of the Revised Judicature Act, and the court's exercise of jurisdiction must further be consistent with relevant local court rules; the court must abide by

the procedural requirements of the particular statute under which it is proceeding (MCL 600.1021, 600.1023).

2. PARENT AND CHILD — CHILD CUSTODY — ESTABLISHED CUSTODIAL ENVIRONMENT — CHANGES IN CUSTODIAL ENVIRONMENT — BEST-INTEREST FACTORS.

The family division of the circuit court may modify, in the best interests of the child, previous custody orders for proper cause shown or because of a change in circumstances; the party seeking a change of custody must establish by a preponderance of the evidence that proper cause or a change in circumstances exists; when the custody dispute is between parents, there is a presumption in favor of the established custodial environment; if an established custodial environment exists with one parent and not the other, the noncustodial parent has the burden of persuasion to show by clear and convincing evidence that a change in the custodial environment is in the child's best interests; if an established custodial environment exists with both parents, the party seeking to modify the custody arrangement bears the burden of rebutting the presumption in favor of the custodial environment established with the other parent; the court must consider the statutory best-interest factors and determine whether a change in the established custodial environment is in the child's best interests (MCL 722.23, 722.27[1][c]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Rebekah Mason Visconti*, Division Chief, and *Tonya C. Jeter*, Assistant Attorney General, for the Department of Human Services.

Edward J. Joseph for Holly Johnson.

Anita G. McIntyre P.C. (by *Anita G. McIntyre*) for the minor child.

Before: MURPHY, P.J., and K. F. KELLY and DONOFRIO, JJ.

K. F. KELLY, J. In this child protective action initiated by the Department of Human Services (DHS or petitioner), respondent-mother, Holly Johnson, appeals as of right the "custody" order entered by Wayne Circuit

Court Judge Jerome C. Cavanagh, assigned to the juvenile section of the family division of the court,[1] awarding the father, Michael Reid, joint legal custody and sole physical custody of the minor child, B.J. Sole legal and physical custody of the minor child had previously been awarded to Johnson by an earlier order entered in an active paternity action between Johnson and Reid pending before Wayne Circuit Court Judge Arthur J. Lombard, assigned to the domestic relations section of the family division.[2]

The issue raised on appeal requires us to consider whether a trial court presiding over a child protective proceeding, or juvenile case, may make determinations in related actions under the Child Custody Act (CCA). We hold that a trial court that is part of a circuit court's family division under MCL 600.1011 presiding over a juvenile case has jurisdiction to address related actions under the CCA consistent with MCL 600.1021 and MCL 600.1023, as well as local court rules. We further hold that when exercising its jurisdiction, a trial court must abide by the relevant procedural and substantive requirements of the CCA. Accordingly, we vacate the trial court's "custody" order entered in the child protective proceedings and remand for further proceedings.

I. FACTS AND PROCEDURAL BACKGROUND

Reid and Johnson had a child out of wedlock, B.J., who was born on March 3, 2004. When Reid discovered Johnson was pregnant with B.J., Johnson and Reid

[1] Child protective proceedings pending before the Wayne Circuit Court are heard in the Lincoln Hall of Justice, located in the city of Detroit.

[2] Domestic relations matters pending before the Wayne Circuit Court are heard in the Coleman A. Young Municipal Center in the city of Detroit.

separated. Reid saw B.J. on only one occasion, for approximately 20 minutes, shortly after B.J.'s birth.

In October 2004, a paternity action was initiated in the Wayne Circuit Court, *Johnson v Reid*, Docket Number 2004-462722-DP. This paternity action was assigned to Judge Lombard. Reid admitted that he is B.J.'s father and signed an affidavit acknowledging paternity.[3] Judge Lombard entered a judgment of support and filiation granting Johnson sole legal and physical custody of B.J. Reid was not granted any parenting time but was ordered to pay child support and other related expenses.

Johnson also has another child, A.P., born on March 14, 1993, from a previous marriage to Gyshawn Presberry. Johnson and Presberry divorced in 1997. The judgment of divorce awarded Johnson legal and physical custody of A.P., permitted Presberry supervised parenting time, and required Presberry to pay child support. Presberry, however, failed to pay child support and at the time of these events had several warrants for his arrest because of his child support arrearage.

A. CHILD PROTECTIVE SERVICES PETITION AND TRIAL

In April 2006, the DHS received a complaint that Johnson was physically abusing A.P. A.P. allegedly had welts and her arms were bleeding. A.P. admitted that her mother frequently beat her. Johnson, however, evaded DHS involvement by sending A.P. to Tennessee.

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[3] MCL 722.1003(1) provides: "If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage." The acknowledgement "establishes paternity, and . . . may be the basis for court ordered child support, custody, or parenting time . . . ." MCL 722.1004.

In December 2006, after A.P. had returned to Michigan, another complaint was filed against Johnson. The DHS sought temporary wardship of both A.P. and B.J. in the case currently on appeal. In the initial petition, it was alleged that Johnson had beaten A.P. and had also allegedly left A.P., who was 12 or 13 years old at the time, to care for B.J. while Johnson was gone from 4 p.m. to midnight. The petition noted that neither of the children's fathers sought custody of the children, sought to visit them, or provided assistance for the children's care. As a result, the children were removed from Johnson's care on December 5, 2006, and placed with relatives.[4]

A preliminary hearing on the petition was held on December 6, 2006, Referee Leslie Graves[5] presiding, during which the DHS indicated that it was unsafe to keep the children in Johnson's home. The court authorized the petition, continued the children's placement with relatives, and granted Johnson supervised parenting time at the agency. The matter was set for a pretrial hearing before Referee David Perkins,[6] which was held on January 16, 2007. A.P.'s father did not attend the pretrial hearing. B.J.'s father, Reid, however, did attend this hearing and was granted supervised parenting time at the agency.

Trial began before Referee Perkins on March 22, 2007, and continued on April 20, 2007, and June 1, 2007. A.P. testified that the allegations of physical abuse were false and that although her mother threatened to

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[4] A.P. was placed with her maternal grandparents, while B.J. was placed with his maternal uncle.

[5] Referee Graves is assigned to the juvenile section of the Wayne Circuit Court's family division.

[6] Referee Perkins is assigned to the juvenile section of the Wayne Circuit Court's family division.

whip her for misbehaving, Johnson never did. According to A.P., her father made false reports of child abuse in retaliation against Johnson for not permitting him to see A.P. A.P. further indicated that allegations that her mother had hit her with a vacuum cleaner cord, a belt, and a coat hanger and had left her alone with B.J. were false, but admitted making these accusations to a protective services worker. Nonetheless, A.P. testified that her mother "whooped" her "[l]ike how other kids get whippings" and further admitted that her mother whipped her with a belt sometime around Thanksgiving 2006. A.P. also testified that Johnson, on one occasion, had ordered her to strip down to her underwear and to lie down with her arms and legs outstretched while Johnson hit her on the thighs with a belt.

Johnson's mother, Judith Johnson, testified that she saw Johnson hit A.P. on two or three occasions and that she thought Johnson was hitting A.P. too hard. She also saw bruises on A.P.'s thighs that appeared to be "from some kind of cord . . . ." Johnson's sister, Kristi Johnson, testified that A.P. had told her that Johnson whipped her on numerous occasions using a vacuum cleaner cord, an extension cord, or a belt and that Johnson had left A.P. alone with her brother until midnight.

Reid, who had lived with Johnson for three months, testified that he had also witnessed Johnson whip A.P. "uncontrollably" with a coat hanger and had also seen Johnson beat A.P. with her hand and a belt. In addition, Reid admitted to having broken Johnson's keyboard when Reid and Johnson separated because Johnson had allegedly tried to prevent him from leaving the apartment. As a result of this incident, Reid had pleaded guilty of malicious destruction of property and was ordered to pay restitution. Reid denied having any

other convictions, although the DHS had documentation of prior convictions for domestic violence and carrying a concealed weapon. He admitted that he had a child support arrearage for B.J., and for three other children from other relationships as well, and that he had "dealt with the warrants for the child support." Reid testified that he had not seen B.J. because Johnson had prevented him from seeing his son. Johnson acknowledged that she wrote to Reid in 2005, after B.J.'s birth, and told him that she did not want him to have anything to do with B.J. Reid indicated that he was self-employed as a handyman and that he had part-time jobs delivering flowers and pizza. A.P.'s father did not attend the proceedings. At the end of the trial, the court assumed temporary jurisdiction over the children, ordered that a parent-agency agreement be prepared, ordered that psychological and psychiatric evaluations of Johnson, Presberry, and Reid be performed, and recommended counseling.

B. JULY 2007 DISPOSITIONAL REVIEW HEARING

Subsequently, at the dispositional hearing on July 27, 2007,[7] the parties entered into a parent-agency agreement that included, among other requirements, obtaining suitable housing, individual and family counseling, obtaining a legal source of income, and attending parent education classes. Referee Perkins also ordered Johnson to undergo anger management and domestic violence counseling. Reid was permitted unsupervised parenting time, including overnights and weekends,

[7] By the time of this dispositional hearing, A.P. was no longer staying with relatives but had been placed in a juvenile detention center as a result of pending criminal charges. These charges were eventually dismissed, and A.P. then began residing with her maternal grandparents again.

while Johnson's supervised parenting time at the agency was reinstated.[8] Between the trial and this dispositional hearing, Reid had not missed a single visit with his son.

C. OCTOBER 2007 PERMANENCY PLANNING HEARING

On October 24, 2007, a permanency planning hearing was held. The foster care worker assigned to the case, Khaleelah Dawson, testified that Reid was in full compliance with the parenting time schedule, had completed a psychological evaluation, and had recently been assigned an individual counselor but had not yet started counseling. Dawson reported that his unsupervised weekend visits with B.J. had been going well and that B.J. had indicated to her that he would like to stay with Reid. Dawson also indicated that B.J. "[got] along well" with Reid's other two children, who visited during the weekends and over the summer. Reid lived alone in his own home, and Dawson indicated that the previous caseworker had been out to the house and found it appropriate. Dawson recommended that B.J. be placed with Reid with in-home services specifically directed at social and educational resources on parenting.

With respect to Johnson, Dawson testified that Johnson was attending individual counseling. Dawson, however, commented that Johnson continued to deny any type of physical abuse and thus recommended individual psychotherapy. Dawson reported that Johnson had attended the domestic violence and substance abuse assessments, as well as parenting classes, but had failed to take any of the random drug screens

[8] It had been discovered that Johnson did not visit B.J. according to the court's orders and allegedly saw B.J. every Sunday without supervision. As a result of her actions, Johnson's visitation with B.J. had been suspended as of the date of this dispositional hearing.

ordered. Johnson had not yet completed a psychiatric evaluation. Further, although Johnson was permitted weekly supervised visitation at the agency, she had only visited twice since the previous dispositional hearing in July 2007. Dawson testified that Johnson had insisted on weekend visits, which were not available at the agency, and that Johnson had not made arrangements to visit during the week despite the agency's efforts to make accommodations. Johnson had informed Dawson that she worked during the day and would not be able to make nighttime visits during the week. Nonetheless, Johnson had failed to submit to Dawson a work schedule or pay stubs, despite Dawson's repeated requests, and Dawson had not been able to verify Johnson's employment. Dawson also indicated that Johnson lacked stable housing because she had moved twice in the previous 90 days. At the end of the hearing, the referee ordered that the children remain temporary wards of the court and continued the previous orders, including one requiring psychotherapy for Johnson.

D. JANUARY 2008 DISPOSITIONAL REVIEW HEARING

A dispositional review hearing followed on January 10, 2008. Dawson testified that Johnson was in partial compliance with her treatment plan. Johnson had started attending supervised visits with the children on a regular basis, participated in a clinic for "child study," and completed the psychological evaluation. However, Dawson had not yet received the results of the psychiatric evaluation, and Johnson had remained reluctant to accept responsibility for the physical abuse, although her therapist reported that she was beginning to accept responsibility. Johnson had also failed to complete the random drug screens, but Dawson did not believe Johnson was using any illicit substances. Dawson

agreed to omit the drug screen requirement unless Johnson showed signs of drug use. Dawson recommended that Johnson be allowed to have some unsupervised day visits, at Dawson's discretion, contingent upon continued compliance with the court's orders. Dawson noted that Johnson did not have suitable housing and that she had referred Johnson to housing assistance. The court report Dawson submitted indicated that during visitation Dawson had to "redirect" Johnson on two separate occasions when Johnson spoke negatively about the children's respective fathers in the children's presence and acted hostilely toward her own parents after parenting time had ended.

Dawson further testified that Reid was in complete compliance with the treatment plan and had done everything the court had asked of him. Reid had actively participated in therapy, and his weekend-long unsupervised visits continued to go well. Dawson had also visited Reid's home and reported that it was suitable. Dawson recommended that B.J. be placed with Reid once in-home services and a suitable day-care plan were in place. Reid had already begun arranging day-care plans with family members.

At the end of this hearing, the court ordered petitioner to place B.J. with Reid because it determined that it was unnecessary to wait for in-home services to begin.[9] The court acknowledged that Reid intended to move for a change of custody of B.J., but explained that custody is a separate issue and that its order for placement did not substitute for, or obviate the need to file, a motion for change of custody. The court also

[9] If a court determines that the "return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child be returned to his or her parent." MCL 712A.19a(5).

adopted Dawson's recommendation that Johnson be given unsupervised day visits with her children at Dawson's discretion. The children continued to be wards of the court.

E. MAY 2008 MOTION FOR CUSTODY

Subsequently, Reid moved for sole custody of B.J. However, the motion for change of custody was not filed in the paternity action before Judge Lombard, in which the original custody order had been entered, but was filed in the juvenile case pending before Referee Perkins.[10] It was noticed to be heard on May 12, 2008, the same day as the next dispositional review hearing and permanency planning hearing. Because of the change of custody motion, Referee Perkins transferred the case to the docket of Judge Cavanagh.[11]

At the outset of the hearing, petitioner asked the court to address the change of custody motion before conducting the dispositional hearing, and the court agreed. Reid argued that he was entitled to custody because he had completely complied with the treatment plan. Johnson objected to the motion for custody generally and to an award of sole legal custody specifically. Johnson also sought custody of B.J. While she argued that she had made progress on her treatment plan and had had trouble with petitioner's caseworker, she failed to articulate a specific objection to a change of physical custody. The attorney appointed for the child argued

[10] The motion was captioned with the case name and docket number of the child protective proceedings. Further, it is unclear from the lower court record whether Reid was asking for joint legal custody or sole legal custody. Reid's motion simply sought "sole custody" of the child.

[11] Wayne Circuit Court family division referees assigned to the juvenile section do not hear custody motions, but it is unclear from the record if that is because of a specific prohibition or simply local practice.

that Johnson should not be given custody as she had concerns that B.J. would be at risk if placed in Johnson's home because Johnson had physically abused A.P. and directed the court's attention to the exhaustive material in both the legal and confidential file.[12] The child's attorney did not object to Reid's obtaining sole physical custody of B.J., with joint legal custody for both parents. Petitioner's attorney stated that the DHS was "not really a party to this case" and did not object to the motion for custody going forward.

After hearing the parties' arguments, the trial court stated: "Okay. After considering the motion the Court's going to grant joint legal custody to mother and father and sole physical custody to Mr. Reid . . . ." Before proceeding with the juvenile case, the court indicated that it would consider Johnson's testimony with regard to the motion for custody.

The court then conducted the dispositional review and permanency planning hearings. At the outset, the trial court admitted evidence petitioner presented, including extensive documentation of the parties' psychological evaluations and related reports prepared by the DHS. During the hearing Dawson testified that Reid had completed his treatment plan, that she could offer him no other services, and that she had no objections to B.J.'s staying in Reid's home. Dawson believed that it was in B.J.'s best interests to be in Reid's physical custody and that upon entry of a custody order, the trial court should dismiss its jurisdiction over B.J.

Dawson also testified that Johnson's individual therapy had been terminated because of lack of atten-

[12] In child protection actions, the legal file is a record of all the court proceedings, while the confidential file contains information concerning the parents' treatment plans and related documentation. The confidential file is not available to the general public.

dance. Dawson indicated that Johnson still did not believe that she had done anything wrong and "blame[d] others for her problems." According to Dawson, Johnson's therapist wanted Johnson to re-enroll for more therapy to work on this problem. Johnson's visitation had also reverted to supervised visits at the agency because Johnson had failed to return B.J. to the agency after an unsupervised Saturday visit and kept him for an entire weekend. Dawson recommended that the current order with respect to Johnson's visitation rights, which included unsupervised visitation at Dawson's discretion, be continued. Dawson testified that she was unable to verify Johnson's housing or employment. Initially, Johnson had told Dawson that she was living with a friend but did not want Dawson to come out and view the home because she would not be living there with her children. Dawson did not conduct a home assessment and was informed on the day of the hearing that Johnson had allegedly found a new home.

As part of this hearing, Dawson's May 8, 2008, court report was admitted into evidence. The report indicated that Johnson had completed the parenting classes and domestic violence classes. The report also noted that Johnson's individual therapy had been terminated as of May 6, 2008, because Johnson's last session had been scheduled for March 8, 2008, and the therapist's attempts to re-engage Johnson had failed. The report further stated that Johnson had written numerous complaints to petitioner indicating that "she was innocent of all allegations and that she was the victim." Dawson indicated in the report that Johnson had been unavailable to plan for reunification. Dawson's attempts to speak with Johnson had been unsuccessful because when Dawson attempted to communicate with Johnson, Johnson would state that someone else was servicing her case. Dawson testified that she and

Johnson had experienced a "communication barrier" and that, as a result of Johnson's complaints, the case was about to be transferred to a different foster care worker.

Johnson testified that she had completed parenting classes and that she had completed therapy. According to Johnson, neither her therapist nor Dawson had told her she needed to continue therapy, but she testified that she would continue to attend sessions. Johnson also testified that she had notified the agency that she had new housing, but had not notified Dawson because there was always a "tussle/tussle" when she tried to talk to Dawson. Johnson admitted that she had filed three other complaints against different DHS employees.

After hearing this testimony, the court stated:

> The Court's jurisdiction over [B.J.] is dismissed. Wardship's terminated. The Court finds reasonable efforts have been made to preserve and unify the family. Progress towards that goal and the goal of reunification have been made.[13]

The trial court continued Johnson's parenting classes and individual therapy sessions. Subsequently, the trial court entered a single order under the juvenile case number dismissing the court's jurisdiction over B.J., terminating its wardship over him, and awarding Reid sole physical custody and Reid and Johnson joint legal custody of B.J. This appeal followed.[14]

II. STANDARDS OF REVIEW

Three standards of review are relevant to our review of a trial court's decision on a motion for change of

[13] The trial court continued its wardship of A.P.

[14] Reid, a respondent below, is not involved in this appeal.

custody. The trial court's factual findings are reviewed under the great weight of the evidence standard. *McIntosh v McIntosh*, 282 Mich App 471, 474 ; 768 NW2d 325 (2009). The court's factual findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We review for an abuse of discretion the trial court's discretionary decisions, such as the award of custody. *Id.* Questions of law in custody matters are reviewed for clear legal error. *Phillips v Jordan*, 241 Mich App 17, 20; 641 NW2d 183 (2000). Clear legal error exists when the trial court incorrectly chooses, interprets, or applies the law. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). Further, whether the circuit court has jurisdiction over both child protection actions and domestic relations matters is a question of law we review de novo. See *Berger*, 277 Mich App at 702.

III. APPLICABLE LAW

Johnson argues that the trial court erred by failing to consider the best interests factors enumerated in the CCA when it awarded custody of the minor child to Reid. Conversely, petitioner and the attorney for the child characterize the trial court's decision as a determination under the juvenile code, meaning that no analysis of the best interests factors was appropriate or even required. While we agree that the trial court erred in the manner in which it entered the "custody" order, we find it necessary to first consider the applicable law governing this case.

A. FAMILY LAW'S CONSTITUTIONAL DIMENSION

In this case, there are two distinct and separate statutory schemes affecting the care and custody of the

minor child: the juvenile code and the CCA. Relevant to each of these statutory schemes are the relative interests of the state, the parents, and the child in the child's upbringing. Generally, the state has no interest in the care, custody, and control of the child and has no business interfering in the parent-child relationship. See *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004). As a practical matter, the state is not equipped to supply a child with the necessary care and direction that a parent is equipped to provide. Neither is it its place to do so, as due process precludes a government from interfering with parents' fundamental liberty interest in making decisions regarding the care, custody, and control of their children absent a compelling state interest. *Troxel v Granville*, 530 US 57, 65-66, 120 S Ct 2054; 147 L Ed 2d 49 (2000); *DeRose v DeRose*, 469 Mich 320, 328-329; 666 NW2d 636 (2003); *Herbstman v Shiftan*, 363 Mich 64, 67-68; 108 NW2d 869 (1961); *Ryan*, 260 Mich App at 333-334. Rather, it is the parent's duty, and fundamental right, to do what the state cannot—direct a child's upbringing and education and prepare that child for future obligations. *Troxel*, 530 US at 65-66. Similarly, a child also has a due process liberty interest in his or her family life, *In re Clausen*, 442 Mich 648, 686; 502 NW2d 649 (1993), which includes having a fit parent, *In re Anjoski*, 283 Mich App 41, 60-61; 770 NW2d 1 (2009); *Herbstman*, 363 Mich at 67-68. In other words, a child has a " 'right to proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals, or well-being . . . .' " *Ryan*, 260 Mich App at 333-334, quoting *Herbstman*, 363 Mich at 67. Thus, when a parent is fit and a child's needs are met, there is no reason for the state to interfere in a child's life.

B. THE CHILD CUSTODY ACT AND THE JUVENILE CODE

The state, however, may become involved in a child's upbringing under certain limited circumstances when a child's welfare is affected. *Ryan*, 260 Mich App at 333. Under domestic relations law, for example, certain actions implicate the state's interest in the child's welfare. These include actions for child support, *LME v ARS*, 261 Mich App 273; 680 NW2d 902 (2004), paternity actions, *Sinicropi v Mazurek*, 273 Mich App 149; 729 NW2d 256 (2006), and dissolution of marriage, *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004). If any of these actions directly or incidentally involve the legal or physical custody of a child, the courts are bound by the CCA in determining who should have physical and legal custody of a child. See *Sirovey v Campbell*, 223 Mich App 59, 68; 565 NW2d 857 (1997). In making this determination, the child's best interests are of paramount importance, and the goal is to resolve a custody dispute in a way that promotes the child's best interests and welfare. *Harvey*, 470 Mich at 192-193. Once a court enters a custody order, it cannot change the award of custody without overcoming certain procedural safeguards. See, e.g., MCL 722.25(1); MCL 722.27. These safeguards are in place for the stability of the child and are meant to protect against unwarranted and disruptive changes of custody. *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009); *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003).

Similarly, the state may become involved in the parent-child relationship when a child's safety is threatened, for example, if the parent has abused or neglected the child or has abandoned the child. The state's involvement under these types of circumstances is governed by the juvenile code, MCL 712A.1 *et seq*. A

court presiding in juvenile proceedings obtains jurisdiction over the matter once a petition is filed and the court has authorized the petition after conducting a preliminary inquiry. MCL 712A.2; MCL 712A.11(1); see *In re Jagers*, 224 Mich App 359, 361; 568 NW2d 837 (1997). Although the court has jurisdiction over the matter, the child will not come under the court's jurisdiction and become a ward of the court until the court holds an adjudication on the merits of the allegations in the petition and finds by a preponderance of evidence that there is factual support for permitting judicial intervention. *In re AMB*, 248 Mich App 144, 176-177; 640 NW2d 262 (2001). Subsequently, the court can hold dispositional review hearings and permanency planning hearings and enter orders governing the child's care and custody. *Id.* at 177; MCL 712A.18f(4). The goal of these proceedings is always reunification of the family unit. See *In re B & J*, 279 Mich App 12, 18; 756 NW2d 234 (2008).

However, a conflict may arise concerning the care and custody of a child, as in this case, where domestic relations law and juvenile law intersect. See *In re Brown*, 171 Mich App 674; 430 NW2d 746 (1988). Obviously, upon entry of a child custody order under the CCA, a child's parents, or other custodians, must abide by the terms of the custody order. However, once a juvenile court assumes jurisdiction over a child and the child becomes a ward of the court under the juvenile code, the juvenile court's orders supersede all previous orders, including custody orders entered by another court, even if inconsistent or contradictory. MCR 3.205(C); see *Krajeweski v Krajewski*, 420 Mich 729, 734-735; 362 NW2d 230 (1984). In other words, the previous custody orders affecting the minor become dormant, in a metaphoric sense, during the pendency of the juvenile proceedings, but when the juvenile court

dismisses its jurisdiction over the child, all those previous custody orders continue to remain in full force and effect. This is necessarily the result because the prior domestic relations court never relinquished its jurisdiction over the custody dispute, as the CCA vests a court with continuing jurisdiction over the matter, *Harvey*, 470 Mich at 192, nor was the prior court required to relinquish or waive its jurisdiction in order for the juvenile court to exercise its jurisdiction, *Krajewski*, 420 Mich at 734-735; MCR 3.205(A). In addition, the juvenile court's orders function to supersede, rather than modify or terminate, the custody orders while the juvenile matter is pending because the juvenile orders are entered pursuant to a distinct statutory scheme that takes precedence over the CCA. See *Krajewski*, 420 Mich at 734-735. We note that during the duration of the juvenile proceedings, while the parties subject to the custody order can move to modify the custody order,[15] any modification would remain superseded by the juvenile court's orders.

C. 1996 PA 388: "FAMILY COURT PLANS"

Until very recently, only Michigan's probate courts had original jurisdiction over all juvenile cases. Const 1963, art 6, § 15, grants probate courts "original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law." However, 1996 PA 388, amending the Revised Judicature Act (RJA)[16] by adding chapter 10, reorganized Michigan's court system by creating a family division within the

[15] The DHS is currently required to provide noncustodial parents of children suspected of being abused or neglected with forms on "how to change a custody order" after determining there is an open "friend of court case" concerning the children. MCL 722.628(21).

[16] 1961 PA 236, MCL 600.101 *et seq*.

circuit court, which assumed much of the jurisdiction over juvenile cases formerly given to the probate courts. MCL 600.1001; MCL 600.1003; MCL 600.1021; see *In re AMB*, 248 Mich App at 167. It required each judicial circuit to develop a "family court plan" under which the family division of each circuit has "sole and exclusive jurisdiction" over, but not limited to, actions under the CCA, child protective actions, and paternity actions. MCL 600.1011; MCL 600.1021. This reorganization, and the mandate that each judicial circuit create a family court plan tailored to its community's needs, is intended to "promote more efficient and effective services to families . . . ." MCL 600.1011(1). As part of this goal, 1996 PA 388 added a provision intended to better serve families who face multiple matters before different judges and encompasses the concept of "one judge, one family." See Saoud Hallmark, *The new family division in Michigan*, 76 Mich B J 956, 958 (1997).[17] MCL 600.1023 provides:

> When 2 or more matters within the jurisdiction of the family division of circuit court involving members of the same family are pending in the same judicial circuit, those matters, whenever practicable, shall be assigned to the judge to whom the first such case was assigned.

And the act specifically gives a judge presiding over a juvenile matter the "power and authority" to hear actions under the CCA. MCL 600.1021(3). Nonetheless, family division judges must still abide by the procedural requirements incumbent upon them when hearing a custody matter under the CCA or conducting proceedings under the juvenile code. See MCR 3.205.

The Wayne Circuit Court developed a family court plan that divided its family division into a juvenile

[17] Linda Saoud Hallmark is now a judge of the Oakland County Probate Court assigned to the family division of the Oakland Circuit Court.

section and a domestic relations section, each of which is assigned particular causes of action in part because the geographical distance between the Lincoln Hall of Justice (where child protective proceedings are heard) and the Coleman A. Young Municipal Building (where domestic relations matters are heard.) Wayne Circuit Court Administrative Order No. 1997-04; Wayne Circuit Court Administrative Order No. 1997-05. For example, the juvenile section is assigned delinquency and abuse and neglect cases, whereas the domestic relations section is assigned cases pertaining to divorce, paternity, support, custody, and emancipation of minors. Each section, however, has the same authority and jurisdiction as the other section over matters enumerated in MCL 600.1021.

The Wayne Circuit Court has also developed its own procedures to better serve families who face multiple matters before different judges within its family division consistent with MCL 600.1023: When a domestic relations dispute arises and a juvenile action involving the same parties is already pending, or vice versa, one judge may resolve both matters if the judges on the respective dockets confer and deem it appropriate. See AO 1997-04; AO 1997-05.

IV. ANALYSIS

A. JURISDICTION AND AUTHORITY

Petitioner and the child's attorney mischaracterize the trial court's decision to award "custody" to Reid as a determination made under MCL 712A.19(1) of the juvenile code and MCR 3.976. According to petitioner and the child's attorney, the trial court was not required to consider the best interests factors delineated in the CCA, as Johnson contends, because the court was

acting under the juvenile code. The attorney for the child further argues that the posture of the case was such that the trial court was precluded from making a custody determination under the CCA because Johnson was incapable of taking custody and application of the factors would be "premature." We disagree.

MCL 712A.19(1) provides, in relevant part:

> Subject to [MCL 712A.20] if a child remains under the court's jurisdiction, a cause may be terminated or an order may be amended or supplemented, within the authority granted to the court in [MCL 712A.18] at any time as the court considers necessary and proper. An amended or supplemented order shall be referred to as a "supplemental order of disposition".

In other words, when a parent has successfully completed his or her treatment plan, and has otherwise become a fit parent, it is appropriate for the court to terminate its jurisdiction over the child. Similarly, MCR 3.976 provides courts with guidance regarding a child's return to a parent in proceedings under the juvenile code and states:

> (A) Permanency Plan. At or before each permanency planning hearing, the court must determine whether the agency has made reasonable efforts to finalize the permanency plan. At the hearing, the court must review the permanency plan for a child in foster care. The court must determine whether and, if applicable, when:
>
> (1) the child may be returned to the parent, guardian, or legal custodian[.]
>
> * * *
>
> (E) Determinations; Permanency Options.
>
> (1) Determining Whether to Return Child Home. At the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines

> that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child.

While it is true that Reid was granted "custody" of the minor child in an order captioned as a juvenile court order and entered during a juvenile proceeding, petitioner and the children's attorney are incorrect to characterize the trial court's determination as based on either of these provisions. Rather, Reid specifically filed a motion for a change of custody, requesting that he have sole custody of B.J. When the trial court granted the motion, it had not yet dismissed its jurisdiction over the minor child pursuant to MCL 712A.19(1), nor had it conducted the permanency planning hearing, as MCR 3.976 requires. Further, had the trial court dismissed its jurisdiction over the minor child under MCL 712A.19(1) before it considered Reid's motion for custody, the minor child would have necessarily been returned to Johnson because the previous custody order from the paternity action granted Johnson sole legal and sole physical custody. MCR 3.205(C). The minor child, however, was permitted to remain in Reid's care. Given these facts and the court's explicit statement that it had considered the change of custody motion and decided to grant Reid joint legal and sole physical custody of the minor child, it is unequivocal that the court's determination was based on the CCA and not the juvenile code.

Although the trial court erred in the *manner* in which it conducted the change of custody hearing, as discussed later, we find nothing inherently wrong with the court's exercising its discretion to consider the merits of the motion. There is no authority to preclude a circuit judge from determining custody pursuant to the CCA ancillary to making determinations under the juvenile code, and neither petitioner nor the child's

attorney has identified any such authority. To the contrary, the RJA, as amended by 1996 PA 388, specifically permits a judge presiding over a juvenile matter to consider related actions under the CCA. Judge Cavanagh, a circuit judge, was acting as a juvenile section judge. Pending before the court were three matters involving the same family: a motion for change of custody, a dispositional review hearing, and a permanency planning hearing. Because the juvenile section has the same authority and jurisdiction as the domestic relations section, MCL 600.1021, we conclude that Reid's motion for custody, as well as the accompanying child protective action, were properly before the court.[18]

We stress, however, that when a family division court deems it appropriate to consolidate numerous matters concerning the same family that fall within the jurisdiction of the family division under MCL 600.1021 but may have originally been assigned to different judges, it is necessary that family division courts follow the procedural requirements incumbent upon them. Here the trial court failed to require that the motion be captioned with the appropriate paternity case name and number and, instead, proceeded to decide the motion for custody under the juvenile case number. And the resultant custody order that the court entered was entered in the same supplemental juvenile order rather than in the paternity action. This was error.

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[18] There is no indication on the record showing that the procedures of AO 1997-04, AO 1997-05, and MCL 600.1023 were not followed, and the parties do not contest whether these procedures were followed. And, while MCL 600.1023 would indicate that the original judge who heard the paternity action in 2004 should be assigned to the case, the lengthy juvenile proceedings and the geographical separation of the juvenile and domestic relations sections of the Wayne Circuit Court would make it impracticable to assign the matter to Judge Lombard's docket in light of Judge Cavanagh's comparatively heightened familiarity with the current proceedings.

B. CUSTODY AWARD

Turning to the substance of Johnson's argument, we also agree that the trial court erred by failing to consider the best interests factors before changing custody.

1. THRESHOLD FINDING AND BURDEN OF PERSUASION

Under the CCA, if a child custody dispute has arisen, the circuit court may, in the best interests of the child, modify its previous orders or judgments "for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c). Thus, the party seeking a change of custody must first establish proper cause or change of circumstances by a preponderance of evidence. *Vodvarka*, 259 Mich App at 508-509. The movant must make this requisite showing before the trial court determines the burden of persuasion to be applied and conducts the evidentiary hearing. *Id.* at 509.

In determining the applicable burden of persuasion, the court must first determine whom the custody dispute is between. If the dispute is between the parents, the presumption in favor of the established custodial environment applies.[19] MCL 722.27(1)(c) embodies this presumption and provides:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court

[19] Alternatively, if the dispute is between a parent and a third party or agency, then the parental presumption embodied in MCL 722.25(1) applies and "trumps" the established custodial environment presumption. *In re Anjoski*, 283 Mich App at 54. In such instances, not relevant here, it is not necessary for the trial court to make findings with respect to the existence of an established custodial environment.

> or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (c) 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 and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

As a threshold matter to determining which party will carry the burden of rebutting the presumption by clear and convincing evidence, the court is required to look into the circumstances of the case and determine whether an established custodial environment exists. See *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991). A child's custodial environment is established "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). In making this determination, a court must also consider the "age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship . . . ." *Id.* If an established custodial environment exists with one parent and not the other, then the noncustodial parent bears the burden of persuasion and must show by clear and convincing evidence that a change in the custodial environment is in the child's best interests. *Berger*, 277 Mich App at 710. We note that in circumstances in which an established custodial

environment exists with both parents, see *Foskett*, 247 Mich App at 8, the party seeking to modify the custody arrangement bears the burden of rebutting the presumption in favor of the custodial environment established with the other parent.

Once the court has determined the applicable burden, it must next determine whether a change in the established custodial environment is in the child's best interests. This analysis involves a consideration of the best interests factors enumerated in MCL 722.23, which are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

2. APPLICATION

In the present matter, the trial court, at petitioner's request, first addressed Reid's motion for custody. We find no fault with the court's decision to first consider Reid's motion. After hearing the parties' arguments, however, the trial court, without making any of the required findings, simply stated: "Okay. After considering the motion the Court's going to grant joint legal custody to mother and father and sole physical custody to Mr. Reid . . . ." We cannot condone this conclusory award of custody and the manner in which the court reached its decision, as it was plainly inconsistent with the procedural requirements of the act.

i. THRESHOLD DETERMINATIONS

First, consistently with the CCA, the trial court should have first determined whether Reid had shown by a preponderance of evidence proper cause or change of circumstances. Clearly a change of circumstances had occurred since the entry of the order of custody entered by Judge Lombard in the paternity action: the minor child was removed from Johnson's care and custody in December 2006 and subsequently started living with Reid in January 2008. Reid was considered to have completed his treatment program as of May 12, 2008, while Johnson was

then unable to independently undertake the care and custody of the children without state oversight.

Next, because Reid met the requisite showing, the court should have articulated on the record the applicable burden of persuasion. As discussed earlier, this determination requires a consideration of both whom the dispute is between and, if it is between the parents, whether an established custodial environment exists with either party. The trial court, however, did not make any findings with respect to the existence of an established custodial environment, nor did it articulate the applicable burden of persuasion. Here, because the dispute is between the parents, the presumption in favor of the established custodial environment applies. MCL 722.27(1)(c).

To determine which party bears the burden of rebutting the presumption, the trial court should have considered whether an established custodial environment existed with either Reid or Johnson. Again, the court made no such finding. However, when there is sufficient information in the record on this issue, we make our own determination of this issue by de novo review. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). The minor child has resided with Reid since January 2008 and has enjoyed parenting time with Reid since December 2006. Before the child began residing with Reid, the child indicated a desire to reside with Reid, and Reid's complete compliance with his treatment plan indicates a desire on Reid's part to make his relationship with the minor child permanent. Further, petitioner had consistently reported that the parenting time had been going well and that the child looked to Reid for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Reid also resided in his own home, which petitioner deemed appropriate

for the child's needs. In our view, these facts were sufficient to establish the existence of an established custodial environment. As a result, Johnson had the burden of showing by clear and convincing evidence that a change in the established custodial environment was in the child's best interests.

ii. BEST INTERESTS FACTORS

This inquiry necessarily requires that a trial court consider the best interests factors delineated in MCL 722.23. Johnson argues that the court's failure to do so constitutes error requiring a remand. We agree that the trial court erred and agree that a remand is necessary.

With respect to the best interests factors,

> the finder of fact must state his or her factual findings and conclusions under each best interest factor. These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties. However, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings. [*MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005) (citations omitted).]

"Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing." *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007) (citations and quotation marks omitted). The scope of such a hearing is within the discretion of the trial court on remand, but it must consider all the evidence and information currently before it.

Here the trial court was faced with a fit father, an unfit mother, and the DHS. Because Reid had become a fit parent, the compelling circumstances justifying pe-

titioner's initial interference in the minor child's life no longer existed and the state no longer had any interest or right to intervene in Reid and B.J.'s enjoyment of their parent-child relationship, in which they both have a fundamental liberty interest. See *DeRose*, 469 Mich at 328-329; *In re Clausen*, 442 Mich at 686; *In re Anjoski*; 283 Mich App at 54; *Ryan*, 260 Mich App at 333. We note that this fundamental interest of a parent in the care and custody of his or her child extends to noncustodial parents, like Reid, as "[t]here is no reason to conclude that a parent has a diminished constitutional right to his child merely because he does not have physical custody of that child." *In re Rood*, 483 Mich 73, 121; 763 NW2d 587(2009) (opinion by CORRIGAN, J.). It follows that the state "may not enter into agreements with an unfit custodial parent that may compromise the state's efforts to reunite the child with the noncustodial parent." *Id*. at 86 n 11. While it may appear that the competing and remaining interests of Reid and Johnson, a fit and an unfit parent, are easily resolved when considered in conjunction with the child's fundamental liberty interest—it is undoubtedly in the child's best interests to be in the care and control of the fit parent—we cannot condone a conclusory award of custody, as was done in this case, given the nature of the parents' rights involved. In any matter involving a change of custody, there must be reviewable indicia on the record showing that the court satisfied itself concerning the best interests of the child. It is simply not enough to grant a change of custody motion without making any findings of fact and merely sign an order. The trial court should have, at a minimum, taken judicial notice of the confidential and legal file, taken any relevant testimony if necessary, given its findings on the best interests factors of the CCA, and subsequently made its custody determination in the paternity action.

Because the trial court failed to make any findings, we are prevented from determining whether the underpinnings of the ultimate determination are against the great weight of the evidence. We note that this is not for a lack of a sufficient evidentiary record. The record contains a plethora of information, compiled during the ongoing juvenile proceedings since 2006, on which the court could have based its determination, including numerous psychological evaluations and court reports regarding the parties' progress, as well as the testimony of the parties involved. But the trial court failed to refer to any of this information in support of its custody determination. Thus, in the absence of a reviewable determination, we must remand for the trial court to articulate factual findings consistent with the requirements of the CCA and conduct a new evidentiary hearing as necessary to make its ultimate custody determination.

V. CONCLUSION

To conclude, our ruling in this case should be understood as clarifying the responsibilities of family division courts exercising jurisdiction under MCL 600.1021 and presiding over multiple matters controlled by different statutory schemes affecting a minor child. If a court presiding over a juvenile proceeding finds itself in a position in which the matter before it has been consolidated with a related custody matter, it must make clear that it is exercising jurisdiction pursuant to chapter 10 of the RJA. Conversely, if a court presiding over a domestic relations matter finds itself in a position in which the matter before it has been consolidated with a juvenile matter, it must also make clear that it is exercising jurisdiction under chapter 10 of the RJA. It is equally important that the court's exercise of jurisdic-

tion be consistent with relevant local court rules. Once a court has made clear its jurisdictional authority, it must be cognizant of which statutory scheme it is applying and must be mindful to put an indication on the record that accurately reflects what is being done and how it is being accomplished. To this end, it is self-evident that family division courts considering consolidated matters must abide by the procedures delineated in the statutory schemes affecting the parties.

In such instances, when one of the matters is a custody dispute, the court making the custody decision must make the requisite threshold determinations and then support its ultimate determination on the record by considering and making findings with respect to the best interests factors. While it was not necessary for the trial court to undertake a lengthy and intensive examination of the best interests factors under the unique circumstances of this case, we caution lower courts finding themselves in a similar procedural posture that there must be some indicia on the record showing that the court has satisfied itself that its determination is in the child's best interests. *Harvey*, 470 Mich at 192-193. We cannot stress the importance of this imperative enough. This requirement is necessary not only for preserving an adequate record for appellate review, see *People v Petty*, 469 Mich 108, 117-118; 665 NW2d 443 (2003), but is also essential for the protection of the fundamental rights of the parties involved. Because the trial court here did not abide by this requirement, a remand is necessary.

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

UNIBAR MAINTENANCE SERVICES, INC v SAIGH

Docket No. 279774. Submitted March 11, 2009, at Detroit. Decided March 19, 2009. Approved for publication May 7, 2009, at 9:00 a.m.

Unibar Maintenance Services, Inc., brought an action in the Oakland Circuit Court against Joseph Saigh, Lawrence Wells, and others, alleging negligent and innocent misrepresentation, breach of contract, and actual and constructive fraud with regard to the plaintiff's purchase of what it thought was health care coverage for its employees. A jury determined that Saigh and Wells (hereafter the defendants) were liable for innocent or negligent misrepresentation and constructive and actual fraud and returned a verdict awarding the plaintiff compensatory and exemplary damages. The court, John J. McDonald, J., entered a judgment consistent with the jury's verdict. The defendants appealed.

The Court of Appeals *held*:

1. The hypothetical questions that the defendants' counsel asked the plaintiff's expert during cross-examination were not in substantial accord with the facts presented at trial and, therefore, the answers to those questions did not create a legitimate basis upon which the trial court should have granted the defendants' motions for a directed verdict and judgment notwithstanding the verdict.

2. A claim for negligent misrepresentation requires the plaintiff to prove that the plaintiff justifiably relied to his or her detriment on information prepared without reasonable care by a defendant who owed the plaintiff a duty of care. The evidence sufficiently established a claim of negligent misrepresentation because the defendants, through their agent and corporation, held themselves out to the plaintiff as specialists in health care insurance coverage and the defendants' relationship with the plaintiff created a duty to proceed under the proper standard of care. The proper standard of care that the defendants owed the plaintiff while they were acting as the plaintiff's insurance agents included determining whether a company is a health insurer licensed to do business in the state, checking on consumer complaints, knowing whether the company exists, and determining whether the company has a history of paying its claims. The defendants failed to

meet that standard of care, in part, by not knowing whether certain of the insurers that they recommended were licensed and by ignoring the fact that certain of those insurers were not paying the claims presented to them. The defendants' argument that the plaintiff failed to show that the defendants owed the plaintiff a duty lacks merit. The plaintiff justifiably relied on the information provided by the defendants. The defendants did not exercise any reasonable care because they recommended to the plaintiff what they represented to be first-dollar-coverage, full coverage health insurance companies that were, in fact, self-funded benefit plans or nonexistent reinsurance coverage. The trial court properly denied the defendants' motions for a directed verdict and judgment notwithstanding the verdict with respect to the claims of negligent and innocent misrepresentation that were pleaded in the alternative.

3. A plaintiff, to sufficiently allege a claim for fraud, must show: that the defendant made a material representation; that the representation was false; that when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; that the defendant made the representation with the intention that the plaintiff would act upon it; that the plaintiff acted in reliance upon it; and that the plaintiff suffered damage. Here, the defendants' agent made multiple affirmative representations to the plaintiff concerning the nature of the companies that she presented to the plaintiff. The defendants knew that the representations were false at the time that they were made to the plaintiff. Even if the defendants had not known that the representations were false, their actions were reckless because they failed to determine necessary information about the companies in order to meet the applicable standard of care. The defendants made the false and material representations with the intention that the plaintiff act upon them. The plaintiff relied on the representations, because the defendants held themselves out to be specialists in health care coverage, and the plaintiff suffered losses or injury. The great weight of the evidence supported the fraud claim brought by the plaintiff.

4. The plaintiff established a proximate cause of its losses or injury with evidence of the defendants' negligence, misrepresentation, and fraud.

5. The defendants stipulated the admission of all the exhibits at trial and, therefore, cannot argue that some of the exhibits were admitted in error.

6. The defendants failed to show that the jury was exposed to an extraneous influence when the jury foreperson brought into the deliberations charts based on material presented at trial after the court had permitted the jury to take notes.

7. The trial court did not abuse its discretion by denying the defendants' motion for a new trial after it denied the defendants' motions for a directed verdict and judgment notwithstanding the verdict.

8. A corporation may be awarded exemplary damages when appropriate. The injury to the plaintiff's reputation amongst its employees that it suffered as a result of the defendants' actions was not compensable in quantitative terms and, therefore, the award of exemplary damages for the injury was proper.

9. The plaintiff presented sufficient evidence of the defendants' bad faith or ill will and that the defendants acted voluntarily.

10. The defendants waived any argument regarding whether they had notice that the plaintiff was seeking exemplary damages by approving the jury instructions concerning exemplary damages. The defendants waived any argument regarding the sufficiency of the evidence supporting the award of pecuniary damages by stipulating the admission of an exhibit quantifying the plaintiff's damages and failing to object to the testimony presented in support of such damages. The evidence supported the damages awards. The trial court did not err by denying the defendants' motion for remittitur.

Affirmed.

Hyman Lippitt, P.C. (by *Douglas Hyman*, *H. Joel Newman*, and *Daniel J. McCarthy*), for the plaintiff.

Plunkett Cooney (by *Robert G. Kamenec*) for the defendants.

Before: DONOFRIO, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM. After a jury trial, Joseph Saigh and Lawrence Wells (hereafter defendants) were found liable for innocent or negligent misrepresentation and constructive and actual fraud. The jury returned a

verdict of $1,282,575 in compensatory and exemplary damages and, subsequently, the trial court entered a judgment against defendants in the same amount. Defendants then moved for a new trial, judgment notwithstanding the verdict (JNOV), and for remittitur. The trial court denied all motions. Defendants now appeal as of right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a maintenance and meter-reading contractor, employing approximately 700 employees across numerous states. In 1999, plaintiff retained Benefits USA, Inc. (Benefits), operated by Gregory Cooper, who is a licensed insurance agent, as its insurance agent. In February or March of 2002, Benefits recommended that plaintiff put a segment of its employees on UltraMed, allegedly a full-coverage primary insurance company, and plaintiff enrolled its employees in the plan. Plaintiff was provided with documentation and promotional materials regarding this plan.

Benefits had learned of UltraMed through Kim Thiteca, who is a licensed insurance agent who sold health insurance for Financial Healthcare Systems (FHS) and who recommended UltraMed for plaintiff through Benefits.[1] FHS is run by defendants Saigh and Wells as partners, both of whom are licensed insurance agents in Michigan. Defendants, including Kim, held themselves out as "specialists" in health care insurance coverage. FHS typically sold one plan at a time and would transition into a new plan when the previous plan failed. According to Kim, it was defendants who

[1] One of plaintiff's employees testified that Kim made an in-person presentation along with Benefits regarding the UltraMed plan. Kim, however, does not recall if she actually met with plaintiff in person to discuss the UltraMed plan.

"brought" the health care plans into the office for their employees to sell. FHS's employees would prepare presentation booklets and other promotional materials using the of information defendants provided them and these materials would be distributed to other agents. Any insurance agent not employed by FHS who wanted to set their clients up with plans held by FHS had to go "through" FHS. In such instances, both FHS and the external agent would receive commissions.

When Kim recommended UltraMed for plaintiff to Benefits in 2002, Kim knew that plaintiff was seeking major full-coverage primary health care insurance and, despite not knowing whether UltraMed was licensed, did not advise Benefits or plaintiff to perform a "due diligence" or take any special precautions. In addition, one of FHS's service representatives testified that FHS already knew that UltraMed was not paying its claims when plaintiff was placed with it. UltraMed, in fact, was not a health insurance company licensed to operate in Michigan. At the time, UltraMed also had a cease and desist order against it in the state of Florida indicating that defendants had made misrepresentations regarding UltraMed.

Subsequently, the claims of plaintiff's employees under the UltraMed plan began to go unpaid. On March 14, 2002, FHS issued a letter informing plaintiff that UltraMed had gone into receivership and had been ordered to stop selling insurance by the state of Texas. The letter was signed by a customer service representative who received the information from defendants. The letter stated:

> We have looked and found another TPA [third-party administrator] to administer this business. They have agreed to keep your current premiums and Plan Descriptions (excluding the discount Dental and Vision plan) for existing

> groups that want to rollover. They also have agreed to retroactive [sic] the effective date to March 1, 2002 provided the appropriate documentation is received. It has been guaranteed that you will not have any lapse of coverage once the signed documentation is received. You will get this information from your agent. The deadline for this rollover is Friday, March 22, 2002.

The new plan recommended to plaintiff was Southern Plan Administrators (SPA). According to Wendy Thiteca, Kim's sister who was a service representative employed by FHS, it was defendants' decision to roll its clients over to SPA.

FHS sent Wendy, who is not a licensed insurance agent, to conduct a due diligence on SPA. During the due diligence Wendy learned that SPA's "reinsurance carrier [was not] on board" and that it was using the premiums it received to pay claims. According to Wendy, the reinsurance carrier was located in Greece and "no one could ever contact [them.]" Defendants were apparently aware of this situation. In other words, SPA was not an actual insurance company; rather, it was an employee health benefit plan that would pay the individual claims and be "backed-up" by reinsurance.

Despite this knowledge, Kim and Benefits made a presentation to plaintiff recommending that plaintiff switch to SPA. Kim presented SPA to plaintiff as a fully insured, first-dollar-coverage, health insurance company and provided a plan description matching UltraMed's. Kim also provided plaintiff with pamphlets and promotional materials, including information about coverage and price quotes. These materials indicated that its customers were satisfied with SPA's coverage. Consequently, in March 2002, plaintiff purchased the SPA plan to replace the UltraMed plan. Under the plan, plaintiff paid SPA $36,000 a month in premiums for the benefit coverage plus an additional 30 percent of each monthly payment to

cover agent fees, commissions, and other administrative costs. SPA, however, was not a health insurance company licensed to operate in Michigan.

On December 12, 2002, Kim sent plaintiff an "urgent" fax requesting plaintiff to fill out a new application for reinsurance with CIC Insurance Company. SPA's reinsurance carrier, Market Trends, had stopped paying claims and SPA decided to switch reinsurance carriers. Kim requested plaintiff to submit another payment, which plaintiff did. CIC, however, also failed to pay any claims and it also was not a licensed insurance company in Michigan. One day later, a cease and desist order was issued against SPA in Texas directing it to stop its operations because of fraudulent practices.

In March 2003, plaintiff began experiencing claims problems. Unbeknownst to plaintiff, SPA had discontinued its operation, but plaintiff continued to make the premium payments. However, when plaintiff could not "get a direct answer out of anybody," it refused to make its July 2003 premium payment. Defendant Saigh and Kim then visited plaintiff in August 2003 in an attempt to resolve the problem. Saigh indicated that if plaintiff made another payment within 24 hours, the claims would be paid. Instead of paying SPA another premium payment, plaintiff, at Saigh's recommendation, signed up with Fleet Care. Soon thereafter, plaintiff discovered that Fleet Care was also not a first-dollar-coverage insurance company. Plaintiff ceased doing business with defendants and switched, with some difficulty, to Aetna Insurance.

As a result of the unpaid claims, plaintiff received "hundreds" of complaints from its employees because their prescriptions were not being covered, collection agents were contacting them, or their doctors refused to

provide any care. In some instances, plaintiff directly paid for its employees' medications and some employees were sued in small claims court by their health care providers. Consequently, "a lot" of plaintiff's employees quit. Further, while plaintiff paid $67,762.55 in premiums to UltraMed and $263,887.15 to SPA, only $124,257 in claims were ever paid.

After discovering this alleged "Ponzi" scheme, plaintiff brought a three-count complaint alleging negligent and innocent misrepresentation, breach of contract, and actual and constructive fraud. The trial court dismissed plaintiff's contract claim on defendants' motion for summary disposition. Plaintiffs then proceeded to trial against defendants Saigh and Wells on the remaining counts.[2]

The trial began on October 17, 2006. Before opening statements, the parties indicated to the trial court that they had stipulated all the trial exhibits. After plaintiff presented its case, defendants moved for a directed verdict. The court denied defendants' motion, determining that reasonable minds could differ. Defendants did not present any witnesses and, after closing arguments, the trial court provided the jury with instructions that the parties stipulated. Subsequently, the jury found defendants guilty of innocent or negligent misrepresentation and actual and constructive fraud, and awarded plaintiff $1,282,575 in compensatory and exemplary damages against defendants jointly and severally. On November 13, 2006, the trial court entered judgment for plaintiff.

After trial, both defendants' counsel and plaintiff's counsel spoke with one of the jurors, Tina Rhines, who

[2] The other originally named defendants did not go to trial and are not involved in the appeal, because they were either dismissed, settled with plaintiff, or were not served.

indicated that the jury foreperson had brought two prepared documents into the jury deliberation room. According to Rhines, the foreperson had prepared two chart summaries showing all the participants in the case and a description of their testimony, as well as a time line of events. These summaries were allegedly used to direct deliberation and were relied on heavily during deliberations.

Defendants then filed numerous postjudgment motions, including motions for a new trial, JNOV, and remittitur. The court denied all three of defendants' motions in a written order. This appeal followed.

II. DIRECTED VERDICT AND JNOV

Defendants first assert that for various reasons none of plaintiff's claims should have been submitted to the jury and the trial court therefore erred by denying defendants' motions for summary disposition,[3] a directed verdict, and JNOV. Consequently, defendants contend they are now entitled to JNOV.

A. STANDARDS OF REVIEW

We review a trial court's decision on a motion for a directed verdict de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 502; 741 NW2d 539 (2007). We must examine all the evidence, and all legitimate inferences arising therefrom, in the light most favorable to the

[3] We consider defendants' contention that the trial court erred by denying summary disposition to be abandoned on appeal. Defendants mention the trial court's denial of summary disposition only in passing. Such cursory treatment does not create a sufficient basis for review. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 251-252; 673 NW2d 805 (2003). Accordingly, we review defendants' arguments as an appeal from the trial court's denial of their motions for a directed verdict and JNOV.

nonmoving party. *Id.* at 502-503. "A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ. If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008) (citation and quotation marks omitted).

We also review de novo a trial court's determination on a motion for JNOV. *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 733; 761 NW2d 454 (2008). "The trial court should grant a JNOV motion only when the evidence and all legitimate inferences viewed in a light most favorable to the nonmoving party fails to establish a claim as a matter of law." *Id.*

B. EXCULPATORY EVIDENCE

Defendants first argue that they are entitled to judgment because plaintiff's sole expert witness, David Walker, absolved defendants from liability on the basis of his answers to numerous hypothetical questions asked during cross-examination. We disagree. In order to be considered competent evidence, the hypothetical questions, through which testimony is elicited, must be in "substantial accord" with the facts presented at trial. See *Alexander v Covel Mfg Co*, 336 Mich 140, 146; 57 NW2d 324 (1953); *Mapes v Berkowitz*, 304 Mich 278, 279-283; 8 NW2d 65 (1943); *Dudley v Gates*, 124 Mich 440, 445-446; 83 NW 97 (1900).

The line of questioning that defendants rely upon requested Walker to consider whether defendants had done anything wrong assuming that Benefits produced the fraudulent documents instead of defen-

dants and that CIC was an authorized insurance company. Specifically, defendants' counsel asked the following questions:

> *Q*. Okay. Assuming that [the documentation] didn't come from Larry or Joe; they really did come from Greg Cooper; just assuming. . . . [D]o you see anything that would indicate to you that either Joe or Larry made a false statement to Unibar at any time prior to March 2003?
>
> * * *
>
> *A*. No.
>
> *Q*. Okay. Do you see anything to indicate they breached the standard of care [also assuming that defendants didn't make any statements]?
>
> *A*. No.
>
> * * *
>
> *Q*. Okay. Assuming that CIC was authorized to do business in Michigan, did in fact pay claims of Unibar's injured employees . . . through March of 2002, with that information, would that alter your opinion in any way that they were negligent?
>
> *A*. With that hypothetical, yes they would not have done something untoward, as it were, or unethical.

After our review of the record, it is plain that the hypothetical questions, which defendants contend the answers to which absolved them from liability, were not in "substantial accord" with the evidence presented at trial. Plaintiff learned of UltraMed through Cooper. Defendants' agent, Kim, had recommended UltraMed for plaintiff to Cooper. Plaintiff was provided documentation regarding the plan. Subsequently, plaintiff enrolled its employees with SPA, after receiving a letter from FHS, which was produced by defendants, indicating that UltraMed had

stopped operating. The letter indicated that plaintiff could roll over its employees to a new plan that defendants had found and not suffer any loss if it did so within eight days. Thereafter, defendants' agent presented plaintiff with promotional materials regarding SPA, which defendants had selected for the rollover, and plaintiff enrolled in the plan. When SPA stopped paying the claims, defendant Saigh went to plaintiff's office, urging plaintiff to pay the premiums. When plaintiff refused to do so, plaintiff signed up with another insurance company that Saigh had recommended, which also ultimately failed to pay claims.

Thus, absolutely nothing in the record indicates that Benefits and Cooper were responsible for creating the documentation at issue in this matter. Moreover, it was unequivocally established that CIC was not a licensed insurance company in Michigan. Because the hypothetical questions were not in substantial accord with the facts presented at trial, they fail to create a legitimate basis upon which the trial court should have granted defendants' motions for a directed verdict and JNOV.

Defendants next contend that because plaintiff settled its claims against Kim and FHS, plaintiff also released defendants from liability because the release of an agent releases the principal from liability. "Release" is an affirmative defense that a defendant must plead in the first responsive pleading. MCR 2.111(F)(1); MCR 2.111(F)(3). Failure to do so results in a waiver of the defense. MCR 2.111(F)(2). Because defendants failed to raise this affirmative defense in their first response and never moved to amend their response once the claims against Kim and FHS were settled, we consider this argument waived and we voice no opinion on this argument's merits.

C. INSUFFICIENT PROOF

1. INNOCENT AND NEGLIGENT MISREPRESENTATION

Defendants also contend that plaintiff failed to present a claim of innocent misrepresentation because there was no privity of contract between the parties and because plaintiff did not show that the injuries plaintiff suffered inured to the benefit of defendants. With respect to negligent misrepresentation, defendants argue that plaintiff failed to establish "justifiable reliance" or that defendants owed plaintiff a duty. We disagree.

"A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (citation and quotation marks omitted). It is not necessary that a plaintiff show a "fraudulent purpose" or intent on the defendant's behalf, or even that the defendant knew that the representation was false. *Id*. at 27-28. The plaintiff, however, must show that privity of contract existed between the plaintiff and the defendant. *Id*. at 28. "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006) (citations and quotation marks omitted).

In the present matter, plaintiff's proofs at trial sufficiently established a claim of negligent misrepresentation. Defendants, through Kim and FHS, held themselves out as "specialists" in health care insurance coverage. Plaintiff, which is not engaged in the business

of health insurance coverage, was introduced to FHS for the purpose of obtaining counseling and advice with respect to health insurance coverage. Defendants' relationship with plaintiff created a duty to proceed under the proper standard of care. See *Brown v Brown*, 478 Mich 545, 552-553; 739 NW2d 313 (2007). As plaintiff's expert, Mr. Walker, testified at trial, insurance agents have a duty to treat their clients under the proper standard of care, which includes, but is not limited to, determining whether a company is a health insurer licensed to do business in the state, checking on consumer complaints, knowing whether the company exists, and determining whether the company has a history of paying its claims. Given this testimony and the undisputed fact that defendants acted as plaintiff's insurance agents, defendants' argument that plaintiff failed to show that defendants' owed plaintiff a duty lacks merit. Further, under such circumstances, it was reasonable that plaintiff relied upon the information that FHS, as a "specialist," provided regarding health insurance plans. *Fejedelem*, *supra* at 503. Thus, it cannot be said that plaintiff failed to establish "justifiable reliance." Further, it is plain that defendants did not exercise any reasonable care because defendants, through Kim, recommended to plaintiff what they represented to be first-dollar-coverage, full-coverage health insurance companies that were, in fact, self-funded benefit plans or nonexistent reinsurance coverage.

Because plaintiff pleaded these claims in the alternative and plaintiff produced more than sufficient proof of negligent misrepresentation, it is not necessary for us to consider defendants' arguments with respect to innocent misrepresentation. The trial court properly denied defendants' motions for a directed verdict and JNOV with respect to negligent and innocent misrepresentation.

2. FRAUD

Defendants next assert that plaintiff's actual fraud claim was not supported by sufficient evidence because plaintiff failed to establish by clear and convincing evidence that defendants made any false and material representations and that defendants acted in bad faith. Specifically, defendants point to evidence that they never spoke to anyone at Unibar and that there was no testimony that anyone other than CIC and Unibar participated in the last CIC/SPA contract or that defendants knew SPA would fail. We disagree.

To sufficiently allege a claim for fraud, a plaintiff must show that: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *M&D, Inc*, *supra* at 27 (citation and quotation marks omitted).

Here, defendants' agent, Kim, made multiple affirmative representations to plaintiff concerning the nature of the supposed health insurance companies that she presented to plaintiff. These representations were false, as Kim represented these companies as first-dollar, full-coverage health insurance companies, when in fact they were not. Moreover, defendants knew that these representations were false at the time that they were made to plaintiff. Both defendants knew that SPA's "reinsurance carrier [was not] on board," that SPA was using the premiums it received to pay claims, and that UltraMed was not paying its claims before they were recommended to plaintiff. Even if defendants

had not known that the representations were false, their actions would still be considered reckless—defendants' representations of these fraudulent companies were made without determining whether these companies were licensed health insurance companies and, in some instances, without conducting a due diligence. Further, it is plain that defendants made these false and material representations with the intention that plaintiff act upon them—defendants knew the type of coverage plaintiff sought for its employees and it presented numerous plans in accordance with plaintiff's needs. It is not surprising that plaintiff relied on defendants' representations because defendants held themselves out as "specialists" in health care coverage. Lastly, the damages plaintiff suffered are evident: plaintiff paid for its employees' claims out of pocket. Given this evidence, we cannot agree with defendants' additional argument that the evidence in support of plaintiff's claims is nominal and that the verdict was against the great weight of the evidence.

Further, defendants' argument that it was entitled to a directed verdict and, subsequently, JNOV because they never individually spoke to plaintiff lacks merit. Defendants' agent, Kim, presented the plans to plaintiff in the course of her employment with defendants. Kim testified at trial that it was defendants who "brought" the health care plans into the office for their employees to sell. A principal will be held liable for the acts of its agents committed in the course of employment. *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 650-651; 649 NW2d 23 (2002). We also find unavailing defendants' characterization of the evidence as showing that only CIC and plaintiff participated in the CIC/SPA contract and as failing to show that defendants knew SPA would fail. Plaintiff signed a reinsurance contract with CIC

when Kim advised and directed plaintiff to sign the new contract. Whether defendants knew that SPA would fail is irrelevant—it is enough that defendants materially represented SPA as a first-dollar, full-coverage insurance carrier.

Finally, defendants argue that plaintiff failed to establish a claim for silent fraud. The jury did not return a verdict against defendants for silent fraud and no judgment was entered against defendants on a claim of silent fraud. Defendants cannot appeal a judgment that was never entered, because they are not considered an "aggrieved party" with respect to silent fraud. MCR 7.203(A). After our review of the record, it is plain that the trial court did not err by denying defendants' motions for a directed verdict and JNOV with respect to plaintiff's fraud claim.

3. PROXIMATE CAUSE

Defendants also contend that plaintiff failed to establish proximate cause between defendants' alleged negligence, misrepresentation, and fraud and plaintiff's damages. In defendants' view, plaintiff's failure to deal directly with CIC caused Unibar's damages. In light of the evidence discussed above, we cannot agree. Further, defendants' argument essentially posits that plaintiff should have mitigated its damages by contacting CIC directly and that its failure to do so was the "sole" cause of its damages. Defendants' position lacks logic. "[A] proximate cause is a foreseeable, natural, and probable cause of the plaintiff's injury and damages." *Kaiser v Allen*, 480 Mich 31, 37-38; 746 NW2d 92 (2008) (citation and quotation marks omitted; alteration in original). A failure to mitigate may contribute to the harm a person suffers, but it is not the ultimate cause of the

harm. Here, it was readily foreseeable that defendants' sale of nonexistent insurance services to plaintiff would cause plaintiff harm. For all the above reasons, after viewing all the evidence and legitimate inference in the light most favorable to plaintiff, we conclude that the trial court did not err by denying defendants' motions for a directed verdict and JNOV.

III. MOTION FOR A NEW TRIAL

Defendants argue that the trial court erred by denying their motion for a new trial. Defendants raise five specific grounds upon which the motion should have been granted.

A. STANDARD OF REVIEW

"A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes." *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006) (citations omitted).

B. EVIDENCE

Defendants first contend that the cease and desist orders from Florida and Texas were irrelevant hearsay, based on mere allegations, and were unfairly prejudicial rather than probative. Defendants have waived this argument on appeal. Defendants stipulated the admission of all the exhibits presented at trial, including both the Florida and Texas cease and desist orders, and cannot now argue error on appeal. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 527-528; 695 NW2d 508 (2004).

C. JUROR MISCONDUCT

Defendants next argue that they were prejudiced because the jury foreperson allegedly brought into deliberations documents not admitted into evidence that had an extraneous influence on the jury. Specifically, the foreperson provided two chart summaries showing all the participants in the case, including a description of their testimony, as well as a time line of events. According to defendants, this conduct materially affected their substantial rights because the jury cannot "defer to one person who prepared a summary of the testimony . . . ." Defendants contend, without any supporting evidence, that the foreperson prepared these documents at home. We do not agree that the complained of conduct warrants a new trial.

Juror misconduct may require a new trial under certain circumstances, but does not require a new trial in every instance. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). Jurors are to consider only the evidence presented to them in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). In order to establish that extraneous facts not introduced into evidence influenced the jury and requires a new trial, a defendant must show (1) that the jury was an exposed to an extraneous influence and (2) that the influence "created a real and substantial possibility [it] they could have affected the jury's verdict." *Id.* at 89. With respect to the second element, a defendant must "demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.*

Defendants have failed to make the requisite showing. First, the jurors in the case were specifically instructed that they could take notes during the

proceedings. Defendants produced no supporting evidence that these documents were prepared at home or that they contained extraneous information not presented in open court. Thus, because these summaries were based on material presented at trial and the trial court permitted the jury to take notes, defendants have failed to show that the jury was exposed to an extraneous influence. *Id.* at 91. While it is not necessary for us to consider the second prong of the test, given our conclusion, we note that defendants have also failed to demonstrate prejudice. We fail to see how these chart summaries, based on evidence presented at trial, are related to a material aspect of the case in such a manner that they have a "direct connection between the extrinsic material and the adverse verdict." *Id*. at 89.

D. INVALID VERDICT

Defendants also claim that a new trial is proper on the basis that the theories of liability submitted to the jury were invalid because the evidence did not support them. Further, in defendants' view, the size of the verdict indicates that the jury decided the case on an improper basis. We disagree. Defendants' argument is conditioned upon a finding that the theories of liability should not have been submitted to the jury. Because we have already concluded that the trial court did not err by denying defendants' motion for a directed verdict and submitting the theories of liability to the jury, defendants' argument that the resultant verdict was premised upon erroneous theories must also fail. We also reject defendants' contention that given the verdict's size the jury must have decided this matter on an improper basis. Defendants cite no authority in support of this proposition and, thus, we consider this argument

abandoned. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008).

E. INSUFFICIENT PROOFS AND EXCULPATORY TESTIMONY

Defendants assert that they are entitled to a new trial on the same grounds that they are entitled to a directed verdict and JNOV. Because we have already concluded that the trial court did not err by denying defendants' motions for a directed verdict and JNOV, it follows that these arguments do not warrant a new trial as an alternate form of relief.

For all the foregoing reasons, we conclude that the trial court did not abuse its discretion when it denied defendants' motion for a new trial.

IV. DAMAGES

Defendants argue that the trial court erred by denying their motion for remittitur. In defendants' view, the award of exemplary damages was improper and the award of actual damages was not supported by sufficient proof.

A. STANDARD OF REVIEW

"An appellate court should reverse the trial court's decision regarding a motion for . . . remittitur only if an abuse of discretion is shown." *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). "The proper consideration in granting . . . remittitur is not whether the verdict 'shocks the conscience' but whether the jury award is supported by the evidence." *Wilson* v *Gen Motors Corp*, 183 Mich App 21, 38; 454 NW2d 405 (1990). "[We] must defer to a trial court's decision because of the trial court's superior ability to view the evidence and evaluate

the credibility of the witnesses." *Bordeaux v Celotex Corp*, 203 Mich App 158, 171; 511 NW2d 899 (1993).

B. EXEMPLARY DAMAGES

Defendants argue that plaintiff is not entitled to exemplary damages. We disagree. The purpose of exemplary damages is to make the injured party whole. *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 187; 364 NW2d 609 (1984). Exemplary damages are recoverable only for intangible injuries or injuries to feelings, which are not quantifiable in monetary terms. *Ray v Detroit*, 67 Mich App 702, 704-705; 242 NW2d 494 (1976); *Ass'n Research & Dev Corp v CNA Financial Corp*, 123 Mich App 162, 171-172; 333 NW2d 206 (1983). "[W]here the grievance created is purely pecuniary in its nature, and is susceptible of a full and definite money compensation," exemplary damages are not permitted because the party may be made whole through monetary compensation. *Durfee v Newkirk*, 83 Mich 522, 526; 47 NW 351 (1890); *Hayes-Albion Corp*, *supra* at 187. "An award of exemplary damages is considered proper if it compensates a plaintiff for the 'humiliation, sense of outrage, and indignity' resulting from injuries 'maliciously, wilfully and wantonly' inflicted by the defendant." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980) (citation omitted). This Court has permitted an award of exemplary damages to a corporation where the corporation suffered a loss of reputation as a skillful and competent company. *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 642-643; 329 NW2d 760 (1982); see also *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 341-342; 425 NW2d 791 (1988) (acknowledging that a corporation's status as a corporation, by itself, does not preclude an award of exemplary damages to the corporation); *Hayes-Albion*

Corp, *supra* at 187-188 (denying award of exemplary damages to a corporation that sought damages for the lost time of an employee).

Given these legal rules, defendants' assertion that plaintiff is not entitled to exemplary damages because plaintiff is a corporation is unavailing and is clearly wrong. However, defendants' contention that the types of injuries that plaintiff suffered were quantifiable in monetary terms, and therefore plaintiff is not entitled to exemplary damages, presents a more difficult inquiry. While it is plain that exemplary damages may be awarded to a corporation, the question becomes: What type of injury to a corporation may be compensated? Because a corporation does not have "feelings," the general definition of exemplary damages does not lend itself to delineating the types of injuries for which a corporation may be compensated with exemplary damages. However, the purpose of compensatory damages, which is to make the plaintiff whole, *Hayes-Albion Corp*, *supra* at 187, indicates that exemplary damages may be construed as appropriate for injuries to a corporation that cannot be measured or estimated in monetary terms. Clearly, a loss of reputation as a skillful company is unquantifiable and recoverable as exemplary damages, *Joba Constr Co*, *supra* at 642-643, as may be a loss of good will, or any damage to other types of company reputation amongst either employees or customers. While this does not provide courts with a clear-cut list of unquantifiable recoverable injuries, it can be said with certainty that future profits, as well as lost time of its employees, do not fit within this category. See *Hayes-Albion Corp*, *supra* 187-188. Further, in terms of producing sufficient evidence in support of exemplary damages, we note that "[i]t is not essential to present direct evidence of an injury to

the plaintiff's feelings. Rather, the question is whether the injury to feelings and mental suffering are natural and proximate in view of the nature of the defendant's conduct." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 490; 593 NW2d 180 (1999).

In the present matter, the injury to plaintiff flows from the nature of defendants' actions. The evidence produced at trial shows that over a period of years, defendants willfully induced plaintiff to purchase, on multiple occasions, what was essentially a self-funded benefit plan represented as a first-dollar, full-coverage health insurance plan when defendants knew plaintiff sought full coverage insurance. Consequently, plaintiff's employees' claims were denied, they were unable to see their health care providers or obtain prescriptions, and in some instances were sued by their health care providers. In addition, plaintiff fielded "hundreds" of complaints from its employees and "a lot" of its employees quit their jobs because of the lack of health benefits. Thus, although plaintiff has not produced any direct evidence showing that its internal reputation has been damaged, it is plain, given the number of complaints and employees who left their employment with plaintiff, that plaintiff's reputation amongst its employees suffered as the proximate result of defendants' actions. See *id.* at 490. Such injuries are not compensable in quantitative terms and the award of exemplary damages was proper. See *Joba Constr Co*, *supra* at 642-643. Thus, defendants' argument that plaintiff's injuries could be quantified and that the award of exemplary damages was duplicative of the award of monetary damages lacks merit.

Given our conclusion, we must note that plaintiff never explicitly alleged that its internal reputation was

injured.[4] However, that is the exact inference to be drawn from all the evidence presented. In any case, to the extent that we have addressed issues not raised by the parties, we may do so if, in our view, the matter requires consideration and it is just to resolve the matter on that basis. *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705-706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994); MCR 7.216(A)(7); see also *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004). This is such a case. We fail to see how defendants would be prejudiced in any way given that defendants stipulated the jury instructions on exemplary damages and did not object when the jury was presented with those instructions.

We also reject defendants' argument that plaintiff failed to provide sufficient evidence of bad faith or ill will on defendants' part because plaintiff failed to show defendants made a "voluntary act." This argument is unavailing. Defendants provided plaintiff with promotional materials and documentation on various insurance plans through Kim, their agent. It is not necessary, where an agency relationship exists, to show a "voluntary act" of the principal because the principal will be held liable for the torts of its agent committed in the course of employment. *Rogers*, *supra* at 650-651.

We lastly reject defendants' argument that they did not have reasonable notice that plaintiff sought exemplary damages because plaintiff failed to plead them. Defendants stipulated the jury instructions, which included an instruction for exemplary damages. Because defendants stipulated these instructions, they cannot

[4] While somewhat poorly argued during closing argument, plaintiff's counsel nonetheless properly presented plaintiff's request for exemplary damages by referring to the internal "turmoil" that defendants' conduct had caused.

now argue that plaintiff's failure to plead exemplary damages resulted in a lack of reasonable notice. We consider this argument waived. *Glen Lake-Crystal River Watershed Riparians*, *supra* at 527-528. The trial court did not abuse its discretion by denying defendants' motion for remittitur with respect to exemplary damages.

C. PECUNIARY DAMAGES

Defendants argue that plaintiff failed to produce supporting documentation for its claim for pecuniary damages. We disagree. "A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision." *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004) (citations and quotation marks omitted). It is sufficient if a plaintiff presents a reasonable basis for computation. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). Further, the certainty necessary to establishing the amount of damages is less once the fact of damages is established. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

In the present matter, defendants stipulated all the exhibits at trial, including an exhibit quantifying plaintiff's damages. Plaintiff's damages were reiterated through the testimony of plaintiff's vice president and defendants never objected to any of this testimony. Thus, defendants have waived any argument regarding whether the fact of damages has been established. *Glen Lake-Crystal River Watershed Riparians*, *supra* at 527-528.

Turning to defendants' argument that the evidence presented was not competent and sufficient, it is our view that the evidence presented adequately supported the jury's award of pecuniary damages. The arguments defendants posit on appeal are in regard to the credibility and believability of this evidence. Such matters are best left to the jury. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

Further, because we have not found it appropriate to reduce the amount of pecuniary damages, we reject defendants' argument that the amount of exemplary damages and the associated legal, administrative, and accounting expenses should be reduced to be commensurate with the pecuniary damages. The trial court did not abuse its discretion by denying defendants' motion for remittitur.

Affirmed.

JOHNSON v WAUSAU INSURANCE COMPANY

Docket No. 281624. Submitted March 11, 2009, at Detroit. Decided March 24, 2009. Approved for publication May 12, 2009, at 9:00 a.m.

Tammy Johnson, as guardian of Nancy Eastman, a legally incapacitated person, brought an action in the Genesee Circuit Court against Wausau Insurance Company, Nationwide Indemnity, Inc., and others. The plaintiff, the caregiver for Eastman (who sustained severe brain injuries in an automobile accident), alleged breach of a no-fault insurance contract and fraud concerning the failure of Wausau and Nationwide (which took over Wausau) to inform the plaintiff and Dorothy Bencheck (Eastman's prior caregiver) that they were entitled to more than the $20 or $21 a day they received from Wausau and Nationwide for their care of Eastman when Bencheck and the plaintiff asked about additional compensation. The court, Joseph J. Farah, J., granted partial summary disposition for Wausau and Nationwide, ruling that the action arose from the no-fault act and that any recovery of no-fault personal protection insurance benefits that accrued before July 20, 2005, was barred by the one-year-back rule of MCL 500.3145(1), which could not be avoided because the plaintiff failed to establish a fraud claim. The plaintiff appealed by leave granted.

The Court of Appeals *held*:

1. Under MCL 500.3145(1), a claimant's recovery for personal protection insurance benefits is limited to losses incurred during the year that precedes the commencement of an action. In unusual circumstances such as fraud, a court may invoke its equitable power to avoid application of the one-year-back rule.

2. The general rule is that to constitute actionable fraud, it must appear (1) that the defendant made a material representation, (2) that it was false, (3) that when the defendant made it the defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion, (4) that the defendant made it with the intention that it should be acted upon by the plaintiff, (5) that the plaintiff acted in reliance upon it, and (6) that the plaintiff thereby suffered injury.

3. Because some insureds may attempt to circumvent the one-year-back rule by asserting a common-law fraud claim against an insurer, trial courts must exercise special care in assessing these types of fraud claims. Courts must carefully consider whether an insured can satisfy the reliance factor. Fraud cannot be perpetrated upon one who has full knowledge to the contrary of a representation. There can be no fraud when a person has the means to determine that a representation is not true. In this case, the plaintiff cannot establish that she or Bencheck relied on the alleged fraudulent misrepresentation by the claims adjuster. The representation did not involve information or facts that were exclusively or primarily in the control of the insurers, and the plaintiff and Bencheck had the ability to determine whether the representation was true by consulting a lawyer.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ACTIONS — ONE-YEAR-BACK RULE — FRAUD.

A common-law action for fraud concerning an insurer's alleged misrepresentation about no-fault personal protection insurance benefits is not subject to the one-year-back rule of the no-fault act; in determining actionable fraud, a court must carefully consider whether the insured can satisfy the detrimental reliance element of fraud (MCL 500.3145[1]).

Bagley & Langan P.L.L.C. (by *Ronald C. Puzio, Jr.*) for Tammy Johnson.

The Law Office of Gail L. Storck (by *Gail L. Storck*) for Wausau Insurance Company and Nationwide Indemnity, Inc.

Before: SAAD, C.J., and BANDSTRA and HOEKSTRA, JJ.

PER CURIAM. In this action for breach of a no-fault insurance contract and fraud, in which plaintiff, Tammy Johnson, sought payment of personal protection insurance benefits, plaintiff appeals by leave granted the trial court's order granting partial summary disposition to defendants Wausau Insurance Company and Nationwide Indemnity, Inc. Because the one-

year-back rule of MCL 500.3145(1) bars plaintiff's no-fault claim for benefits that accrued before July 20, 2005, and because plaintiff cannot establish the reliance element of her fraud claim, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On October 5, 1983, Nancy Eastman, then 10 months old, suffered severe brain injuries in an automobile accident. Eastman's parents were unable to care for her after her release from a hospital. Dorothy Bencheck agreed to care for Eastman and subsequently became Eastman's legal guardian.

Defendant Wausau Insurance Company[1] insured Eastman's father through a no-fault insurance policy. According to letters from defendant, as a settlement for any claims Eastman may have had against her father,[2] it paid $37,500 to Eastman. The settlement money was placed in a fund under the protection of the probate court. Defendant also agreed to pay Bencheck $20 a day for her care of Eastman.

According to Bencheck, she called defendant "constantly" on "[d]ifferent occasions, different times" about whether she was entitled to additional benefits for caring for Eastman. She was told, usually by Albert Abdey, a claims adjuster, that defendant had paid everything that it was going to pay to Eastman and that she should petition the probate court to get money from the settlement proceeds. Bencheck testified that defendant never informed her that she was entitled to attendant

[1] It appears from the record that, at some time after the accident, defendant Nationwide Indemnity took over Wausau Insurance Company. We will collectively refer to Wausau Insurance Company and Nationwide Indemnity as defendant.

[2] Eastman suffered her injuries in the automobile accident because she had not been placed in a child safety seat.

care benefits that were paid on an hourly basis. In 1989, Bencheck suffered financial difficulty, and after the probate court denied a request for money from Eastman's settlement proceeds, she was no longer able to care for Eastman.

In April 1990, plaintiff took over the care of Eastman. She received $20 a day from defendant for caring for Eastman. The payment, at some time, increased to $21 a day. When plaintiff inquired about the increase, Abdey replied that it was a cost of living adjustment. There was no testimony from plaintiff that she ever asked Abdey if she was entitled to receive additional benefits for caring for Eastman.

Abdey admitted that he never advised either Bencheck or plaintiff that they were entitled to attendant care benefits based on an hourly rate. He did not believe they were entitled to such benefits because such benefits "make[] it [i.e., caring for the disabled person] a job." Further, he did not recall Bencheck ever asking him if she was entitled to additional benefits. And, even if she had, Abdey would not have advised her of any benefits because defendant was paying the benefits it had agreed to pay in the settlement.

In the summer of 2006, plaintiff sued defendant for breach of contract. The complaint was later amended to include a claim for fraud or fraudulent misrepresentation. Plaintiff alleged that defendant, despite having knowledge that Eastman required supervision 24 hours a day, never told or advised her that she was entitled to attendant care benefits. Plaintiff also alleged that, when she inquired about whether she was entitled to additional benefits, defendant told her that no additional benefits were available to her. Plaintiff alleged that defendant made material representations that were false, made the representations knowing that they

were false or made them recklessly without knowledge of the truth, made the representations with the intent that plaintiff would rely on them, and that plaintiff did rely on the representations.

Defendant moved for partial summary disposition under MCR 2.116(C)(8) and (10). Defendant argued that, because plaintiff's cause of action arose out of the no-fault act, MCL 500.3101 *et seq.*, the one-year-back rule of MCL 500.3145(1) barred plaintiff's claim for benefits that accrued before July 20, 2005. Defendant further argued that plaintiff had not shown that it had committed any fraud or misrepresentation. In response, plaintiff argued that defendant had made material misrepresentations concerning the benefits available for Eastman's care because defendant, despite knowing that Eastman required constant supervision, represented to plaintiff and Bencheck that they were not entitled to any benefits beyond the $20 (and later $21) daily payments. The trial court granted the motion for partial summary disposition. Because it concluded that there was no factual issue concerning whether the elements of fraud had been established, the trial court refused to exercise its equitable power to avoid application of the one-year-back rule. It barred plaintiff from recovering any personal protection insurance benefits that were available for the care of Eastman under the no-fault act before July 20, 2005.

Plaintiff moved this Court for leave to appeal the trial court's order. We granted plaintiff's application. *Johnson v Wausau Ins Co*, unpublished order of the Court of Appeals, entered June 6, 2008 (Docket No. 281624).

II. ANALYSIS

On appeal, plaintiff maintains that the trial court erred by granting defendant's motion for partial sum-

mary disposition because when the submitted documentary evidence is considered in a light most favorable to her, questions of material fact exist regarding whether defendant committed fraud in connection with its failure to provide attendant care benefits to plaintiff and Bencheck for their care of Eastman. In particular, plaintiff argues that Abdey intentionally misrepresented that attendant care benefits based on an hourly rate were not available for the care of Eastman and that plaintiff and Bencheck relied on his representations to their financial detriment, evidenced by the fact that they just accepted the $20 (and later $21) daily payments.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court did not specify under which subrule it was granting the motion. Because the parties relied on matters beyond the pleadings, we will treat the motion as being granted under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Mulcahey v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007). The Court must consider all the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Id*. at 698-699. Summary disposition is properly granted if the evidence presented establishes that no genuine question of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*. at 699.

B. APPLICABLE LAW

"Under MCL 500.3107, family members are entitled to reasonable compensation for the services they provide at home to an injured person in need of care." *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 164; 761 NW2d 784 (2008).[3] For purposes of this appeal, there appears to be no dispute that plaintiff and Bencheck were entitled to compensation beyond the $20 (and later $21) daily payments for their care of Eastman.

MCL 500.3145(1), the one-year-back rule of the no-fault act, provides in pertinent part:

> 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 survivors 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.]

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574, 586; 702 NW2d 539 (2005), the Supreme Court held that the last sentence of MCL 500.3145(1) must be applied as written: a claimant's recovery for personal protection insurance benefits is limited to losses in-

[3] MCL 500.3107(1)(a) provides that personal protection insurance benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

curred during the one year that precedes commencement of the action. The Court overruled *Lewis v Detroit Automobile Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986), in which the Court had extended the doctrine of judicial tolling to the one-year-back rule, such that the one-year-back limitation was tolled from the time the insured made a specific claim for benefits until the date the claim was formally denied. *Devillers, supra* at 577, 586. Nonetheless, the Court held that in "unusual circumstances," i.e., fraud or mutual mistake, a court may invoke its equitable power to avoid application of the one-year-back rule. *Id.* at 590-591.

The six elements of actionable fraud were set forth in *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976):

> "[T]o constitute actionable fraud, it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." [Quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).]

Fraud will not be presumed; it must be proven by "clear, satisfactory and convincing evidence." *Hi-Way Motor Co, supra* at 336.

Shortly after this Court granted plaintiff's application for leave to appeal, the Supreme Court, in *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008), specifically addressed whether an action for fraud is subject to the one-year-back rule of MCL 500.3145(1). The Court stated:

> Because the one-year-back rule only applies to actions brought under the no-fault act, and because a fraud action is not a no-fault action, i.e., an "action for recovery of personal protection insurance benefits payable under [the no-fault act] for accidental bodily injury," MCL 500.3145(1), but instead is an independent and distinct action for recovery of damages payable under the common law for losses incurred as a result of the insurer's fraudulent conduct, *we hold that a common-law cause of action for fraud is not subject to the one-year-back rule*. [*Id.* at 401 (emphasis added).]

The Court clarified that, because a fraud claim is separate from a no-fault claim, a court does not need to invoke its equitable power in the fraud action to avoid application of the one-year-back rule. *Id.* at 413. "[T]he no-fault rules simply do not apply" to the fraud claim. *Id.*

However, the Supreme Court cautioned that, because some insureds may attempt to circumvent the one-year-back rule by asserting a common-law fraud claim against an insurer, "trial courts should exercise special care in assessing these types of fraud claims." *Id*. at 413-414. Regarding the reliance element of fraud, the Court stated:

> In particular, courts should carefully consider in this context whether insureds can satisfy the reliance factor. Insureds must "show that any reliance on [the insurer's] representations was reasonable." *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). Because fraud cannot be "perpetrated upon one who has full knowledge to the contrary of a representation," *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951), insureds' claims that they have reasonably relied on misrepresentations that clearly contradict the terms of their insurance policies must fail. One is presumed to have read the terms of his or her insurance policy, see *Van Buren v St Joseph Co Village Fire Ins Co*, 28 Mich 398, 408 (1874); therefore, when the insurer has made a statement that clearly conflicts with the terms of the insurance policy, an insured cannot argue that he or she reasonably relied on that statement without

> questioning it in light of the provisions of the policy. See also *McIntyre v Lyon*, 325 Mich 167, 174[;] 37 NW2d 903 (1949); *Phillips v Smeekens*, 50 Mich App 693, 697; 213 NW2d 862 (1973). In addition, insureds will ordinarily be unable to establish the reliance element with regard to misrepresentations made during the claims handling and negotiation process, because during these processes the parties are in an obvious adversarial position and generally deal with each other at arm's length. See *Mayhew v Phoenix Ins Co*, 23 Mich 105 (1871) (Where the insured has the same knowledge or means of knowledge as the insurer, the insurer cannot be regarded as occupying any fiduciary relationship that would entitle the insured to rely on the insurer's representations, and a settlement hastily made with the insurer under such circumstances will not be set aside for fraud. Insureds are bound to inform themselves of their rights before acting, and, if they fail to do so, they themselves are responsible for the loss.); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994) ("There can be no fraud when a person has the means to determine that a representation is not true."). However, when the process involves information and facts that are exclusively or primarily within the insurers' "perceived 'expertise' in insurance matters, or facts obtained by the insurer[s] in the course of [their] investigation, and unknown" to the insureds, the insureds can more reasonably argue that they relied on the insurers' misrepresentations. 14 Couch, Insurance, 3d, § 208:19, p 208-26; see also *Crook v Ford*, 249 Mich 500, 504-505; 229 NW 587 (1930); *French v Ryan*, 104 Mich 625, 630; 62 NW 1016 (1895); *Tabor* v *Michigan Mut Life Ins Co*, 44 Mich 324, 331; 6 NW 830 (1880). [*Id.* at 414-416.]

C. APPLICATION OF *COOPER*[4]

Even assuming that Abdey made a fraudulent misrepresentation when, in response to Bencheck's

[4] We note that while plaintiff, in her appellate brief, cited *Cooper* for the proposition that the one-year-back rule does not apply to a fraud claim, plaintiff failed to address the Supreme Court's cautionary notes regarding the reliance element of fraud.

inquiries about additional benefits, he told her that additional benefits were not available to her or when, in the absence of such an inquiry, he failed to inform Bencheck and plaintiff that additional benefits were available to them, plaintiff cannot establish that either she or Bencheck relied on the fraudulent misrepresentation. Abdey's representation did not involve information or facts that were exclusively or primarily in the control of defendant. Rather, Abdey's misrepresentation concerned what benefits were available to plaintiff and Bencheck for their care of Eastman under the no-fault act. Plaintiff and Bencheck had the means, i.e., consultation with a lawyer, to determine whether Abdey's representation was true. Indeed, soon after plaintiff learned that additional benefits might be available for her care of Eastman, she consulted a lawyer and the present case was initiated shortly thereafter. Plaintiff does not claim, nor is there even the slightest hint of evidence, that defendant in any way prevented her or Bencheck from determining the truthfulness of Abdey's representation. Because plaintiff and Bencheck had the means to determine the accuracy of Abdey's representation, plaintiff is not able to establish that either she or Bencheck relied on Abdey's representation. Accordingly, plaintiff's claim for fraud fails.

Because plaintiff cannot establish a claim for fraud and because the one-year-back rule bars plaintiff's no-fault claim for benefits that accrued before July 20, 2005, the trial court did not err by granting defendant's motion for partial summary disposition. We therefore affirm the trial court's order granting the motion.

Affirmed.

KMART MICHIGAN PROPERTY SERVICES, LLC v
DEPARTMENT OF TREASURY

Docket No. 282058. Submitted April 7, 2009, at Lansing. Decided May 12, 2009, at 9:05 a.m.

Kmart Michigan Property Services, LLC (KMPS), a limited liability company whose only member was Kmart Corporation, filed a single business tax return for a fiscal year ending January 28, 1998. The Department of Treasury, after conducting an audit, denied the claimed refund after determining that KMPS should not have filed a separate single business tax return and should have submitted its income, deductions, credits, assets, and liabilities with those of Kmart Corporation. KMPS appealed to the Tax Tribunal, which granted summary disposition for KMPS, concluding that KMPS was entitled to file a separate single business tax return. The department appealed.

The Court of Appeals *held*:

1. Under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., repealed by 2006 PA 325, every person with business activity was required to pay the single business tax. MCL 208.31(1). The SBTA defined "person" as an individual, firm, bank, financial institution, limited partnership, copartnership, joint venture, association, corporation, receiver, estate, trust, or any other group or combination acting as a unit. MCL 208.6. The Tax Tribunal correctly concluded that "any other group or combination acting as a unit" included limited liability companies.

2. Revenue Administrative Bulletin 1999-9 of the department—which provided that a single-member entity that, like KMPS, elected to be a disregarded entity for federal income tax purposes (26 CFR 301.7701-2) had to have the same filing status for single business tax purposes and its income, deductions, credits, assets, and liabilities were deemed to be those of its owner—was an explanatory guideline that was not a rule that had the force of law. MCL 24.207(h). The plain language of MCL 208.6 of the SBTA did not support RAB 1999-9.

Affirmed.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Samuel J. McKim, III*, *Joanne B. Faycurry*, and *Loren M. Opper*), for the petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Bruce C. Johnson*, Assistant Attorney General, for the respondent.

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

PER CURIAM. Respondent, Department of Treasury (the Department), appeals as of right the order of the Michigan Tax Tribunal granting petitioner Kmart Michigan Property Services, LLC (KMPS), summary disposition. We affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

KMPS was a limited liability company (LLC) formed in Michigan and wholly owned by its single member, Kmart Corporation (Kmart). During the period at issue, KMPS had three employees and was responsible for winding up the business affairs of Builders Square, its former subsidiary, whose assets were sold to a third party. KMPS filed a single business tax (SBT) return for a fiscal year ending January 28, 1998. At some point, the Department audited KMPS for that fiscal year in connection with an audit of Kmart and determined that KMPS should not have filed a separate SBT return, but should have submitted its income, deductions, credits, assets, and liabilities with those of Kmart, its parent corporation, for the tax year at issue. The Department determined that it would not accept KMPS's SBT return for the period at issue and would "disregard the entity and treat it as a division of its owner."

On March 2, 2005, an informal conference was held at which a referee heard arguments from both parties. The referee determined that KMPS was not entitled to a refund for the tax year at issue, which would have been the result if the Department had permitted KMPS to file a separate SBT return. KMPS filed an appeal to the tribunal on August 3, 2005, and later filed a motion for summary disposition.

In its summary disposition motion, KMPS argued that it met the definition of a "person" under MCL 208.6(1) of the Single Business Tax Act (SBTA), MCL 208.1 *et seq*.,[1] qualifying it to file a separate SBT return for the period at issue. KMPS further argued that the Department improperly applied retroactively the guidance of its Revenue Administrative Bulletin (RAB) 1999-9, and further that RAB 1999-9 lacked statutory authority and conflicted with the statute, rendering it invalid. The Department argued before the tribunal that KMPS was not a person under the SBTA, but rather a single-member LLC. In addition, the Department argued that because KMPS elected to be a nonentity for federal tax purposes for tax year 1998, it could not choose to be an entity for purposes of its state SBT filing.

The tribunal concluded that although it was logical for the Department to reason that taxpayers should be categorized under the SBTA according to the entity classification they elected for federal tax purposes, "[t]his rationale . . . is not the same as a legal requirement." The tribunal stated that revenue administrative bulletins deserve due deference from the courts, but are not binding legal authority, particularly if they contravene the applicable statute. The tribunal stated further that KMPS's federal tax sta-

[1] Repealed by 2006 PA 325.

tus was not determinative of whether it satisfied the definition of "person" under the SBTA, because the SBTA filing requirements are independent of the federal tax code and existed "long before the federal 'check-the-box' regulations" permitting a taxpayer to choose its entity status. Thus, the tribunal found that KMPS was entitled to file a separate SBT return for the tax year at issue.

II. STANDARD OF REVIEW

We have limited review of Tax Tribunal decisions. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). Where the facts are not disputed and there is no allegation of fraud, our review is limited to whether the tribunal made an error of law or adopted a wrong principle. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201-202; 713 NW2d 734 (2006). However, because the decision involves issues of statutory interpretation and application, our review is de novo. *Id.* at 202.

In statutory interpretation, our primary goal is to determine and give effect to the intent of the Legislature. *Mt Pleasant*, *supra* at 53. We begin by reviewing the language of the statute. *Id.* "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Id.* "[A] provision of the law is ambiguous only if it 'irreconcilably conflicts' with another provision or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation omitted; emphasis in original). Words and phrases are not read "discretely," but rather within the context of the whole act. *Id.* at 167-168.

Additionally, " 'the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.' " *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting and adopting the standard stated in *Boyer-Campbell v Fry*, 271 Mich 282, 296; 260 NW 165 (1935). Because the Department has legal responsibility to collect taxes and is responsible for "[s]pecialized service for tax enforcement, through establishment and maintenance of uniformity in definition, regulation, return and payment," MCL 205.1, we accord respectful consideration to its position. However, "the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Complaint of Rovas*, *supra* at 103.

III. ANALYSIS

The Department argued before the Tax Tribunal that KMPS was not a "person" but a single-member LLC, such that the SBTA required KMPS to file its SBT return as a disregarded entity. As a "disregarded entity," a single-member LLC is not taxed separately, but has its income attributed to its owner and the owner is then responsible for paying all taxes due. Thus, the Department argued, KMPS should have been included in Kmart's SBT return rather than filing its own.

Under the SBTA, "every person with business activity in the state" was required to pay the SBT. MCL 208.31(1). "Person" was defined as "an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, receiver, estate, trust, or any other group or combination acting as a unit." MCL 208.6. As the

tribunal noted in its opinion, "[a] plain reading of the phrase 'or any other group or combination acting as a unit' should be construed to cover the same kind, class, character or nature as those entities specifically enumerated," such that "[t]he concluding phrase . . . encompasses business entities that are not enumerated or lack precise legal identification." Under this interpretation, the tribunal concluded, an LLC, though not identified in the SBTA, fits within the statutory definition of "person" whether it has one or more members. The Department conceded that a "person" with business activity in Michigan is subject to pay the SBT, but argues that KMPS's election for federal tax purposes overrides its legal status in Michigan for state tax purposes.

Federal treasury regulations 26 CFR 301.7701-1 through 301.7701-3 set forth the classification of organizations for federal tax purposes. 26 CFR 301.7701-1(a)(4) states that "[u]nder §§ 301.7701-2 and 301.7701-3, certain organizations that have a single owner can choose to be recognized or disregarded as entities separate from their owners." 26 CFR 301.7701-3(a) provides in relevant part:

> A business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) can elect its classification for federal tax purposes as provided in this section. An eligible entity . . . with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner. Paragraph (b) of this section provides a default classification for an eligible entity that does not make an election.

The default classification under 26 CFR 301.7701-3(b)(ii) provides that "unless the entity elects otherwise," a domestic eligible entity shall be "[d]isregarded as an entity separate from its owner if it has a single owner." The federal regulations make no special provision for domestic

entities that are LLCs or whose members are LLCs. Accordingly, under federal tax law, KMPS could elect to be taxed as an entity separate from Kmart or to be a disregarded entity. The parties agree that for the tax year 1998, KMPS elected to be a disregarded entity for federal tax purposes.

The Department argues that Michigan's SBT utilizes the same "check-the-box" regulations that the federal income tax rules use, relying on Revenue Administrative Bulletin (RAB) 1999-9, which provides, in part:

> Michigan conforms to federal check-the-box regulations [26 CFR 301.7701-1 through 301.7701-3] for SBT purposes. The entity election or default classification for filing the federal income tax return is effective for all components of the SBT return that are related to federal income tax. . . . A taxpayer who elects entity classification at the federal level shall file the Michigan SBT return on the same basis and reflect the same tax consequences.
>
> * * *
>
> In the case of a disregarded entity, the single member files the return and indicates its legal organization. The member filing the return should attach a statement to the return listing the single member entity(s) included in the return. [RAB 1999-9, ¶ I, p 2.]

RAB 1999-9 also notes the following:

> Under [26 CFR] 301.7701-2, if a single member entity is disregarded for federal income tax purposes, its activities are included as a part of the owner's activities in the respective sole proprietorship, branch, or division of the owner. Therefore, income, deductions, credits, assets and liabilities of a single member entity having nexus with Michigan, who elects to be disregarded as an entity for federal income tax purposes, are deemed to be those of the owner. [RAB 1999-9, ¶ IV, p 3.]

Thus, under the guidelines outlined in RAB 1999-9, KMPS was required to use the same entity status it had chosen for federal tax purposes with respect to its SBT filing. If KMPS had followed the guidance of RAB 1999-9, it would not have filed a separate SBT return but would have accounted for its "income, deductions, credits, assets and liabilities" in its owner's SBT filing, i.e., as a disregarded entity. See RAB 1999-9, ¶ IV, p 3.

However, as the tribunal noted in its opinion and the Department conceded at oral argument, the Department's policies as described in RAB 1999-9 do not have the force of a legal requirement. MCL 205.3(f) provides that the Department "may periodically issue bulletins that index and explain current department interpretations of current state tax laws." Significantly, the statute makes a separate provision for *rules* issued by the Department: "After reasonable notice and public hearing, the department may promulgate rules consistent with this act in accordance with the administrative procedures act . . . , MCL 24.201 to 24.328, necessary to the enforcement of the provisions of tax and other revenue measures that are administered by the department." MCL 205.3(b). Under MCL 24.207(h), explanatory guidelines are distinguished from rules that have the force of law: rules do not include "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." The Department indicated to this Court that bulletins are considered "interpretative statements." Accordingly, we agree with the tribunal that KMPS was not legally required to follow RAB 1999-9.

We note that even though RAB 1999-9 is not legally binding, it reflects the Department's interpretation of a statute it is charged with enforcing, entitling it to

respectful consideration. *In re Complaint of Rovas*, *supra* at 103. However, we conclude that the Department's legal rationale is inconsistent with the plain language of the SBTA.

Neither the SBTA nor the federal regulations require an entity to be consistent in its self-classification with respect to its state and federal tax filings for a given year. Indeed, the federal regulations expressly state that entity classification under the Internal Revenue Code "is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law." 26 CFR 301.7701-1(a)(1). In response, the Department argues that the Legislature "adopt[ed] federal categories consistently" in the SBTA, "indicated in the statute by its adoption . . . of terminology from the Internal Revenue Code."

MCL 208.2(2) provides that any "term used in this act and not defined differently shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required." However, nothing in this subsection indicates that entity classification elections in the federal tax code must be carried over to an entity's SBT filing. Rather, it simply provides that terms defined in the federal regulations have the same meaning when used in the SBTA. There is no specific term at issue in this case and, therefore, no definition to find in the federal regulations. Consequently, the SBTA's provisions regarding who must pay the SBT stand alone.

Looking simply at the provisions of the SBTA, KMPS was required to file an SBT return, regardless of its classification as a disregarded entity for federal tax purposes, because KMPS fit within the statutory defi-

nition of a "person" conducting business activity and the SBTA required all persons conducting business activity in the state to file an SBT return. Therefore, the SBTA does not support the requirement of RAB 1999-9 that an organization that is a disregarded entity for federal tax purposes for a given taxable period must also file as a disregarded entity for state tax purposes. Accordingly, we conclude that the tribunal made no error of law. *Wexford Med Group*, *supra*.

Affirmed.

REICHER v SET ENTERPRISES, INC

Docket No. 278907. Submitted August 6, 2008, at Detroit. Decided May 12, 2009, at 9:10 a.m.

Peter L. Reicher brought an action under the sales representatives' commissions act (SRCA), MCL 600.2961, against S.E.T. Enterprises, Inc., in the Wayne Circuit Court, seeking unpaid commissions, penalty damages, and attorney fees. On competing motions for summary disposition, the court, John A. Murphy, J., granted summary disposition for the defendant, ruling that the plaintiff's claims were barred under the terms of a waiver of claims contained in an agreement by which the plaintiff had settled a prior SRCA action against an entity whose liabilities had been assumed by the defendant. The plaintiff appealed.

The Court of Appeals *held*:

1. The waiver of claims in the settlement agreement was not barred by MCL 600.2961(6) of the SRCA. MCL 600.2961(8), which nullifies a provision in a contract between a principal and a sales representative that purports to waive any right under the SRCA, applies to sales representation agreements, not to an agreement by which an action brought under the SRCA is settled.

2. Under the clear terms of the waiver of claims, which must be treated and interpreted as an enforceable contract, the plaintiff waived all claims for commissions, attorney fees, costs, expenses, and additional damages under the SRCA. The settlement agreement also did not include any penalty provision for late payments of amounts due under the settlement agreement.

Affirmed.

STATUTES — SALES REPRESENTATIVES' COMMISSIONS ACT — WAIVER OF RIGHTS — SETTLEMENT AGREEMENTS.

Rights under the sales representatives' commissions act may not be waived in a sales representation agreement; the prohibition does not apply to a waiver contained in an agreement by which an action brought under the act is settled (MCL 600.2961[8]).

Randall J. Gillary, P.C. (by *Randall J. Gillary* and *Kevin P. Albus*), for the plaintiff.

Law Offices of Richard M. Shulman (by *Richard M. Shulman*) for the defendant.

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

WILDER, J. Plaintiff appeals as of right the circuit court's order denying his motion for summary disposition, and granting summary disposition to defendant, in this action seeking penalty damages and attorney fees under the Michigan sales representatives' commissions act (SRCA), MCL 600.2961. We affirm.

In or around 1972, according to plaintiff, plaintiff and Jebco Manufacturing, Inc. (Jebco), entered into an oral sales representation agreement. Under this agreement, plaintiff solicited orders for automotive parts manufactured by Jebco. For the orders, Jebco promised to pay sales commissions to plaintiff for the life of the parts. From 1972 through about August 1999, according to plaintiff, plaintiff procured orders for Jebco parts, and Jebco paid plaintiff sales commissions. Throughout that period, according to plaintiff, Jebco would pay the commissions to plaintiff on the 10th or 12th day of each month for the shipments made during the preceding month.

By letter dated August 27, 1999, Jebco informed plaintiff that the sales representation agreement would be terminated, except for the commission obligations assumed by Noble Metal Forming, Inc. (Noble) (an earlier name of defendant), to which Jebco was selling substantially all its assets and business. The letter stated: "As we have discussed, effective as of the close of business August 31, 1999, Jebco will complete the sale of substantially all of its assets and business to Noble

Metal Forming, Inc., a Michigan corporation based in Detroit, Michigan." The letter further stated that Jebco was terminating its sales representation agreement with plaintiff: "Inasmuch as Jebco will no longer be in the automotive supply business after August 31, 1999, please accept this letter as Jebco's notice that, effective as of the close of business on August 31, 1999, the Sales Representation Agreement shall be terminated, except for the obligations assumed by Noble as described" in the letter.

According to the August 27, 1999, letter, Noble agreed to assume Jebco's obligations under the sales representation agreement for products sold before August 31, 1999, for which payment had not been received by Jebco by the closing date. The letter stated:

> As part of the sale, Noble has agree[d] to the following:
>
> • [To] Assume the obligations of Jebco arising under the Sales Representation Agreement with respect to commissions due for products sold prior to August 31, 1999 for which payment has not been received by the Company from the ultimate customer as of the Closing Date.

Noble also agreed, according to Jebco's letter, to assume certain other obligations of Jebco arising under the sales representation agreement:

> As part of the sale, Noble has agree[d] to the following:
>
> * * *
>
> • [To] Assume the obligations of Jebco arising under the Sales Representation Agreement with respect to commissions relative to (i) products sold after August 31, 1999 on contracts that existed on August 31, 1999 as required by the "life of part" or other commission continuation provisions under the Sales Representation Agreement, and (ii) business generated for the benefit of Noble after August 31, 1999 as a result of the efforts of you prior to August 31,

> 1999 which can be reasonably evidenced by you (e.g., the DaimlerChrysler RS 2001 Program).

Effective August 31, 1999, Jebco sold substantially all its assets and its business to Noble.

According to plaintiff, in February 2000, Noble terminated the sales representation relationship with him and indicated it did not intend to fulfill its obligation to pay life-of-the-part sales commissions to him. As a result, in March 2000, plaintiff commenced an action in the Macomb Circuit Court. In resolving that action, in February 2001, plaintiff and Noble entered into a written settlement agreement. Noble agreed to pay commissions to plaintiff for parts listed in an exhibit to the agreement, which payments would include not only the parts listed, but any modifications or changes to the parts. Noble agreed to pay commissions for parts shipped through June 1, 2000, at the rate of 3 percent, and 3 or 2 percent for parts shipped commencing on June 1, 2000, through May 31, 2005, as listed in the agreement. Plaintiff agreed to dismiss the action.

The settlement agreement also contained a mutual release:

> **3. Mutual Release of All Claims**. For valuable consideration, receipt of which is hereby acknowledged, both NOBLE and REICHER mutually hereby agree to release, acquit, and forever discharge the other including all agents, representatives, employees, insurers, attorneys, and indemnitors *of and from any and all claims which either may have against the other, except those arising out of this Settlement Agreement and Mutual Release, which arose out of and/or during the course of the employment relationship* between PETER L. REICHER and JEBCO MANUFACTURING, INC. and the employment relationship, if any, between PETER L. REICHER and NOBLE METAL FORMING, INC. as well as any affiliated entity. *This includes, without limitation, claims for commissions, attor-*

> *ney fees, costs, expenses, additional damages under the Michigan Sales Commission Act, and any other claims for commissions or compensation of any kind*. [Emphasis added.]

About May 2001, Noble changed its corporate name to S.E.T. Metal Forming, Inc. In July 2001, S.E.T. Metal Forming, Inc., merged into S.E.T. Steel, Inc. In September 2001, S.E.T. Steel, Inc., changed its name to S.E.T. Enterprises, Inc.

According to plaintiff, during these changes in defendant's corporate entity and name, defendant continued to pay sales commissions in accordance with the settlement agreement. According to defendant's response to plaintiff's requests for admissions, sometime in February 2004, defendant began making its commission payments late, and from February 2004 through August 2005, defendant made approximately 11 payments to plaintiff that were more than 45 days late when they were paid. Defendant argues that by August 2005, it had satisfied all payments under the settlement agreement.

As a result of the late payments, plaintiff commenced this action, seeking penalty damages and attorney fees under the SRCA. Plaintiff made a list of the late payments and attached it to requests for admissions, and defendant admitted that the list was accurate.

Later, plaintiff filed a motion for summary disposition under MCR 2.116(C)(10), arguing that defendant admitted that it failed to make commission payments within the time limits prescribed by the SRCA and that defendant failed to produce any evidence that its failure to make timely payments was a result of mistake or inadvertence. In its response to the motion, defendant argued that plaintiff's claim was barred by the release in the settlement agreement. In his reply brief, plaintiff

argued that the release only applied to claims arising before the execution of the settlement agreement and that the release excluded claims arising under the settlement agreement. Plaintiff also argued that, under the SRCA, any attempts to waive the provisions of the SRCA are void. The circuit court agreed with defendant, denied plaintiff's motion, and granted summary disposition to defendant.

We first examine whether the SRCA provision prohibiting waiver of any right under the SRCA voids the release involved herein. We hold that it does not.

Well-established principles guide this Court's statutory construction efforts; we begin by consulting the specific statutory language at issue. *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006). "When the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *Id*. at 136.

The SRCA establishes due dates for the payment of commissions to terminated sales representatives and imposes penalties on principals who intentionally fail to pay commissions by the due dates. MCL 600.2961(4) provides: "All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due." MCL 600.2961(2) provides: "The terms of the contract

between the principal and sales representative shall determine when a commission becomes due." MCL 600.2961(3) provides:

> If the time when the commission is due cannot be determined by a contract between the principal and sales representative, the past practices between the parties shall control or, if there are no past practices, the custom and usage prevalent in this state for the business that is the subject of the relationship between the parties.

Under MCL 600.2961(5), if a principal fails to pay commissions on time, it is liable to the sales representative for (1) actual damages caused by the failure to pay on time and (2) twice the amount of the commissions due or $100,000, whichever is less, if the principal is found to have intentionally failed to pay the commissions when due. When a sales representative brings an action under the SRCA, the court "shall award to the prevailing party reasonable attorney fees and court costs." MCL 600.2961(6). Finally, the SRCA provides that "[a] provision in a contract between a principal and a sales representative purporting to waive any right under this section is void." MCL 600.2961(8).

By its plain language, this prohibition against waiving rights under the SRCA applies only to a contract between a principal and a sales representative. We conclude, therefore, that by its clear intent and import, the SRCA prohibition applies only to waivers contained in sales representation contracts.

In the present case, the release or waiver is contained, not in a sales representation contract, but rather in a settlement agreement. An agreement to settle a pending lawsuit is a contract, governed by the legal rules applicable to the construction and interpretation of other contracts. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

Moreover, by definition, a settlement agreement is a compromise of a disputed claim. *Hoffman v Burkhammer*, 373 Mich 187, 195; 128 NW2d 503 (1964) ("[T]he April 12 agreement was a compromise settlement of a disputed claim, that is, it was an executory accord."). Given the discrete differences between a settlement agreement and a sales representation agreement, we conclude that plaintiff's settlement with Noble falls outside the scope of the SRCA.

Since the SRCA does not as a matter of law void the waiver of a claim to penalty damages and attorney fees pursuant to a settlement agreement resolving litigation, we next examine whether the release at issue bars plaintiff's claims under the SRCA. We conclude that it does.

Summary dispositions are reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A written contract's interpretation is also reviewed de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). The interpretation of a statute is a question of law that is reviewed de novo. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

Michigan courts enforce contracts. *Coates*, *supra* at 503-504. We enforce contracts according to their terms, as a corollary to the parties liberty to enter into a contract. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). We examine contractual language and give the words their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). An unambiguous contractual provision reflects the parties intent as a matter of law, and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality*

Products & Concepts Co v Nagel Precision, Inc, 469 Mich 362, 375; 666 NW2d 251 (2003). Courts may not create ambiguity when contract language is clear. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). Rather, this Court must honor the parties' contract, and not rewrite it. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008); see also *Coates*, *supra* at 511 n 7.

Pursuant to the settlement agreement, plaintiff and Noble resolved by compromise the claims and defenses asserted in the previous litigation. Noble agreed to make commission payments for parts shipped up to May 31, 2005, in exchange for plaintiff's agreement to forgo any other potential claims, including penalty damages for late payments under the SRCA. We conclude that, under the circumstances of this case, the SCRA does not prohibit the compromise agreed to by the parties. Plaintiff could have continued the litigation and may have recovered a judgment in full, but he also could have lost the prior litigation and recovered nothing, on the basis that the shipment of parts at issue was not included within the liabilities that Noble assumed when it succeeded Jebco. A settlement agreement is a binding contract. *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004) (judgments entered pursuant to the agreement of the parties are in the nature of a contract rather than a judicial order entered against one party; a settlement agreement is a contract and must be construed and applied as such). Nothing in the settlement agreement provides any penalty for making late payments. Accordingly, the release bars the claims under the SRCA.

Because we hold that the trial court correctly granted summary disposition to defendant, plaintiff's assertion

that the trial court erred by denying his motion for summary disposition is moot. *In re Duane V Baldwin Trust*, 274 Mich App 387, 404; 733 NW2d 419 (2007). Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

WASHINGTON v WASHINGTON

Docket No. 281174. Submitted March 4, 2009, at Detroit. Decided May 12, 2009, at 9:15 a.m.

Phillip Washington obtained a divorce from Alicia Washington in the Oakland Circuit Court, Family Division, Cheryl A. Matthews, J., which entered a judgment that incorporated an arbitration award on the division of marital property. The court denied a motion by the defendant to set aside, vacate, or modify the arbitration award. The defendant appealed.

The Court of Appeals *held*:

1. MCL 600.5081(2) provides four limited circumstances under which a reviewing court may vacate a domestic relations arbitration award. One of them is when an arbitrator exceeded his or her powers. MCL 600.5081(2)(c).

2. An arbitrator exceeds his or her powers when the arbitrator acts beyond the material terms of the arbitration agreement or acts contrary to controlling law. Any error of law must be discernible on the face of the arbitration award and must be so substantial that, but for the error, the award would have been substantially different.

3. The defendant argued that the arbitration award in this case was facially inequitable and therefore contrary to Michigan law. However, an equitable distribution of marital property need not be an equal distribution as long as there is, as in this case, an adequate explanation for the chosen distribution. The arbitrator in this case applied controlling law when dividing marital property and did not exceed his powers.

Affirmed.

1. DIVORCE — MARITAL PROPERTY — ARBITRATION — DOMESTIC RELATIONS ARBITRATION.

A domestic relations arbitration award may be vacated by a reviewing court if the arbitrator exceeded his or her powers; an arbitrator exceeds his or her powers when the arbitrator acts beyond the material terms of the arbitration agreement or acts contrary to controlling law; any error of law must be discernible on the face of

the arbitration award and must be so substantial that, but for the error, the award would have been substantially different (MCL 600.5081[2]).

2. DIVORCE — MARITAL PROPERTY — EQUITABLE DISTRIBUTION.

An equitable distribution of marital property need not be an equal distribution as long as there is an adequate explanation for the chosen distribution.

Allan Falk, P.C. (by *Allan Falk*), for the plaintiff.

Judith A. Curtis for the defendant.

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

MURRAY, P.J. Defendant appeals as of right the trial court's judgment of divorce entered after a partial settlement and subsequent arbitration award on the division of marital property. On appeal, defendant challenges the trial court's denial of her motion to set aside, vacate, or modify the arbitration ruling as being inconsistent with Michigan law. For the following reasons, we affirm.

I. FACTS AND PROCEEDINGS[1]

On August 18, 2004, and after a marriage of approximately 14 years, plaintiff filed a complaint to obtain a divorce from defendant. Less than four months later, the parties reached a partial settlement through mediation. The settlement resolved issues of custody, parenting time, spousal support, and the sale of the marital home. According to the written settlement agreement, plaintiff was ordered to pay defendant $33,500 a year,

[1] Our recitation of the facts is more detailed than necessary to resolve the issues presented. Nonetheless, we have provided this detail to give context to the case and our decision.

for four years, in non-modifiable spousal support. Further, the parties agreed to joint custody over the children, with plaintiff paying $2,897 a month in child support.

At the same time, the parties entered into an arbitration agreement to resolve the division of property, debts, and any unresolved issues flowing from the settlement agreement.[2] The parties selected the arbitrator and eventually proceeded to an arbitration hearing. On December 19, 2006, the arbitrator submitted his arbitration ruling.[3] The arbitrator determined that the fair market value of plaintiff's dental practice was $165,000. He also determined that because plaintiff would be paying spousal and child support out of the earnings that made up a portion of the fair market value of the business, dividing the business at full value would constitute "double-dipping" into plaintiff's future earnings. As a result, the arbitrator valued the practice, for the purposes of the division of property, at $99,000 and awarded the practice to plaintiff.

Next, the arbitrator determined that the property on which the practice was located should also be valued using a fair market value approach, a fact agreed to by both real estate experts. After a discussion of a separate offer to purchase the building and the complicating consequences from the offer, the arbitrator valued the property at $123,000 (the fair market value offered by defendant's expert), minus the $47,000 outstanding mortgage balance, and awarded it to plaintiff.

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[2] The parties also simultaneously signed an "Acknowledgment of Domestic Relations Arbitration Information," seeking to comply with MCL 600.5072(1).

[3] The arbitrator had previously submitted a ruling on personal property issues, and that ruling is not a subject of this appeal.

The arbitrator also awarded defendant one car worth $14,000 and plaintiff two cars worth $31,000 and $12,000, respectively. The amount receivable from plaintiff's loan to his sister was awarded to plaintiff. The economic damages ($50,000) flowing from defendant's personal injury settlement were considered marital property subject to division, while the noneconomic damages ($212,500) were considered defendant's separate property. Further, a play structure and furniture for the children, worth $13,600, were awarded to defendant. All other bank accounts were divided evenly. Plaintiff retained $18,000 in credit card debt and defendant retained $61,000 in credit card debt.

The arbitrator stated that the total value of assets awarded to defendant was $177,428 less than that awarded to plaintiff, but that this division of property was equitable for two reasons. First, he determined that $80,555 of the home improvement expenses made by defendant using the home equity line of credit was "less than necessary and beyond that which the parties could afford." As such, he concluded that these expenses were defendant's "separate responsibility" and that the remainder of the expenses were "joint in nature." Second, he concluded that, with respect to defendant's personal injury settlement "a portion of [defendant's] separate property shall be taken into consideration in the overall award." The arbitrator opined that, taking these issues into consideration, the division of property was equitable, even if it was not equal.

Defendant then filed with the trial court a motion to set aside, vacate, or modify the arbitration award. Defendant argued that the arbitrator exceeded his powers and showed partiality against her and that the award was issued beyond the time limits afforded by statute. After a hearing, the court ruled that there was

no basis under MCL 600.5081 to set aside the award, and it denied the motion. The trial court therefore entered a judgment of divorce that included the division of property determined by arbitration.

II. ANALYSIS

This Court reviews de novo a trial court's ruling on a motion to vacate or modify an arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). This means that we review the legal issues presented without extending any deference to the trial court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714 n 33; 624 NW2d 443 (2000).

Judicial review of arbitration awards is usually extremely limited, *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999),[4] and that certainly is the case with respect to domestic relations arbitration awards. Through MCL 600.5081(2), the Michigan Legislature has provided four very limited circumstances under which a reviewing court may vacate a domestic relations arbitration award:

> (a) The award was procured by corruption, fraud, or other undue means.
>
> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
>
> (c) The arbitrator exceeded his or her powers.
>
> (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence ma-

[4] Indeed, as the United States Court of Appeals for the Sixth Circuit declared, "[a] court's review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.' " *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999).

> terial to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

MCL 600.5081(2)(c), "the arbitrator exceeded his or her powers" provision, is the codification of a phrase used for many years in common-law and statutory arbitrations. Indeed, our Court has repeatedly stated that "arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996); see also *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005), and *Krist v Krist*, 246 Mich App 59, 62; 631 NW2d 53 (2001). Pursuant to MCL 600.5081(2)(c), then, a party seeking to prove that a domestic relations arbitrator exceeded his or her authority must show that the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law.

Whether an arbitrator exceeded his or her authority is also reviewed de novo. *Miller*, *supra* at 30. A reviewing court may not review the arbitrator's findings of fact, *Detroit Automobile Inter-Ins Exch v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982); *Krist*, *supra* at 67, and any error of law must be discernible on the face of the award itself, *Gavin*, *supra* at 428-429. By "on its face" we mean that only a legal error "that is evident without scrutiny of intermediate mental indicia," *id*. at 429, will suffice to overturn an arbitration award. Courts will not engage in a review of an "arbitrator's 'mental path leading to [the] award.' " *Krist*, *supra* at 67, quoting *Gavin*, *supra* at 429. Finally, in order to vacate an arbitration award, any error of law must be "so substantial that, but for the error, the award would have been substantially different." *Collins v Blue Cross*

Blue Shield of Michigan, 228 Mich App 560, 567; 579 NW2d 435 (1998), citing *Gordon Sel-Way v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Defendant's primary argument is that the arbitration award was facially inequitable—and therefore contrary to Michigan law and the arbitration agreement[5]—because she received one-quarter of the marital assets and three-quarters of the marital debts. Whether this division of property is in contravention of Michigan divorce law requires us to review the controlling principles governing property distribution upon divorce. The goal behind dividing marital property is to reach an equitable distribution in light of all the circumstances. *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). However, an equitable distribution need not be an equal distribution, as long as there is an adequate explanation for the chosen distribution. *Id*. at 717, citing *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002), and *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). See also *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987) (A property award "need not be equal, it need only be equitable."). As a result, an unequal division in the range of 70 percent to 30 percent is not contrary to Michigan law as long as it is based on appropriate criteria. *Berger*, *supra* at 718-722. And, as a corollary to that, there is no Michigan statute or caselaw that precludes outright a substantial deviation from numerical equality in a property distribution award.

Assuming defendant's arithmetic is correct, there is no basis on the face of the award to conclude that the

[5] The arbitration agreement states that the "parties agree to be guided by the laws of the state of Michigan during the arbitration process and also agree that the Rules of Evidence may be applied or relaxed at the discretion of the Arbitrator."

arbitrator's award was in contravention of controlling law. The arbitrator recognized the foregoing principles of Michigan divorce law and applied that law to the facts as he found them. Once we are satisfied that the arbitrator applied the controlling law, our review is complete absent some error appearing on the face of the award. But here no such error exists. Indeed, the opinion and award reveals that the arbitrator addressed the unequal award by stating that "[defendant] dissipated assets both through credit card spending and the use of the home equity, at an unreasonable rate, and well beyond that at which [plaintiff] dissipated assets." He concluded that it was difficult to determine the exact amount of defendant's unreasonable spending, but that it was "well in excess of $100,000" and that the award, therefore, was equitable. Again, whether that factual conclusion was correct is outside our review. But, because Michigan law permits deviations beyond a purely even distribution, the arbitrator did not exceed his authority. *Gavin*, *supra* at 429; *Krist*, *supra* at 67. Additionally, once we have recognized that the arbitrator utilized controlling law, we cannot review the legal soundness of the arbitrator's application of Michigan law. *Krist*, *supra* at 67.

Thus, although defendant argues that the arbitrator erred by considering in the division of marital property part of the noneconomic damages obtained from her personal injury settlement received during the pendency of the divorce, we are only concerned with whether the arbitrator recognized the controlling law. Here, while noneconomic damages are ordinarily considered separate property, they are available for distribution as a marital asset in order to ensure an equitable distribution of property. *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001).

In conclusion, there is nothing on the face of the arbitrator's award that evinces an error of law. The arbitrator explicitly considered the parties' arguments and evidence, and based his decision on the controlling legal factors pertaining to the equitable division of property. Because a reviewing court is limited to examining the face of an arbitration ruling, there is no basis for concluding that the arbitrator exceeded his authority in issuing this particular award. *Gavin*, *supra* at 429; *Krist*, *supra* at 67.

Defendant also argues that the arbitrator erred in his valuations of most of the parties' assets. While defendant argues that the arbitrator's mistakes render the award facially inequitable, we are mindful that

> an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrator's decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award . . . . [*Gordon Sel-Way*, *supra* at 497.]

The trial court was not required or authorized to review the arbitrator's findings of fact, and neither is this Court. It is simply outside the province of the courts to engage in a fact-intensive review of how an arbitrator calculated values, and whether the evidence he relied on was the most reliable or credible evidence presented. *Krist*, *supra* at 67-68.

In the same vein, defendant argues that the arbitrator misapplied the factor of fault in the property award. For example, defendant argues that the arbitrator put too much weight on her own conduct and not enough on plaintiff's conduct. Although the arbitrator concluded that defendant's reckless spending justified in part an unequal property division, fault is clearly a proper

factor to consider in the division of marital property. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Berger*, *supra* at 717. This is particularly true in a case like this where, unlike in *Berger*, the fault was directly related to the parties' assets and debts. In making this argument, defendant also resorts to rearguing the substantive factual questions already put before and decided by the arbitrator, and a court is the wrong forum for that.[6] Hence, because of the limited standard of review, we reject defendant's numerous attacks on the arbitrator's valuations, calculations, and similar factual findings.

Plaintiff may tax costs as prevailing party. MCR 7.219(A).

Affirmed.

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[6] Defendant also argues that the arbitrator violated MCL 600.5078(1) by not issuing his ruling within 60 days after the arbitration hearing. Defendant has not, however, alleged on appeal what substantial difference would have resulted from a timely arbitration ruling. *Collins*, *supra* at 567. Further, there is nothing in the record to indicate that the arbitrator's delay had any effect on the property division in the arbitration ruling. Thus, the trial court did not err by denying defendant's motion on this ground.

CUMMINS v ROBINSON TOWNSHIP
BERENS v ROBINSON TOWNSHIP

Docket Nos. 279020, 279064, and 279088. Submitted December 9, 2008, at Grand Rapids. Decided May 12, 2009, at 9:20 a.m.

Vance and Rebecca Cummins brought an action in the Ottawa Circuit Court against Robinson Township, individual members of the township board of trustees, William Easterling and Phillip Forner (township building officials), and others, seeking money for damage to their residence from floods in 2004 and 2005 and the costs associated with rebuilding in compliance with flood-resistant building code requirements imposed by the defendants. The court, Edward R. Post, J., granted summary disposition in favor of Easterling and Forner with regard to the counts alleging and seeking punitive damages for conspiracy to violate the plaintiffs' constitutional, statutory, and common-law rights; concert of action to commit one or more tortious acts; unlawful and unconstitutional extrajudicial taking; deliberate and purposeful violation of state statutes governing the exercise of eminent domain; extortion; trespass; intentional infliction of emotional distress; procedural due process violation; and denial of equal protection. The court denied summary disposition with regard to the counts alleging fraud, gross negligence, and a substantive due process violation. Easterling and Forner appealed, and the township and some of the board members cross-appealed. (Docket No. 279020.)

Dennis Berens, John Boos, and other residents of Robinson Township brought an action in the Ottawa Circuit Court against the township, Easterling, Forner, and others, alleging that the defendants' actions with regard to the imposition of rebuilding requirements following a 2005 flood resulted in violations of US Const, Ams V and XIV, and Const 1963, art 1, § 17, and art 10, § 2, with regard to the taking of property, substantive and procedural due process violations, fraudulent misrepresentation, and breach of duties to fairly and responsibly enforce state and local laws. The court, Edward R. Post, J., granted summary disposition in favor of Easterling and Forner with regard to the Taking Clause allegations, and the plaintiffs dismissed their taking and due process claims against the township trustees. The court denied summary

disposition of the taking claim against the township. The court ruled that the procedural due process claim failed as a matter of law, but denied summary disposition in favor of the township, Easterling, and Forner with regard to the substantive due process claim. The court also granted the defendants' motion for summary disposition of the claims alleging fraudulent misrepresentation and breach of duties to fairly and responsibly enforce state and local law. Easterling and Forner appealed by leave granted. (Docket No. 279064.) The township appealed by leave granted. (Docket No. 279088.) The appeals were consolidated.

The Court of Appeals *held*:

1. The Cumminses' failure to exhaust administrative remedies does not bar their constitutional substantive due process claim brought pursuant to 42 USC 1983. However, it may bar a claim for a regulatory taking.

2. The doctrine of exhaustion of administrative remedies would not deprive the trial court of its jurisdiction with respect to properly filed, viable common-law tort claims, such as fraud or gross negligence, because the Construction Board of Appeals would not have had jurisdiction to grant any monetary relief requested.

3. The trial court erred by not granting Easterling and Forner summary disposition of the gross negligence claim. Even if their interpretation of the building code were grossly negligent, it would not have been the proximate cause of the plaintiffs' claimed injuries, i.e., the one most immediate, efficient, and direct cause preceding the injury.

4. The Single State Construction Code Act, MCL 125.1501 *et seq*., requires building officials to make prompt building code decisions and provide the opportunity for a prompt appeal of a decision. The code further provides that a building official could face misdemeanor charges if the official knowingly issues, fails to issue, causes to be issued, or assists in the issuance of a certificate, permit, or license in violation of the act or a rule promulgated under the act or other applicable law. In light of this statutory scheme, fairness is not offended by placing the burden on the plaintiffs to appeal perceived economically impracticable and unnecessary building requirements rather than proceed to incur the expense and later seek redress through costly tort litigation. Nothing in the code provides that building officials should face future tort liability for not approving building plans that are the least costly to the applicant. The plaintiffs failed to support their claim that the defendants owed them a duty to interpret and apply the building code to impose as little economic effect as possible.

5. Even if Easterling's and Forner's conduct breached a duty to the plaintiffs and the conduct was grossly negligent, the plaintiffs cannot establish that such conduct was the proximate cause of the plaintiffs' claimed injuries because the plaintiffs cannot establish that the conduct caused them to undertake economically impracticable and unnecessary rebuilding when they had alternatives such as choosing not to rebuild or appealing the building code determinations.

6. The plaintiffs failed to plead with particularity the alleged false representations of material fact that Easterling or Forner made that formed the basis of a claim for fraud. The trial court erred by failing to grant Easterling and Forner summary disposition of the fraud claim.

7. Actionable common-law fraud requires proof that (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew the representation was false when the defendant made it, or made it recklessly, without knowledge of its truth as a positive assertion, (4) the defendant made the representation with the intention that the plaintiff would act upon it, (5) the plaintiff acted in reliance upon it, (6) and the plaintiff suffered damage. The action must be predicated on a false statement relating to a past or existing fact. Promises regarding the future are contractual and will not support a claim of fraud. The plaintiff must have reasonably relied on the false representation to establish a claim of fraudulent misrepresentation. There can be no fraud where a person has the means to determine that the representation is not true. The alleged false statements made by the defendants regarding the applicability of the building code or other legal requirements pertaining to the plaintiffs' flood-damaged property and whether the cost of repair would exceed 50 percent of the preflood fair market value are actually legal opinions and statements regarding actions necessary in the future to comply with legal requirements. The alleged statements are not false representations concerning an existing or past fact and cannot establish fraud. The plaintiffs cannot establish reasonable reliance on the defendants' statements because information about those matters was readily available to the plaintiffs and within their knowledge. The plaintiffs cannot establish reasonable reliance on any incorrect building code decision because they had ample opportunity to appeal any of the decisions.

8. The general test to determine whether a law or its enforcement violates substantive due process is whether the law is rationally related to a legitimate governmental purpose. In the context of individual governmental actions or actors, however, to

establish a substantive due process violation, the governmental conduct must be so arbitrary and capricious as to shock the conscience. In disputes over municipal actions, including the issuance of building permits, only the most egregious official conduct can be considered arbitrary in the constitutional sense. The specific allegations against Easterling and Forner do not state conscience-shocking conduct. Even if the defendants' application of the flood-resistant building code requirements to the plaintiffs' situation were erroneous, it still furthered legitimate state interests and cannot be characterized as conscience-shocking behavior. The plaintiffs' remedy is an administrative appeal or pursuing other legal remedies, not a claim for violation of substantive due process. To the extent that the plaintiffs alleged an unconstitutional taking, their remedy was not under the substantive component of the Fourteenth Amendment, but rather under the Taking Clause of the Fifth Amendment. The trial court erred by denying the defendants summary disposition of the Cumminses' substantive due process claim.

9. While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking for purposes of the just compensation provisions of US Const, Am V, and Const 1963, art 10, § 2. Apart from the two narrow categories of regulatory action that generally will be deemed taking per se for Fifth Amendment purposes, i.e., where the government requires an owner to suffer a permanent physical invasion of the owner's property or governmental regulations completely deprive an owner of all economically beneficial use of the property, regulatory taking challenges are governed by a balancing test that requires a reviewing court to engage in an ad hoc, factual inquiry centering on three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations.

10. There must be some action by the government expressly directed toward the plaintiff's property that effectively limits the use of the property to support a claim that a de facto taking has occurred. The plaintiffs' de facto taking claim fails because they have neither alleged nor produced any evidence of a causal connection between any deliberate actions of the defendants and the decline in the market value of their property. There is no logical causal relationship between compliance with flood-resistant building requirements and any decline in the fair market value of the Cumminses' home. The mere reduction in the value of

regulated property is insufficient by itself to establish that a compensable taking has occurred.

11. Because the Cumminses chose to rebuild their home, the township was required to enforce the state building code. A municipality may not be found liable for a taking of private property when it is merely enforcing the requirements of state law. In order to impose liability on a township, city, or county, the plaintiffs must establish that the defendants' regulation caused the taking. The Taking Clause does not guarantee property owners an economic profit from the use of their land. The fact that the Cumminses' use of their property as a residence is more costly in the face of the need to repair repeated flood damage does not establish a taking.

12. A claim that the application of governmental regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. The rule of finality applies even when a plaintiff's constitutional claim is premised under 42 USC 1983. A taking claim based on a law or regulation that is alleged to go too far in burdening property depends on the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. Until these ordinary processes have been followed, the extent of the regulation on property is not known and a regulatory taking has not yet been established. The Cumminses' taking claim was not ripe for adjudication because they failed to seek alternative relief from the Construction Board of Appeals, which could have reviewed and granted relief if the defendants improperly or erroneously applied the building code requirements and could have granted variances from the code's requirements. The plaintiffs are not excused from the rule of finality because they have not demonstrated that an appeal to the Construction Board of Appeals would have been futile. The trial court erred by not granting summary disposition in favor of the defendants on the taking claims because they were not ripe for judicial review.

13. The substantive due process claims brought by the plaintiffs in Docket Nos. 279064 and 279088 failed for the same reasons the Cumminses' claim failed in Docket No. 279020.

14. The plaintiffs' temporary regulatory taking claim in Docket Nos. 279064 and 279088 lacks merit because they have not shown that an extraordinary delay in the permit review process

resulted in a temporary taking requiring just compensation. No extraordinary delay occurred in the permit review process in these appeals. Summary disposition should have been granted in favor of all the defendants in both appeals. The matter must be remanded to the trial court for the entry of an order of summary disposition in favor of all the defendants on all the plaintiffs' claims.

Reversed and remanded.

1. ADMINISTRATIVE LAW — CONSTITUTIONAL LAW — TORTS — EXHAUSTION OF REMEDIES.

The failure to exhaust administrative remedies does not bar a substantive due process claim brought pursuant to 42 USC 1983 or a properly filed, viable common-law tort claim such as fraud or gross negligence.

2. TORTS — NEGLIGENCE — ELEMENTS OF NEGLIGENCE — ADMINISTRATIVE LAW — SINGLE STATE CONSTRUCTION CODE ACT — APPEAL.

The Single State Construction Code Act requires building officials to make prompt building code decisions and provide the opportunity for a prompt appeal of a decision; the act does not provide that building officials may face future tort liability for not approving building plans that are the least costly to the applicant (MCL 125.1511[1]).

3. FRAUD — MISREPRESENTATION — KNOWLEDGE OF FALSEHOOD — REASONABLE RELIANCE ON FALSE REPRESENTATION.

A plaintiff seeking to establish a claim of fraudulent misrepresentation must establish that the plaintiff reasonably relied on the false representation; alleged misrepresentations regarding the terms of written documents that are available to the plaintiff cannot support reasonable reliance.

4. CONSTITUTIONAL LAW — DUE PROCESS — SUBSTANTIVE DUE PROCESS.

A plaintiff must allege conduct that is intended to injure in some way unjustifiable by any governmental interest and that is conscience-shocking in nature to state a cognizable substantive due process claim.

5. CONSTITUTIONAL LAW — DUE PROCESS — SUBSTANTIVE DUE PROCESS.

When a particular amendment of the United States Constitution provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing the claim.

6. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — TAKING PRIVATE PROPERTY.

A municipality may not be found liable for a taking of private property when it is merely enforcing the requirements of state law; the plaintiff must establish that a township, city, or county regulation caused a taking in order to impose liability on the township, city, or county for the taking.

7. CONSTITUTIONAL LAW — TAKING PRIVATE PROPERTY — GOVERNMENTAL REGULATIONS — CIVIL RIGHTS ACTIONS — RULE OF FINALITY.

A claim that the application of governmental regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue; the rule of finality applies even where the plaintiff's claim is based on 42 USC 1983.

8. ADMINISTRATIVE LAW — SINGLE STATE CONSTRUCTION CODE ACT — VARIANCES.

The Single State Construction Code Act authorizes a construction board of appeals to grant variances from a substantive requirement of the code if the literal application of the substantive requirement would result in an exceptional, practical difficulty to the applicant, provided that certain conditions are met (MCL 125.1515[1]).

Corwin Law & Consulting, PLC (by *Stephen C. Corwin* and *Thoa K. Du*), for Vance and Rebecca Cummins.

Dilley & Rominger, PLC (by *Charles S. Rominger*), for Dennis Berens and others.

Smith Haughey Rice & Roegge (by *William L. Henn*, *Craig R. Noland*, and *Jon D. Vander Ploeg*) and *Scholten Fant* (by *Ronald A. Bultje*) for Robinson Township, Bernice Berens, Jackie Frye, Cheryl Clark, John Kuyers, Tracy Mulligan, Jacob Korving, and Chris Kuncaitis.

Foster, Swift, Collins & Smith, P.C. (by *Thomas R. Meagher* and *Philip E. Hamilton*), for William Easterling and Phillip Forner.

Before: MURRAY, P.J., and MARKEY and WILDER, JJ.

PER CURIAM. These are consolidated appeals from two cases in which plaintiffs are residents of the Van Lopik and Limberlost subdivisions in Robinson Township who assert tort claims and constitutional violations against the township, the members of its board of trustees (Bernice Berens, Jackie Frye, Cheryl Clark, John Kuyers, Tracy Mulligan, Jacob Korving, Chris Kuncaitis, Ray Masko, Earl Rayla, Donna Stille, and Larry Harmon), its building officials (William Easterling and Phillip Forner), and others, after the Grand River flooded in the area of their homes in May 2004 and January 2005. The trial court granted in part and denied in part defendants' motions for summary disposition in each case. In Docket No. 279020, defendants appeal and cross-appeal. In Docket Nos. 279064 and 279088, defendants appeal by leave granted. We reverse and remand for entry of summary disposition in favor of all defendants on all of plaintiffs' claims.

The underlying dispute in these cases involves the application of the Single State Construction Code Act (SSCCA), MCL 125.1501 *et seq*. At the times pertinent to these actions (2004 and 2005), the applicable building code in Michigan was, with certain exceptions, the International Building Code (2003). The 2003 International Building Code was adopted by reference effective February 29, 2004. See 2004 AACS, R 408.30401. Specifically, the defendant building officials determined the cost of repairing plaintiffs' flood-damaged homes would exceed 50 percent of the fair market value of plaintiffs' homes before the flooding, thus triggering the application of flood-resistant building code requirements. 2003 Michigan Residential Code R105.3.1.1. The Cumminses, in Docket No. 279020, were the only parties who suffered damage in the 2004 flood and borrowed in

excess of their home's value to rebuild it under the flood-resistant building code requirements before the 2005 flood. Almost all plaintiffs in Docket Nos. 279064 and 279088 appealed to the Construction Board of Appeals (CBA) on the basis that the 50 percent threshold had not been reached. By December 1, 2005, the CBA had granted relief to all plaintiffs who appealed. All plaintiffs were reissued occupancy permits by October 2005, regardless of whether their homes complied with building code or health department regulations.

In Docket No. 279020, the Cumminses filed their complaint in July 2006, alleging 13 separate counts: (1) conspiracy to violate plaintiffs' constitutional, statutory, and common-law rights, (2) concert of action to commit one or more tortious acts, (3) unlawful and unconstitutional extrajudicial taking, (4) deliberate and purposeful violation of state statutes governing the exercise of eminent domain, (5) fraud, (6) extortion, (7) trespass, (8) intentional infliction of emotional distress, (9) gross negligence, (10) substantive due process violation, (11) procedural due process violation, (12) denial of equal protection, and (13) punitive damages against the individual township trustees and building officials Easterling and Forner. The trial court granted Easterling and Forner's motion for summary disposition pursuant to MCR 2.116(C)(4), (7), (8), and (10) with regard to all counts except counts (5) fraud, (9) gross negligence, and (10) substantive due process violation.

The trial court ruled that the Cumminses' fraud claim against Easterling and Forner presented material issues of fact for trial. The court reasoned "that there is a genuine issue of material fact as to whether or not defendants made false material representations of facts to plaintiffs which plaintiffs relied upon." On this basis, the trial court ruled that defendants' motion for sum-

mary disposition regarding count (5) fraud failed pursuant to MCR 2.116(C)(10).

Regarding the Cumminses' gross negligence claim against Easterling and Forner, the trial court also determined that a material question of fact existed over whether defendants' conduct constituted gross negligence under MCL 691.1407. Specifically, the court ruled that a question of fact existed concerning whether defendants' imposition of building code requirements after the 2004 and 2005 floods rose to the level of gross negligence and was the proximate cause of plaintiffs' injuries.

The trial court also ruled that plaintiffs' substantive due process claim survived defendants Easterling and Forner's motion for summary disposition. Specifically, the court determined that a genuine issue of material fact existed regarding whether defendants acted arbitrarily and capriciously by imposing new building code requirements on plaintiffs in an effort to convince the Federal Emergency Management Agency (FEMA) to provide the township with grant funds to buy plaintiffs' property. Easterling and Forner appeal by right.

Regarding the Cumminses' claims against the township and its trustees, the trial court did not dismiss count (3) unlawful and unconstitutional extrajudicial taking, and count (10) substantive due process violation. The trial court ruled that plaintiffs' taking claim was not barred by the doctrine of ripeness, reasoning that the CBA was not the initial decision maker and that an appeal by the Cumminses to the CBA would have been futile because the CBA could not award money damages. Further, the court determined that the Cumminses' allegations that defendants engaged in a deliberate and aggressive course of action against plaintiffs to force them to sell their property without pay-

ment of just compensation and that defendants' actions caused plaintiffs to expend thousands of dollars in unnecessary repairs, stated a claim for a de facto or regulatory taking for which issues of material fact remained.

The trial court, however, dismissed the Cumminses' taking claims against the individual township trustees because the Cumminses produced no legal authority to establish that individuals—as opposed to the township—could take property for public use. The court also dismissed plaintiffs' tort claims against the township and its trustees on the basis of governmental immunity.

The trial court granted defendants' motion for summary disposition regarding plaintiffs' procedural due process claim, but the court ruled that genuine issues of material fact remained with regard to the Cumminses' substantive due process claim. As with this claim against Easterling and Forner, the trial court ruled that there was a genuine issue of material fact concerning whether defendants acted arbitrarily and capriciously when they imposed new building code requirements on plaintiffs in an alleged attempt to convince FEMA to provide the township with funds necessary to induce the Cumminses and other plaintiffs to sell their properties. Defendant Robinson Township and its trustees cross-appeal the various rulings of the trial court denying summary disposition with regard to plaintiffs' taking and substantive due process claims.

In Docket No. 279064, defendants Easterling and Forner appeal by leave granted the trial court's order that denied their motion for summary disposition, in part, with regard to plaintiffs' claims for violations of their rights to substantive due process. In Docket No. 279088, the township appeals by leave granted the trial court's order that denied its motion for summary dis-

position, in part, with regard to plaintiffs' taking and substantive due process claims. Both of these appeals arise from the same lower court case.

Plaintiffs' complaint set forth four unlabeled counts. The first count cited the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2, and alleged that defendants violated plaintiffs rights by

> [f]iling [a] false application for a FEMA grant, including the intent and plan to take Plaintiffs' properties without just compensation; [and]
>
> Imposing unwarranted re-build and renovation requirements that were not required to avoid the effects of periodic floods in the general area.

The trial court granted defendants Easterling and Forner's motion for summary disposition regarding count I because the Taking Clause implicates only governmental, not individual liability. Plaintiffs apparently voluntarily dismissed both their taking and due process claims against the township trustees. As for plaintiffs' taking claim against the township, the trial court ruled as it did in Docket No. 279020. It found that plaintiffs' complaint pleaded facts that, if proved, would state a temporary taking claim and that genuine issues of material fact remained and precluded summary disposition.

Plaintiffs alleged in count II of their complaint that defendants violated plaintiffs' rights under the Fifth Amendment and the Fourteenth Amendment of the United States Constitution and Const 1963, art 1, § 17. The trial court viewed this count as stating a claim based on both procedural and substantive due process. The trial court ruled that the procedural due process claim failed as a matter of law. But the trial court denied defendants' motion with respect to plaintiffs' substantive due process claim against the township and defen-

dants Easterling and Forner for the same reasons it denied summary disposition regarding similar claims by the Cumminses in Docket No. 279020.

The trial court granted defendants summary disposition of plaintiffs' claims in count III (fraudulent misrepresentation) and in count IV (breach of duties "to fairly and responsibly enforce state and local laws").

This Court granted defendants' application for leave to appeal in Docket Nos. 279064 and 279088, in part, because nearly identical issues were already before the Court as an appeal by right in Docket No. 279020, arising out of same factual circumstances. The Court also consolidated all three appeals to advance the efficient administration of the appellate process.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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." *Id*.

"MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court and this Court must accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party. *Maiden*, *supra* at 119. The motion may be granted only "where the claims are so clearly

unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

We also review de novo constitutional issues and any other questions of law that are raised on appeal. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 541; 688 NW2d 550 (2004).

I. DOCKET NO. 279020

Easterling and Forner first argue that, in essence, plaintiffs' claims against them are that they misinterpreted or misapplied the building code, which ultimately led to plaintiffs' damages. Consequently, they argue, because plaintiffs failed to exhaust their administrative remedies, the trial court lacked subject-matter jurisdiction and plaintiffs' complaint should have been dismissed in its entirety under MCR 2.116(C)(4). Plaintiffs argue that they are not required to exhaust their administrative remedies to bring a substantive due process claim under 42 USC 1983. Further, plaintiffs contend that they are excused from any requirement of exhaustion of administrative remedies because to do so would have been futile. The CBA would not have been able to award plaintiffs the relief they sought, which was money damages.

We agree with plaintiffs that failing to exhaust administrative remedies does not bar their constitutional substantive due process claim brought pursuant to 42 USC 1983. It may, however, bar a claim for a regulatory taking. See *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 79-83; 445 NW2d 61 (1989), discussing *Patsy v Florida Bd of Regents*, 457 US 496; 102 S Ct 2557; 73 L Ed 2d 172 (1982), and *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US

172; 105 S Ct 3108; 87 L Ed 2d 126 (1985). Also, we conclude that the doctrine of exhaustion of administrative remedies would not deprive the trial court of its jurisdiction with respect to properly filed, viable common-law tort claims, such as fraud or gross negligence. The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court. *Trever v Sterling Hts*, 37 Mich App 594, 596; 195 NW2d 91 (1972). The converse, however, is that where the administrative appellate body cannot provide the relief sought, the doctrine does not apply. *Id*. at 596-597. Here, plaintiffs assert tort claims against defendants alleging that defendants fraudulently induced plaintiffs to incur unnecessary expenses and that defendants were grossly negligent. Thus, plaintiffs' argument that the CBA would not have jurisdiction to grant the relief they requested (money damages) has merit.

Easterling and Forner next argue that the trial court erred when it failed to dismiss plaintiffs' gross negligence claim. They assert entitlement to immunity from tort liability pursuant to MCL 691.1407(2)(c) because their conduct did not amount to gross negligence, and even if it did, it was not the proximate cause of plaintiffs' damages. Plaintiffs argue they are not required to plead specific facts in avoidance of government immunity because that requirement applies only to claims against governmental bodies, not governmental employees. Plaintiffs assert that the trial court correctly ruled that genuine issues of material fact remain for trial regarding whether Easterling and Forner were grossly negligent by imposing allegedly unwarranted rebuilding requirements after the floods in 2004 and 2005 and whether this gross negligence was the proximate cause of plaintiffs' injuries.

We conclude that the trial court erred by not granting defendants summary disposition with regard to plaintiffs' gross negligence claim. Even if Easterling's and Forner's interpretation of the building code were grossly negligent, it would not have been "the" proximate cause of plaintiffs' claimed injuries, i.e., the one most immediate, efficient, and direct cause preceding the injury. MCL 691.1407(2)(c); *Robinson v Detroit*, 462 Mich 439, 446; 613 NW2d 307 (2000).

Here, plaintiffs have not stated, nor have they argued on appeal, the nature and extent of the alleged duty that Easterling and Forner might have breached so as to render them liable for gross negligence. The governmental immunity statute does not itself create a cause of action called "gross negligence." *Rakowski v Sarb*, 269 Mich App 619, 627; 713 NW2d 787 (2006). It is axiomatic that the tort of negligence consists of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another so as to avoid unreasonable risk of harm. *Maiden*, *supra* at 131. And, if defendants owed no duty to plaintiffs, plaintiffs' gross negligence claim is unenforceable as a matter of law. *Id*. at 135.

"Whether a defendant owes a plaintiff a duty of care is a question of law for the court." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons or their property. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992); *Clark v Dalman*, 379 Mich 251,

261; 150 NW2d 755 (1967). This Court in *Rakowski*, *supra* at 629, listed a number of factors pertinent to determining whether to impose a common-law duty:

> (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of connection between the conduct and injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and, (7) finally, the burdens and consequences of imposing a duty and the resulting liability for breach. The inquiry is ultimately a question of fairness involving a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. [Citations and punctuation omitted.]

The *Rakowski* Court weighed these factors to conclude that a building inspector did not owe a duty of care to a third party injured by faulty construction the inspector had approved. *Id*. at 630-635. Here, plaintiffs assume, but do not support with citation of legal authority or argument, that defendants owed them a duty to interpret and apply the building code to impose as little economic effect as possible. But the SSCCA requires that this state's various building codes balance several factors, including ensuring adequate maintenance of buildings and structures while still adequately protecting the health, safety, and welfare of the people. MCL 125.1504(3)(e). The SSCCA also has the goal of eliminating "restrictive, obsolete, conflicting, and unnecessary construction regulations that tend to increase construction costs unnecessarily . . . ." MCL 125.1504(3)(d). Nothing in the SSCCA, however, suggests that a front-line building official should face future tort liability for not approving building plans that are the least costly to the applicant. Rather, the SSCCA requires that building officials make prompt building code decisions and provide the opportunity for a prompt appeal of a building official's decision. MCL

125.1511(1) provides: "Failure by an enforcing agency to grant, in whole or in part, or deny an application within [10 or 15 business days] shall be deemed a denial of the application for purposes of authorizing the institution of an appeal to the appropriate board of appeals." Further, a local building official could face misdemeanor criminal charges if the official "[k]nowingly issues, fails to issue, causes to be issued, or assists in the issuance of a certificate, permit, or license in violation of [the SSCCA] or a rule promulgated under this act or other applicable laws." MCL 125.1523(1)(g). In light of this statutory scheme, we conclude that fairness is not offended by placing the burden on plaintiffs to appeal perceived economically impracticable and unnecessary building requirements rather than proceed to incur the expenses and later seek redress through costly tort litigation. Recognizing the duty that plaintiffs assume exists would not advance the public interest.

Moreover, even if Easterling's and Forner's conduct breached a duty to plaintiffs and the conduct is "gross negligence" as defined by MCL 691.1407(7)(a), plaintiffs cannot establish that such conduct was "the" proximate cause of plaintiffs' claimed injuries. Simply stated, plaintiffs cannot establish that defendants' conduct caused them to undertake economically impracticable and unnecessary rebuilding when plaintiffs had alternative courses of action, including (1) choosing not to rebuild (selling their property "as is," just as they did when the Cumminses purchased the property in a flood-damaged state in 1994), or (2) exercising their right to appeal building code determinations they deemed impracticable or unnecessary. In addition, plaintiffs acknowledge in their complaint that other actors and causes contributed to their financial losses, including a decline in market values. Plaintiffs chose to incur debt far in excess of their property's preflood

value. Further, other factors played a part in plaintiffs' financial problems and stress, including "lost business revenue . . . mortgage costs . . . [and] facing foreclosure." Because other homeowners successfully pursued administrative appeals, plaintiffs cannot establish that Easterling's and Forner's interpretation and application of the building code, even if "grossly negligent," were "the proximate cause," i.e., "the one most immediate, efficient, and direct cause preceding [their] injury . . . ." *Robinson*, *supra* at 446.

Easterling and Forner next argue that the trial court erred when it failed to grant summary disposition with regard to plaintiffs' fraud claim. We agree. Plaintiffs have failed to plead with particularity the false representations of material fact that either Easterling or Forner made that form the basis of a claim for fraud. MCR 2.112(B)(1); *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008). Further, a viable fraud claim may not be inferred, even viewing plaintiffs' complaint in the light most favorable to them. At most, plaintiffs allege that defendants made intentional, inaccurate statements regarding the law or stated opinions about future events (repair costs), which were not misrepresentations of existing or past facts necessary to support a claim of fraud. So plaintiffs' complaint fails to state a claim for which relief can be granted. MCR 2.116(C)(8).

Actionable common-law fraud requires proof that " '(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance

upon it; and (6) the plaintiff suffered damage.' " *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (citations omitted). Further, an action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim of fraud. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Further, to establish a claim of fraudulent misrepresentation, the plaintiff must have reasonably relied on the false representation. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). "There can be no fraud where a person has the means to determine that a representation is not true." *Id*.

Plaintiffs argue that the gist of their fraud claim is that defendants imposed unrealistic and unwarranted requirements on them when seeking building and occupancy permits after floods damaged their home in 2004 and 2005. Plaintiffs allege that all named defendants "individually, collectively, or with one or more actors, made one or more material representations" as follows:

> a. Misrepresented the law insofar as such law pertained to effecting repair on the homeowners' properties, and Plaintiffs' in particular,
>
> b. Misrepresented the facts pertaining to the nature and extent of damages to homeowners' properties, and Plaintiffs' in particular, as caused by the 2004 and 2005 Floods, and
>
> c. Misrepresented the law and the necessity of taking action to evict homeowners and Plaintiffs in particular and the shutting off of their utilities.

Plaintiffs do not allege with particularity the statements each defendant made that support these conclusory allegations. MCR 2.112(B)(1). Plaintiffs merely refer to unspecified allegations throughout their com-

plaint. Assuming that the three stated allegations above can be inferred from the whole of plaintiffs' complaint, it is clear that allegations a and c relate to opinions regarding the applicability of the building code or other legal requirements pertaining to plaintiffs' flood-damaged property. Allegation c apparently relates to a determination whether the cost of repairing plaintiffs' home would exceed 50 percent of its fair market value before the flood damage, which would involve the application of flood-resistant building code requirements. See 2003 Michigan Residential Code R105.3.1.1. Thus, viewing plaintiffs' allegations in the light most favorable to them, we conclude that the alleged false statements are actually legal opinions and statements regarding actions necessary in the future to comply with legal requirements. So, the alleged statements are not false representations concerning an existing or past fact and cannot constitute fraud. *Hi-Way Motor Co*, *supra* at 336; see also *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994) (alleged misrepresentation of the meaning of a contract term could not constitute fraud because not predicated on a statement of past or existing fact), and *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 554; 487 NW2d 499 (1992) (statements related to future action and to opinion were not actionable as fraud because not predicated on a statement relating to a past or an existing fact).

We acknowledge that some caselaw indicates that " 'the mere fact that statements relate to the future will not preclude liability for fraud if the statements were intended to be, and were accepted as, representations of fact, and involved matters peculiarly within the knowledge of the speaker.' " *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005), quoting *Crook v Ford*, 249 Mich 500, 504-505; 229 NW 587 (1930).

Both *Foreman* and *Crook* are factually distinguishable from the present case. In *Crook*, the alleged false statements related to the past fact of whether a home had been constructed in a workmanlike manner. *Crook*, *supra* at 502. In *Foreman*, the false statements were made in a divorce case regarding the value of a major marital asset (a car dealership), and the other spouse was not permitted full access to make her own valuation. *Foreman*, *supra* at 143-144. The *Foreman* case also involved the wife's claim that she was fraudulently induced to enter a property settlement on the basis of the husband's false statement that he would continue operating the car dealership rather than sell it.[1] *Id*. at 143-148. There is no claim in the present case that defendants made false promises of future conduct with fraudulent intent upon which plaintiffs detrimentally relied.

Even assuming that defendants either knowingly or recklessly imposed "false" building code requirements, i.e., ones that were not legally required, plaintiffs' fraud theory still fails because plaintiffs cannot establish reasonable reliance on defendants' statements. *Nieves*, *supra* at 464. Thus, alleged misrepresentations regarding the terms of written documents that are available to the plaintiff cannot support the element of reasonable reliance. *Id*. at 464-465; *Cooper*, *supra* at 414-415. Here, the building code would have been readily available to plaintiffs. "People are presumed to know the law." *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000), citing *Mudge v Macomb Co*, 458 Mich 87, 109 n 22; 580 NW2d 845 (1998). Likewise, the value of plaintiffs'

[1] "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

home before the flood and the cost of any necessary repairs would be matters at least equally within plaintiffs' knowledge or their ability to determine. Plaintiffs had equal access to information by which they were "bound to inform themselves of their rights before acting, and, if they fail[ed] to do so, they themselves are responsible for the loss." *Cooper*, *supra* at 415.

Additionally, the element of reasonable reliance is further negated because plaintiffs had ample opportunity to appeal any of Easterling's and Forner's building code determinations. The SSCCA provides ample opportunity to an aggrieved party to promptly appeal an adverse decision by a local building code official. MCL 125.1514 requires the creation of a construction board of appeals for each governmental subdivision enforcing the code. When necessary documents are provided to building officials, they must render a decision regarding permit applications within 10 or 15 business days. MCL 125.1511(1). "Failure by an enforcing agency to grant, in whole or in part, or deny an application within these periods of time shall be deemed a denial of the application for purposes of authorizing the institution of an appeal to the appropriate board of appeals." *Id*. "If an enforcing agency refuses to grant an application for a building permit, or if the enforcing agency makes any other decision pursuant or related to this act, or the code, an interested person, or the person's authorized agent, may appeal in writing to the board of appeals." MCL 125.1514(1). In addition to having the authority to correct any erroneous determination by building officials, the construction board of appeals also has the authority to grant "a specific variance to a substantive requirement of the code if the literal application of the substantive requirement would result in an exceptional, practical difficulty to the applicant," provided certain conditions are satisfied. MCL 125.1515. Fur-

ther, an aggrieved party may appeal an adverse decision of the construction board of appeals to the State Construction Code Commission. MCL 125.1516. Beyond administrative appeals, further appeal to the circuit court and to this Court are available. See MCL 125.1517; MCL 125.1518; MCL 24.301. Consequently, plaintiffs cannot establish reasonable reliance on any incorrect building code decision defendants made that would constitute a viable claim for fraud. The trial court erred by not granting defendants' motion for summary disposition with regard to plaintiffs' fraud claim.

All defendants argue that the trial court erred by not granting them summary disposition of plaintiffs' substantive due process claim. We agree. Accepting plaintiffs' factual allegations as true and construing them in the light most favorable to plaintiffs, we conclude that plaintiffs' substantive due process claim against all defendants fails as a matter of law. The trial court erred by not granting defendants summary disposition of this claim. MCR 2.116(C)(8).

Both the Fourteenth Amendment of the United States Constitution and Const 1963, art 1, § 17, guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). These constitutional provisions guarantee more than procedural fairness and have a substantive component that protects individual liberty and property interests "against ' "certain government actions regardless of the fairness of the procedures used to implement them." ' " *Id*. at 523, quoting *Collins v Harker Hts*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992), quoting *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986). This state's constitutional provi-

sion is coextensive with its federal counterpart. *Sierb*, *supra* at 523. "The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power." *Id*.

In general, the test to determine whether a law or its enforcement violates substantive due process is "whether the law is rationally related to a legitimate governmental purpose." *Electronic Data Systems Corp v Flint Twp*, 253 Mich App 538, 549; 656 NW2d 215 (2002); see also *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 292; 590 NW2d 612 (1998) (applying the same test to the department's enforcement decision). In the context of individual governmental actions or actors, however, to establish a substantive due process violation, "the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008). In disputes over municipal actions, including the issuance of building permits, only the most egregious official conduct can be considered arbitrary in the constitutional sense. *Id*. at 197, quoting *City of Cuyahoga Falls v Buckeye Community Hope Foundation*, 538 US 188, 198-199; 123 S Ct 1389; 155 L Ed 2d 349 (2003), and *Sacramento Co v Lewis*, 523 US 833, 846; 118 S Ct 1708; 140 L Ed 2d 1043 (1998).

This Court in *Mettler Walloon* surveyed numerous federal decisions that addressed substantive due process claims in the context of enforcement of land use regulations and concluded, "under federal law, even a violation of state law in the land use planning process does not amount to a federal substantive due process violation." *Mettler Walloon*, *supra* at 203. One of the federal cases the *Mettler Walloon* Court reviewed was *Mongeau v City of Marlborough*, 492 F3d 14, 20 (CA 1,

2007), in which the plaintiff, Eugene Mongeau, asserted that city building official Stephen Reid had violated Mongeau's substantive due process rights in part by " 'wrongly charg[ing] or demand[ing] too much for his building permit . . . .' " The federal court noted, in essence, that even if this were true, " '[Mongeau] may find recourse in other laws, but not in the substantive component of the Due Process Clause of the Fourteenth Amendment.' " *Mettler Walloon*, *supra* at 201, quoting *Mongeau*, *supra* at 20. Similarly, this Court quoted *Koscielski v City of Minneapolis*, 435 F3d 898 (CA 8, 2006), in turn quoting *Anderson v Douglas Co*, 4 F3d 574, 577 (CA 8, 1993), opining that " '[d]ue process claims involving local land use decisions must demonstrate the "government action complained of is truly irrational, that is something more than . . . arbitrary, capricious, or in violation of state law." ' " *Mettler Walloon*, *supra* at 204. In sum, the " 'Due Process Clause "is not a guarantee against incorrect or ill-advised [governmental] decisions." ' " *Id*. at 206, quoting *Collins*, *supra* at 129 (citation omitted).

Here, plaintiffs' primary allegation against defendants is the strict enforcement of building code provisions requiring flood-resistant construction when plaintiffs claim they should have been allowed to utilize cheaper (and less flood-resistant) rebuilding methods and materials. But even if defendants' application of the building code to plaintiffs' circumstance were erroneous, their enforcement of flood-resistant building code requirements still advanced legitimate state interests in protecting the health, safety, and welfare of the public and protected property located in flood-prone areas. Plaintiffs also do not dispute that if the township planned to acquire private property in the flood plain where their home was located for a park and as a flood buffer zone, this

too would further a public use that would serve similar legitimate state interests. Indeed, plaintiffs do not contend that the township could not condemn their property for this public use; rather, plaintiffs allege only that the township, through Easterling, Forner, and others, attempted to acquire their property at less than its fair market value, that is, without constitutionally required "just compensation."

These allegations do not state conscience-shocking conduct. " 'To state a cognizable substantive due process claim, the plaintiff must allege "conduct intended to injure in some way unjustifiable by *any* government interest" *and* that is "conscience-shocking" in nature.' " *Mettler Walloon*, *supra* at 201-202, quoting *Mitchell v McNeil*, 487 F3d 374, 377 (CA 6, 2007), quoting *Lewis*, *supra* at 849 (emphasis added). Consequently, even if defendants' application of the flood-resistant building code requirements to plaintiffs' situation were erroneous, it still furthered legitimate state interests and, therefore, could not be characterized as conscience-shocking. Plaintiffs' remedy for an erroneous building code decision is to perfect an administrative appeal or pursue other available legal remedies; plaintiffs' claim is not one of substantive due process. *Mongeau*, *supra* at 20. Even assuming that defendants were motivated to further a township flood-mitigation plan, their subjective motivation does not alter the legal conclusion that applying flood-resistant building code provisions to property situated in a flood plain, which had suffered repeated flood damage over the years, furthered legitimate state interests and therefore is not egregious, conscience-shocking conduct. *Mettler Walloon*, *supra.*

Plaintiffs' allegation that defendants attempted to take private property without just compensation also

fails to support their substantive due process claim. First, as the trial court correctly ruled, only a governmental entity may take private property for public use. Second, the township did not, in fact, purchase plaintiffs' property for less than fair market value. Plaintiffs were not forced "to surrender their property for pennies on the dollar or nothing." If the township had acquired plaintiffs' property at less than fair market value other than through a voluntary sale, plaintiffs' remedy would have arisen under the Fifth Amendment, not the substantive due process component of the Fourteenth Amendment of the United States Constitution and Const 1963, art 1, § 17. In *Lewis*, the Supreme Court noted its reluctance " 'to expand the concept of substantive due process' " so that " '[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.' " *Id*. at 842, quoting *Albright v Oliver*, 510 US 266, 273; 114 S Ct 807; 127 L Ed 2d 114 (1994) (plurality opinion of Rehnquist, C.J.), quoting *Graham v Connor*, 490 US 386, 395; 109 S Ct 1865; 104 L Ed 2d 443 (1989) (citation omitted). Because claims of permanent or temporary regulatory taking of private property for public use without just compensation come within the protection of the Fifth Amendment, see *First English Evangelical Lutheran Church v Los Angeles Co*, 482 US 304; 107 S Ct 2378; 96 L Ed 2d 250 (1987) (*First English I*) (involving the allegation that a flood-plain ordinance denied all use of property near a riverbed), this part of plaintiffs' claim cannot invoke the Due Process Clause. *Lewis*, *supra* at 842.

Plaintiffs have not alleged that defendants conducted themselves so outrageously or arbitrarily as to shock the conscience. *Mettler Walloon*, *supra* at 197-213. Rather, plaintiffs allege conduct that furthers legitimate state interests—enforcing the state building code by requiring flood-resistant construction for property situated in a flood-prone area. To the extent plaintiffs allege that defendants erred in their application of the building code, plaintiffs' remedy was to perfect an appeal or pursue other state remedies. *Mongeau*, *supra* at 20. And, to the extent plaintiffs' complaint alleges an unconstitutional taking, their remedy is not under the substantive due process component of the Fourteenth Amendment; their remedy is under the Taking Clause of the Fifth Amendment. *Lewis*, *supra* at 842; *First English I*, *supra*. Because plaintiffs have not alleged facts to sustain their substantive due process claim, the trial court erred by not granting defendants summary disposition. MCR 2.116(C)(8).

Finally, we address plaintiffs' taking claim. Defendant Robinson Township argues that plaintiffs' taking claim fails because plaintiffs did not exhaust their administrative remedies, the permit process did not entail unreasonable delay, and fluctuations in market value do not constitute a taking of property. Plaintiffs argue that the township's deliberate course of conduct that reduced the value of their property constituted a de facto taking. Plaintiffs also assert that a regulatory taking occurred under the balancing test of *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Plaintiffs assert that the increase of their debt on their home (which exceeded their equity) to meet building code requirements, the decline in market value of their home, and the township's improper motivation to acquire their

property at less than fair market value establish that a taking occurred. We disagree.

Both the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2, prohibit the taking of private property for public use without just compensation.[2] *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). The Taking Clause of the Fifth Amendment "provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.' " *First English I*, *supra* at 314. The Taking Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id*. at 315 (emphasis added). Thus, the government is not constitutionally prohibited from taking private property for public use but is only required to pay property owners just compensation when it does so. The government normally "takes" private property through the power of eminent domain and formal condemnation proceedings. See *Dorman*, *supra* at 645. But a "taking" of private property may occur without formal condemnation proceedings when the government overburdens the property with regulations. *Id*. In general, " 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998) (*K & K Constr I*), quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922).

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[2] Michigan's Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Const 1963, art 10, § 2.

The United States Supreme Court recognizes two types of "categorical takings" regarding "regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle v Chevron USA Inc*, 544 US 528, 538; 125 S Ct 2074; 161 L Ed 2d 876 (2005). "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Id*. "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Id*., quoting *Lucas v South Carolina Coastal Council*, 505 US 1003, 1019; 112 S Ct 2886; 120 L Ed 2d 798 (1992) (emphasis in *Lucas*). Apart from "these two relatively narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 [98 S Ct 2646; 57 L Ed 2d 631] (1978)." *Lingle*, *supra* at 538.[3] The Court in *Penn Central* established a balancing test that requires "a reviewing court [to] engage in an 'ad hoc, factual inquir[y],' centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *K & K Constr I*, *supra* at 577, quoting *Penn Central*, *supra* at 124. The "common touchstone" of all taking analyses is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly

[3] The *Lingle* Court also discussed another type of taking case, not pertinent here, involving the doctrine of unconstitutional conditions—when the government requires a party to give up the constitutional right to receive just compensation for property taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property. *Nollan v California Coastal Comm*, 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987); *Dolan v City of Tigard*, 512 US 374; 114 S Ct 2309; 129 L Ed 2d 304 (1994).

appropriates private property or ousts the owner from his domain." *Lingle*, *supra* at 539.

Plaintiffs argue that they have alleged and presented evidence to support a cause of action for a de facto taking. Michigan "recognizes a cause of action, often referred to as an inverse or reverse condemnation suit, for a de facto taking when the state fails to utilize the appropriate legal mechanisms to condemn property for public use." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 187-188; 521 NW2d 499 (1994). A de facto taking "can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a 'taking.' " *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004). No exact formula exists to determine when a de facto taking occurs, but there must be some action by the government expressly directed toward the plaintiff's property that effectively limits the use of the property. *Dorman, supra* at 645.

Plaintiffs' de facto taking theory fails because they have neither alleged nor produced any evidence of a causal connection between any deliberate actions of defendants and the decline in the market value of their property. Thus, "a plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages." *Hinojosa*, *supra* at 548. Not only do plaintiffs bear the burden of proving causation in an inverse condemnation action, plaintiffs must also "satisfy this burden by proving that the government's actions were a substantial cause of the decline of its property." *Merkur*, *supra* at 130. Here, back-to-back devastating floods in 2004 and 2005 damaged plaintiffs' property. Although the township's building officials enforced the state building code when plaintiffs decided to rebuild their home following each

flood, there is no logical causal relationship between compliance with flood-resistant building requirements and any decline in the fair market value that plaintiffs' home may have experienced. The mere reduction in the value of regulated property is insufficient by itself to establish that a compensable taking has occurred. *Penn Central*, *supra* at 131; *Dorman*, *supra* at 647.

Likewise, plaintiffs' theory that the township and its trustees possessed the subjective intent to acquire plaintiffs' property for the public's use as a park and as a flood-buffer zone fails to establish a taking because there is no causal nexus to the market value decline of plaintiffs' property. The township's obtaining a FEMA grant after the 2005 flood to provide a mostly federally funded buyout option to flood victims (at 75 percent of preflood damage fair market value) cannot establish a taking because it did not oust plaintiffs from their property or diminish the property's value. The FEMA grant that was never utilized with respect to plaintiffs' property simply was not the functional "equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, *supra* at 539. Plaintiffs' property must in fact be taken to invoke constitutional just compensation.

Plaintiffs also claim that they suffered a "categorical" taking per se, i.e., that defendants' actions "completely destroyed" their property. Plaintiffs argue that they were required to either abandon their home or rebuild it at costs far exceeding its value, which essentially deprived them of all its economically beneficial use. Quite the contrary, the undisputed facts establish that plaintiffs twice *chose* to rebuild their home after it was severely damaged by flooding. Because plaintiffs chose to rebuild their home, the township was *required*

to enforce the state building code. This Court has held that a municipality may not be found liable for a taking of private property when it is merely enforcing the requirements of state law. "In order to impose liability on the township, city, or county, the [plaintiffs] must establish that [the] *defendants' regulation* caused the taking." *Frenchtown Charter Twp v City of Monroe*, 275 Mich App 1, 5-6; 737 NW2d 328 (2007) (emphasis in original).

Further, the fact that plaintiffs incurred debt in excess of their equity to rebuild their home does not establish that the township's enforcing the state building code was "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, *supra* at 539. Other than the relatively brief periods that plaintiffs' home was uninhabitable because it required structural repair or did not meet minimal health and sanitation requirements, defendants never prohibited plaintiffs from using their property for the beneficial residential use plaintiffs desired. For those periods when plaintiffs were unable to occupy their property as a residence, they dispute that a "temporary" taking occurred. Rather, plaintiffs argue that the mere fact that complying with building code requirements resulted in a negative equity denied them all economically beneficial use. This claim is without merit because even with a negative equity, plaintiffs are still able to use their property as a residence, and the property still retains some value even if its market value has declined. The fact that using their property as a residence is more costly in the face of the necessity to repair repeated flood damage does not establish a taking. "The Taking Clause does not guarantee property owners an economic profit from the use of their land." *Paragon Properties Co v City of Novi*, 452 Mich

568, 579 n 13; 550 NW2d 772 (1996), citing *Sun Oil Co v Madison Hts*, 41 Mich App 47, 56; 199 NW2d 525 (1972).

Next, plaintiffs argue that genuine issues of material fact exist regarding their regulatory taking claim. They contend that the township was improperly motivated to apply more costly flood-resistant building code requirements. Defendants argue that because plaintiffs failed to pursue available administrative remedies, their taking claim was not ripe for adjudication, and, therefore, the trial court erred by not granting defendants summary disposition on this claim. We agree.

"[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, *supra* at 186. The rule of finality applies to all constitutional "as applied" challenges to land use regulations and ensures that a plaintiff has suffered an " 'actual, concrete injury.' " *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 160-161; 683 NW2d 755 (2004) (citation omitted). Contrary to plaintiffs' argument, the rule of finality applies even when a plaintiff's constitutional claim is premised under 42 USC 1983. *Paragon Properties*, *supra* at 576.

The *Williamson* Court discussed whether the Court's decision in *Patsy v Florida Bd of Regents*, 457 US 496; 102 S Ct 2557; 73 L Ed 2d 172 (1982), holding "there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action," affected the rule of finality when asserting a regulatory taking claim. *Williamson*, *supra* at 192. The Court observed, "whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an

administrative action must be final before it is judicially reviewable." *Id*. When an administrative appeal would review whether the government's initial decision was "unlawful or otherwise inappropriate," the failure to exhaust administrative remedies would not preclude a § 1983 action under *Patsy*. *Id* at 193. But where the administrative body is empowered to review the initial agency decision by participating in the decision making regarding the regulation at issue and grant a variance from the regulation's requirements, the initial decision "is not a final, reviewable decision." *Id*. at 194. Thus, *Williamson* requires that before a claim that the imposition of a regulation to a parcel of property has effected a taking is ripe for adjudication, the claimant must have sought "alternative relief, in the form of variances . . . ." *Paragon Properties*, *supra* at 577.

This Court in *Braun*, *supra* at 159, and more recently in *Frenchtown Charter Twp*, *supra* at 7, adopted the rule of finality in *Palazzolo v Rhode Island*, 533 US 606, 620-621; 121 S Ct 2448; 150 L Ed 2d 592 (2001):

> Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

We conclude that the trial court erred by distinguishing *Williamson* and its progeny and ruling that the CBA could only review "whether or not the regulations were indeed proper." The trial court erred because the CBA

could not only review and determine whether the township building officials were properly applying the building code, it could also grant variances. MCL 125.1515(1) authorizes the CBA to grant variances from a "substantive requirement of the code if the literal application of the substantive requirement would result in an exceptional, practical difficulty to the applicant," provided the conditions of that section are complied with. Moreover, the 2003 Michigan Residential Code severely restricts the discretion of building officials with respect to the application of the code to structures in areas prone to flooding "without the granting of a variance . . . by the board of appeals." R104.10.1. The same code also provides criteria for the CBA when considering granting variances in areas prone to flooding. R112.2.2. In sum, while the CBA could review and grant relief if building officials improperly or erroneously applied the code's requirements, it could also grant variances from the code's requirements. Thus, under *Williamson* and its progeny, because plaintiffs failed to "seek alternative relief, in the form of variances," their taking claim was not ripe for adjudication. *Paragon Properties*, *supra* at 577.

We also reject the trial court's alternative reasoning for not applying the finality doctrine. The trial court reasoned that because the CBA could not award plaintiffs money damages, the plaintiffs' appeal to the CBA would have been futile. A plaintiff may be excused from the rule of finality if further administrative appeal would be futile. *Palazzolo*, *supra* at 625-626; *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007). Plaintiffs, however, made no showing that an appeal to the CBA would have been futile, i.e., that plaintiffs would not have been able to obtain relief from building code requirements they deemed economically impracticable. "Futility will not

be presumed; courts assume that the administrative process will properly correct alleged errors." *Id*.

The trial court's reasoning "puts the cart before the horse." Plaintiffs cannot bring an action for money damages for a taking of property without just compensation until they have obtained a final regulatory decision, including pursuing available remedies for a variance from the regulations they assert caused them harm. Until the government has rendered a final decision regarding the application of a regulation to a particular property, including whether a variance may be granted, it is impossible to determine if a taking has occurred. *Paragon Properties*, *supra* at 576-577; *Braun*, *supra* at 158-159. The Supreme Court explained in *Williamson*:

> [A]mong the factors of particular significance in [applying the *Penn Central* balancing test] are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. [*Williamson*, *supra* at 191.]

In sum, under *Williamson* and its progeny, plaintiffs' regulatory taking claim was not ripe for adjudication because plaintiffs failed to seek alternative relief from the CBA in the form of variances regarding the alleged economically impracticable building code provisions requiring flood-resistant repair and reconstruction. *Paragon Properties*, *supra* at 577. Plaintiffs are not excused from the rule of finality because they have not demonstrated that an appeal to the CBA would have been futile. *L & L Wine & Liquor Corp, supra* at 358. Consequently, the trial court erred by not granting defendants summary disposition on plaintiffs' taking claim, which was not ripe for judicial review. *Frenchtown Charter Twp*, *supra* at 7; *Braun*, *supra* at 161.

We reverse and remand in Docket No. 279020 for the entry of an order of summary disposition in favor of all defendants on all of plaintiffs' claims. Because defendants prevail, they may tax costs pursuant to MCR 7.219.

II. DOCKET NOS. 279064 AND 279088

Plaintiffs in this case assert the same substantive due process claims as the Cumminses did in Docket No. 279020. For the reasons discussed in that case, the trial court erred by not granting all defendants summary disposition on these claims.

Plaintiffs failed to allege or produce any evidence of conduct on the part of defendants that was so outrageous as to be arbitrary, capricious, and so lacking in rational relationship to a legitimate governmental purpose as to shock the conscious. Defendants did not enact "new regulations," they only interpreted and applied preexisting state building code requirements rationally related to the public's health, safety, and welfare with respect to structures situated in flood-prone areas. At most, defendants erred in their interpretations of the building code, for which plaintiffs had an administrative remedy.

To the extent plaintiffs claim defendants' actions "forced" them to sell their property to Robinson Township at below fair market value, plaintiffs' remedy, if any, is under the Taking Clause of the Fifth Amendment, not the Due Process Clause. But plaintiffs' taking claim also fails for reasons already discussed. We note that those few plaintiffs that voluntarily sold their flood-damaged properties under the FEMA grant program have waived a just compensation claim.[4]

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[4] Plaintiffs do not specifically argue or present evidence that those plaintiffs who participated in the FEMA grant program actually received

Plaintiffs in this case, however, also assert that the facts and circumstances establish a compensable temporary taking. See *First English I*, *supra*. We conclude that plaintiffs' temporary regulatory taking claim lacks merit because plaintiffs have neither alleged facts nor produced evidence supporting a claim that extraordinary delay in the permit review process resulted in a temporary taking that required just compensation under the *Penn Central* balancing test. Indeed, plaintiffs concede that it was not the timeliness of defendant's decisions but the expense of complying with flood-resistant building code requirements and plaintiffs' own delay in pursuing hardship appeals that delayed the repair and reoccupation of their homes.

In the seminal case recognizing the concept of a temporary taking, *First English I*, *supra*, the Court accepted as true the plaintiff's allegation that a temporary flood-plain ordinance enacted after devastating flooding denied it all use of its camp property near a river. *First English I*, *supra* at 313, 321. The flood destroyed all the plaintiff's buildings situated in the flood plain and the county of Los Angeles adopted an interim ordinance barring the construction or reconstruction of any buildings or structures in a designated flood-protection area, which included the plaintiff's property. *Id*. at 307. The California courts rejected the plaintiff's taking claim on the ground that just compensation could be obtained only prospectively after a

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less than fair market value for their property. Fair market value must be determined as of the date the taking occurs. *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965). A taking through the FEMA grant could not have occurred until after the 2005 flood. But, under the grant program, compensation was based on a percentage of fair market value of the property *before* the flood damaged it. Moreover, plaintiffs could contractually waive their constitutional right to just compensation. See *Stone v Michigan*, 467 Mich 288, 292; 651 NW2d 64 (2002).

judicial determination that the ordinance violated the plaintiff's constitutional rights. *Id*. at 312. The United States Supreme Court held that once a court has determined that a "taking" has occurred, the Fifth Amendment commands just compensation even though the taking was only temporary. *Id*. at 316, 321. The Court's holding was limited: "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id*. at 321. The Court further limited its holding by specifically noting that its analysis did not address "the quite different questions that would arise in the case of *normal delays in obtaining building permits*, changes in zoning ordinances, variances, and the like which are not before us." *Id*. (emphasis added). On remand, the California Court of Appeal held that the plaintiff's taking claim was properly dismissed because, among other reasons, the county ordinance had not deprived the plaintiff of all use of its property and because the 22-month total moratorium was a reasonable period to permit the county to study the problems associated with development in the flood-prone area and devise "a permanent ordinance which would allow only safe uses and the construction of safe structures in and near the river bed." *First English Evangelical Lutheran Church v Los Angeles Co*, 210 Cal App 3d 1353, 1373; 258 Cal Rptr 893 (1989) (*First English II*).

The Supreme Court rejected a "temporary taking" claim involving a categorical ban on all residential development for a period of 32 months in *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302; 122 S Ct 1465; 152 L Ed 2d 517 (2002). The United States Court of Appeals for the

Ninth Circuit had "held that because the regulations had only a temporary impact on [the] petitioners' fee interest in the properties, no categorical taking had occurred." *Id.* at 318. The Supreme Court rejected arguments for a bright-line rule when considering claims of regulatory takings, noting that determining whether a "regulatory taking" has occurred requires the "ad hoc" factual inquiry of the *Penn Central* balancing test. *Id*. at 325-327. In doing so, courts must focus not only on " 'the parcel as a whole,' " *id*. at 327, quoting *Penn Central*, *supra* at 130-131, but also on the temporal dimensions of the owner's interest. *Tahoe-Sierra*, *supra* at 331-332. With respect to the temporal aspects of governmental regulation and property interests, the Court opined:

> Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. Cf. *Agins* v. *City of Tiburon*, 447 U.S. [255,] 263, n. 9 [100 S Ct 2138; 65 L Ed 2d 106 (1980)] ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, *absent extraordinary delay*, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense' " (quoting *Danforth* v. *United States*, 308 US 271, 285 [60 S Ct 231; 84 L Ed 240] (1939))). [*Id*. at 332 (emphasis added).]

The *Tahoe-Sierra* Court also observed that to require just compensation for " 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like,' " *id*. at 335, quoting *First English I*, *supra* at 321, would affect other temporary regulations "that have long been considered permissible exercises of the police power." *Tahoe-Sierra*, *supra* at 335.

"A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking." *Id*. *Tahoe-Sierra* teaches "that requiring a governmental agency to compensate a property owner for the loss of value while considering applications for permits and variances under a land-use regulatory scheme would either become cost-prohibitive or lead to governmental agencies making hasty, presumably haphazard, decisions." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 536 n 17; 705 NW2d 365 (2005) (*K & K Constr II)*.

Comparing the length of total moratoriums held not to constitute temporary regulatory takings in *First English* and *Tahoe-Sierra*, we conclude no extraordinary delay occurred in the permit review process here. Further, requiring plaintiffs to obtain building and occupancy permits cannot itself constitute a taking of property. *Bond v Dep't of Natural Resources*, 183 Mich App 225, 231; 454 NW2d 395 (1989), citing *United States v Riverside Bayview Homes, Inc*, 474 US 121, 126-127; 106 S Ct 455; 88 L Ed 2d 419 (1985). "[T]he very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *Id*. at 127. Indeed, the essence of plaintiffs' claim is not that they would not be allowed to use their property for residential purposes but that they had to comply with flood-resistant building code requirements that imposed financial hardship. This claim does not establish a temporary regulatory taking under the *Penn Central* balancing test.

The *Penn Central* balancing test requires examining (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered

with distinct, investment-backed expectations. The relevant inquiries regarding the character of the government's action is whether it singles plaintiffs out to bear the burden for the public good and whether the regulation being challenged "is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." *K & K Const II*, *supra* at 559. Here, the township enforced the statewide building code and its provisions regarding flood-plain construction that apply equally to all landowners with property similarly situated in flood-prone areas. Thus, plaintiffs are both benefited and burdened like other similarly situated property owners; "this factor weighs heavily against finding that a compensable regulatory taking has occurred here." *Id*. at 563.

The economic effect of enforcing the building code requirements for flood-resistant construction also precludes a conclusion that a temporary taking occurred. Plaintiffs' only claim is that such construction is more costly than construction that is not flood-resistant. But, as noted already, "[t]he Taking Clause does not guarantee property owners an economic profit from the use of their land." *Paragon Properties, supra* at 579 n 13. Applying this principle to the present case means that the Taking Clause does not guarantee that a property owner may choose the least costly building materials or methods to repair or rebuild property that has been damaged in a flood. Moreover, plaintiffs who appealed to the CBA obtained relief from the economic hardship the regulations might impose within a reasonable period. This factor does not support finding a temporary taking occurred in this case.

The last *Penn Central* balancing-test factor examines the extent to which the governmental regulation has interfered with plaintiffs' distinct, investment-backed

expectations. Here, plaintiffs do not assert that their property is used to make a profit; rather, they use their property for residential purposes. Because their homes are situated in a flood plain that experiences frequent flooding, plaintiffs could have no reasonable expectation that their property would not periodically experience flood damage necessitating costly repairs. See *Dorman*, *supra* at 648-649 (holding that the plaintiff could not establish that a zoning regulation interfered with "distinct, investment-backed expectations" when the zoning regulation was consistent with the neighborhood and "[a] simple visual inspection of the area would have placed plaintiff on notice that his proposed development was inconsistent with the character of the neighborhood"); see, also, *K & K Constr II*, *supra* at 558 (the plaintiffs knowingly purchased regulated wetlands so "it [was] clear that there [had] not been a significant negative effect on [the] plaintiffs' *reasonable* investment-backed expectations") (emphasis in original). Similarly, the application of flood-resistant building code requirements to property situated in a flood-prone area cannot have interfered with plaintiffs' *reasonable* "distinct, investment-backed expectations."

In sum, plaintiffs' temporary regulatory taking claim fails as a matter of law because plaintiffs have neither alleged nor produced any evidence that the government extraordinarily delayed its responses and decisions following the flooding that damaged plaintiffs' homes and rendered them temporarily uninhabitable. Plaintiffs simply have not created a question of fact under the *Penn Central* balancing test that a temporary taking requiring just compensation occurred. Consequently, the trial court erred by not granting defendant township summary disposition.

We reverse and remand in Docket Nos. 279064 and 279088 for the entry of an order of summary disposition in favor of all defendants on all of plaintiffs' claims. Because defendants prevail, they may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

CANJAR v COLE

Docket No. 282237. Submitted April 8, 2009, at Detroit. Decided May 14, 2009, at 9:00 a.m.

Gregory A. Canjar brought an action in the Lapeer Circuit Court against Roger D. Cole and Darlene L. Lamb, seeking to quiet title in his favor by adverse possession to a strip of land that the defendants held by deed and that adjoined the plaintiff's property. The court, Nick O. Holowka, J., quieted title in the defendants, concluding that although the plaintiff met all the requirements for an adverse possession claim, the plaintiff's former wife had not satisfied the hostile intent element. The court ruled that the plaintiff's wife had to meet the requirements for an adverse possession claim because she had held the plaintiff's property as a tenant by the entirety during her marriage to the plaintiff. The plaintiff appealed.

The Court of Appeals *held*:

1. When real property is held under a tenancy by the entirety, neither spouse can convey, encumber, or alienate the property without the consent of the other.

2. A plaintiff, in order to establish a claim of adverse possession, must provide clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for 15 years. The 15-year period begins when the rightful owner has been disseised of the land. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership.

3. Nothing in the intent and purpose of the tenancy by the entirety supports a conclusion that both spouses must meet the requirements of adverse possession in order for one spouse to individually append property adjoining property held by the spouses under a tenancy by entirety. Because the additional property is outside the boundaries of the entirety property, the principles applicable to entirety property requiring spouses to act jointly do not apply.

Reversed and remanded for an order quieting title in the plaintiff; monetary award to defendants as prevailing parties vacated.

ADVERSE POSSESSION — TENANTS BY THE ENTIRETY — SPOUSES AS ADVERSE POSSESSORS.

It is not necessary for both spouses who hold property under a tenancy by the entirety to satisfy the elements of adverse possession when one spouse claims adverse possession of adjoining property; only the claimant has to satisfy the elements.

Gary J. Canjar, for the plaintiff.

Taylor, Butterfield, Riseman, Clark, Howell, Churchhill & Jarvis, P.C. (by *Carl M. Riseman*), for the defendants.

Before: ZAHRA, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM. In this quiet title action, we must determine whether plaintiff-husband and his nonparty, former wife who owned property by the entirety must both have had "hostile" intent for plaintiff to individually adversely possess property abutting the property held by the entirety. Following a bench trial, the trial court determined that plaintiff met all the elements required to sustain a cause of action for adverse possession, but concluded that the nonparty former wife's lack of hostile intent during the required statutory period destroyed the plaintiff's claim of adverse possession and created a valid defense for defendants. Plaintiff appeals as of right, and we reverse. We hold that an adverse possessor who seeks to append property to property that he or she holds by the entirety with his or her nonparty spouse may adequately satisfy the requirements of adverse possession individually regardless of the intent of the nonparty spouse.

I. BASIC FACTS AND PROCEDURAL HISTORY

This lawsuit arises out of a dispute over a triangular-shaped parcel of property located along the boundary of

plaintiff's and defendants' properties and measuring approximately 0.46 acres. Plaintiff and his now ex-wife, Daryl Snow, had purchased a 10-acre parcel of land in 1976 and held the property as tenants by the entirety. Plaintiff and his wife began living on the property in 1980. Defendant Darlene Lamb purchased the property to the north of plaintiff's property in 1988; Lamb and defendant Roger Cole had initially rented the property from the previous owner and had resided on the property since 1984. In 1993, a warranty deed was issued to both Lamb and Cole. A creek and tree line creates a natural boundary between plaintiff's and defendants' properties. The disputed property lies on plaintiff's side of the creek but was owned by defendants pursuant to the terms of their deed.

Starting shortly after their purchase of the 10-acre property, plaintiff began "bush-hogging" and mowing the disputed land. Plaintiff cleared and maintained his land, including the disputed parcel, all the way to the creek and the tree line. Plaintiff knew that he was on defendant's property when maintaining the land all the way to the creek and tree line. Plaintiff nonetheless continued to use the disputed property almost every day or every other day in some way. Plaintiff had a garden on the disputed parcel for about six years, planted some trees there in 1977, had a doghouse on it for several years, burned trash there once or twice a week, and stored various personal property, including vehicles, on the disputed land. In addition, plaintiff created a baseball and soccer field for his children on the disputed area, and his wife used the area to play with the children and tend a strawberry garden.

A fire that occurred on the disputed property in spring 2004 precipitated the current litigation. Plaintiff accidentally set fire to some of the trees he had planted

on the disputed property while he was burning leaves, and defendant Cole allegedly came onto the property complaining that plaintiff had burned his trees. Cole threatened to file a complaint, and plaintiff filed this lawsuit seeking to quiet title to the disputed parcel in himself on a theory of adverse possession.

After a lengthy pretrial process, the matter proceeded to a bench trial. Plaintiff testified that he conducted his activities on the property with the intent of claiming the land for his own although he knew he did not own the parcel. Plaintiff also stated that he never saw defendants on the disputed property, they never told him to stop using the disputed property, and they never removed any of his personal property from the area. Plaintiff also never asked for, or received, permission to use the property.

Plaintiff's friend, Richard Nash, corroborated plaintiff's trial testimony that plaintiff used the disputed property as his own. According to Nash, he helped plaintiff plant some large trees in the disputed area, cleared brush with a chain saw from the land, saw vehicles on the disputed area, and noticed that plaintiff maintained his property up to the creek. Plaintiff's wife, Snow, whom he divorced sometime in 2002, also confirmed plaintiff's actions on the disputed land. Snow testified that she quitclaimed her interest in the 10-acre property to plaintiff after the divorce, thereby destroying the tenancy by the entirety. Snow testified that plaintiff was on the disputed property weekly since 1980, until she moved out in 2003, and that they maintained the property all the way to the creek line to make it "look nice." She stated that it would be open and obvious to a casual observer that she and plaintiff were occupying the property. Snow also testified that it was never the "spirit of [her] heart to ever take any-

thing that was not [hers]" and that she "never had intentions" to own the disputed property.

Lamb disputed that any vehicles had been parked on the property or that any other personal property had been placed there. Lamb asserted that she used the property on a regular basis and that it was never mowed until 1997. She testified that she and her children would walk through the disputed area on "many" occasions, using it for hunting, snowmobiling, and riding dirt bikes. She also testified that her children played in the riverbed in the summer.

After closing arguments, the trial court quieted title in defendants. The trial court reasoned that although plaintiff had met all the requirements of adverse possession, plaintiff's claim nonetheless failed because Snow did not intend to adversely possess the property. In the trial court's view, because plaintiff and Snow had owned the 10-acre property as tenants by the entirety, Snow was also required to act with hostile intent in order for plaintiff to prevail on his claim of adverse possession. This appeal followed.

II. STANDARDS OF REVIEW

We review de novo actions that are equitable in nature, such as quiet title actions, but the trial court's factual findings are reviewed for clear error. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). Conclusions of law are also reviewed de novo. *Ambs v Kalamazoo Co Road Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003).

III. QUIET TITLE ACTION

Plaintiff argues that the trial court erred by ruling that both husband and wife must have the same intent

to adversely possess a parcel of property adjoined to property they hold by the entirety in order for one spouse individually to lay claim to the disputed property through adverse possession. We agree. Because our determination addresses married individuals' rights and the purpose of the tenancy by the entirety, as well as the nature of an adverse possession claim, we find it necessary to first discuss these concepts as they have developed in Michigan.

A. MARRIAGE AND INDIVIDUAL SPOUSES' RIGHTS

It has long been recognized that a married man has the right to hold and manage property held individually, obtained before or after marriage. See *Burdeno v Amperse*, 14 Mich 91, 92 (1866); *Schmoltz v Schmoltz*, 116 Mich 692; 75 NW 135 (1898); *Trabbic v Trabbic*, 142 Mich 387; 105 NW 876 (1905); *Le Blanc v Sayers*, 202 Mich 565; 168 NW 445 (1918). Married women did not always enjoy these same rights because, at common law, the power and independent authority to act was vested in the husband alone. See *Snyder v People*, 26 Mich 106, 109 (1872). In other words, once married, a woman ceased to have control or authority over her actions or her property because they became subject to the control of her husband. *Burdeno*, *supra* at 92; *People v Wallace*, 173 Mich App 420, 426; 434 NW2d 422 (1988). A wife could not manage or own her own property, could not enter into contracts, and could not sue in her own name. *Burdeno*, *supra* at 92. "In short, she lost entirely all the legal incidents attaching to a person acting in her own right [and the] husband alone remained *sui juris*, as fully as before marriage." *Id.*

Eventually, however, a set of mandates came into being, termed the married women's property acts, which "gave married women the power to protect,

control and dispose of property in their own name, free from their husbands' interference." *Wallace*, *supra* at 428, citing *Snyder*, *supra* at 107, 110. Const 1963, art 10, § 1, abolished what was known in the former common law as "disabilities of coverture," or a married woman's incapacity to enter into a binding contract. That provision provides:

> The disabilities of coverture as to property are abolished. The real and personal estate of every woman acquired before marriage and all real and personal property to which she may afterwards become entitled shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be dealt with and disposed of by her as if she were unmarried. Dower may be relinquished or conveyed as provided by law.

Similarly, MCL 557.21(1) provides:

> If a woman acquires real or personal property before marriage or becomes entitled to or acquires, after marriage, real or personal property through gift, grant, inheritance, devise, or other manner, that property is and shall remain the property of the woman and be a part of the woman's estate. She may contract with respect to the property, sell, transfer, mortgage, convey, devise, or bequeath the property in the same manner and with the same effect as if she were unmarried. The property shall not be liable for the debts, obligations, or engagements of any other person, including the woman's husband, except as provided in this act.

See also *Manufacturers Nat'l Bank v Pink*, 128 Mich App 696, 699-700; 341 NW2d 181 (1983) (recognizing married women's independent right to contract).

Consequently, married women's rights became coterminous with married men's rights and, today, *each* spouse has the power and authority to independently exercise his or her rights free of the other spouse's

interference. See MCL 557.21; *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406; 578 NW2d 267 (1998). And, although many legal structures remain intact for the purpose of protecting the marital estate, e.g., the tenancy by the entirety discussed below, nothing in the law today functions to prevent one spouse from acquiring property in an individual capacity without the consent of the other.

B. TENANCY BY THE ENTIRETY

With the rights of married spouses in mind, we now turn to the tenancy by the entirety. "A tenancy by the entirety is a type of concurrent ownership in real property, which is unique to married persons." *Tkachik v Mandeville*, 282 Mich App 364, 370; 764 NW2d 318 (2009). This type of concurrent ownership, which also derived from English common law, is intended to protect the martial estate. *Id.* This Court discussed the nature of property held by the entirety in *Rogers v Rogers*, 136 Mich App 125, 134; 356 NW2d 288 (1984):

> The classic basis for the tenancy by the entireties was the concept that "the husband and wife are but one person in the law". In a true tenancy by the entireties, each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entireties, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. [Citations omitted.]

Stated more succinctly, when a husband and wife choose to hold property by the entirety, neither spouse may individually convey, encumber, devise, or alienate that property without the consent of the other spouse.

Rather, the property is protected from one spouse acting alone to accomplish these types of transactions.

C. ADVERSE POSSESSION

Whereas the tenancy by the entirety is a type of concurrent ownership, adverse possession is a type of claim. This doctrine was adopted in our legal system from English common law. Sprankling, *The antiwilderness bias in American property law*, 63 U Chi L R 519, 537-540 (1996). The underlying philosophy of a claim for adverse possession is to encourage land use, as it favors the productive use of land over its disuse. *Id*. The import of this doctrine, as this Court has recognized, "is against a party who has had rights that have not been asserted for an extended period of time to the detriment of another." *McGee v Eriksen*, 51 Mich App 551, 559; 215 NW2d 571 (1974).

Accordingly, Michigan law has sanctioned a claim that permits the otherwise unlawful taking of property initially owned rightfully by another. MCL 600.5801. In order to establish a claim of adverse possession, a plaintiff must provide "clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The 15-year period begins when the rightful owner has been disseised of the land. MCL 600.5829. "Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." *Kipka*, *supra* at 439. In addition, a plaintiff must also show that the plaintiff's actions were "hostile" and "under claim of right," meaning that the use is "inconsistent with the right of the owner, without permission asked or given, and which use would entitle

the owner to a cause of action against the intruder." *Wengel v Wengel*, 270 Mich App 86, 92-93; 714 NW2d 371 (2006) (quotation marks and citation omitted).

D. APPLICATION

Turning to the instant case, plaintiff argues that the trial court erred by quieting title in defendants because it found that Snow did not have the hostile intent necessary to adversely possess the disputed property, which, in the trial court's view, was necessary because plaintiff and Snow owned the adjoining property by the entirety. We agree with plaintiff.

The trial court concluded that plaintiff had met all the requirements, except that his former wife had expressed no hostile intent or claim of title,[1] and therefore plaintiff's claim failed. The trial court reasoned as follows:

> The Court is satisfied that based upon the testimony here that anyone driving up the driveway of the Canjar residence . . . would make the natural assumption that that parcel of property belongs to the Canjar's [sic] living at 3203 Muir Road. They mowed it. They took care of it. They did all things necessary to exercise dominion, control and everything else over that particular piece of property. The Court is satisfied that the property was down a hill or slope. There was a tree line. They really didn't see it. It was difficult for them to see even though they may have driven by on a regular basis because they lived right there. The Court is satisfied that . . . the Canjars exercised visible open, notorious, exclusive possession of that property.
>
> The issue now becomes was there a claim of right. The Court's position in this matter is that the property that this .46 acres is to be appended to is property that is owned by

[1] We note that defendants did not cross-appeal the trial court's other factual findings and, therefore, we do not address the validity of those findings on appeal.

the entireties by Mr. and Mrs. Canjar at the time they bought the land, . . . and the case law is ample where under Michigan law both the husband and wife have a single cause of action for damages to entireties property. Neither the husband nor wife, acting alone, may convey or contract to convey to a stranger, property held by both of them as tenants by the entireties.

The reason that's important is because one of the owners of the 10 acres . . . , Miss Daryl Canjar, now known as Daryl Snow, clearly testified that she knew the Coles had superior title, that she only took care of it to make it look nice, to make it look neat, to have someplace for the children to play, even some of the Cole children played on it. She was clear in regard to that. So the owner of the property has to have—the claim has to be hostile in regard to both. And she acknowledged that it wasn't hostile. She knew they had a claim of right. . . . So with that said, with her position and based upon the Rogers case, the St[e]r-rett[2] case and all the other things I've talked about, there is no 15 years . . . .

Again, in order to have the entire 15 years of adverse possession tacked, that's one thing. Now, again, Mr. Canjar, I know your argument is that if the property was located somewhere else and Mr. Cole drove to a cottage—that's not the issue. The issue is that piece of property is abutting the property that was held by the entireties. The fact that Mrs. Canjar did not have the same state of mind as being notorious, hostile, claim of right, defeats your client's 15 years in regard to this matter. . . .

* * *

Again, I heard your argument about the husband's claim and people mowing the grass. I hope you were being facetious, Mr. Canjar, because those aren't the facts the Court is looking at here. So in regard to those positions the

[2] See *Rogers*, *supra*; *Estate of Sterrett v Watson*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2004 (Docket No. 241996).

> Court is satisfied that the 15 years have not been met because the owners of the entirety did not, together, express notorious, exclusive or hostile or claim of right to said .46 acres.

The trial court erred. The doctrine of adverse possession simply does not require an analysis of how other owners, who own other land in conjunction with a plaintiff and which property abuts the disputed parcel, treated the disputed land.[3] Significantly, the elements of adverse possession are silent with respect to whether the adverse possessor owns other land, adjoining or not, and whether the adverse possessor holds such land jointly, by the entirety, or singly. In our view, it cannot be more plain that the entire focus of a claim for adverse possession is the adverse possessor's actions on, and intent with respect to, the land he or she seeks to adversely possess during the statutory period, as well as the rightful owner's actions and uses with respect to the disputed land. See *Kipka*, *supra* at 439; *Wengel*, *supra* at 92-93. Thus, whether the adverse possessor owns other land to which he seeks to append the disputed property is immaterial and, consequently, irrelevant to an adverse possession analysis. Further, nothing in the doctrine of adverse possession is inconsistent with permitting one spouse individually to adversely possess land abutting land that is owned by the entirety, although the other spouse may not have had the same hostile intent.

Equally significant is that nothing in the character of the tenancy by the entirety justifies the trial court's conclusion of law. Nothing in the intent and purpose of this type of concurrent ownership permits us to conclude, as the trial court did, that both spouses must

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[3] We note that if Snow had been a plaintiff, there is no question that her intent would matter.

meet the requirements of adverse possession in order for one spouse to individually append an adjacent parcel of property to property that is held by the entirety. The nature and purpose of this type of concurrent ownership do not support this proposition. Rather, because the additional property is outside the boundaries of the entirety property, the principles applicable to entirety property requiring that spouses act jointly, see *Rogers*, *supra* at 134, simply do not apply and are irrelevant. As such, this type of concurrent ownership provides no restriction on the acquisition of additional property through adverse possession by one spouse, regardless of whether the disputed parcel is attached to the entirety property, or whether the nonparty spouse agrees with the other spouse's activities in attempting to adversely possess property.

Accordingly, we hold that in order for one spouse to claim adverse possession of property that abuts property owned by the entirety, it is not necessary that both spouses have the same intent to adversely possess the parcel as long as the plaintiff can singly satisfy all the elements of adverse possession. A decision contrary to our holding would imply that married persons cannot acquire property as individuals, which is obviously contrary to established law that each spouse is free to acquire property independently and without the interference of the other spouse. See Const 1963, art 10, § 1; MCL 557.21; *North Ottawa Community Hosp*, *supra* at 406. Thus, plaintiff certainly did not need his spouse's permission, consent, or even complicity to adversely possess the disputed parcel. Plaintiff's actions alone were sufficient. As the trial court found, plaintiff satisfied the hostility requirement, as well as all other elements of adverse possession. The judgment quieting title in defendants was entered in error.

Lastly, we note that the court's statement that Michigan caselaw provides that "both husband and wife have a single cause of action for damages to entireties property" and that neither may act alone in conveying or contracting to convey entirety property is clearly inapplicable to the present matter. Plaintiff's claim did not involve a claim of damages, or conveyance, or encumbrance with respect to the 10-acre property.

In light of our conclusion, it is unnecessary for us to address plaintiff's remaining claims. However, to the extent that defendants were awarded $517.48 because they were the prevailing parties, we vacate that award because defendants are no longer the prevailing parties.

Reversed. Remanded for entry of an order quieting title to the disputed property in plaintiff. We do not retain jurisdiction.

PEOPLE v DAVIS

Docket No. 282994. Submitted May 6, 2009, at Detroit. Decided May 14, 2009, at 9:05 a.m.

Michael L. Davis was charged with larceny in a building, but failed to appear for his preliminary examination. On May 10, 2007, the prosecution received a certified letter from the Department of Corrections (DOC) indicating that the defendant was incarcerated. The defendant was arraigned on a *capias* order on October 17, 2007, and bound over for trial in the Wayne Circuit Court following a preliminary examination on November 1, 2007. The defendant moved for dismissal because of the lack of a speedy trial. The court, Carole F. Youngblood, J., dismissed the case, concluding that MCL 780.131(1) requires that an inmate be brought to trial within 180 days and that the 180-day period had elapsed without the defendant's proceeding to trial. The prosecution appealed.

The Court of Appeals *held*:

MCL 780.131(1) provides that when the DOC receives notice of an untried warrant, indictment, information, or complaint pending against an inmate, the inmate must be "brought to trial within 180 days after" the DOC gives the prosecution written notice of where the inmate is confined and requests final disposition of the warrant, indictment, information, or complaint. The 180-day period begins the day after the prosecution receives the notice. MCL 780.133 provides that the court loses jurisdiction over the charges if action is not commenced on the matter within the 180-day period. MCL 780.131, however, does not require that the trial begin or be completed within that period. The court retains jurisdiction if the prosecution takes good-faith action well within the period and proceeds with dispatch toward readying the case for trial. The defendant was arraigned on the *capias* order and was bound over for trial within 180 days of the prosecution's receiving notice from the DOC of the defendant's incarceration. Given the prosecution's good-faith efforts to proceed promptly with pretrial proceedings, the trial court erred by dismissing the case.

Reversed and remanded for further proceedings.

PRISONS AND PRISONERS — 180-DAY RULE — TRIAL OF INMATES ON PENDING CHARGES — PROSECUTING ATTORNEY'S DUTY UNDER 180-DAY RULE.

When the Department of Corrections receives notice of an untried warrant, indictment, information, or complaint pending against an inmate, the inmate must be "brought to trial within 180 days after" the department gives the prosecution written notice of where the inmate is confined and requests final disposition of the warrant, indictment, information, or complaint; the 180-day period begins the day after the prosecution receives the notice, and the court loses jurisdiction over the charges if action is not commenced on the matter within that period; the statute, however, does not require that the trial begin or be completed within that period; rather, the court retains jurisdiction if the prosecution takes good-faith action well within the period and proceeds with dispatch toward readying the case for trial (MCL 780.131[1], 780.133).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

Gayle Fort Williams for the defendant.

Before: SERVITTO, P.J., and O'CONNELL and ZAHRA, JJ.

O'CONNELL, J. The prosecution appeals as of right a December 18, 2007, order of dismissal for a violation of the statutory 180-day rule, MCL 780.131. We reverse and remand.

Defendant was charged with larceny in a building, MCL 750.360, for an offense that occurred on August 26, 2006. The complaint was filed and the warrant authorized on September 20, 2006. Defendant was arraigned on October 16, 2006, and a preliminary examination was scheduled for October 26, 2006. Defendant failed to appear, and a *capias* order was entered.

On May 10, 2007, the prosecution received a certified letter from the Department of Corrections (DOC) informing it that defendant was incarcerated with the

DOC. Defendant was arraigned on the *capias* order on October 17, 2007. On November 1, 2007, the preliminary examination was held, and defendant was bound over for trial. He was arraigned in circuit court a week later. The trial court scheduled a final pretrial conference for December 18, 2007, and scheduled the trial for January 14, 2008.

On December 13, 2007, defendant moved to dismiss for lack of a speedy trial. He alleged that he was arrested in August 2006 and had been incarcerated since his arrest.[1] He further alleged that he was prejudiced by the delay in proceeding to trial, a delay for which he was not responsible, because "some evidence is no longer available to aid in his defense."

The prosecution interpreted the motion as one to dismiss for a violation of the 180-day rule, MCL 780.131, and asserted that the statute "doesn't require the trial itself commence within 180 days, but that the process to bring the defendant to trial begin within the statutory period." The prosecution asserted that it received notice of defendant's incarceration from the DOC on or about May 11, 2007, and that defendant was arraigned within the next 180 days. On December 18, 2007, the trial court held that because the statute specifically requires that an inmate "be brought to trial within 180 days" and the 180-day period had elapsed without defendant's proceeding to trial, dismissal was required.

MCL 780.131(1) states:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against

[1] The reason for his incarceration is unclear from the lower court record.

> any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.

The 180-day period begins on the day after the prosecution receives notice that the defendant is incarcerated and awaiting trial on pending charges. *People v Williams*, 475 Mich 245, 256 n 4; 716 NW2d 208 (2006).

In this case, the prosecution received notice in May 2007, and the 180-day period expired the following November. MCL 780.133 provides that the court loses jurisdiction over the charges if action is not commenced on the matter within the 180-day period:

> In the event that, within the time limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

On appeal, the prosecution claims that the trial court erred when it dismissed the pending charge against defendant because it commenced the prosecution of the charge within 180 days of receiving notice of defen-

dant's incarceration from the DOC, satisfying the requirements of MCL 780.131 and MCL 780.133. We agree. Our Supreme Court directly addressed this question in *People v Hendershot*, 357 Mich 300; 98 NW2d 568 (1959), when it reconciled the provision in MCL 780.131 that requires that a prisoner be brought to trial within 180 days with the provision in MCL 780.133 that requires dismissal of criminal charges only if action has not been commenced within 180 days. The *Hendershot* Court stated:

> It is to be noted that, while [MCL 780.131] directs that the inmate "shall be brought to trial" within 180 days, the statute does not deprive the court of jurisdiction and require dismissal unless "action is not commenced on the matter" within that period.
>
> The language of [MCL 780.131] is not that the inmate shall be "tried" or that his "trial shall commence" within 180 days, but, instead, that he "shall be brought to trial" within that time. The legislative intent and meaning in its use of the term "brought to trial" is to be gathered from the entire act. [MCL 780.133]'s provision for action to be commenced on the matter within the mentioned time throws strong light on the question. Clearly, if no action is taken and no trial occurs within 180 days, the statute applies. If some preliminary step or action is taken, followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly, the statute opens the door to a finding by the court that good-faith action was not commenced as contemplated by [MCL 780.133], thus requiring dismissal. The statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period. If, as here, apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met. When the people have moved the case to the point of readiness for trial and stand

> ready for trial within the 180-day period, defendant's delaying motions, carrying the matter beyond that period before the trial can occur, may not be said to have brought the statute into operation, barring trial thereafter. [*Id.* at 303-304.]

The trial court held that *Williams* supported its determination that dismissal of the charge against defendant was warranted because the prosecution had failed to bring defendant to trial within 180 days of receiving notice of his incarceration from the DOC. However, we note that *Williams* did not address the direct question at issue in this case. In *Williams*, our Supreme Court held that a version of MCR 6.004(D) adopted in 1989 to codify its interpretation of the 180-day rule in *People v Hill*, 402 Mich 272; 262 NW2d 641 (1978), *Hendershot*, and *People v Castelli*, 370 Mich 147; 121 NW2d 438 (1963), was "invalid to the extent that it improperly deviated from the statutory language." *Williams*, *supra* at 259. Our Supreme Court overruled its earlier holdings in *Hill* and *Castelli*, stating:

> MCR 6.004(D) was adopted in 1989 to codify, with two exceptions, this Court's interpretation of the 180-day-rule statute in [*Hill*, *Hendershot*], and dictum in [*Castelli*]. We hold that this version of MCR 6.004(D) was invalid to the extent that it improperly deviated from the statutory language. This Court's holding in *Hill*, *supra*, and its dicta in *Castelli*, *supra*, along with the portion of the court rule implementing these holdings, improperly expanded the scope of the 180-day-rule statute by requiring the prosecutor to bring a defendant to trial within 180 days of the date that the Department of Corrections knew or had reason to know that a criminal charge was pending against the defendant. MCR 6.004(D)(1)(b). This language does not appear in the statute. The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges.

> The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant. We decline to read such nonexistent language into the statute. *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003). We overrule *Hill*, *supra*, and *Castelli*, *supra*, to the extent that they are inconsistent with MCL 780.131. [*Id.*]

Questions concerning when the DOC knew or had reason to know of pending criminal charges against a defendant were not addressed in *Hendershot* and are not applicable in this case. Further, our Supreme Court expressly declined to overrule *Hendershot* in *Williams* or any other case. Accordingly, *Hendershot* remains good law.

Therefore, because the prosecution commenced the action within 180 days of receiving notice of defendant's incarceration from the DOC, the trial court has not lost jurisdiction of the case and erred when it entered an order dismissing the case, even though a trial had not occurred by the 180-day mark. The prosecution made good-faith efforts to proceed promptly with pretrial proceedings; defendant was arraigned on the *capias* order on October 17, 2007, and was bound over for trial following the preliminary examination in November 2007. Further, trial would have been quickly forthcoming—a final pretrial conference was scheduled for December 18, 2007, and the trial was scheduled to begin in January 2008.

There is no indication that any delay in bringing defendant to trial was inexcusable or demonstrated an intent not to promptly bring the case to trial. To the contrary, it appears that the prosecution intended to bring the case to trial in a timely manner. The prosecution commenced proceedings in this case within the

180-day period and promptly proceeded to prepare the case for trial, making the necessary good-faith steps to satisfy the requirements of MCL 780.131 and MCL 780.133 as set forth in *Hendershot*. Therefore, the trial court did not lose jurisdiction of the case, and its dismissal of this case was in error.

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

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specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute; Congress's intent must be given effect, and the court must reject administrative constructions that are contrary to clear congressional intent. *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212.

SINGLE STATE CONSTRUCTION CODE ACT

3. The Single State Construction Code Act authorizes a construction board of appeals to grant variances from a substantive requirement of the code if the literal application of the substantive requirement would result in an exceptional, practical difficulty to the applicant, provided that certain conditions are met (MCL 125.1515[1]). *Cummins v Robinson Twp*, 283 Mich App 677.

ADULT ENTERTAINMENT—*See*

CONSTITUTIONAL LAW 4

ADVERSE POSSESSION

EASEMENTS

1. Adverse possession can apply against easements created by private dedications in a plat recorded before the January 1, 1968, effective date of the Land Division Act (MCL 560.101 *et seq*.). *Beach v Lima Twp*, 283 Mich App 504.

TENANTS BY THE ENTIRETY

2. It is not necessary for both spouses who hold property under a tenancy by the entirety to satisfy the elements of adverse possession when one spouse claims adverse possession of adjoining property; only the claimant has to satisfy the elements. *Canjar v Cole*, 283 Mich App 723.

AGENCY

PERSONNEL AGENCIES

1. A person who is to receive a fee for assisting another in making basic career decisions is a Type B personnel agency and must be licensed under article 10 of the Occupational Code; article 10 prevents a personnel agency from bringing an action for compensation for performing an act without alleging and proving that the agency and its agent are licensed under the article (MCL

CONSTITUTIONAL LAW

See, also, ADMINISTRATIVE LAW 1
CRIMINAL LAW 3
INTOXICATING LIQUORS 1

DUE PROCESS

1. *People v Chapo*, 283 Mich App 360.
2. A plaintiff must allege conduct that is intended to injure in some way unjustifiable by any governmental interest and that is conscience-shocking in nature to state a cognizable substantive due process claim. *Cummins v Robinson Twp*, 283 Mich App 677.
3. When a particular amendment of the United States Constitution provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing the claim. *Cummins v Robinson Twp*, 283 Mich App 677.

FIRST AMENDMENT

4. Content-neutral time, place, and manner zoning regulations of protected speech such as nonobscene erotic entertainment are acceptable under the First Amendment as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication; in determining the availability of reasonable alternative avenues of communication, a court may consider the existence of currently operating adult entertainment businesses grandfathered under the ordinance. *Truckor v Erie Twp*, 283 Mich App 154.

GUILTY PLEAS

5. A trial court may not, as a condition for a guilty plea, impose a waiver of the right to appointed appellate counsel (US Const, Am XIV). *People v Billings*, 283 Mich App 538.

MUNICIPAL CORPORATIONS

6. A municipality may not be found liable for a taking of private property when it is merely enforcing the requirements of state law; the plaintiff must establish that a township, city, or county regulation caused a taking in order to impose liability on the township, city, or county for the taking. *Cummins v Robinson Twp*, 283 Mich App 677.

COSTS

See, also, ENVIRONMENT 3

CASE EVALUATION SANCTIONS

1. Expert witness fees incurred in trial preparation may be awarded as actual costs for purposes of case evaluation sanctions (MCR 2.403[O][1], [6][a]). *Peterson v Fertel*, 283 Mich App 232.

COUNTERFEITING—*See*

CRIMINAL LAW 2

FRAUD 1

COURTS

FAMILY DIVISION OF CIRCUIT COURT

1. A family division judge presiding over a matter under the juvenile code, MCL 712A.1 *et seq*., has the power and authority to hear related domestic relations actions; a court presiding over a juvenile proceeding that faces a matter that has been consolidated with a related domestic relations matter, or a court presiding over a domestic relations proceeding, that faces a matter that has been consolidated with a juvenile matter, must make it clear that it is exercising jurisdiction under chapter 10 of the Revised Judicature Act, and the court's exercise of jurisdiction must further be consistent with relevant local court rules; the court must abide by the procedural requirements of the particular statute under which it is proceeding (MCL 600.1021, 600.1023). *In re AP*, 283 Mich App 574.

CRIMINAL INFORMATIONS—*See*

CONSTITUTIONAL LAW 1

WITNESSES 1

CRIMINAL LAW

See, also, INTOXICATING LIQUORS 1
WITNESSES 1

ASSISTANCE OF COUNSEL

1. *People v Chapo*, 283 Mich App 360.

COUNTERFEITING

2. A conviction of possession of a counterfeit bill or note requires the prosecution to show that the defendant

sion of property to recover three times the amount of actual damages sustained means the actual loss the victim suffered as a result of the defendant's criminal conduct; once inflicted and created, the amount of actual damages does not change simply because an insurer has a contractual obligation to compensate the victim in whole or in part for the actual loss (MCL 600.2919a). *Alken-Ziegler, Inc v Hague*, 283 Mich App 99.

ENDORSEMENTS IN POLICIES—*See*

INSURANCE 1

ENVIRONMENT

ENVIRONMENTAL PROTECTION ACT

1. Where a defendant's conduct itself does not offend the Michigan Environmental Protection Act, no violation of the act exists; an improper administrative decision, standing alone, does not harm the environment and does not provide a basis for judicial review of the decision under the act (MCL 324.1701 *et seq*.). *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115.
2. A trial court, in determining whether a plaintiff has made out a prima facie violation of the Michigan Environmental Protection Act, may employ either of the equally available methods of making detailed and specific findings that the defendant's conduct has polluted, impaired, or destroyed, or is likely to pollute, impair, or destroy, the air, water, or other natural resources, or it may find that the defendant has violated an applicable pollution control standard (MCL 324.1701 *et seq*.). *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115.
3. The costs allowed under the Michigan Environmental Protection Act are the same as costs allowed under the Revised Judicature Act; the Michigan Environmental Protection Act does not provide for an award of attorney fees (MCL 324.1701 *et seq*., 600.101 *et seq*.). *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115.

ENVIRONMENTAL PROTECTION ACT—*See*

ENVIRONMENT 1, 2, 3

using it to defray the expenses of the activity indicates a nonpecuniary purpose (MCL 691.1413). *Transou v City of Pontiac*, 283 Mich App 71.

GOVERNMENTAL REGULATIONS—*See*

CONSTITUTIONAL LAW 7

GRANDFATHERING UNDER ZONING ORDINANCES—*See*

CONSTITUTIONAL LAW 4

GUILTY PLEAS—*See*

CONSTITUTIONAL LAW 5

HYPOTHETICAL QUESTIONS—*See*

EVIDENCE 1

IMPLIED CONTRACTS—*See*

EQUITY 1

INEFFECTIVE ASSISTANCE OF COUNSEL—*See*

CRIMINAL LAW 1

INFORMANTS—*See*

SEARCHES AND SEIZURES 2, 3

INFORMATIONS—*See*

CONSTITUTIONAL LAW 1

INSURANCE

CONTRACTS

1. *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 283 Mich App 243.

NO-FAULT

2. An out-of-state insurer that is not authorized to transact automobile liability insurance and personal and property protection insurance in Michigan may voluntarily file a certification that any accidental bodily injury or property damage occurring in Michigan and arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident will be subject to the personal and property protection insurance system set forth in the no-fault act;

for injury to property unless, after the claim first accrued, the action is commenced within three years after the time of the injury; a claim accrues at the time the "wrong" upon which the claim is based was done regardless of the time when damage results; the "wrong" is done when the plaintiff is harmed by the negligent act rather than when the defendant acted negligently (MCL 600.5805[1], [10]; 600.5827). *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264.

MARITAL PROPERTY—*See*

DIVORCE 1, 2

MASTER AND SERVANT

WHISTLEBLOWERS' PROTECTION ACT ACT

1. The Whistleblowers' Protection Act provides protection for two types of whistleblowers, first, those who report, or are about to report, violations of a law, regulation, or rule of a public body, and, second, those who are requested by a public body to participate in an investigation held by that public body or in a court action; the second type of whistleblower is not required to report or testify regarding a violation or suspected violation of a law, regulation, or rule in order to be protected by the provisions of the act (MCL 15.362). *Shaw v City of Ecorse*, 283 Mich App 1.

MAYORS—*See*

MUNICIPAL CORPORATIONS 1

MEDICAL MALPRACTICE—*See*

DAMAGES 2, 3

NEGLIGENCE 2, 3

MENTAL HEALTH

DEVELOPMENTAL DISABILITIES

1. A person may be found to have a substantial functional limitation in the area of major life activity concerning the capacity for independent living, for purposes of determining whether the person has a developmental disability, if the person is not physically able to live independently even though the person is mentally capable of living independently (MCL 330.1100a[21][a][*iv*][F]). *Mericka v Dep't of Community Health*, 283 Mich App 29.

regardless of location or surroundings. *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422.

PRIVATE NUISANCES

2. One is liable for a private nuisance if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422.

PUBLIC NUISANCES

3. A public nuisance is an unreasonable interference with a common right enjoyed by the general public; unreasonable interference includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422.

NUISANCE PER SE—*See*

NUISANCE 1

OCCUPATIONAL CODE—*See*

AGENCY 1

OFFENSE VARIABLES—*See*

SENTENCES 1

OFFERS OF JUDGMENT—*See*

JUDGMENTS 2

180-DAY RULE—*See*

PRISONS AND PRISONERS 1

ONE-YEAR-BACK RULE—*See*

INSURANCE 3

must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court; an appropriate ground should be relevant to at least one of the 12 statutory best-interest factors, MCL 722.23, and must be of such magnitude that it has a significant effect on the child's well-being. *Brausch v Brausch*, 283 Mich App 339.

5. A movant seeking to establish a "change of circumstances" necessary to revisit a child custody order under MCL 722.27(1)(c) must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed; the relevance of the facts presented should be gauged by reference to the statutory best-interest factors outlined in MCL 722.23. *Brausch v Brausch*, 283 Mich App 339.
6. The family division of the circuit court may modify, in the best interests of the child, previous custody orders for proper cause shown or because of a change in circumstances; the party seeking a change of custody must establish by a preponderance of the evidence that proper cause or a change in circumstances exists; when the custody dispute is between parents, there is a presumption in favor of the established custodial environment; if an established custodial environment exists with one parent and not the other, the noncustodial parent has the burden of persuasion to show by clear and convincing evidence that a change in the custodial environment is in the child's best interests; if an established custodial environment exists with both parents, the party seeking to modify the custody arrangement bears the burden of rebutting the presumption in favor of the custodial environment established with the other parent; the court must consider the statutory best-interest factors and determine whether a change in the established custodial environment is in the child's best interests (MCL 722.23, 722.27[1][c]). *In re AP*, 283 Mich App 574.

PARENTAL FITNESS—*See*

PARENT AND CHILD 1

PAROLE

SENTENCES

1. Time spent in jail by a parolee awaiting sentencing for an offense committed while on parole is to be credited, if

before points can be assessed for that variable (MCL 777.49). *People v Steele*, 283 Mich App 472.

SENTENCING GUIDELINES—*See*

SENTENCES 1

SETOFFS—*See*

DAMAGES 2

SETTLEMENT AGREEMENTS—*See*

STATUTES 2

SETTLEMENT OFFERS—*See*

JUDGMENTS 2

SINGLE BUSINESS TAX—*See*

TAXATION 1

SINGLE STATE CONSTRUCTION CODE ACT—*See*

ADMINISTRATIVE LAW 3

TORTS 1

SPOUSES AS ADVERSE POSSESSORS—*See*

ADVERSE POSSESSION 2

STANDARD OF PRACTICE OR CARE—*See*

NEGLIGENCE 3

STATUTES

JUDICIAL CONSTRUCTION

1. A statute should be construed in a manner that avoids an absurd result; a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result. *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422.

SALES REPRESENTATIVES' COMMISSIONS ACT

2. Rights under the sales representatives' commissions act may not be waived in a sales representation agreement; the prohibition does not apply to a waiver contained in an agreement by which an action brought under the act is settled (MCL 600.2961[8]). *Reicher v SET Enterprises, Inc*, 283 Mich App 657.

act does not provide that building officials may face future tort liability for not approving building plans that are the least costly to the applicant (MCL 125.1511[1]). *Cummins v Robinson Twp*, 283 Mich App 677.

TOURISM—*See*

MUNICIPAL CORPORATIONS 1

TRADE READJUSTMENT ALLOWANCE BENEFITS—*See*

UNEMPLOYMENT COMPENSATION 1

TRIAL PREPARATION COSTS—*See*

COSTS 1

TRIAL OF INMATES ON PENDING CHARGES—*See*

PRISONS AND PRISONERS 1

UNEMPLOYMENT COMPENSATION

TRADE READJUSTMENT ALLOWANCE BENEFITS

1. The deadlines stated in 19 USC 2291(a)(5)(A)(ii) apply only to enrollments in approved training programs that are necessary for an unemployed worker to be eligible for federal trade readjustment allowance (TRA) benefits; the deadlines do not apply to applications for waivers from the training-program requirement; those waivers are subject only to the timing restrictions generally applicable to the provision of TRA benefits (19 USC 2291[a][5][A][i] and [ii], 19 USC 2291[a][5][C], 19 USC 2291[c]). *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212.

UNJUST ENRICHMENT—*See*

EQUITY 1

UTTER AND PUBLISH—*See*

CRIMINAL LAW 2

VARIANCES—*See*

ADMINISTRATIVE LAW 3

VENUE

DEFAMATION

1. "Injury," as contemplated in the venue statute for tort