MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN
COURT OF APPEALS

FROM

December 23, 2008 to March 17, 2009

DANILO ANSELMO
REPORTER OF DECISIONS

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[1] To January 1, 2009.

[2] To January 1, 2009.

[3] From December 30, 2008.

[4] From January 1, 2009.

[5] From February 2, 2009.

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[2] From January 8, 2009.

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JUDGE

CYNTHIA DIANE STEPHENS

Judge Cynthia Diane Stephens was appointed to the Court of Appeals on December 23, 2008, to replace Judge Helene N. White, who was appointed to the federal bench. Judge Stephens holds a Juris Doctor degree from Emory University and a Bachelor of Arts degree from the University of Michigan. She has been licensed to practice law in Georgia, Texas, and Michigan. She served as a judge of the 36th District Court from 1982 to 1985 and as a judge of the Wayne Circuit Court from 1985 to 2008. Before her judicial career, Judge Stephens served as vice-chairperson of the Wayne County Charter Commission, as Associate General Counsel to the Michigan Senate, as Regional Director for the National Conference of Black Lawyers in Atlanta, Georgia, and as a consultant to the National League of Cities Veterans Discharge Upgrade Project.

Judge Stephens served for 16 years as a Commissioner of the State Bar of Michigan and was the chairperson of the Bar's Justice Initiatives Committee, Communications Committee, and Children's Task Force. She is a former member of the Executive Board of the National Bar

Association and its Judicial Council. She received the State Bar of Michigan's highest honor, the Robert P. Hudson Award, in 2005.

Judge Stephens has been an adjunct professor of law at the Wayne State University Law School, the Detroit College of Law, and the University of Detroit Mercy Law School. She has also been on the faculties of the National Judicial College and the Michigan Judicial Institute. She was a contributing author of Michigan Nonstandard Jury Instructions (Lawyers Cooperative Publishing), as well as numerous articles on subjects ranging from jury selection to ethics.

Judge Stephens has served on numerous civic boards and commissions, including New Detroit; the Inner City Business Improvement Forum, the Detroit Metropolitan Association Board of Trustees for the United Church of Christ, the Greater Detroit Area Health Care Council, and the Girl Scouts.

Judge Stephens resides in Detroit with her husband, attorney Thomas O. Martin, and their daughter, Imani Diane.

JUDGE

MICHAEL J. KELLY

Judge Michael J. Kelly was elected to the Court of Appeals in 2008. Previously, he served as a judicial advisory assistant to a circuit judge and worked as a trial lawyer in private practice for 20 years. He attended Michigan State University and earned his Bachelor of Arts degree from the University of Michigan — Flint in 1984. Following his enrollment at the Detroit College of Law, he was accepted as a participant in the London Law Program at Regents College in London, England, in 1987 and received his Juris Doctor degree from the Detroit College of Law in 1988.

JUDGE

DOUGLAS B. SHAPIRO

Judge Douglas B. Shapiro was born in 1954 in New York City, New York. He earned a Bachelor of Arts degree in History, with high distinction, from the University of Michigan in 1983. He received his Juris Doctor degree, cum laude, from the University of Michigan Law School in 1986. He also studied at Adam Mickiewicz University in Poznan, Poland. Judge Shapiro is licensed to practice law in Michigan and the District of Columbia.

Following law school, Judge Shapiro served as a law clerk to Justice James Brickley of the Michigan Supreme Court from 1986 through 1989. In 1990, he served as an assistant at the State Appellate Defender Office in Detroit and, for the following year, as a staff attorney with the Center for Social Gerontology, a national agency for the aged based in Ann Arbor, Michigan. In 1991, he joined the practice of Muth and Fett, PC, a law firm in Ypsilanti, Michigan, specializing in personal injury litigation. He became a partner in the firm of Muth and Shapiro, PC, in 1995, where he

continued trial and appellate practice until his appointment on February 2, 2009, as a judge of the Michigan Court of Appeals, replacing Judge Michael R. Smolenski, who retired on December 31, 2008.

Judge Shapiro sat on the executive board of the Michigan Association for Justice from 1997 to 2008 and on the Negligence Law Council of the State Bar of Michigan from 2006 to 2008. He also served in the Representative Assembly of the State Bar of Michigan, on numerous State Bar committees, and on committees for the Michigan Association for Justice. He has had articles published in several law journals and has participated regularly as a guest lecturer to students and lawyers regarding various aspects of the law.

Judge Shapiro is married to Jeannette L. Duane and has two sons. He currently resides with his family in Ann Arbor.

Court of Appeals Cases

JIMKOSKI v SHUPE

Docket No. 279580. Submitted December 3, 2008, at Grand Rapids. Decided December 23, 2008, at 9:00 a.m.

Carey Jimkoski, as personal representative of the estate of Nicholas P. Jimkoski, deceased, brought an action in the Huron Circuit Court against Peter L. Shupe, Thomas Shupe, and Bernice Shupe. Nicholas Jimkoski was killed when a large bale of straw fell from a stack and struck him after he had helped Peter Shupe load bales onto a wagon. Following a jury trial, the court, M. Richard Knoblock, J., entered a judgment in the plaintiff's favor. Peter Shupe appealed.

The Court of Appeals *held*:

1. The trial court did not err by denying Shupe's motion for summary disposition based on the open and obvious danger doctrine. While a possessor of land ordinarily does not have a duty to remove open and obvious dangers on the premises, the possessor still owes a duty of care to an invitee if special aspects of the condition render the hazard effectively unavoidable or unreasonably dangerous. A genuine issue of material fact existed regarding whether there were special aspects that precluded applying the open and obvious danger doctrine to the situation of an extremely heavy bale hanging high in the air.

2. The fact that Nicholas Jimkoski may also have been negligent did not bar the cause of action. The jury's special verdict allocated 40 percent of the negligence giving rise to the accident to Jimkoski and reduced the damages recoverable from Shupe accordingly.

3. The jury's verdict was properly based on a premises-liability theory, the jury having found that special aspects made the open and obvious danger unreasonably dangerous. Any error related to instructing the jury on the theory of ordinary negligence did nothing to affect the outcome of the trial and does not require reversal.

4. The collateral source rule, found in MCL 600.6303, requires that an award of future economic damages be offset by social security benefits. The trial court, however, did not err by refusing to reduce the award for possible future cost of living increases in

those benefits. Those increases are not certain and are not a previously existing statutory obligation necessitating reduction of the award under MCL 600.6303(5).

Affirmed.

DAMAGES — FUTURE ECONOMIC DAMAGES — REDUCTION OF DAMAGES AWARD — SOCIAL SECURITY BENEFITS — COST OF LIVING INCREASES.

The collateral source rule requires that an award of future economic damages be offset by social security benefits, but need not be reduced for possible future cost of living increases in social security benefits (MCL 600.6303[1], [4], and [5]).

Gordon & Gordon, P.C. (by *Arnold M. Gordon*), for Carey Jimkoski.

Jonathon Shove Damon for Peter Shupe.

Before: HOEKSTRA, P.J., and BANDSTRA and DONOFRIO, JJ.

BANDSTRA, J. Peter Shupe (defendant) appeals as of right the judgment entered in plaintiff's favor following a jury trial. Defendant also challenges the trial court's decision to deny defendant's motions for summary disposition and a directed verdict. We conclude that the trial court did not err in determining that the factual record would support a conclusion by the fact-finder that, even if the danger resulting in plaintiff's injuries was open and obvious, special aspects existed that justified imposing liability on defendant under a premises-liability theory. Because of that conclusion and the imposition of liability under that theory that was a sufficient basis for the verdict, we need not consider defendant's claim that the jury was erroneously permitted to find him liable under a negligence theory. Further, we conclude that there was no error in failing to include possible future cost of living increases in social security benefits as a collateral source that would reduce plaintiff's damages. We affirm.

STATEMENT OF FACTS

Defendant is a farmer. His farming operation includes selling bales of straw, weighing approximately 700 pounds, that are stored in stacks, with the top bales being approximately 11 feet off the ground. Plaintiff's[1] father placed an order for several bales of straw from defendant. On a cold and blustery winter day, defendant began loading the bales of straw onto plaintiff's wagon, using a loader tractor to transfer the straw bales from the stack. At some point during the loading process, plaintiff, whom defendant described as a good friend, stopped by to see how the job was progressing.

Defendant had nearly completed loading the wagon when he encountered a problem. When defendant attempted to pull a three-bale group from the top of the stack, instead of all three bales lifting, as was normal, only the two lower bales came off the stack; the topmost bale remained attached to the stack, apparently frozen in place. Defendant, who had experience with thousands of bales, had never seen this happen before.

Defendant finished loading the wagon using the two bales that had come off the stack, as well as the additional bales that had been stacked below them. He then attempted to dislodge the hanging bale using the loader tractor, nudging it four or five times, but the bale remained frozen in place. After the unsuccessful attempt to knock down the frozen bale, defendant left it hanging there and, with plaintiff's assistance, secured the bales that had been loaded onto plaintiff's wagon. At some point after the load was secured, the frozen bale fell from the stack and struck plaintiff. Because of his injuries from the accident, plaintiff died and this

[1] For ease of reference, we will refer to plaintiff's decedent, Nicholas Jimkoski, as plaintiff for purposes of this opinion.

suit followed. Additional facts will be provided as necessary to explain our decision.

ANALYSIS

I. PREMISES LIABILITY—OPEN AND OBVIOUS DANGER DOCTRINE

Defendant argues that the trial court should have granted his motion for summary disposition based on the open and obvious danger doctrine.[2] We disagree.

Because this issue was raised in the trial court, it is preserved for review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We review de novo the decision of the trial court on the motion for summary disposition. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123; 693 NW2d 374 (2005).

Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record leaves open an issue on which reasonable minds

---

[2] Defendant also argues that the trial court erred by denying his motion for a directed verdict. However, as we conclude below was the case with regard to the motion for summary disposition, questions of material fact remained after trial whether a special aspect was present. The evidence presented at trial was essentially the same as the evidence presented in support of the motion for summary disposition and did not resolve the outstanding questions of fact. A directed verdict is only appropriate when there is no factual dispute on which reasonable jurors could disagree. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). Since factual disputes on which reasonable jurors could disagree were present, the trial court did not err in denying defendant's motion for a directed verdict.

might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court is liberal in finding genuine issues of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995).

A possessor of land owes an invitee a duty to exercise reasonable care to protect the invitee from unreasonable risks of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not ordinarily extend to the removal of open and obvious dangers. *Id*. In determining whether a condition presents an open and obvious danger, an objective test is used to establish whether an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Even if a condition is open and obvious, however, a possessor of premises still owes a duty of care to an invitee if "special aspects" of the condition render the hazard effectively unavoidable or unreasonably dangerous. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592-593; 708 NW2d 749 (2005).

At issue with respect to defendant's motion for summary disposition is his contention that no special aspects existed that would preclude application of the open and obvious danger defense. Defendant had also argued with respect to the motion that there was no genuine issue of material fact regarding the predicate determination that the hanging straw bale was an open and obvious danger. However, even had the trial court agreed with defendant with respect to that issue, defendant's motion for summary disposition would properly have been denied because, as we explain below, a genuine issue of material fact existed regarding whether special aspects existed that precluded applying the open and obvious danger defense.

Further, as we also explain below, the jury in this case agreed with defendant that the hanging straw bale was open and obvious and only imposed liability on defendant because it found that special aspects existed. For these reasons, defendant was not prejudiced by the trial court's determination that a genuine issue of material fact existed with respect to whether the hanging bale was an open and obvious danger, and we need not further consider that question.

We conclude that the trial court did not err by concluding that a genuine issue of material fact existed concerning whether the hanging bale presented special aspects that "[gave] rise to a uniquely high likelihood of harm or severity of harm if the risk [was] not avoided . . . ." *Lugo*, 464 Mich at 519. The straw bale that killed plaintiff was extremely heavy and hanging high in the air in a position where, if it became dislodged, it would fall with sufficient speed to cause significant damage. Defendant admitted that, having unsuccessfully attempted to dislodge the bale, he believed that it would not continue to hang suspended that way indefinitely. Given the inevitability of the bale's collapse, its height, and its weight, the fact-finder could reasonably have concluded that it constituted a special aspect because of the "severity of harm" it could foreseeably cause if not avoided. *Id*.

Further, there was evidence upon which the fact-finder could reasonably have concluded that the hanging bale presented a "high likelihood of harm," even beyond the facts of its weight and precariously hanging position. *Id*. Before the accident, plaintiff and defendant had apparently moved out of the zone of danger presented by the hanging bale to work together securing the straw that had been loaded on plaintiff's wagon. Nonetheless, for some reason, plaintiff moved back near the stacked straw, where he was killed. Similarly, defen-

dant stated, both in answer to interrogatories and at his deposition, that he was himself almost struck by the falling straw bale, thus indicating that he too had returned to the dangerous area. Further, according to a state police investigator, defendant stated that, after the trailer was loaded, it was cold and he and plaintiff got in the corner behind the bales to get out of the wind. The fact-finder could reasonably have concluded that, because the hanging bale presented a danger in an area where plaintiff might likely seek shelter from the wind, it presented a high likelihood of harm notwithstanding its open and obvious nature.

We recognize that the evidence could lead a reasonable fact-finder to conclude that plaintiff and defendant were both equally aware of and knowledgeable about the danger presented by the hanging bale. Nonetheless, as the owner of the premises on which that danger was located, defendant had a legal obligation to protect plaintiff, his invitee, because of the special aspects presented by that dangerous condition. In light of that, the fact that plaintiff here may also have been negligent does not bar a cause of action, as explained in *Lugo*:

> Under comparative negligence, where both the plaintiff and the defendant are culpable of negligence with regard to the plaintiff's injury, this reduces the amount of damages the plaintiff may recover but does not preclude recovery altogether. . . .
>
> Accordingly, it is important for courts in deciding summary disposition motions by premises possessors in "open and obvious" cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff. [*Lugo*, 464 Mich at 523-524.]

Consistent with these principles, the jury's special verdict in this case allocated 40 percent of the negligence giving rise to the accident to plaintiff and reduced

the damages recoverable from defendant accordingly; plaintiff's negligence was not a complete bar to this action.

Finally, defendant's argument that there were no special aspects related to the dangerous condition presented by the hanging bale because it was avoidable is without merit. In *Lugo*, one hypothetical "special aspect" provided to illustrate the analysis was an unguarded 30-foot-deep pit, which the Court acknowledged would be easily avoidable. *Id.* at 518. However, the *Lugo* Court reasoned that the substantial risk of severe injury or death associated with such a condition would make it unreasonably dangerous to maintain even if it was avoidable. *Id*. As explained above, that was also the case here. The trial court did not err by denying defendant summary disposition under the open and obvious danger doctrine.[3]

II. NEGLIGENCE THEORY

Defendant argues that the trial court erred by providing a jury instruction and questions on the special

---

[3] Defendant also contends that he was entitled to summary disposition under the "known risk" doctrine, i.e., that plaintiff's claim should fail as a matter of law because he was aware of the risk that the hanging bale presented. However, defendant only relies on caselaw predating *Lugo*, and his cursory treatment of this theory does nothing to explain how a rule preventing plaintiff from recovery if he knew of the risk can coincide with the imposition of liability we have concluded was appropriate under the *Lugo* analysis. Moreover, finally, defendant's argument here seems closely akin to an argument that plaintiff's claim should be barred because of contributory negligence. The doctrine of contributory negligence has been abandoned in Michigan and replaced with a rule of comparative fault. *Placek v Sterling Hts*, 405 Mich 638, 650; 275 NW2d 511 (1979). The extent of a plaintiff's comparative fault, if any, is generally a question for the jury, *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991), and, as we have already noted, the jury allocated substantial fault to plaintiff in rendering its verdict. In any event, considering these significant questions and defendant's terse assertion of this argument, we do not consider it properly preserved for our review.

verdict form relating to ordinary negligence because plaintiff's claim should have been limited to a premises-liability theory. Defendant asserts that plaintiff's injuries resulted solely from a condition on the land. He argues that the loading operation, during which any active negligence might have occurred, was completed before decedent was struck by the bale of straw. Regardless of the merits of that argument, we conclude that defendant was not prejudiced because the verdict was, in any event, properly based on a theory of premises liability.

To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Defendant did so here. We review de novo preserved claims of instructional error. *Rose v State Farm Mut Automobile Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2007). MCR 2.613(A) provides that a verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial. *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005); *McClaine v Alger*, 150 Mich App 306, 317; 388 NW2d 349 (1986).

The court provided the jury with a special verdict form, which included the following questions:

1. Was Peter Shupe negligent?

2. Was Peter Shupe's negligence a proximate cause of the injury to Nicholas Jimkoski?

3. Was the bale of straw which fell on Nicholas Jimkoski a dangerous condition on the premises?

4. Did Peter Shupe know of, or by the exercise of reasonable care should he have discovered, the condition,

> and should he have realized that the condition involved an unreasonable risk of harm to Nicholas Jimkoski?
>
> 5. Should Peter Shupe have expected that Nicholas Jimkoski would not discover or realize the danger, or would fail to protect himself against it?
>
> 6. Was the condition open and obvious?
>
> 7. Was the condition known to Nicholas Jimkoski?
>
> 8. Was there a special aspect to the condition?
>
> 9. Did Peter Shupe fail to exercise reasonable care to protect Nicholas Jimkoski against the danger?

The jury answered yes to questions 1 to 4, no to question 5, and yes to questions 6 to 9. Therefore, with respect to premises liability (questions 3 to 9), the jury found that, even though the bale was an open and obvious danger, special aspects were present that made it unreasonably dangerous.[4]

As we have previously explained, there was nothing wrong with allowing the jury to make those determinations because there was sufficient factual support for them in the record. Further, the imposition of liability on defendant under the premises-liability theory was a

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[4] We reject defendant's contention that, because the jury determined, in response to question 5, that defendant should have expected that plaintiff would discover or realize the danger posed by the hanging bale and protect himself against it, no premises liability may be imposed. Defendant's reliance on *Prebenda v Tartaglia*, 245 Mich App 168; 627 NW2d 610 (2001), in this regard is misplaced. *Prebenda*'s recitation of the elements of a cause of action by which an invitee may impose premises liability on a possessor of land was stated in the most general of terms, *id.* at 169, because that was all that was necessary to support the holding of the case, that there was simply no dangerous condition whatsoever under the facts presented, *id.* at 170. *Prebenda* specifically did "not consider the intricacies of the open and obvious [danger] doctrine" in that context. *Id*. Most notably, *Prebenda* did not consider, and does nothing to undermine, the *Lugo* rule that, even if a defendant reasonably expects that a plaintiff will discover or realize a danger and protect against it, liability may be imposed if that danger presents a special aspect.

sufficient ground for the verdict. Hence, even if the jury had not been instructed on the theory of ordinary negligence and the contested questions had been excluded from the special verdict form, the jury would have found in plaintiff's favor. Therefore, any error related to the challenged jury instructions and questions on the special verdict form did nothing to affect the outcome of the trial and does not require reversal.

III. OFFSET FOR SOCIAL SECURITY BENEFIT INCREASES

The parties agree that Michigan's collateral-source rule requires that an award of future economic damages be offset by social security benefits. Defendant contends that the offset should include cost of living increases to those benefits. We disagree.

Defendant argued at a motion following trial that future cost of living increases in social security benefits should be used to offset the damages award; thus, this issue is preserved. *Peterman,* 446 Mich at 183. Issues of statutory interpretation are questions of law and are reviewed de novo. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

When construing the provisions of a statute, the primary task is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). If the language in the statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent, and judicial construction is not permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996); *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 14; 684 NW2d 391 (2004).

MCL 600.6303, in pertinent part, sets forth the circumstances under which a jury award is to be set off by a collateral-source payment:

> (1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). . . .
>
> * * *
>
> (5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits.

Social security benefits are specifically identified as collateral-source payments, MCL 600.6303(4), and should be used to reduce the jury verdict pursuant to MCL 600.6303(1). *Haberkorn v Chrysler Corp*, 210 Mich App 354, 375; 533 NW2d 373 (1995). However, as with any collateral-source payment, social security benefits may not be used to reduce a judgment unless there is "a previously existing . . . statutory obligation" to pay the benefits. MCL 600.6303(5). Cost of living adjustments in future Social Security benefits, even though likely, are not certain to occur, and the rate of inflation, which controls the amount of any increase, is impossible to predict without rank speculation. Certainly, at the time a judgment might be reduced under the collateral-source statute, future social security adjustments are not a "previously existing . . . statutory obligation." The

trial court did not err by refusing to reduce the award of future economic damages on the basis of a speculative determination regarding possible future cost of living increases in social security benefits.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

PEOPLE v MULLEN

Docket No. 281202. Submitted March 4, 2008, at Detroit. Decided December 23, 2008, at 9:05 a.m.

James L. Mullen, charged in the Oakland Circuit Court with operating a motor vehicle while intoxicated, third offense, moved to suppress evidence of his blood alcohol content as determined in a blood test performed pursuant to a search warrant. The court, Mark A. Goldsmith, J., granted the motion, ruling that the arresting police officer's affidavit in support of the search warrant contained false information and omitted material information about the field sobriety tests administered to the defendant, and that the affidavit, as corrected for false or omitted information, did not establish probable cause for the issuance of a warrant. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

1. The trial court did not clearly err when it determined that the arresting officer acted intentionally or with reckless disregard for the truth when he omitted from the affidavit the fact that the defendant had a piece of paper in his mouth less than 15 minutes before a preliminary breath test, in contravention of Mich Admin Code R 325.2655(2)(b), which requires that the mouth be free of foreign objects 15 minutes before a preliminary breath test. However, an affidavit supporting a warrant is presumed to be valid, and the defendant presented insufficient evidence at the suppression hearing that the presence of paper in his mouth would significantly call into question the accuracy of the preliminary breath test so as to preclude a finding of probable cause.

2. The trial court correctly determined that the arresting officer omitted certain facts related to the horizontal gaze nystagmus test, which he administered incorrectly and whose results he interpreted inaccurately.

3. The trial court did not clearly err in determining that the arresting officer's statement in the affidavit about the results of the "one-legged stand" test was false or misleading.

4. The trial court correctly struck the reference in the affidavit to the "finger to nose" test after determining that the defendant, as instructed, touched his nose rather than its tip.

5. The trial court did not clearly err by determining that the arresting officer falsely stated in the affidavit that the defendant exhibited slurred speech.

6. Disregarding the false statements in the affidavit and considering the facts that were omitted from the affidavit, there was sufficient information for a finding of probable cause to believe that a crime had been committed and that evidence of the crime would be found in the defendant's blood.

Reversed and remanded for further proceedings.

1. SEARCHES AND SEIZURES — SEARCH WARRANTS — AFFIDAVITS — PROBABLE CAUSE — APPEAL.

A reviewing court gives great deference to a magistrate's finding of probable cause to issue a search warrant; the reviewing court need only determine whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause; a substantial basis exists where there was a fair probability that contraband or evidence of the crime could be found in the particular place to be searched.

2. SEARCHES AND SEIZURES — SEARCH WARRANTS — AFFIDAVITS — PROBABLE CAUSE — PRESUMPTION OF VALIDITY OF AFFIDAVITS.

An affidavit in support of a search warrant is presumed to be valid; a defendant is entitled to a hearing to challenge the validity of a search warrant if the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause; the same rule applies to material omissions from affidavits.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, and *Joyce F. Todd*, Chief, Appellate Division, for the people.

Kenneth D. Miller for the defendant.

Before: METER, P.J., and SAWYER and WILDER, JJ.

WILDER, J. The prosecution appeals by delayed leave granted[1] the circuit court's order granting defendant's motion to suppress evidence of the results of his blood alcohol content (BAC) test. Defendant sought to suppress the evidence, contending that the search warrant affidavit included false information and that material information was omitted. Following an evidentiary hearing, the circuit court concluded that the arresting officer either intentionally or recklessly included false information in the search warrant affidavit, and that material information was omitted from the affidavit. After striking the false information and considering the omitted information, the circuit court further concluded that the affidavit, as corrected, did not establish probable cause to issue a search warrant, and granted the suppression motion.

We conclude that although the circuit court's factual determinations are not clearly erroneous, its determination that the affidavit, as corrected, did not establish probable cause to issue a search warrant, was erroneous. Therefore, we reverse the circuit court's order suppressing the BAC evidence.

I

At approximately 2:00 a.m. on November 9, 2006, Troy Police Officer Frank Shuler saw defendant's vehicle stop at a red light, pause for a few seconds, and then proceed past the red light. Officer Shuler made a traffic stop, and when he approached the driver's side window of the vehicle, he smelled alcohol and noticed that defendant's eyes were bloodshot and watery. Of-

[1] This Court granted leave to appeal limited to the issues raised in the application. *People v Mullen*, unpublished order of the Court of Appeals, entered November 30, 2007 (Docket No. 281202).

ficer Shuler testified[2] that the smell of alcohol was fairly strong and that he therefore asked defendant if he had consumed any alcohol that evening. Defendant indicated that he drank two glasses of wine with dinner.

Officer Shuler asked defendant to get out of the vehicle for field sobriety tests, and first asked defendant to count backward from 89 to 78. While defendant was able to do so, Officer Shuler averred in his affidavit to the magistrate that defendant's speech was slurred and that defendant swayed back and forth. Second, Officer Shuler conducted the "horizontal gaze nystagmus" test or HGN.[3] Officer Shuler asked defendant to stand with his arms at his sides, then held a pen in front of defendant's face at eye level, instructed defendant to hold his head still and to follow the pen with his eyes while Officer Shuler moved it side to side. Officer Shuler held the pen four to six inches from defendant's face, but despite the officer's directions, defendant repeatedly moved his head to follow the pen. Officer Shuler testified that defendant "had the lack of smooth pursuit [meaning that defendant's eyes allegedly jolted or staggered while defendant shifted his gaze to follow the pen] and maximum deviation at onset prior to forty-five." By describing "maximum deviation," Officer Shuler meant that defendant's eyes began to strain and "bounced" side to side within 45 degrees of center.

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[2] With the exception of testimony to be identified, later, Officer Shuler provided essentially the same testimony at both the preliminary examination and the evidentiary hearing conducted by the trial court.

[3] HGN "is an involuntary jerking of the eye that occurs naturally as the eyes gaze to the side." HGN is "exaggerated and may occur at lesser angles" when a person is intoxicated. *Development of a Standardized Field Sobriety Test, Appendix A: Standardized Field Sobriety Testing*, available at <http://www.nhtsa.dot.gov/people/injury/alcohol/SFST/appendix_a.htm> (accessed February 5, 2008).

Third, Officer Shuler subjected defendant to the "one-legged stand" test. Before conducting this test, defendant notified the officer that he had a knee injury, so the officer instructed defendant to stand on his good leg. Officer Shuler testified that he demonstrated the test and instructed defendant to count until told to stop. Officer Shuler testified that defendant stopped counting before he was instructed to do so, and swayed while standing on one leg.[4]

Finally, Officer Shuler conducted the "finger to nose" test. He first demonstrated the test for defendant, and then instructed defendant to keep his feet together, put his arms out to his sides with his palms up, tilt his head back, and alternate touching the tip of his nose with his right and left index fingers. Officer Shuler testified that defendant was unable to touch the actual tip of his nose, touching the bridge instead, and that defendant also swayed back and forth during the test. Officer Shuler noted that defendant's speech was "a little slurred" throughout the entire interaction.

Officer Shuler then conducted a preliminary breath test (PBT). Officer Shuler testified at the preliminary examination that he checked defendant's mouth before placing him in the backseat of the patrol car, waited 15 minutes, and then administered the test. He also specifically testified that he could not recall whether defendant had paper in his mouth before administering the test. At the evidentiary hearing, Officer Shuler testified that defendant was chewing gum when he was stopped, that he asked defendant to spit the gum out, and that he believed defendant complied. Officer Shuler further testified that he checked defendant's mouth and found it to be empty, but he subsequently admitted

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[4] However, the fact that defendant swayed during the one-legged stand test was not disclosed by Officer Shuler on the affidavit.

that, when he began to read defendant his PBT rights, he noticed that defendant had a little piece of paper in his mouth. Officer Shuler explained that he did not believe that the paper would compromise the PBT results, and therefore waited only a few minutes after noticing the paper before administering the test. Defendant's PBT result was 0.15.

Officer Shuler placed defendant under arrest and transported him to the police station. After conducting a LEIN[5] search, the officer discovered that defendant had one or two prior arrests for driving under the influence of liquor. He read defendant his chemical test rights and asked for a blood sample. Defendant initially consented, but then refused. Officer Shuler then proceeded to secure a search warrant. He filled out a standardized form affidavit to secure the warrant. On the form, Officer Shuler circled the entry indicating that he was investigating a case of operating a motor vehicle while under the influence of liquor. Among several choices provided on the form, Officer Shuler selected one stating that there was a strong odor of alcohol emanating from defendant's breath and person. He also selected one indicating that defendant had slurred speech and watery eyes. The officer reported that defendant had a PBT result of 0.15. Officer Shuler noted that he observed defendant stop at a red light and then proceed on red. He indicated that defendant "conducted field sobriety test poorly . . . stopped counting before he was told to stop on the one leg stand . . . Nystagmus was present . . . [and defendant] was unable to touch his right & left tip of his index fingers to the tip of his nose." Officer Shuler did not disclose in his affidavit that the defendant had paper in his mouth less than 15 minutes before he conducted the PBT.

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[5] "LEIN" stands for the Law Enforcement Information Network.

Relying on the affidavit, the magistrate issued a search warrant for a blood sample. The blood test revealed that defendant had a blood alcohol content of 0.11 grams of alcohol per 100 milliliters of blood. Defendant was charged, as a third offender, with operating a motor vehicle while intoxicated, in violation of MCL 257.625(1).

II

Before concluding its evidentiary hearing, the circuit court viewed the videotape of the traffic stop. Following the hearing, the circuit court ruled that Officer Shuler had recklessly omitted information that defendant had paper in his mouth less than 15 minutes before the administration of the PBT, recklessly stated in the affidavit only that nystagmus was present without informing the magistrate that he had administered the HGN test in a non-standardized way and explaining the manner in which the test was administered, intentionally or recklessly misrepresented that defendant's speech was slurred (a conclusion that the circuit court reached after viewing a videotape), intentionally or recklessly misrepresented that defendant stopped counting at an inappropriate time during the one-legged stand test, and intentionally or recklessly misrepresented that defendant was unable to touch the tip of his nose with his index fingers. The circuit court concluded that given the remaining information in the affidavit indicating that a strong odor of intoxicants emanated from defendant and that defendant had watery eyes, there was insufficient evidence to support a finding of probable cause to issue the search warrant, and the BAC evidence should be suppressed.

III

We review de novo a trial court's ultimate determination on a motion to suppress, *People v McBride (On Remand)*, 273 Mich App 238, 249; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008), and its factual findings for clear error, *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). We review de novo underlying issues of law such as statutory questions or the application of a constitutional standard to uncontested facts. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

IV

We begin with the constitutional text. The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [US Const, Am IV (emphasis added).]

Whether a search is reasonable is a fact-intensive determination and must be measured by examining the totality of the circumstances. *Williams, supra* at 314. A reviewing court must give great deference to a magistrate's finding of probable cause to issue a search warrant. Accordingly, we do not review de novo the lower court's determination regarding the sufficiency of a search warrant affidavit. *Keller*, *supra* at 474, 476-477. Rather, "this Court need only ask whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *People v Martin*, 271 Mich App 280, 297; 721

NW2d 815 (2006) (quotation marks and citation omitted). To find a substantial basis, we must "ensure that there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Martin*, *supra* at 297 (quotation marks and citation omitted).

V

The prosecutor contends that the circuit court clearly erred by determining that Officer Shuler intentionally or recklessly misrepresented material facts and omitted material facts from the affidavit. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

The United States Supreme Court has found that false statements must be stricken from a search warrant affidavit:

> [W]here the defendant makes a substantial preliminary showing that a *false statement knowingly and intentionally, or with reckless disregard for the truth*, was included by the affiant in the warrant affidavit, *and if the allegedly false statement is necessary to the finding of probable cause*, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, *with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded* to the same extent as if probable cause was lacking on the face of the affidavit. [*Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978) (emphasis added).]

See also *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

The trial court determined that Officer Shuler, either intentionally or with reckless disregard for the truth, omitted material information regarding defendant's PBT result. In his affidavit, Officer Shuler indicated that defendant's PBT results were 0.15, but he omitted that defendant had a piece of paper in his mouth several minutes before administering the test. A PBT should be administered only after the defendant's mouth has been clear of foreign substances for 15 minutes. Mich Admin Code R 325.2655(2)(b). The purpose of the rule is to ensure accuracy of test results. See *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998); *People v Rexford*, 228 Mich App 371, 378; 579 NW2d 111 (1998). Having reviewed the record, we conclude that the circuit court did not clearly err when it determined that Shuler acted intentionally or with reckless disregard for the truth when he omitted this information about the PBT.

But the fact that Shuler intentionally or recklessly omitted relevant information does not, by itself, invalidate the warrant. In Michigan, there is a presumption that an affidavit supporting a search warrant is valid. *Martin*, *supra*. *Martin* states:

> A defendant is entitled to a hearing to challenge the validity of a search warrant if he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause . . . ." *Franks, supra* at 155-156; see also *Stumpf, supra* at 224. However, there is a presumption that the affidavit supporting the search warrant is valid. *Franks, supra* at 171. In order to warrant a hearing, the challenge "must be more than conclusory and must be

> supported by more than a mere desire to cross-examine." *Id*. The rule from *Franks* is also applicable to material omissions from affidavits. *Stumpf, supra* at 224. [*Martin, supra* at 311.]

Thus, according to *Stumpf*, only when there have been *material* omissions *necessary to the finding of probable cause* may the resulting search warrant be invalidated. We conclude on the basis of this record that the omission by Shuler (the fact that defendant had paper in his mouth less than 15 minutes before the PBT was conducted) was not material, because defendant presented insufficient evidence in the hearing below that the presence of paper in his mouth, three minutes before administration of the PBT, would significantly call into question the accuracy of the PBT result so as to preclude a finding of probable cause.

If, for example, Shuler had disclosed on the affidavit the fact that paper was in defendant's mouth approximately three minutes before he was administered the PBT, the magistrate would have been able to determine what weight to give the PBT result and would not have been required to exclude consideration of the PBT evidence.[6] In this situation, the magistrate's discretion to consider the PBT evidence was broad because only a

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[6] In analogous situations, the failure strictly to observe the administrative rule requirements for administration of a PBT (such as the 15 minute observation period) has not led to exclusion of the evidence. In *Wujkowski, supra*, the operator continually observed the defendant from 5:05 a.m. until 5:23 a.m. except for the few seconds it took the officer to walk over and check the datamaster to determine if the fifteen minutes had elapsed. *Id*. at 186. This Court held "that the momentary time that the officer did not observe defendant was so minimal that the test results cannot be assumed to be inaccurate," noting that "there was no allegation that defendant placed anything in his mouth or regurgitated. Under these circumstances, the Circuit Court erred in ruling that the violation of the administrative rule required suppression of the results of the Breathalyzer test." *Id*. at 186.

probable cause finding was required, not proof beyond a reasonable doubt. *People v Yost,* 468 Mich 122, 126; 659 NW2d 604 (2003). As the Supreme Court noted in *Yost*: "[T]o find probable cause, a magistrate need not be without doubts regarding guilt. The reason is that the gap between probable cause and guilt beyond a reasonable doubt is broad . . . and finding guilt beyond a reasonable doubt is the province of the jury." *Id.*

The circuit court also did not clearly err when it determined that Officer Shuler omitted certain facts related to the HGN test, either intentionally or with reckless disregard for the truth. While the standard distance for holding the stimulus when conducting the HGN test is 12 to 15 inches from the suspect's face, Officer Shuler could not recall the proper distance that he learned in training and held the pen only four to six inches from defendant's face. When conducting an HGN test, the officer looks for three factors: (1) "the eye cannot follow a moving object smoothly"; (2) "jerking is distinct when the eye is at a maximum deviation"; and (3) "the angle of onset of jerking is within 45 degrees of center." See *Development of a Standardized Field Sobriety Test, Appendix A: Standardized Field Sobriety Testing*, available at <http://www.nhtsa.dot.gov/people/injury/alcohol/SFST/appendix_a.htm> (accessed February 5, 2008).

Although Officer Shuler testified that he knew and understood these factors, he generically stated in the affidavit that "nystagmus is present" without revealing that he had the stimulus too close to defendant's eyes. Because nystagmus occurs naturally and is always present, the fact that the test had not been performed accurately was a significant omission in the warrant affidavit reviewed by the magistrate. We agree with the circuit court that Officer Shuler's incorrect administra-

tion of the HGN test led to an inaccurate interpretation of the results, and that Officer Shuler acted with at least reckless disregard for the truth when including the misleading statement about the HGN test results in the affidavit.

We also conclude that the circuit court did not clearly err in determining that Officer Shuler's affidavit statement about the results of the one-legged stand test was false or misleading. Upon review of the patrol car video, the circuit court concluded that while defendant appeared to pause once while counting, he did not stop counting as averred by Officer Shuler. Moreover, Officer Shuler omitted from the affidavit the fact that defendant was swaying slightly during the test, despite the fact that swaying is a standardized factor. The circuit court also did not err by striking the reference to the "finger to nose" test from the affidavit, because the record supports the circuit court's finding that Officer Shuler instructed defendant to touch his nose, rather than the tip of his nose, and that defendant performed the test as he was instructed to do.

Finally, we conclude that the circuit court did not clearly err by determining that Officer Shuler falsely stated that defendant exhibited slurred speech. While the video reveals that defendant did speak slowly, we agree with the circuit court that there is no sign of slurred speech. Accordingly, the circuit court properly struck this statement from the affidavit.

VI

The circuit court determined that after striking the inaccurate facts in the affidavit and considering the omitted material facts, there was insufficient evidence to support the magistrate's finding of probable cause. We disagree.

Absent the stricken statements, and after adding the material information that was improperly omitted, the affidavit would have asserted that Officer Shuler detected the "strong" odor of alcohol and noticed that defendant had "watery eyes," that defendant drove his vehicle through a red light at 2:00 a.m., and that while defendant had paper in his mouth three minutes before the test was administered, defendant's PBT result was 0.15.

"Probable cause does not require certainty. Rather, it requires only a probability or substantial chance of criminal activity." *People v Champion*, 452 Mich 92, 111 n 11; 549 NW2d 849 (1996), citing *Illinois v Gates*, 462 US 213, 243-244 n 13; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

> Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search. [*People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000).]

The remaining information in the search warrant affidavit, after the improperly omitted information is added and the improper information is disregarded, is sufficient to form probable cause to issue a search warrant for defendant's blood. When reviewing a search warrant affidavit, we must read it in a "common sense and realistic manner," *People v Whitfield*, 461 Mich 441, 444; 607 NW2d 61 (2000) (quotation marks and citation omitted), not a crabbed or hypertechnical manner. Defendant was stopped for a traffic violation in the middle of the night and exhibited a strong smell of alcohol. On the basis of that evidence, Shuler subjected defendant to field sobriety tests. Although the officer

failed to correctly administer some of the tests, the evidence presented below did not establish that the 0.15 PBT test result was significantly unreliable as to preclude the reasonable belief by a police officer or a magistrate that defendant's blood might contain evidence of intoxication. Given the absence of any basis to significantly call into question the 0.15 PBT result, and given the other circumstantial evidence that defendant was intoxicated, we find that the circuit court erred by determining that a reasonable magistrate would not have found probable cause to issue a search warrant.

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

BRIGGS TAX SERVICE, LLC v DETROIT PUBLIC SCHOOLS

Docket No. 278865. Submitted November 12, 2008, at Detroit. Decided December 23, 2008, at 9:10 a.m. Leave to appeal granted, 483 Mich ___.

Briggs Tax Service, L.L.C., petitioned the Tax Tribunal for a refund of taxes that it alleged the Detroit Public Schools had levied and collected without authorization and to enjoin future tax collections without proper authorization. Briggs also named the Detroit Board of Education, the city of Detroit, and the Wayne County Treasurer as respondents. At issue were school-operating property taxes that the Detroit Public Schools levied on nonhomestead-property owners in a three-year period even though the electors had not authorized the taxes for those years, as required by MCL 380.1211. The tribunal initially dismissed the claim on jurisdictional grounds because Briggs had not filed it within 30 days after the applicable tax bills were issued, but subsequently allowed Briggs to file an amended petition. The amended petition included allegations of mutual mistake. The Detroit Public Schools and the county treasurer moved separately for summary disposition on various grounds, which the tribunal granted. Briggs appealed.

The Court of Appeals *held*:

The tribunal erred when it dismissed the petition. When Briggs filed its petition, MCL 205.735(2) generally required a party to file a petition with the tribunal within 30 days of a final decision. When another statute provides a different filing time limit, however, that statute controls and MCL 205.735 does not apply. MCL 211.53a permits a petition for a refund within three years from the date of the tax payment in the case of a mutual mistake of fact. As used in that statute, "mutual mistake of fact" means an erroneous belief about a material fact that affects the substance of the transaction that both parties share and rely on. This case arose from a mutual mistake of fact. Both parties believed that Briggs was required to pay the disputed taxes even though it had no such obligation. Whether the procedures necessary to renew the property tax assessments in order to levy the taxes were followed is a question of fact. Whether Briggs was required to pay the taxes is also a factual question. Therefore, Briggs was entitled to the

three-year limitations period. The tribunal had jurisdiction, and the 30-day statute of limitations did not bar this case. Summary disposition was inappropriate.

Reversed and remanded.

TAXATION — PROPERTY TAX — TAX TRIBUNAL — JURISDICTION — LIMITATION OF ACTIONS — MUTUAL MISTAKE OF FACT.

The three-year limitations period of MCL 211.53a, rather than the general limitations periods of MCL 205.735, applies when the assessment and payment of property taxes involves a mutual mistake of fact; as used in MCL 211.53a, "mutual mistake of fact" means an erroneous belief about a material fact that affects the substance of the transaction that both parties share and on which the parties rely.

Giarmarco Mullins & Horton, PC (by *Larry W. Bennett*), and *The Mazzara Law Firm, PLLC* (by *Jack J. Mazzara* and *Lanalee C. Farmer*), for Briggs Tax Service, L.L.C.

Dickinson Wright PLLC (by *Robert F. Rhoades* and *Adam D. Grant*), *Miller, Canfield, Paddock & Stone PLC* (by *Jerome R. Watson* and *Larry J. Saylor*), and *Thrun Law Firm, PC* (by *David Olmstead* and *Roy H. Henley*), for the Detroit Public Schools and the Detroit Board of Education.

Joanne D. Stafford, Assistant Corporation Counsel, for the city of Detroit

Edward M. Thomas, Corporation Counsel, and *Richard G. Stanley*, Assistant Corporation Counsel, for the Wayne County Treasurer.

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

O'CONNELL, J. Petitioner Briggs Tax Service, L.L.C. (Briggs), appeals as of right the decision by the Michigan Tax Tribunal (Tribunal) granting respondents' motions for summary disposition under MCR

2.116(C)(4) and (7) and dismissing its petition for a refund of school-operating property taxes for the years 2002, 2003, and 2004 under MCR 2.116(C)(4).[1] We reverse and remand.

The applicable provision of the Revised School Code, MCL 380.1 *et seq.*, requires that school electors approve any increases in property taxes and limits the millage that may be levied at 18 mills. See MCL 380.1211.[2] The parties do not dispute that respondent Detroit Public Schools (DPS) levied school-operating property taxes on nonhomestead-property owners for tax years 2002, 2003, and 2004, although DPS electors did not authorize these taxes.[3]

In its initial petition filed with the Tribunal, Briggs sought to have the unauthorized taxes that were levied and collected by DPS refunded and to enjoin future collections without proper authority. In addition to DPS, petitioner named as respondents the Detroit Board of Education, the city of Detroit (City), and the Wayne County Treasurer. Petitioner also sought an award for the damage allegedly caused by the unlawful property tax levy and alleged that

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[1] Briggs is not appealing the Tribunal's holding that its claim pertaining to tax year 2005 is moot. Although the parties debate whether summary disposition pursuant to MCR 2.116(C)(8) and (10) would be appropriate, the Tribunal never granted summary disposition on those grounds in its final opinion and judgment. Therefore, we will not address the appropriateness of summary disposition on those grounds.

[2] The Revised School Code was amended to require elector approval of property tax increases after Michigan voters adopted Proposal A in 1994, which amended article 9, § 3, of the Michigan Constitution. For a discussion of the historical reforms to school financing, see *Durant v Michigan* (*On Remand*), 238 Mich App 185; 605 NW2d 66 (1999).

[3] Voters had authorized the school-operating millage in 1993, but this millage expired on June 30, 2002. After the November 2005 election, the school-operating millage was reinstated.

> [i]n assessing, levying, collecting and/or receiving the 18 mil [sic] property tax after authorization for the tax expired on June 30, 2002, defendants have violated Michigan Const. Art Ix [sic], § 6, and have taken the property of plaintiffs and other property owners in the City of Detroit without due process of law.[4]

The Tribunal dismissed Briggs's claim for a refund on jurisdictional grounds because the case was not filed within 30 days of the issuance of the applicable tax bills. However, on reconsideration, the Tribunal gave Briggs the opportunity to file an amended petition.

In its amended petition, Briggs alleged that the "assessment and collection of the Illegal Levy constituted a fraud or constructive fraud on Petitioner" and tolled any period of limitations. In the seven-count petition, Briggs sought tax refunds on the grounds that respondents violated MCL 380.1211 by levying, collecting, or receiving the illegal levy (count I), that a mutual mistake of fact occurred under MCL 211.53a (count III), and that city ordinances precluded illegal and unjust taxes (count VI). Briggs sought damages for alleged misrepresentations (count II), violations of the Michigan Constitution (count V), and conversion under both the common law and an ordinance (count VII). Briggs also sought the creation of a constructive trust for the amount of the illegal tax levy under a constructive fraud theory (count IV).

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[4] On August 8, 2005, petitioner and other property owners also filed an action in the Wayne Circuit Court seeking class certification and refunds of the school-operating property tax. That case was disposed of by summary disposition in May and June 2006 on the ground that the Tribunal had exclusive jurisdiction over the claims. Claims based on the Headlee Amendment were dismissed on other grounds. This Court affirmed that decision in March 2007. See *Briggs Tax Service, LLC v Detroit Pub Schools*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2007 (Docket No. 271631).

DPS moved for summary disposition under MCR 2.116(C)(4), (7), (8), and (10). The Wayne County Treasurer moved for summary disposition under MCR 2.116(C)(4) on the basis of the Tribunal's lack of jurisdiction and under MCR 2.116(C)(8) and (10) on the basis of Wayne County's lack of involvement in levying taxes.[5] After a hearing, and in response to respondents' motions, the Tribunal granted summary disposition under MCR 2.116(C)(4) and (7) and dismissed Briggs's petition under MCR 2.116(C)(4).

On appeal, Briggs claims that it was entitled to pursue a refund pursuant to MCL 211.53a and that the Tribunal erred when it dismissed its petition. We agree. Generally, our review of a Tribunal decision is limited. *Mount Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). Our review of the Tribunal's decision includes "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. The Tribunal's factual findings are final if they are supported by competent and substantial evidence. *Mount Pleasant*, *supra* at 53. We review de novo both questions of statutory construction and the Tribunal's grant or denial of a motion for summary disposition. *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007).

Because the Tribunal's rules of practice and procedure do not contain an applicable rule concerning summary disposition, the Tribunal appropriately applied MCR 2.116 to address summary disposition claims. See Mich Admin Code, R 205.1111(4) ("If an

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[5] The City filed an answer to the amended petition and affirmative defenses, but it did not file a motion for summary disposition.

applicable entire tribunal rule does not exist, the 1995 Michigan Rules of Court, as amended, . . . shall govern.”); *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 705-706, 714 NW2d 392 (2006). We will also review the Tribunal’s decision regarding summary disposition under the correct subrules of MCR 2.116. See *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43; 742 NW2d 624 (2007).

A motion for summary disposition may be granted under MCR 2.116(C)(4) when a court lacks subject-matter jurisdiction. Summary disposition is appropriate under MCR 2.116(C)(7) if the “claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.” We review de novo the Tribunal’s decision to grant a motion for summary disposition under MCR 2.116(C)(4) or (7). *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

At the time of this petition, MCL 205.735(2) set forth requirements for invoking the Tribunal’s jurisdiction. As a general rule, the statute required filing a petition with the Tribunal within 30 days of a final decision.[6] However, this Court has also held that when another statute provides a different time limit for filing a petition with the Tribunal, that statute controls and MCL 205.735 does not apply. *Wikman v City of Novi*, 413 Mich 617, 652-653; 322 NW2d 103 (1982). One such statute is MCL 211.53a, which provides:

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[6] Effective May 30, 2006, the time limits were moved to MCL 205.735(3) and the general time limit changed to 35 days. See 2006 PA 174.

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

Therefore, if Briggs's excess tax payments arose because of a mutual mistake of fact by both Briggs's agent and the assessing officer regarding the nature and amount of taxes that Briggs owed, the three-year filing provision of MCL 211.53a would apply, and Briggs would have had three years, not 30 days, to file its petition for a tax refund.[7]

In *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006), our Supreme Court considered the common-law meaning of the phrase "mutual mistake of fact," its usage in contract law, and the definition in Black's Law Dictionary to determine the legislative intent behind MCL 211.53a. The Court

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[7] We disagree with the Tribunal's conclusion that MCL 211.53a does not apply because the statute only concerns a mutual mistake of fact by the petitioner and the assessing officer and the assessing officer is not a party to this appeal. For purposes of this appeal, the parties do not dispute that a mistake was made, i.e., Briggs paid school-operating property taxes that were not properly authorized. Respondents in this case are all governmental entities, and a governmental entity can only act through its agents. *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 621 n 35; 363 NW2d 641 (1984). Further, the "general rule is that knowledge of an agent on a material matter, acquired within the scope of the agency, is imputed to the principal." *Turner v Mut Benefit Health & Accident Ass'n*, 316 Mich 6, 21; 24 NW2d 534 (1946). The assessing board made a mistake in this case: it applied the taxes on the assumption that the school-operating property taxes were valid, although these taxes had not been properly authorized and, therefore, should not have been assessed for this purpose. The board's mistake, in turn, can be imputed to respondents because respondents relied on the board's assessments for tax-collection and budgeting purposes. Hence, a mutual mistake occurred in this case.

determined that this phrase had acquired a peculiar and appropriate meaning in the law that had not changed since *Sherwood v Walker*, 66 Mich 568; 33 NW 919 (1887).[8] *Id.* at 440-442. Our Supreme Court concluded that the phrase "mutual mistake of fact" in MCL 211.53a means "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Sherwood*, *supra* at 442.

The dispute in *Ford Motor Co* arose after the petitioner filed statutorily required personal property tax statements containing factual errors with the appropriate taxing jurisdictions. The assessors accepted and relied on the incorrect statements when calculating the petitioner's tax liability. *Ford Motor Co*, *supra* at 428. After discovering the inaccuracies, the petitioner filed petitions with the Tribunal against the taxing jurisdictions for refunds under MCL 211.53a. *Ford Motor Co*, *supra* at 428-429. In holding that the petitioner's refund claim was valid, our Supreme Court noted that ultimate statutory responsibility for determining the proper assessments rested with the assessor:

> In sum, the [General Property Tax Act (GPTA)] requires the assessor to ascertain what personal property is in his jurisdiction and assess it accordingly. In doing so, the assessor must exercise his best judgment and has many tools available to better fulfill his statutory responsibility. And while the personal property statements greatly assist the assessor in carrying out that responsibility, the assessor is not bound by the taxpayer's personal property statement. So when an assessor simply relies on a taxpayer's personal property statement and subsequently calculates

[8] In *Sherwood*, our Supreme Court determined that the sellers had the right to rescind a contract for the sale of a cow if the parties understood that the cow was barren at the time of contracting but it was later determined that the cow was not barren and, therefore, worth more than the agreed-upon price. See *Ford Motor Co*, *supra* at 440-442.

the assessment on the basis of this information alone—like in these cases—the assessor is effectively adopting the personal property statement as his own belief of what the taxpayer owns. In other words, under these circumstances, there is a mutual understanding of what property the taxpayer owns, and this mutual understanding goes to the very nature of the transaction—an accurate tax assessment. Therefore, the GPTA and the assessment process itself lead us to the inescapable conclusion that mutual mistakes of fact occurred in these cases. [*Id.* at 446-447 (citations omitted).]

More recently, in *Eltel Assoc, LLC v City of Pontiac*, 278 Mich App 588; 752 NW2d 492 (2008), this Court upheld the Tribunal's determination that MCL 211.53a applied when an assessor mistook the date on deeds as the date when ownership of exempt property was transferred to the petitioner for the purpose of determining that the property did not qualify for a tax exemption for a given tax year. This Court determined that the petitioner was also misdirected by the mistake and "plenarily adopted it as its own when it paid the taxes . . . ." *Eltel Assoc, LLC*, *supra* at 592. This Court explained:

The nature of this factual issue is not transformed by petitioner's initial understanding of its ownership anymore than it would be by a misperception about the nature of the state's exemption after the December closing. See *Carpenter v Detroit Forging Co*, 191 Mich 45, 53; 157 NW 374 (1916). The factual mistake concerned the identity of the parcels' owner on December 31, 2001, not any legal nitpicking that arose afterward. *Id.* Simply put, the date on which title transferred to petitioner was purely a factual issue until respondent clouded it with a technical legal challenge to the particulars of this transfer. If an assessor mistakenly places an exempt property on the rolls because the deed's scrivener absent-mindedly misdated it as delivered the previous year and a taxpayer remits payment because it carelessly mistakes the same date as accurate, then the issue would be a factual one: When did the

> taxpayer actually obtain the property? This factual issue could not be retroactively transformed by claiming that laws involving written instruments, statutes against the back-dating of documents, or a latent violation of the rules against perpetuities, all raise legal questions that, had the assessor or landowner ever considered them, would have affected their legal confidence in the factual issue of ownership.
>
> Likewise, it does not serve any legitimate purpose to probe every passing thought of a billed taxpayer to explore whether any point of misplaced confidence in a bill's factual accuracy carries with it some underlying notion of legal rights and obligations. *Id.*; see also *Ford Motor Co*, *supra*. Petitioner demonstrated that the parties mistakenly believed that petitioner owned the properties in 2001, making them subject to taxation in 2002. Petitioner did not own the properties in 2001, and they were exempt from taxation in 2002. Although respondent's legal challenge demonstrates its continued refusal to acknowledge its mistake, its obstinacy does not make the mistake one of law. [*Eltel Assoc, LLC*, *supra* at 592-593.]

We have determined that the *Eltel* Court's well-reasoned opinion is applicable to this case. This litigation arises not from a dispute over a question of law, but from a mutual mistake of fact—both parties erroneously believed that Briggs was required to pay the disputed taxes in 2002, 2003, and 2004, although Briggs had no such obligation. See *Ford Motor Co*, *supra* at 442. Although the statutory provisions of the Revised School Code identify the circumstances under which the property taxes in question could be levied, the question whether the procedures necessary to renew the property tax assessments in order to levy taxes on nonhomestead-property owners for tax years 2002, 2003, and 2004 were followed is one of fact—either the school electors authorized the taxes for those years or they didn't. Similarly, whether Briggs, a nonhomestead-property owner, was required to pay these taxes (and,

hence, whether Briggs is entitled to a refund of these taxes) is a factual question. Therefore, the belief apparently held by both Briggs and respondents—that respondents were authorized to issue, and Briggs was obligated to pay, the disputed taxes in 2002, 2003, and 2004—constitutes a mutual mistake of fact.

Because the alleged overpayment of taxes arose when the parties made a mutual mistake of fact, MCL 211.53a controls. Therefore, Briggs could bring a suit to recover excess tax payments if the disputed payments for the 2002, 2003, and 2004 tax years were made within three years of filing suit. Because the Tribunal has jurisdiction over this case, summary disposition under MCR 2.116(C)(4) is inappropriate. Similarly, summary disposition should not have been granted under MCR 2.116(C)(7) because this case is not barred by a 30-day statute of limitations.

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

UNTHANK v WOLFE

Docket No. 284182. Submitted December 3, 2008, at Detroit. Decided December 23, 2008, at 9:15 a.m. Vacated in part, 483 Mich ___.

Christine Wolfe sought a divorce from Kenneth Barnett in the Wayne Circuit Court, Bill Callahan, J. She decided during the divorce proceedings to allow Phillip and Phyllis Unthank to adopt her unborn child, whom Barnett denied fathering. Following the child's birth, Wolfe executed a document under MCL 710.23d(1)(c) temporarily transferring physical custody of the child to the Unthanks. Genetic testing subsequently revealed that Barnett was the father, and he sought custody of the child in the divorce proceeding. The Unthanks petitioned the Wayne County Probate Court for appointment as the child's temporary guardians, which the court, June E. Blackwell-Hatcher, J., granted. Over the next five years, a complex series of proceedings in both the circuit court and the probate court followed. Barnett continued his efforts to gain custody in both courts. While Wolfe had signed powers of attorney delegating her parental powers to the Unthanks, she subsequently revoked them and filed petitions in the circuit court requesting that the child be returned to her. The Unthanks also sought custody in both courts, and each court entered numerous orders concerning the child and the various attempts to gain custody or guardianship of him. Judge Blackwell-Hatcher again appointed the Unthanks as temporary guardians, which Wolfe appealed in the circuit court before Judge Callahan. Eventually, Judge Blackwell-Hatcher was assigned to the custody matter in the circuit court and granted Wolfe parenting time. Judge Callahan denied Wolfe's appeal of Judge Blackwell-Hatcher's guardianship order. Throughout this time, the relationship between Wolfe and the Unthanks continued to deteriorate dramatically, leading to motions to suspend Wolfe's parenting time and even a physical altercation. Wolfe called the child "Cody" when he was in her care, and the Unthanks called him "Duane." A trial of the custody matter finally ensued, and, more than one year after it ended, Judge Blackwell-Hatcher denied the Unthanks' custody motion, awarded sole custody to Wolfe, and denied Wolfe's request for attorney fees. The Unthanks appealed, and Wolfe cross-appealed.

The Court of Appeals *held*:

The Unthanks lacked standing to pursue custody of the child. Under MCL 710.23d(1)(c)(*iii*), Wolfe retained full parental rights to the child throughout the proceedings in the circuit court and the probate court, and both courts erred by exploring custodial options after Wolfe revoked her permission for temporary placement with the Unthanks.

1. Two statutes confer standing in child custody actions. The Unthanks lacked standing under MCL 722.26c(1), which allows a third party to bring a custody action in certain circumstances, because the child was never formally placed with them for adoption and Wolfe and Barnett were married at the time of the child's conception.

2. The Unthanks also lacked standing under MCL 722.26b(1), which allows a guardian to bring a custody action. While Judge Blackwell-Hatcher appointed them as the child's temporary guardians, they were not eligible under MCL 700.5204(2) to be guardians for purposes of MCL 722.26b(1) when they filed their third-party custody action. MCL 700.5204(2)(b) requires a parent to have given current permission for the child to reside with another person before that person may seek a guardianship order. Barnett, however, never agreed to permit the child to reside with the Unthanks, and Wolfe unequivocally revoked her permission before the Unthanks brought their custody action. Despite the Unthanks' status as temporary guardians, Wolfe's revocation eliminated their authority as the child's guardians, and they lacked any legal basis to claim a substantive right to custody.

3. Judge Blackwell-Hatcher made no findings regarding Wolfe's request for attorney fees and expenses under MCR 3.206(C), which allows the court to award attorney fees and expenses in a domestic relations action if the requesting party demonstrates that he or she is unable to bear the expense of the action and that the other party is able to pay. A remand is necessary to resolve that issue. Judge Blackwell-Hatcher's denial of attorney fees under MCR 2.114 and 5.114, however, was proper.

Custody award and denial of attorney fees under MCR 2.114 and 5.114 affirmed and case remanded for further proceedings.

GUARDIAN AND WARD — CHILD CUSTODY — STANDING.

Appointment as the temporary guardian of a child does not by itself give the temporary guardian standing to pursue custody of the child (MCL 722.26b, 722.26c).

Scott Bassett and *Williams, Williams, Rattner & Plunkett, P.C.* (by *John F. Mills*), for Phillip and Phyllis Unthank.

Faupel, Fraser & Fessler (by *Marian L. Faupel* and *James Fraser*) for Christine Wolfe and Kenneth Barnett.

Before: BORRELLO, P.J., and DAVIS and GLEICHER, JJ.

GLEICHER, J. In this child custody action, third-party custodians Phillip and Phyllis Unthank appeal as of right the circuit court's order granting Christine Wolfe, the biological mother of the minor child involved, sole physical and legal custody. We affirm regarding custody, but remand for further proceedings concerning Wolfe's motion for attorney fees pursuant to MCR 3.206(C).

I. FACTS AND PROCEEDINGS

In May 2001, Christine Wolfe married Kenneth Dale Barnett, and later that year Wolfe gave birth to Samantha Barnett. In May 2002, Wolfe filed a complaint for divorce. During the divorce proceedings, Wolfe revealed that she was pregnant. Barnett denied paternity of the unborn child. Wayne Circuit Court Judge Bill Callahan entered a divorce judgment that awarded Wolfe and Barnett joint legal and physical custody of Samantha, but included no provision regarding the unborn child.

During the divorce proceedings, Wolfe decided to allow plaintiffs (the Unthanks) to adopt the unborn child. Wolfe and the Unthanks contemplated an adoption pursuant to MCL 710.23a, which allows a parent to "make a direct placement of the child for adoption by making a temporary placement under" MCL 710.23d. MCL 710.23a(1). "A temporary placement becomes a

formal placement when the court orders the termination of the rights of the parent or parents . . . and approves placement under [MCL 710.51].” *Id.*

On January 23, 2003, Wolfe bore the child involved in this dispute, and the next day executed a statement transferring his physical custody to the Unthanks, pursuant to MCL 710.23d(1)(c) of the Michigan Adoption Code. This provision contemplates that in furtherance of a direct placement adoption, a parent with legal and physical custody of a child “may make a temporary placement of the child” through a document “evidencing the transfer of physical custody of the child.” The document must also contain, among other things, a declaration that

> unless the parent or guardian and the prospective adoptive parent agree otherwise, the prospective adoptive parent has the authority to consent to all medical, surgical, psychological, educational, and related services for the child *and language indicating that the parent or guardian otherwise retains full parental rights to the child being temporarily placed and that the temporary placement may be revoked by the filing of a petition under subsection (5).*[1] [MCL 710.23d(1)(c)(*iii*) (emphasis added).]

The Unthanks called the child Duane and took him home from the hospital when he was one day old.

In February 2003, genetic testing revealed that Barnett had fathered the child. Shortly after he received the genetic testing results, Barnett filed a motion in the divorce case seeking custody of the child, accompanied by a birth certificate listing the child’s name as Cody Thomas Barnett. Initially, Wolfe opposed Barnett’s efforts to obtain custody of his son. When the Unthanks

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[1] Subsection 5, MCL 710.23d(5), addresses the procedure that a parent or guardian must follow when he or she petitions to regain custody of a child who has been temporarily placed.

learned of Barnett's interest in custody of the child, they filed a petition in the probate court requesting appointment as the child's "co-temporary guardians." On February 27, 2003, Wayne County Probate Court Judge June Blackwell-Hatcher appointed the Unthanks as temporary coguardians. The letters of guardianship bore an expiration date of April 2, 2003.

On March 6, 2003, Barnett filed in the probate court a petition requesting return of the child, which Judge Blackwell-Hatcher denied. The probate court extended the Unthanks' temporary guardianship through April 24, 2003. Barnett then shifted his custody efforts to the circuit court.[2] On April 22, 2003, Judge Callahan entered an "Amended Consent Judgment of Divorce," which provided: "IT IS FURTHER ORDERED AND ADJUDGED that the parties to this action have mutually agreed to place the unborn child of the parties, presently *in utero*, for adoption. Accordingly, no further provision for said child is made in this Judgment of Divorce." Apparently in response to Barnett's continuing campaign for the child's custody, in July 2003, the circuit court entered an order awarding Wolfe "full legal and physical custody" of "DUANE UNTHANK, during the pendency of this matter or until the further order of the Court." The order additionally provided: "IT IS FURTHER ORDERED that PHILLIP AND PHYLLIS UNTHANK are the agents of the custodial parent, CHRISTINE WOLFE, and in whom's [sic] residence the minor child will remain until the further order of the Court."

In April 2003, September 2003, December 2003, June 2004, and December 2004, Wolfe signed powers of

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[2] The record of the divorce proceedings has not been provided to this Court. We have derived the facts recited here from the portions of the circuit court record that appear in the probate court record.

attorney delegating "all of my parental powers" to the Unthanks. In November 2003, Judge Callahan ordered Barnett to pay child support, undergo drug testing, and complete a psychological evaluation. Barnett disobeyed all these orders. Although Wolfe obtained a psychological examination, she failed to undergo the drug testing ordered by Judge Callahan.

On March 20, 2005, Wolfe revoked the December 2004 power of attorney. In a letter written to the Unthanks, Wolfe explained that "[i]t has been my decision to raise my child," and requested that within 48 hours the Unthanks "return . . . Duane (Cody) to me." The Unthanks did not respond. On March 29, 2005, Wolfe filed a pro se petition in the divorce proceeding, requesting that the court order the immediate return of her child.

On May 15, 2005, the Unthanks filed in the divorce action a "Complaint for Third Party Custody." Wolfe responded with an emergency motion for summary disposition, alleging that the Unthanks lacked standing to seek custody. Judge Callahan agreed that the Unthanks lacked standing to bring a third-party custody action and indicated that he would not entertain their third-party custody complaint unless the probate court appointed them temporary coguardians of the child. On June 3, 2005, the Unthanks filed a petition in the Wayne County Probate Court seeking an order of temporary guardianship.[3]

On June 8, 2005, the parties appeared before Judge Blackwell-Hatcher in the probate court. Counsel for the Unthanks advised Judge Blackwell-Hatcher that his clients had requested a temporary guardianship "for

[3] The Unthanks had previously filed a petition for permanent guardianship of the child. As further discussed later, the probate court "stayed" the petition on June 30, 2005.

two reasons": to confer standing in a custody action and to allow the Unthanks to make medical decisions regarding the child. The Unthanks' counsel further represented:

> And this whole matter should and will go back to Judge Callahan. . . .
>
> So we're here solely to seek Temporary guardianship; solely to have this go back to Judge Callahan. And, Judge Callahan will determine what is best for this child, but we fear, unless Judge Callahan can get to the merits, to have a home study done; to direct that the tests which were ordered and never completed, be done; that Duane has lived his entire life with the Unthanks will be moved. Up until quite recently he was Duane; quite recently he became Cody for some reason he decided to change his name. I have fears for his best interests, but I don't ask this Court to become enmeshed in that custody decision, it's Judge Callahan's.

Wolfe's counsel argued that because Wolfe had revoked the final power of attorney and filed a petition requesting the child's return, the Unthanks could not qualify for a guardianship.[4] The Unthanks' counsel replied that Wolfe "has smoked marijuana" and "has a history of making poor choices . . . ." Judge Blackwell-Hatcher expressed the following: "I'm not convinced [Wolfe] has made diligent efforts to get her child back. Her reasoning for not doing it isn't logical." After additional argument and discussion with counsel, Judge Blackwell-Hatcher ruled:

> I think pursuant to the statute, the statutory requirement has been met. I do have some concerns, what I'm going to do is appoint Philip [sic] and Phyllis Unthank as the Temporary guardians, but their letters are going to

[4] Wolfe's counsel invoked *Deschaine v St Germain*, 256 Mich App 665; 671 NW2d 79 (2003), which we will discuss in more detail later.

> expire on June 30th. At that time, I'm going to set it for a full hearing, on that day at 11:00.

On June 15, 2005, Wolfe appealed in the circuit court Judge Blackwell-Hatcher's order appointing the Unthanks as temporary coguardians. The appeal was assigned to Judge Callahan, who failed to decide it for another 11 months. Meanwhile, on June 23, 2005, the Unthanks again filed a circuit court action seeking custody of the child, which was also assigned to Judge Callahan. That same day, Wolfe filed another petition in the circuit court requesting immediate return of the child. And on June 24, 2005, Wolfe and Barnett stipulated the entry of an order in the divorce action stating that Wolfe would be awarded "the full legal and physical custody, control, maintenance and education of the parties' minor son CODY THOMAS BARNETT." A handwritten provision at the end of the stipulated order stated that the order "does not affect" the guardianship orders "through June 30, 2005," or the circuit court custody case initiated by the Unthanks.

On June 30, 2005, the parties appeared before Judge Blackwell-Hatcher for a hearing regarding the temporary guardianship order scheduled to expire that day. Counsel for the Unthanks immediately informed Judge Blackwell-Hatcher that MCL 722.26(b) required that the probate court stay further proceedings until disposition of the child custody action in the circuit court.[5] Wolfe's counsel urged Judge Blackwell-Hatcher to order

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[5] MCL 722.26b(4) provides in pertinent part that

> [u]pon the filing of a child custody action brought by a child's guardian or limited guardian, guardianship proceedings concerning that child in the probate court are stayed until disposition of the child custody action. A probate court order concerning the guardianship of the child continues in force until superseded by a circuit court order.

the Unthanks to return the child to Wolfe. Judge Blackwell-Hatcher stayed the probate proceedings pending the outcome of Wolfe's appeal of the temporary coguardianship appointment.[6]

On July 13, 2005, the Wayne Circuit Court transferred the custody matter from Judge Callahan to Judge Blackwell-Hatcher. The next day, the parties and their lawyers gathered in Judge Blackwell-Hatcher's courtroom. Judge Blackwell-Hatcher expressed dismay regarding her assignment to the case and reflected as follows:

> Well let me just say, as a preliminary matter that, this has been very confusing with the way that it's happened and reviewing the transcript of the prior hearing. I think that some of the things that were said to me were, at best, misleading, at worst, maybe intentional. I'm really kind of concerned. I understand the statute and the reasoning for having cases reassigned to the Probate Judge to sit as a Circuit Judge in Child Custody actions is because it's assumed that the Probate Judge had extensive experience with the family in the guardianship. And, in fact, I didn't at all. The only reason I very reluctantly and very narrowly appointed a temporary guardian was because I was assured that Judge Callahan was so invested in this case, that all he needed was that so that he could flush it out . . . .

Counsel for the Unthanks argued that because the child custody filing stayed the probate proceedings, "any guardianship orders then, in effect, remain during the pendency of the Custody Act . . . ." Judge Blackwell-Hatcher ultimately expressed the following:

> But I think the main point is you've appealed my appointment of the guardian.
>
> Why would we go into this extensive custody, all these extensive custody issues when, if your appeal is granted,

[6] Judge Blackwell-Hatcher's order did not enter until September 6, 2005.

> they have no standing and this matter will be dismissed by me as a Circuit Judge, unless someone else has to hear it, I don't know.

Judge Blackwell-Hatcher denied Wolfe's renewed request for immediate return of the child and refused to hear a motion requesting the child's return unless Wolfe's counsel withdrew the guardianship appeal. Wolfe was afforded parenting time, but not overnight visitation.

During the 11 months that Judge Callahan considered the appeal of Judge Blackwell-Hatcher's guardianship decision, the relationship between Wolfe and the Unthanks dramatically deteriorated. In August 2005, the Unthanks moved to suspend Wolfe's parenting time. The motion averred that Wolfe had fed the child meat, notwithstanding that the Unthanks maintained him on a vegetarian diet. Additional allegations in the motion included that Wolfe (1) smoked cigarettes in the child's presence despite his asthma, (2) drove the child in a "car with the windows in the back . . . rolled up in 90° weather," even though the Unthanks believed that Wolfe's vehicle lacked air conditioning, and (3) permitted the child to see Barnett, who the Unthanks claimed had an "established abusive background." The Unthanks further claimed that the child had an abrasion on his chin and a cut on his lip after visits with Wolfe.

On September 2, 2005, Phyllis Unthank unilaterally suspended Wolfe's parenting time. Judge Blackwell-Hatcher appointed a guardian ad litem to investigate the Unthanks' assertions. The guardian ad litem concluded that the Unthanks' allegations lacked merit and that no basis existed for the suspension of Wolfe's visitation. Judge Blackwell-Hatcher reinstated Wolfe's parenting time.

In March 2006, Wolfe and Phyllis Unthank argued while exchanging the child, and a physical altercation ensued. Wolfe refused to return the child to the Unthanks, and Phyllis Unthank called the police. The police returned the child to the Unthanks several days later. At an April 2006 hearing regarding these events, Judge Blackwell-Hatcher ordered that future exchanges of the child occur in a public place. The parties' disagreements regarding the child extended to virtually every aspect of the boy's life. For example, throughout the four years of the custody dispute, Wolfe referred to the child as "Cody" when he was in her care, while the Unthanks called him "Duane."

On May 19, 2006, Judge Callahan entered an order denying Wolfe's appeal of Judge Blackwell-Hatcher's order for temporary coguardianship. In June 2006, the Unthanks filed another motion to suspend Wolfe's parenting time, primarily complaining that the child had "rope burns" on the back of his neck after a visit with Wolfe. The Unthanks initiated an investigation by Child Protective Services (CPS), which declined to take further action after a social worker viewed the reddened areas. At a hearing conducted on July 12, 2006, Wolfe testified that the child had sustained a small injury while playing with his older sister and a jump rope. Judge Blackwell-Hatcher admonished Wolfe to supervise the children more carefully, but refused to suspend Wolfe's parenting time.[7]

On October 12, 2006, the parties commenced a custody trial, which continued on October 13, 2006, and January 26, 2007. The trial witnesses included the parties, the guardian ad litem, and a psychologist who

[7] At the subsequent custody trial, Phyllis Unthank admitted that she had made a second CPS referral regarding Wolfe, which CPS investigated but failed to pursue.

had evaluated Wolfe and Barnett in 2003. On February 20, 2008, more than a year after the trial concluded, Judge Blackwell-Hatcher entered an opinion and order denying the Unthanks' motion for custody, awarding sole custody of the child to Wolfe, and denying Wolfe's request for attorney fees.

II. ANALYSIS

A

The Unthanks raise several challenges to the soundness of Judge Blackwell-Hatcher's opinion and order awarding Wolfe custody of the child. But first we must address a preliminary and potentially dispositive question of law. We recognize that the parties do not specifically devote arguments in their appellate briefs to the matter of the Unthanks' standing. However, as reflected within our factual and procedural summary, the parties did raise the issue of standing before the circuit and probate courts. In any event, because the question of standing constitutes an important preliminary legal issue for which we have all the relevant facts, we choose to address it at the outset of our analysis. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237-238; 713 NW2d 269 (2005).

"The question of standing is not merely whether a party has a 'personal stake' in the outcome that will ensure 'sincere and vigorous advocacy.' " *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992) (citation omitted). Additionally,

> "[o]ne cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the

> subject matter of the controversy. This interest is generally spoken of as 'standing' . . . ." [*Id*. at 42-43 quoting 59 Am Jur 2d, Parties, § 30, p 414.]

" 'Whether a party has standing is a question of law that we review de novo.' " *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008) (citation omitted).

Two pertinent statutes confer standing in child custody actions, MCL 722.26b and MCL 722.26c. In MCL 722.26c, our Legislature has provided, in relevant part:

> (1) A third person may bring an action for custody of a child if the court finds either of the following:
>
> (a) Both of the following:
>
> (*i*) The child was placed for adoption with the third person under the adoption laws of this or another state, and the placement order is still in effect at the time the action is filed.
>
> (*ii*) After the placement, the child has resided with the third person for a minimum of 6 months.
>
> (b) All of the following:
>
> (*i*) The child's biological parents have never 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.

The Unthanks lacked standing under the clear and unambiguous terms of MCL 722.26c(1) because the child was never formally placed with them for adoption. Although Wolfe initially executed a statement transferring physical custody of the child at the time of his birth, a consummated adoptive placement was thwarted by Barnett's refusal to consent to the adoption and Wolfe's written revocation of the temporary

placement, pursuant to MCL 710.23d(1)(c)(*iii*). The plain language of MCL 710.23d(1)(c)(*iii*) recognizes that "the parent or guardian otherwise retains full parental rights to the child being temporarily placed and that the temporary placement may be revoked by the filing of a petition under [MCL 710.23d(5)]." Furthermore, the child's biological parents were married at the time of his conception, rendering MCL 722.26c(1)(b) inapplicable.

The Unthanks presumably recognized their lack of standing under MCL 722.26c and instead attempted to gain standing through appointment as the child's temporary guardians. The guardianship statute relevant here provides that a "guardian or limited guardian of a child has standing to bring an action for custody of the child as provided in this act." MCL 722.26b(1). In this case, however, the Unthanks were not eligible to be guardians for the child under MCL 700.5204(2) *when they filed their third-party custody action*. MCL 700.5204(2) permits the probate court to appoint a guardian for an unmarried minor under any of the following circumstances:

> (a) The parental rights of both parents or the surviving parent are terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination or mental incompetency, by disappearance, or by confinement in a place of detention.
>
> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.
>
> (c) All of the following:
>
> (*i*) The minor's biological parents have never been married to one another.

(*ii*) The minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order.

(*iii*) The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

The only subsection of this statute potentially applicable under the circumstances of this case is subsection 2(b), which requires that the "parent or parents permit the minor to reside with another person . . . ." But Barnett never agreed to permit the child to reside with the Unthanks, and Wolfe unequivocally revoked her permission in March 2005. In *Deschaine v St Germain*, 256 Mich App 665, 669-670; 671 NW2d 79 (2003), this Court definitively construed MCL 700.5204(2)(b) as requiring that a parent have given *current* permission for the child to reside with another person before that person may seek a guardianship order. The mother in *Deschaine* had occasionally allowed her child to live with the child's maternal grandparents. *Id*. at 666. Immediately after the mother's death, the grandparents took the child to their home, over the objection of the child's father. The grandfather then filed a petition for temporary guardianship, which the circuit court granted. The father again objected, and the circuit court ultimately decided that because the grandfather lacked current parental permission to house the child, he did not satisfy the conditions of MCL 700.5204(2)(b) and could not obtain guardianship of any type. The circuit court thus concluded that the grandfather lacked standing to petition for the child's custody, and this Court affirmed. *Deschaine*, *supra* at 667.

The Unthanks filed their first custody petition in May 2005. By then, Barnett had demonstrated unwavering opposition to their continued custody of the

child, and Wolfe had revoked permission for the child to continue to reside with the Unthanks. Because neither parent permitted the child to reside with the Unthanks, the Unthanks could not possibly have qualified as the child's guardians. Therefore, they lacked standing to pursue custody of the child under MCL 722.26b.

Despite their inability to establish standing under MCL 722.26c or MCL 722.26b, as limited by the requirements of MCL 700.5204(2), the Unthanks waged a full-scale custody battle on the basis of their appointment as the child's temporary coguardians. The Unthanks argued in the circuit and probate courts that as the child's temporary coguardians, they achieved standing under MCL 722.26b(1) because under MCL 700.5213(3), a temporary guardian enjoys the status of a permanent guardian. Our Supreme Court's holding in *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993), soundly rebuts the Unthanks' contention concerning temporary custody, as does a pertinent provision of the Michigan Court Rules.

Clausen and the instant case share important similarities. Both involve a failed adoption and a subsequent claim for third-party custody. In *Clausen*, a Michigan couple, Roberta and Jan DeBoer, sought to adopt a child born in Iowa on February 8, 1991. Cara Clausen, the child's mother, identified Scott Seefeldt as the child's father, and by February 14, 1991, Seefeldt and Clausen had released custody of the child. The DeBoers then filed in Iowa a petition for adoption. On February 25, 1991, an Iowa district court terminated the parental rights of Clausen and Seefeldt and granted the DeBoers custody of the child. The DeBoers promptly returned to Michigan with the baby. Nine days later, Clausen moved to revoke her release of the child's custody and revealed that Daniel Schmidt was the child's father. Schmidt

filed an affidavit of paternity and sought to intervene in the adoption proceeding. Subsequently, an Iowa court concluded that the previous termination of parental rights was void with respect to Schmidt and denied the DeBoers' petition to adopt the child. Iowa's appellate courts affirmed these decisions. *Id*. at 657-659.

The Iowa district court then ordered the DeBoers to return the child to Iowa, which the DeBoers refused to do. While appeals pended in Iowa, the DeBoers filed a petition in Michigan seeking jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA). The petition requested that the Washtenaw Circuit Court enjoin enforcement of the Iowa custody order or modify it to give the DeBoers custody. The circuit court entered an ex parte temporary restraining order directing that the child remain with the DeBoers. Schmidt filed "a motion for summary judgment" requesting the dismissal of the preliminary injunction, which the circuit court denied. This Court reversed the circuit court, concluding that the circuit court lacked jurisdiction under the UCCJA and that the DeBoers lacked standing. *Id*. at 659-660.

After this Court's decision, a Michigan attorney previously appointed coguardian ad litem for the child filed a complaint for custody in the Washtenaw Circuit Court. The circuit court conducted a hearing and entered an "order continuing status quo," which permitted the DeBoers to retain custody. Our Supreme Court then granted leave to appeal.[8] *Id.* at 660-661.

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[8] We observe that the Iowa and Michigan trial and appellate courts conducted the proceedings in *Clausen* with expedition. The entire process, including two state trial court judgments and four appeals, concluded in approximately two years. In stark contrast, the instant custody proceedings dragged slowly on for five years in the Wayne circuit and probate courts.

The first three sections of the Supreme Court's analysis in *Clausen* concerned jurisdictional and procedural issues under the UCCJA. *Id*. at 661-678. In part V, the Supreme Court examined whether the DeBoers had standing to claim custody of the child. *Id*. at 678. After rejecting the DeBoers' claim of standing under the UCCJA, the Supreme Court considered their assertion that "they had a substantive right to custody because they had custody pursuant to the February 25, 1991, order of the Iowa district court." *Id*. at 681. The Supreme Court soundly rejected this contention, explaining that "a third party does not obtain . . . a substantive right [to custody] by virtue of the child's having resided with the third party." *Id*. at 682. In a paragraph of the opinion foreshadowing this case, the Supreme Court observed:

> It may be that the Iowa district court's February 25, 1991, order appointing the DeBoers as custodians during the pendency of the Iowa adoption proceeding was sufficiently analogous to a Michigan guardianship (which would create standing) to have given them standing to prosecute a custody action during the effectiveness of that order. However, as the Court of Appeals said, when the temporary custody order was rescinded, they became third parties to the child and no longer had a basis on which to claim a substantive right of custody. [*Id*. at 683.]

Similarly in this case, irrespective of the temporary guardianship order, Wolfe's revocation of the initial temporary placement agreement, given in contemplation of the Unthanks' adoption of her child, eliminated their authority to serve as the child's guardians. At that point, the Unthanks lacked any legal basis on which to claim a substantive right of custody. Unlike the DeBoers, the Unthanks later convinced a court to appoint them as the child's temporary coguardians. But this effort to avoid the guardianship statute cannot serve to

create substantive custodial rights. The Supreme Court emphasized in *Clausen* that the "safeguards in the guardianship statute provide protection against manipulative attempts to temporarily obtain possession and use that as the basis for a Child Custody Act action." *Id*. at 691.

The statutory language regarding temporary guardianship manifests one such safeguard. In MCL 700.5213, the Legislature set forth the procedures governing the probate court's appointment of a guardian. Subsection 3 provides: "If necessary, the court may appoint a temporary guardian with the status of an ordinary guardian of a minor, but the temporary guardian's authority shall not exceed 6 months." MCL 700.5213(3). The term "if necessary" demonstrates the Legislature's intent that a trial court consider whether temporary guardianship constitutes a needed steppingstone on the path to permanent guardianship. The inherently brief duration of a temporary guardianship bespeaks the Legislature's concern that a temporary guardianship exist only long enough to facilitate the child's maintenance while a permanent guardianship is finalized.

A second safeguard against manipulative efforts to engineer standing resides within the Michigan Court Rules. MCR 5.403(A) envisions that the "court may appoint a temporary guardian only in the course of a proceeding for permanent guardianship." The Unthanks recognized that after Wolfe withdrew her consent to the child's initial placement with them, they could never qualify as the child's permanent guardians. The Unthanks sought temporary guardianship primarily to bypass the standing requirements of the Child Custody Act, as reflected by their argument in the lower courts that a temporary guardianship would confer the

same standing as full guardianship. While under certain circumstances a temporary guardian may properly petition for custody,[9] we reject the notion that third-party custodians may deliberately employ temporary guardianship as a ruse to avoid the clear, unambiguous requirements for standing found in MCL 722.26b and MCL 722.26c.

In summary, the clear and unambiguous language of MCL 710.23d(1)(c)(*iii*) provides that Wolfe retained full parental rights to the child throughout these proceedings. When Wolfe revoked her permission for temporary placement with the Unthanks, the probate and circuit courts erred by embarking on an extended exploration of custodial options. The Unthanks possessed no constitutional or statutory rights to raise the child or to become the child's legal guardians. The requirements of the Child Custody Act for standing serve as bulwarks against unwarranted intrusions into a parent's authority to make fundamental decisions, including the everyday residence of the child. By overlooking those requirements, the circuit and probate courts unduly prolonged this expensive and traumatic litigation.

B

Even assuming that the Unthanks had standing to participate in the custody dispute with Wolfe, our review of the record and Judge Blackwell-Hatcher's meticulously written opinion in this matter reveals no clear legal error on a major issue. The Unthanks

[9] In *Kater v Brausen*, 241 Mich App 606; 617 NW2d 40 (2000), this Court held that a temporary guardian *who had filed a petition for guardianship* had standing to bring a third-party custody action. The plaintiff in *Kater* was the stepfather, with whom the children were living when their mother died. *Id*. at 607.

contend that Judge Blackwell-Hatcher committed clear legal error on a major issue by ruling that they had to prevail on each of the "best interest" factors to retain custody of the child. We evaluate the Unthanks' argument guided by the Legislature's mandate that "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Clear legal error occurs when a court "incorrectly chooses, interprets, or applies the law . . . ." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). "[A] trial court's findings on each factor should be affirmed unless the evidence ' "clearly preponderate[s] in the opposite direction." ' " *Id.* at 879 (citation omitted).

The Child Custody Act governs our review of the Unthanks' claim. The act provides that in a child custody dispute between parents and 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." MCL 722.25(1). This legislative command comports with our state's historical jurisprudence. "It is a well-established principle of law that the parents, whether rich or poor, have the natural right to the custody of their children. 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." *Herbstman v Shiftan*, 363 Mich 64, 67; 108 NW2d 869 (1961). Michigan's presumption favoring parents accords with the principles revisited by the United States Supreme Court in *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000). The Supreme Court observed in *Troxel* that

> so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. [*Id*. at 68-69.]

Judge Blackwell-Hatcher's 27-page opinion included a lengthy discussion of the standard of review that she employed during the custody trial. Within that section of her opinion, Judge Blackwell-Hatcher set forth the following:

> [T]he "clear and convincing evidence" standard is a substantive standard rather than just an evidentiary standard. Consequently, in order to overcome the natural parent presumption, the Court is required to find that, when all of the factors in MCL 722.23 are collectively considered, the third party must clearly and convincingly establish that the best interests of the child require maintaining custody with him or her. It is not sufficient that the third party may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him or her. [Citation omitted.]

After finding that the child had an established custodial relationship with the Unthanks, Judge Blackwell-Hatcher returned to a discussion of the law governing her decision, beginning with the "preeminent case on Third Party Custody disputes in Michigan," *Heltzel v Heltzel*, 248 Mich App 1; 638 NW2d 123 (2001). Judge Blackwell-Hatcher summarized *Heltzel* as follows:

> [T]he Court of Appeals held that a non parent third party seeking to obtain custody of the child over a fit parent bears the burden of clearly and convincingly demonstrating that all the relevant factors pursuant to MCL 722.23, including the existence of a custodial environment and all the legislatively mandated best interests concerns, taken together, require placement with the third-party [sic].

Her opinion quoted with emphasis the following excerpt from *Heltzel*:

> We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves 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.]

Judge Blackwell-Hatcher rejected the Unthanks' contention that Wolfe and Barnett were unfit parents, which would have eliminated the parental presumption. Her opinion then returned to the evidentiary standard that governed her analysis:

> [T]he Court finds the parental presumption in favor of the Defendant [sic] in this case exists and to rebut this presumption the Plaintiffs must show clear and convincing evidence that the "best interests of the child" require a removal of the child from his natural parents in favor of the established custodial environment provided by the Plaintiffs.

Judge Blackwell-Hatcher then discussed, in more than 10 pages, her findings on each of the best-interest factors. Judge Blackwell-Hatcher found that factors b and d "slightly" favored the Unthanks, factors c, e, f, and k favored the Unthanks, and the parties were equal regarding factors a, g, h, i, and j. The judge viewed factor *l* as favoring Wolfe, largely because the guardian ad litem had recommended that Wolfe have custody of the child. The opinion summarized as follows:

> In viewing the "sum total" of the factors under MCL 722.23 in this case, the Court ultimately believes the child in this case has to be returned to his mother even though some of the factors favor the Plaintiffs, as Guardians. As the above-referenced case law suggests, when, as here, the statutory presumption in favor of parental custody and the presumption in favor of the established custodial environment conflict, due process demands that the presumption remain in favor of custody of the natural parents absent a showing of parental unfitness or abandonment. In such cases, it is presumed that the "best interests of the child" are normally served by granting custody to the natural parent. To rebut that presumption, the third-party Plaintiffs in this case must show by clear and convincing evidence that the child's best interests require instead maintaining the established custodial environment. *Heltzel* [248 Mich App at] 24-28. In this regard, the benefit established by the third-party [sic] must also be greater than a marginal benefit. [*Id*.] at . . . 28.

After examining these indisputably correct summaries of the applicable law, Judge Blackwell-Hatcher concluded:

> While the court acknowledges that this case is a difficult one because of the Plaintiffs as Guardians have [sic] prevailed on several factors, the Court still believes that custody should be with Christine Wolfe, the child's mother. Although the Unthanks' [sic] may be more stable and responsible, this Court still does not feel these factors alone are enough to rebut the presumption in favor of the Defendant [sic] in this case given the child's young age, and how long Ms. Wolfe has fought for custody over him. Despite some concern over the fitness of Mr. Barnett, Christine Wolfe fought for over three years for her son and did prove she can take care of two daughters. Lastly, the Guardianship although solid with the Unthanks' [sic] was for a relatively short period of years.
>
> As held in *Eldred v Ziny*, 246 Mich. App. 142, 150; 631 NW 2d748 (2001)[:]

> "Only when all the legislatively mandated best interest concerns taken together clearly and convincingly demonstrate that the child's best interest require placement with a third person should custody be awarded over the natural parents."
>
> *In the instant case, although the Guardians prevail on some factors, they do not clearly and convincingly prevail on all factors as required by the law*. [Emphasis added.]

We reject the Unthanks' argument that this lone, conclusory sentence, although possibly amounting to legal error, requires a remand of this case. Taken in isolation and entirely out of its context within the balance of the opinion, the contested sentence seems to inaccurately suggest that a third-party custodian must prevail on all statutory best-interest factors.[10] Numerous statements of the law within Judge Blackwell-Hatcher's opinion, together with the complained-of remark when viewed in its proper context, demonstrate that she repeatedly, consistently, and correctly applied the law as analyzed in *Heltzel* by evaluating the totality of the circumstances and applying the proper standard of proof. We cannot conclude that the one arguably

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[10] *Heltzel* instructs that a court must decide whether "all relevant factors," including the existence of an established custodial relationship, and "all legislatively mandated best interest concerns," collectively considered, "clearly and convincingly demonstrate that the child's best interests require placement with the third person." *Heltzel*, 248 Mich App at 27. In *Henrikson v Gable*, 162 Mich App 248, 252; 412 NW2d 702 (1987), this Court quoted approvingly the following language derived from a previous case: " '[The presumption that the best interests of the child would be served by granting custody to the natural parent] remains a presumption of the strongest order and it must be seriously considered and heavily weighted in favor of the parent.' " (Citation omitted.) We similarly concluded in *Henrikson* that an appropriate application of this strong presumption required a trial court "to find that, when all of the factors in MCL 722.23 . . . were collectively considered, [the third party] clearly and convincingly established that the best interests of the children required maintaining custody with the [third party]." *Henrikson*, *supra* at 253.

erroneous sentence extracted from a lengthy, factually detailed, well-reasoned opinion mandates another custody hearing.

C

We next briefly address the Unthanks' criticism of Judge Blackwell-Hatcher's determination that Wolfe and Barnett were fit parents and therefore were entitled to the presumption that their custody served the child's best interests. MCL 722.25(1). According to the Unthanks, the parents' failure to provide the child financial support during the five years he resided with the Unthanks, and their failure to visit him regularly during the first two years of his life, rendered Wolfe and Barnett unfit.

We reject the Unthanks' argument that Wolfe's absence from the first two years of the child's life required that she be deemed an unfit parent. The adoption code specifically preserved Wolfe's right to "full parental rights" when she revoked the temporary placement with the Unthanks. MCL 710.23d(1)(c)(*iii*). We decline to negate this legislative pronouncement by holding that Wolfe's failure to more swiftly revoke the temporary placement rendered her unfit. We similarly reject the argument that the failure of Wolfe and Barnett to provide support during the years that this action pended suffices to deny them the presumption favoring parental custody. After Wolfe revoked permission for the child to reside with the Unthanks, she aggressively pursued full custody of the child. By the time the Unthanks filed this third-party custody action, custody of the child had become virtually shared between the parties. Under these circumstances, and in the absence of an order requiring Wolfe to provide further support to the Unthanks, we detect no basis for a finding of Wolfe's unfitness.

In light of our determination that the Unthanks lack standing to obtain custody of the child, we need not address the remaining arguments that Judge Blackwell-Hatcher erred in her findings regarding best-interest factors a, g, and j. For the same reason, we decline to address the arguments raised by Wolfe and Barnett regarding factors b, c, d, f, and k.

D

On cross-appeal, Wolfe argues that the circuit court erred by denying her request for attorney fees. We review for an abuse of discretion a circuit court's decision regarding the necessity or reasonableness of attorney fees. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Id*. (citations omitted).

In the third-party custody action, Wolfe's counsel moved for attorney fees and expenses under MCR 3.206(C). MCR 3.206(C)(1) and (2)(a) authorize the court to award attorney fees and expenses in a domestic relations action if the party requesting them alleged "facts sufficient to show that . . . the party is unable to bear the expense of the action, and that the other party is able to pay . . . ." MCR 3.201(A)(1) indicates that subchapter 3.200 of the court rules applies to actions that relate to "the custody of minors" under the Child Custody Act. Judge Blackwell-Hatcher entirely failed to make any findings regarding Wolfe's request for attorney fees and expenses under MCR 3.206(C). The opinion referred instead to Wolfe's request for attorney fees under MCR 2.114 and MCR 5.114, and stated: "This custody action has merit and was not frivolous or devoid of legal merit. It was a close case which was very

difficult to decide and therefore the Court will not award fees as a sanction to either party in this case."

Because Judge Blackwell-Hatcher failed to make any findings regarding Wolfe's claim for attorney fees and expenses under MCR 3.206(C), we remand for the expeditious resolution of this issue. We affirm Judge Blackwell-Hatcher's ruling with regard to attorney fees under MCR 2.114 and MCR 5.114, finding no evidence that the Unthanks' efforts to retain custody were unreasonable, vexatious, or motivated by a desire to harass Wolfe or Barnett.

III. CONCLUSION

We affirm the award of custody to Wolfe and the denial of attorney fees under MCR 2.114 and MCR 5.114. We remand for a determination regarding Wolfe's entitlement to attorney fees and expenses under MCR 3.206(C). We do not retain jurisdiction.

PEOPLE v DROOG

Docket No. 279843. Submitted December 2, 2008, at Grand Rapids. Decided January 13, 2009, at 9:00 a.m.

Michelle R. Droog, pursuant to the Code of Criminal Procedure, MCL 780.621, moved in the Kent Circuit Court to have her conviction of obtaining a controlled substance by fraud, MCL 333.7407(1)(c), set aside. That conviction had been reported to the Secretary of State, as mandated by the Michigan Vehicle Code, MCL 257.732(4)(i). The court, James R. Redford, J., denied the motion, ruling that pursuant to MCL 257.732(22), it could not order the expunction of the conviction. The defendant appealed by leave granted.

The Court of Appeals *held*:

The defendant sought to have her conviction set aside, not to have the Secretary of State's record of the conviction expunged. The Vehicle Code limitation on a court's authority to order the expunction of a Secretary of State record does not affect the authority granted to a court by the Code of Criminal Procedure to set aside a criminal conviction.

Reversed and remanded for the entry of an order setting aside the defendant's conviction.

CRIMINAL LAW — SETTING ASIDE CONVICTIONS — CONVICTIONS REPORTABLE TO THE SECRETARY OF STATE — CODE OF CRIMINAL PROCEDURE — VEHICLE CODE.

The Michigan Vehicle Code provision forbidding a trial court from ordering the expunction of a violation reportable to the Secretary of State under the Vehicle Code does not affect the court's authority under the Code of Criminal Procedure to set aside a conviction (MCL 257.732[22]; MCL 780.621).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *H. Steven Langschwager*, Assistant Attorney General, for the people.

Law Group of Rademaker & Kelley, P.C. (by *Amy M. Rademaker*), for the defendant.

Before: HOEKSTRA, P.J., and BANDSTRA and DONOFRIO, JJ.

BANDSTRA, J. By leave granted,[1] defendant appeals an order of the trial court denying her application, filed under the Code of Criminal Procedure, to set aside a previous conviction. The trial court's decision was based solely on a provision of the Michigan Vehicle Code that states that "a court shall not order expunction of any violation reportable to the Secretary of State." MCL 257.732(22). We conclude that this provision of the Vehicle Code does not apply to prohibit the setting aside of a conviction under the Code of Criminal Procedure. We reverse and remand.

FACTS

Defendant had been convicted in 2001 of obtaining a controlled substance by fraud, MCL 333.7407(1)(c). She was sentenced to probation and community service and ordered to pay restitution. As required by the Vehicle Code, the convicting court forwarded an abstract of the court record regarding the conviction to the Secretary of State. MCL 257.732(4)(i).[2] In 2007, defendant filed an application to set aside her conviction under the Code of Criminal Procedure. MCL 780.621. The trial court

[1] We reject the prosecution's argument that we are without jurisdiction; defendant's application was filed well within 12 months of the challenged order. MCR 7.205(F).

[2] The forwarding of and maintenance of abstracts is used by the Secretary of State for motor vehicle purposes, including the imposition of points against the records of drivers, MCL 257.320a, and possible sanctions against driver's licenses. MCL 257.317 *et seq*. Further, points imposed can affect a driver's costs of obtaining insurance coverage.

reasoned that, although the defendant had satisfied the requirements necessary to warrant having her conviction set aside, the court did not have authority to grant that relief because of a provision in the Vehicle Code stating that "a court shall not order expunction of any violation reportable to the secretary of state under this section." MCL 257.732(22). The prosecution does not dispute the fact that, but for the operation of this provision, defendant would be entitled to have her conviction set aside. Thus, we are confronted with an issue that is solely a matter of statutory interpretation.

ANALYSIS

Statutory interpretation presents a question of law, which this Court reviews de novo. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236-237; 644 NW2d 734 (2002); *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 99; 643 NW2d 553 (2002). "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). The first criterion in determining the Legislature's intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993); *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996); see also *Roberts v Mecosta County Gen Hosp,* 466 Mich 57, 63; 642 NW2d 663 (2002) (determining the intent of the Legislature begins with an examination of the language of the statute). As previously discussed by this Court, "[s]tatutory language should be construed reasonably, keeping in mind the purpose 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." *USAA Ins Co, supra* at 389.

Pursuant to these authorities, we begin with a close examination of the language of the two statutes at issue here. The Vehicle Code states that a court shall not "order expunction" of any "violation reportable to the secretary of state under this section." MCL 257.732(22). However, this was not the statutory relief that defendant sought; instead, she asked the court to "set aside" her "conviction" under the Code of Criminal Procedure, MCL 780.621. Notwithstanding the different language employed in the two statutes, the prosecution argues that expunction of a reportable violation is identical to setting aside a criminal conviction, i.e., that the two statutes refer to the exact same thing. We disagree.

We begin by noting the obvious: Had the Legislature intended to limit a court's authority to set aside a conviction under the Code of Criminal Procedure, it could have clearly done so with language that closely tracked the language of that code, perhaps with a citation or reference to that code. In the absence of such a clear legislative directive,[3] we are hesitant to conclude that the authority to set aside convictions, clearly granted by the Code of Criminal Procedure, has been limited by § 732(22) of the Vehicle Code.

Further, as already noted, the Vehicle Code provision states that "a court shall not order expunction of any violation reportable to the secretary of state under this section." A common sense understanding of this language inevitably leads to the conclusion that the limitation pertains to actions against the Secretary of State. However, the secretary generally does not maintain

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[3] The prosecution can only point to cases where the "set aside" statute has been passingly referred to as an expunction statute, e.g., *People v Link*, 225 Mich App 211, 213; 570 NW2d 297 (1997), and one statutory provision where the two terms seem to be used interchangeably. MCL 750.224f(4).

records of criminal convictions and defendant's motion to set aside her conviction was not directed at the Secretary of State. Moreover, had relief been granted to defendant, she would have been "considered not to have been previously convicted" for all "purposes of the law." MCL 780.622(1). In that sense, the setting aside of a conviction under the Code of Criminal Procedure is much broader than the expunction of a violation reportable to the Secretary of State under the Vehicle Code. As noted earlier, violations reported to the secretary affect only drivers and their use of vehicles.

We thus conclude that the expunction of a record maintained by the Secretary of State is a much different matter from the setting aside of a criminal conviction.[4] The two statutes have to do with different subjects and, thus, their provisions are not in conflict.[5] The Vehicle Code limitation on a court's authority to order the expunction of a Secretary of State record does not affect the authority granted by the Code of Criminal Procedure to set aside a criminal conviction.

We note that our interpretation of these statutes avoids two potential problems. First, the Code of Criminal Procedure itself contains exceptions to its provision allowing convictions to be set aside; convictions of

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[4] In this regard, we note that violations reportable under the Vehicle Code do not pertain only to criminal convictions; they can also result from forfeitures of bail and entries of civil infraction determinations and default judgments. MCL 257.732(1)(a).

[5] Because the two statutes are not in conflict, the prosecution's citation of *People v Cohen*, 217 Mich App 75, 79-80; 551 NW2d 191 (1996), for the proposition that a more specific statute governs over conflicting provisions in a more general statute is inapposite. Further, the two statutes at issue here have differing purposes and effects and the mere fact that, as the prosecution argues, they are both "records related statutes" does not call into play the doctrine of *in pari materia* (upon the same matter or subject). So, we reject the prosecution's arguments based on that doctrine.

felonies punishable with life imprisonment, traffic offenses, and certain designated violations of the penal code cannot be set aside. MCL 780.621(2). To adopt the prosecution's argument here would, in effect, add another broad exception to this list, for convictions that result in a violation reportable to the Secretary of State. It would be inappropriate to "read [that] into" the Code of Criminal Procedure on the basis of a strained interpretation of the Vehicle Code. *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 399; 760 NW2d 510 (2008) ("We cannot read into a statute language that was not placed there by the Legislature."); see also *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."). Second, adopting the prosecution's argument would lead to a puzzling result. Under MCL 257.732(4)(i), reports must be made to the Secretary of State regarding listed drug offenses, including defendant's, but only if the convicted person receives a sentence of one year or less. Thus, under the prosecution's interpretation of the Vehicle Code, a person receiving a greater sentence could have her conviction set aside (because the conviction did not result in a report to the Secretary of State) while persons receiving a lesser sanction, like defendant, could not. That would be a seemingly absurd result not likely to have been intended by the Legislature.

Further, we note that our decision does not mean that the Vehicle Code limitation is without any effect whatsoever with respect to motions to set aside criminal convictions. For example, a person afforded that relief could not argue that, because the conviction giving rise to a report maintained by the Secretary of State had

been set aside, the Secretary of State should no longer maintain that record. If the conviction was a "violation reportable," the Secretary of State could not be required to expunge the record of that violation because the underlying conviction had been set aside.[6] By its clear terms, MCL 257.732(22) prevents a court from ordering expunction "except as provided in" the Vehicle Code. Expunction cannot be ordered on the basis of some "other provision of law," including the provisions of the Code of Criminal Procedure for setting aside a conviction.

In light of our decision on this issue, we need not address the other argument defendant raised on appeal. We reverse the order of the trial court and remand this case for the entry of an order setting aside defendant's conviction. We do not retain jurisdiction.

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[6] The prosecution claims that our decision, allowing the Secretary of State to maintain a public record of a reported conviction even after that conviction has been set aside, contradicts the prohibition in the Code of Criminal Procedure against anyone divulging, using, or publishing information concerning a conviction that has been set aside. MCL 780.623(5). That provision is not before us, and we express no comment regarding the merits of the prosecution's concern. We note, however, that, in a similar situation, the Attorney General has opined that the Department of Commerce can maintain records regarding administrative sanctions imposed against persons on the basis of convictions that were later set aside, while also concluding that those records cannot disclose information regarding the convictions themselves. 1994 OAG, No. 6780 (January 4, 1994).

SHERMAN-NADIV v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 279302. Submitted November 13, 2008, at Detroit. Decided November 20, 2008. Approved for publication January 13, 2009, at 9:05 a.m.

Rochelle Sherman-Nadiv and Yair Nadiv brought an action in the Oakland Circuit Court against Farm Bureau General Insurance Company of Michigan, the insurer of a rental home owned by the plaintiffs, after the defendant denied a claim for water damage to the house caused by a broken indoor water pipe. The policy excludes coverage for accidental discharge of water if the house has been vacant for more than 30 consecutive days immediately before the loss and provides that "[a] dwelling being constructed is not considered vacant." The court, Rudy J. Nichols, J., granted a motion in limine brought by the defendant and precluded the plaintiffs from presenting evidence or argument at trial regarding whether the house was being constructed when it was under repair and renovation at the time of the loss. A jury returned a verdict in favor of the defendant. The plaintiffs appealed.

The Court of Appeals *held*:

The trial court did not abuse its discretion by granting the motion in limine. The plain, ordinary, and unambiguous meaning of "[a] dwelling being constructed" is a house being erected or built from the ground up; it does not mean a house being repaired, remodeled, or renovated. In any event, there was no evidence of construction or repair work being performed at the house within the 30 days preceding the loss.

Demorest Law Firm, PLLC (by *Mark S. Demorest* and *Melissa L. Demorest*), for the plaintiffs.

Moblo & Fleming, P.C. (by *Daniel J. Fleming* and *Allison L. Silverstein*), for the defendant.

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

PER CURIAM. In this insurance action, plaintiffs appeal as of right, arguing both that defendant was improperly granted a motion in limine because the language forming the basis for the denial of coverage was ambiguous and that the jury's finding that the subject premises had been vacant for 30 days before the loss occurred was against the great weight of the evidence. We affirm.

Plaintiffs, Rochelle Sherman-Nadiv and Yair Nadiv, own several rental properties in southeast Michigan, including a rental home at 41 West Hayes Street in Hazel Park (the house). Defendant, Farm Bureau General Insurance Company of Michigan, issued an insurance policy on the house to plaintiffs. After tenants moved from the house in the autumn of 2003, the house remained vacant for several months. During this time, plaintiffs oversaw repairs and renovation work undertaken to prepare the house for rental relicensure by the city. The city issued a landlord license for the house on April 29, 2004. Soon thereafter, Gregory Fyfe contacted plaintiffs and expressed an interest in renting the home. Sherman-Nadiv met Fyfe at the house on May 1, 2004, and Fyfe agreed to rent the house. Fyfe signed the lease, gave Sherman-Nadiv $500, and received a house key.

Fyfe promised to pay the balance of the initial month's rent by May 15, 2004, but he never did. When Sherman-Nadiv went to the house on May 15, 2004, to collect the rent from him, she discovered that the house was unoccupied. When she returned to the house a couple of days later to post a notice to quit, she again noticed that the house appeared to be unoccupied. Although some clothes and a couch were later found in the house, none of the individuals living in neighboring homes reported seeing activity at the house during the

period when Fyfe supposedly lived at the house, and overall there was conflicting evidence regarding whether the house was occupied in May 2004.

On May 29, 2004, a woman living near the house noticed through an open window that the ceiling to the living room and dining room had been damaged, and she contacted Sherman-Nadiv. Sherman-Nadiv went to the house and, upon entering, discovered that the house had suffered extensive water damage as a result of a break in the supply line of the second-floor toilet. Plaintiffs filed a claim for loss with defendant, reporting the date and time of loss as May 29, 2004, at 12:00 p.m. Defendant formally denied plaintiffs' claim on July 11, 2005, and plaintiffs subsequently brought this action in order to recover under the insurance contract.

At trial, a jury was asked to decide whether plaintiffs engaged in "fraud, false swearing, misrepresentation and/or concealment of material facts in the presentation of [the insurance] claim to Defendant with intent for the Defendant to rely on the misrepresentations which bars [plaintiffs'] claim pursuant to the terms of the policy." The jury determined that plaintiffs did not do so. The jury also rendered a verdict indicating that "the premises located at 41 W. Hayes, Hazel Park, Michigan [was] vacant more than 30 consecutive days immediately before the loss."

First, plaintiffs argue that the trial court erred when it granted defendant's motion in limine to preclude plaintiffs from presenting evidence, testimony, or argument at trial regarding whether the house was "being constructed" at the time of the loss. We disagree.

The trial court has the discretion to admit or exclude evidence, and we will not disturb the trial court's ruling on such an issue absent a determination that an abuse of discretion occurred. *Elezovic v Ford Motor Co*, 472

Mich 408, 419; 697 NW2d 851 (2005). A trial court does not abuse its discretion when its decision falls within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The proper interpretation of a contract and the legal effect of a contractual clause are questions of law that we review de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

Because insurance policies are contractual agreements, they are subject to the same rules of contract interpretation that apply to contracts in general. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005); *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). A court must construe and apply unambiguous insurance policy provisions as written, unless a policy provision is illegal or a traditional defense to the enforceability of a contract applies. *Auto-Owners Ins Co*, *supra* at 566-567. An insurance policy is read as a whole, and meaning should be attributed to all terms. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). "The contractual language is to be given its ordinary and plain meaning." *Id*.

The insurance policy in this case provides, in pertinent part:

> We insure for direct physical loss to the property covered caused by a peril listed below, unless the loss is excluded in the General Exclusions.
>
> * * *
>
> 12. **Accidental discharge or overflow of water or steam** from within a plumbing, heating, air conditioning, or automatic fire protective sprinkler system or from within a household appliance. We also pay for tearing out

and replacing any part of a covered building necessary to repair the system or appliance from which the water or steam escaped.

This peril does not include loss:

* * *

b. on the Described Location, if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant[.]

The plain and ordinary meaning of the phrase "being constructed," as used in the contract, indicates that a house being erected (that is, built from the ground up) is not considered vacant pursuant to the policy exclusion. The language is unambiguous. If the exclusion had stated that a house "under construction" was not considered vacant, it is arguable that the phrase would be susceptible to more than one reasonable construction. Had the parties intended the exception to apply to houses where repairs, remodeling, or renovation work were being performed, the policy would have reflected this intent unambiguously. Plaintiffs' argument that "being constructed" encompasses repairs, remodeling, or renovation work is unpersuasive because this broad interpretation would lead to the result that a house would not be considered vacant under a wide variety of circumstances where major or minor repair work was performed in the 30 days preceding a loss. In that case, the insurer would be uncertain regarding the extent of the risk it would be required to cover, and an insured, in order to defeat the policy exclusion, would only be required to show evidence that any sort of repair, however minor, occurred in the 30 days preceding the loss. On the other hand, the process of building or constructing a house consists of a discrete event with a

beginning and an end. In that case, both the insurer and insured are aware of the scope of the risk and extent of coverage because of this comparatively certain time period.

In any event, contrary to plaintiffs' argument, the record demonstrates that the trial court did not rely on a narrow construction of "being constructed" when it granted defendant's motion in limine. The trial court interpreted "being constructed" broadly as "action that is still in progress," but concluded that there was no indication that any construction or repair work had been performed at the house in the 30 days preceding the loss. Accordingly, the trial court did not abuse its discretion when it granted defendant's motion in limine to preclude evidence, testimony, or arguments that the house was "being constructed" in the 30 days preceding the loss.

Plaintiffs also claim that the jury's verdict was against the great weight of the evidence. However, plaintiffs failed to properly raise this issue below in a motion for a new trial, and our failure to review this unpreserved issue will not result in a miscarriage of justice. Therefore, we decline to consider this issue further.[1] See *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997).

Affirmed.

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[1] Nevertheless, although plaintiffs argue otherwise, the verdicts in this case were not inconsistent. The jury could have believed Sherman-Nadiv's testimony regarding her encounter with Fyfe, and also believed that Fyfe leased, but never occupied, the house.

PEOPLE v BLUNT

Docket No. 275852. Submitted June 4, 2008, at Lansing. Decided January 13, 2009, at 9:10 a.m. Leave to appeal denied, 483 Mich ___.

Donovan A. Blunt tendered in the Saginaw Circuit Court a conditional plea of no contest to charges of assault with intent to do great bodily harm less than murder and unlawful use of a harmful chemical substance after throwing heated cooking oil at his housemate. The court, Fred L. Borchard, J., imposed prison sentences of 6½ to 10 years for the assault conviction and 20 to 40 years for the conviction of unlawful use of a harmful chemical substance. The defendant appealed.

The Court of Appeals *held*:

1. A person who uses a harmful chemical substance in a manner that inflicts a serious impairment of bodily function is guilty of a felony that is punishable with imprisonment for life or any term of years. MCL 750.200i(1)(b), (2)(d). MCL 750.200h(i) defines "harmful chemical substance" as a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with one or more other chemical substances, can be used to cause death, injury, or disease in humans, animal, or plants. The heated cooking oil in this case was not a harmful chemical substance. The statutory definition of "harmful chemical substance" refers to substances that possess an inherent or intrinsic ability or capacity to cause death, illness, injury, or disease. The heated cooking oil, through its chemical or physical properties, did not cause or contribute to the victim's injuries. The defendant's conviction of unlawful use of a harmful chemical substance must be vacated.

2. The case must be remanded for resentencing because offense variables 1 (victim subjected to a harmful chemical substance), MCL 777.21(1)(b), and 2 (offender used a harmful chemical substance), MCL 777.32(1)(a), of the sentencing guidelines were improperly scored when determining the sentence for the assault conviction. However, the circuit court properly scored 50 points for offense variable 7 (the victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety of the victim suffered during the

offense). MCL 777.37(1)(a). The circuit court correctly determined that the defendant had treated the victim sadistically, that is, the defendant subjected the victim to prolonged pain or humiliation to produce suffering for the victim or gratification for the defendant. MCL 777.37(3).

Affirmed in part, reversed in part, and remanded for resentencing.

CRIMINAL LAW — UNLAWFUL USE OF A HARMFUL CHEMICAL SUBSTANCE — HEATED COOKING OIL.

A harmful chemical substance, for purposes of the statutory provisions that make it a felony to use a harmful chemical substance in a manner that inflicts a serious impairment of a bodily function, is one that has an inherent or intrinsic ability or capacity to cause death, illness, injury, or disease; heated cooking oil is not a harmful substance as contemplated in those provisions (MCL 750.200h[i]; MCL 750.200i[1][b], [2][d]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Janet M. Boes*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for the defendant.

Before: GLEICHER, P.J., and FITZGERALD and HOEKSTRA, JJ.

GLEICHER, P.J. Defendant entered a conditional plea of no contest to charges of assault with intent to do great bodily harm less than murder, MCL 750.84, and unlawful use of a harmful chemical substance, MCL 750.200i(1)(b). The circuit court sentenced him to concurrent prison terms of 6½ to 10 years' imprisonment for the assault conviction and 20 to 40 years' imprisonment for the conviction of unlawful use of a harmful chemical substance. Defendant appeals by delayed leave granted. We affirm the assault conviction, vacate defendant's conviction under MCL 750.200i(1)(b), and remand for resentencing.

Defendant lived next door to the victim in a Saginaw rooming house. On December 29, 2005, defendant heated cooking oil in a pot, took the pot to the victim's room, and knocked on the victim's door. When the victim opened the door, defendant threw the hot oil at the victim's face. The victim suffered severe burns of his face, neck, chest, and esophagus that necessitated extensive skin grafting.

Defendant first contends that the trial court improperly convicted him of violating MCL 750.200i(1)(b) because heated cooking oil does not qualify as a "harmful chemical substance." When construing a statute, this Court must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "The first step in that determination is to review the language of the statute itself." *Id*. (quotation marks and citation omitted). We construe statutory language according to the common and approved meaning of the words, but when a statute employs technical terms of art, " 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate.' " *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 51; 530 NW2d 99 (1995), quoting *Corning Glass Works v Brennan*, 417 US 188, 201; 94 S Ct 2223; 41 L Ed 2d 1 (1974). 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). When discerning legislative intent, a particular word in one statutory section must be interpreted in conjunction

with every other section, "so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 183; 189 NW 221 (1922); see also *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003) (invoking as a statutory interpretation aid the doctrine of *noscitur a sociis*, "i.e., that a word or phrase is given meaning by its context or setting") (quotation marks and citation omitted). This Court considers both the plain meaning of critical words or phrases used in the statute, and their placement and purpose in the statutory scheme. *Hill*, *supra* at 515.

The statute at issue, MCL 750.200i, provides in pertinent part as follows:

> (1) A person shall not manufacture, deliver, possess, transport, place, use, or release any of the following for an unlawful purpose:
>
> (a) A harmful biological substance or a harmful biological device.
>
> (b) A harmful chemical substance or a harmful chemical device.
>
> (c) A harmful radioactive material or a harmful radioactive device.
>
> (d) A harmful electronic or electromagnetic device.

A person who violates subsection 1 in a manner that inflicts a "serious impairment of a body function" is subject to imprisonment for life or any term of years. MCL 750.200i(2)(d).

In MCL 750.200h, our Legislature defined many of the terms used in MCL 750.200i:

> (f) "Harmful biological device" means a device designed or intended to release a harmful biological substance.
>
> (g) "Harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived

> from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.
>
> (h) "Harmful chemical device" means a device that is designed or intended to release a harmful chemical substance.
>
> (i) "Harmful chemical substance" means a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.
>
> (j) "Harmful radioactive material" means material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity.
>
> (k) "Harmful electronic or electromagnetic device" means a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system.
>
> (l) "Harmful radioactive device" means a device that is designed or intended to release a harmful radioactive material.

We must consider whether the heated cooking oil thrown by defendant constitutes a "harmful chemical substance" in the context of MCL 750.200i. Indisputably, cooking oil is a chemical substance. However, "through its chemical . . . properties," cooking oil cannot "cause death, injury, or disease." Rather, the chemical properties of cooking oil facilitate the use of this substance as a common, everyday foodstuff. We reject the notion that the Legislature intended that ordinary and otherwise perfectly safe liquids can qualify as "harmful chemical substance[s]" merely because one may incorporate them into the commission of an as-

saultive crime. The definitions of the terms describing other "harmful" items identified in MCL 750.200h and MCL 750.200i reinforce our conclusion that cooking oil does not meet the definition of a harmful chemical substance, because the statutory definitions refer to substances or devices that possess an inherent or intrinsic ability or capacity to cause death, illness, injury, or disease.

The prosecutor argues that because defendant heated the oil, it falls within the portion of the definition addressing a chemical's physical properties. According to the prosecutor, the following definitional language encompasses heated cooking oil: " 'Harmful chemical substance' means a solid, liquid, or gas that through its chemical *or physical properties* . . . can be used to cause death, injury or disease . . . ." MCL 750.200h(i) (emphasis added). The Legislature did not further define the term "physical properties." Because "physical properties" is a term of art derived from chemistry and related scientific fields, we refer to a scientific definition of the phrase.

> Physical properties of solids, liquids, and gases are those characteristics that can be observed and those that describe its behavior under certain conditions. Properties such as volume and mass depend on the amount of a substance that is being observed. Properties that do not depend on the quantity include the melting point of a solid and the boiling point of a liquid as well as density, color, hardness, odor, taste, elasticity, and tensile strength. [New York Public Library Science Desk Reference (1995), p 236.]

This definition comports with our Legislature's definition of the same term, which appears in the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. In MCL 324.20117(11)(b), the Legislature defined the "physical properties of a hazardous substance" as including "its boiling point, melting

point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at 20 degrees Celsius."

The "physical properties" of cooking oil are those that can be observed and that describe the behavior of cooking oil under various circumstances. Those physical properties include its boiling point, density, color, odor, taste, and solubility in water. But these physical properties do not themselves render cooking oil a harmful or dangerous substance. The statutory definition includes a requirement that the chemical substance must possess harmful qualities "*through* its . . . physical properties." (Emphasis supplied.) Because the physical properties of the cooking oil did not cause or contribute to the victim's injuries, the term "harmful chemical substance" simply does not encompass the cooking oil, even when heated by defendant and used to injure the victim. Stated differently, the victim did not sustain injury "through [the] chemical or physical properties" of the cooking oil. MCL 750.200h(i), MCL 750.200i(1)(b).[1]

We also reject that an otherwise harmless chemical substance may be rendered harmful by an intervening act, and thereby fall within the statutory definition in MCL 750.200h. To interpret the statutory language in this manner would render nugatory the word "harm-

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[1] In contrast, the physical properties of some other chemical substances render these substances harmful. For example, hydrogen gas possesses an important "physical property" that brings it within MCL 750.200h(i). "Hydrogen gas is highly flammable and will burn in air at a very wide range of concentrations between 4% and 75% by volume." Hydrogen, Wikipedia, <http://en.wikipedia.org/wiki/hydrogen> (accessed on January 5, 2009). "When mixed with oxygen across a wide range of proportions, hydrogen explodes upon ignition." *Id*. (accessed on December 15, 2008). This "physical property" of hydrogen gas permits it to qualify as a harmful chemical substance, because "through its . . . physical properties," the gas can be readily ignited, and used to cause death or injury.

ful" as a modifier of the term "chemical substance." Reviewing the statute as a whole, we conclude that the Legislature's use of the adjective "harmful" before the terms "chemical substance," "biological device" "biological substance," "chemical device," "radioactive material," "electronic or electromagnetic device," and "radioactive device" evinces its intent to identify materials or things possessing intrinsically dangerous, noxious, or pernicious qualities. The Legislature, under MCL 750.200i, intended to punish only those who use a certain class of "harmful" objects or substances to injure others. Construing the statute as an harmonious whole, we conclude that, when enacting this statute, the Legislature did not contemplate that it could be applied to punish a defendant who inflicts injury by altering the physical characteristics of an otherwise harmless object, substance, or device.

Virtually any liquid, from maple syrup to laundry detergent, may become a lethal weapon when boiled. Water, an otherwise innocuous "chemical substance," potentially could be a dangerous weapon when frozen and thrown in a victim's face as a hard-packed snowball. Here, the Legislature's insertion of the term "harmful" reflects its intent that the statute apply to substances capable of causing harm "through [their] chemical or physical properties," rather than to substances that are commonplace and otherwise inoffensive. Were we to interpret the statute as suggested by the prosecutor, we would essentially read out the word "harmful," given that innumerable safe chemical substances may become dangerous when someone alters their physical properties. Because we must give effect to every word used in a statute, we conclude that MCL 750.200h(i) does not include heated cooking oil. *Hill*, *supra* at 515. Accordingly, we vacate defendant's conviction under MCL 750.200i(1)(b).

In light of our decision to vacate defendant's conviction under MCL 750.200i(1)(b), we hold that the circuit court improperly scored offense variables (OV) 1 (victim subjected to a harmful chemical substance), MCL 777.31(1)(b), and 2 (offender used a harmful chemical substance), MCL 777.32(1)(a), when calculating the penalty for his conviction of assault with intent to do great bodily harm less than murder under MCL 750.84. Therefore, we remand for resentencing based on properly scored offense variables.

Defendant also challenges the circuit court's scoring of 50 points for OV 7, which is proper where "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The circuit court determined that defendant treated the victim with sadism, which is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Defendant's conduct subjected the victim to extreme pain and extensive and serious injuries. The nature and circumstances of the offense support a reasonable inference that defendant attacked the victim for the purpose of producing suffering. Thus, the circuit court did not abuse its discretion by scoring 50 points for OV 7. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We affirm defendant's assault conviction, reverse his conviction under MCL 750.200i(1)(b), and remand for resentencing. We do not retain jurisdiction.

In re LEE
In re IVOS

Docket Nos. 282848 and 283562. Submitted August 5, 2008, at Lansing. Decided January 15, 2009, at 9:00 a.m.

The Kent County Prosecuting Attorney filed a petition in the Kent Circuit Court, Family Division, alleging that Chelsey L. Lee, a minor, had committed the offense of malicious destruction of personal property valued at $1,000 or more but less than $20,000. MCL 750.377a(1)(b)(*i*). A court probation officer provided the parties with notice that the court would consider diverting the case to the consent calendar. The prosecutor filed an objection to diverting the case from the adjudicative process. A family court referee authorized the filing of the petition. A pretrial conference was held. The minor filed a notice with the court indicating that she intended to plead guilty, pursuant to a plea bargain, to a lesser offense of malicious destruction of personal property valued at $200 or more but less than $1,000. MCL 750.377a(1)(c)(*i*). The court, Daniel V. Zemaitis, J., notified the parties that a delinquency adjudication/disposition hearing would be held, but gave no indication that the court intended to consider diverting the case to the consent calendar. At the hearing, a court probation officer recommended placing the minor on the court's consent calendar. However, the prosecutor objected for substantive reasons and because the victim was not notified that the court might consider diversion. The court determined that diversion was in the best interests of the public and the minor. The court then entered an order diverting the case to the consent calendar. The prosecutor appealed by leave granted.

The Kent County Prosecuting Attorney filed a petition in the Kent Circuit Court, Family Division, alleging that Nikola Ivos, a minor, had committed the offense of second-degree home invasion. MCL 750.110a(3). A family court referee authorized the petition. A pretrial conference was scheduled and, at the conference, the parties entered a plea bargain under which the minor would plead guilty to an added count of third-degree home invasion. MCL 750.110a(4). A family court referee accepted the plea, made the minor a temporary ward of the court, and ordered that a disposi-

tional hearing would be conducted. At the dispositional hearing, the court, G. Patrick Hillary, J., recessed the hearing and conducted a meeting in chambers with the attorneys and the court's probation officer during which the court expressed its inclination to assign the case to the consent calendar. After the recess, the victim stated at the hearing her opposition to transferring the case to the consent calendar. The court adjourned the dispositional hearing and held another hearing in chambers about a month later, during which the court indicated that it was still inclined to assign the case to the consent calendar. The court indicated the same inclination in a letter to counsel sent another month later. The court held another hearing about a month later. During that hearing the court stated that, although the minor had entered an initial plea, there had been no disposition and, therefore, the court was not precluded by statute or court rule from transferring the matter to the consent calendar. The court thereafter entered an order transferring the matter to the consent calendar. The prosecutor appealed by leave granted from that order. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The judge in the case involving Lee failed to comply with the notice procedure provided in MCL 780.786b and MCR 3.932(B) before moving the case from the adjudicative process to the consent calendar. The judge failed to provide the prosecutor written notice that the judge might transfer the case. Although the judge erred, it would not be inconsistent with substantial justice in this case to not grant the relief requested by the prosecutor. The order of the trial court in the case involving Lee must be affirmed.

2. The judge in the case involving Ivos was correct in stating that as long as the judge complied with the notice requirements of MCL 780.786b(1), the judge could remove the case from the adjudicative process to the consent calendar at any time before disposition. The judge did comply with the notice procedure of MCL 780.786b(1). The order of the trial court in the case involving Ivos must be affirmed.

Affirmed.

INFANTS — CRIME VICTIM'S RIGHTS ACT — DIVERSION FROM ADJUDICATIVE PROCESS — NOTICE OF INTENT TO DIVERT A JUVENILE CASE.

The Crime Victim's Rights Act and the court rules, in a case where it is alleged that a juvenile has committed an offense listed in the act, require the court to give written notice of its intent to divert the case from the adjudicative process to the court's consent calendar before it takes any formal or informal action to accom-

plish the diversion; the purpose of such notice is to afford the prosecution and the crime victim an opportunity to address the court with regard to any proposed diversion (MCL 780.781[f], 780.786b; MCR 3.932[B]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *Kimberly M. Manns*, Assistant Prosecuting Attorney, for the petitioners.

Sluiter, Agents, Van Gessel, Winther & Carlson (by *Dennis R. Carlson*) for the respondents.

Before: MARKEY, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM. In each of these cases consolidated on appeal, the prosecutor appeals by leave granted the order of the family division of the circuit court (family court) removing from the adjudicative process a juvenile delinquency case in which it was alleged that the minor committed an offense defined in § 31(1)(f) of the Crime Victim's Rights Act (CVRA), MCL 780.781(1)(f). The family court transferred each case to the family court's consent calendar. The prosecutor argues that the family court failed to comply with MCL 780.786b and MCR 3.932(B), which require the court to give written notice of its intent to divert such cases so that both the prosecutor and the crime victims are afforded an opportunity to address the court before it takes any formal or informal action to remove the case from the adjudicative process. With respect to Docket No. 282848, we conclude that the family court erred by failing to comply with MCL 780.786b and MCR 3.932(B). Nevertheless, reversal is not in the interests of the public or the minor and therefore unwarranted under the criteria of MCR 2.613(A). We

therefore affirm the order in Docket No. 282848 and the order in Docket No. 283562.

These cases present issues regarding the interpretation and application of statutes and court rules, which are questions of law we review de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004). The foremost principle "in construing statutes is 'to discern and give effect to the Legislature's intent.' " *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006), quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). When the statutory language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Morey*, *supra* at 330. A provision in a statute is ambiguous only if it irreconcilably conflicts with another provision or it is equally susceptible to more than a single meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). The rules of statutory construction apply equally to court rules. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004); *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003).

In general, the family court has jurisdiction over juveniles within its judicial circuit that have "violated any municipal ordinance or law of the state or of the United States." MCL 712A.2(a)(1). In Docket No. 282848, the prosecutor filed a petition with the court alleging that the juvenile had committed the offense of malicious destruction of personal property valued at $1,000 or more but less than $20,000. MCL 750.377a(1)(b)(*i*). In Docket No. 283562, the prosecutor filed a petition with the court alleging that the juvenile had committed the offense of second-degree home invasion, MCL 750.110a(3). After a preliminary inquiry, the family court could, "in the inter-

est of the juvenile and the public: (1) deny authorization of the petition; (2) refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq*.; (3) direct that the juvenile and the parent, guardian, or legal custodian be notified to appear for further informal inquiry on the petition; (4) proceed on the consent calendar . . .; or (5) place the matter on the formal calendar . . . ." MCR 3.932(A). Here, however, each petition alleged a "violation of a penal law of this state for which a juvenile offender, if convicted as an adult, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony." MCL 780.781(1)(f)(*i*). Therefore, MCR 3.932(B) applies. It provides: "A case involving the alleged commission of an offense listed in the Crime Victim's Rights Act, MCL 780.781(1)(f), may only be removed from the adjudicative process upon compliance with the procedures set forth in that act. See MCL 780.786b." The court rules do not define "adjudicative process," but, clearly, it is the judicial procedure that could lead to the court's fact-finding determination that the petition's allegations are true. This would constitute an "adjudication," analogous to a criminal conviction, that the court has jurisdiction over the juvenile under MCL 712A.2(a)(1). See MCR 3.903(A)(26); *In re Whittaker*, 239 Mich App 26, 28-30; 607 NW2d 387 (1999); *In re Wilson*, 113 Mich App 113, 121; 317 NW2d 309 (1982).

MCR 3.932(B) provides that diversion of a juvenile case in which it is alleged that the minor committed an offense listed in § 31(1)(f) of the CVRA is governed by MCL 780.786b(1), which provides:

> Except for a dismissal based upon a judicial finding on the record that the petition and the facts supporting it are insufficient to support a claim of jurisdiction under section 2(a)(1) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2, a case involving the alleged commission

> of an offense, as defined in section 31, by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process *unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process. Before any formal or informal action is taken, the prosecutor shall give the victim notice of the time and place of the hearing on the proposed removal of the case from the adjudicative process. The victim has the right to attend the hearing and to address the court at the hearing*. As part of any other order removing any case from the adjudicative process, the court shall order the juvenile or the juvenile's parents to provide full restitution as provided in section 44. [Emphasis added.]

The plain language of MCL 780.786b(1) contains several procedural steps that the family court must fulfill before deciding to remove from the adjudicative process a juvenile case in which it is alleged that the minor committed a CVRA offense. We note that in each of the present cases, a preliminary inquiry disclosed sufficient evidence to authorize the filing of the prosecutor's petition. MCR 3.932(A)(1); MCL 780.786b(1). We also note that the appeals in these cases pertain solely to the procedural requirements of MCL 780.786b(1) and the court rules. No one argues in these appeals that the family court judges abused their discretion in making the substantive decisions to divert these cases to the consent calendar. See MCL 722.824.

Clearly and unambiguously, MCL 780.786b(1) requires that before the family court formally or informally acts to remove from the adjudicative process a juvenile case involving a CVRA offense, the court must give the prosecuting attorney written notice of the

court's intent to do so. Second, the court's notice to the prosecutor must specify the time and place at which the court will conduct a hearing on its proposed intent to remove the case from the adjudicative process. Third, the court's written notice to the prosecutor must be furnished sufficiently in advance so that the prosecutor can fulfill its responsibilities to both notify the victim or victims of the time and place of the court's hearing on the proposed removal of the case from the adjudicative process and also afford the victim or victims an opportunity to consult with the prosecuting attorney regarding the disposition of the case. See MCL 780.786b(2). Finally, at the removal hearing, the court must afford both the prosecuting attorney and the victim of the alleged offense the opportunity to address the court regarding the court's intent to remove the case from the adjudicative process. We now review the record in the cases at bar in light of the plain requirements of MCL 780.786b(1) and the pertinent court rules.

A. DOCKET NO. 282848

In Docket No. 282848, the prosecutor filed its petition on June 22, 2007. Although not contained in the court file, or reflected in the court's docket entries, the parties agree that a court intake probation officer provided the parties some form of notice that the court would consider diverting the case to the consent calendar. On August 3, 2007, the prosecutor filed an objection to the court's diverting the case from the adjudicative process. Thereafter, on August 22, 2007, a family court referee authorized the filing of the petition and completed forms necessary to appoint counsel to represent the minor. On September 12, 2007, the court scheduled

the case for a pretrial conference on October 8, 2007. No transcript of the pretrial conference has been provided to this Court, but the docket entries of the family court reflect that a pretrial conference was held on the date scheduled. A "notice of intent to plea" was filed with the court indicating that the minor, pursuant to a plea bargain, intended to plead guilty to a lesser offense of malicious destruction of personal property valued at $200 or more but less than $1,000. MCL 750.377a(1)(c)(*i*).[1] About November 1, 2007, the family court provided the interested parties notice that a "delinquency adjudication/disposition hearing" would be held on November 15, 2007. The notice gave no indication that the court intended to consider diverting the case to the consent calendar.

At the November 15, 2007, hearing, a family court probation officer recommended that the minor be placed on the court's consent calendar. The prosecutor objected for substantive reasons and because the victim lacked notice that the court might consider diversion, stating:

> . . . I know the victim did have notice that [there] was an adjudication disposition today your Honor, but after speaking with them [the victim and her daughters] after the pretrial we thought this would be an adjudication and I did phone them yesterday and so did [the prosecutor's victim/witness coordinator] and we were unable to contact the victim to see if they would want to come and address the court. They did fill out a victim impact statement. [S]o I think notice to the victim, even though they thought this was a[n] adjudication, they didn't know the change in the case other than my voice mail yesterday letting them know that the probation officer was recommend[ing] consent

[1] This offense does not fall within the definition of MCL 780.781(1)(f) because it is punishable if committed by an adult by not more than one year in jail and is expressly designated a misdemeanor, not a felony.

calendar; and I have a feeling based on my discussions with the victims that they would wan[t] to be here to address the Court to make an argument and show their concerns of why consent calendar would not be appropriate.

Although recognizing that the notice of hearing did not include the possibility of diverting the case to the consent calendar, the court determined that diversion was in the best interests of the public and the juvenile. Regarding notice to the victim, the court ruled:

> As far as the victim is concerned there is an adjudication/disposition notice which was sent to the victims. The victims themselves are not here with us and while this isn't an adjudication or a disposition in the sense that the notice was sent out for, they're not here to tell me what they [want to] do and the prosecutor's [got to] guess from things which had occurred in the past as to what their attitude about this would be. That's why we have these hearings so that everybody has a chance . . . to say what they need to say. They can do it to the Court so that we can find out and they're not here. It's now 25 to 12 for an 11 o'clock hearing and they're not here.

The court effectuated its bench ruling by order entered December 19, 2007, that provided the case would be diverted from the adjudicative process and placed on the consent calendar.

We hold that the family court failed to comply with the requirements of MCL 780.786b(1) by not providing the prosecutor with written notice of the court's intent to remove the case from the adjudicative process and notice of the time and place of a hearing on the proposed removal. Although the court furnished the prosecutor notice of an adjudicative-dispositional hearing, nothing in that written notice apprised the prosecutor that the court might remove the case from the adjudicative process by transferring the case to the court's consent

calendar. The notice the family court gave in this case was insufficient to satisfy the requirements of MCL 780.786b(1).

Although we conclude that the family court erred, reversal is not necessarily warranted. Although analogous, juvenile delinquency proceedings are not adult criminal proceedings. *In re Wilson*, *supra* at 121. "[J]uvenile justice procedures are governed by the applicable statutes and court rules, with an emphasis on rehabilitation rather than retribution." *In re Whittaker*, *supra* at 28-29. The court rules provide that harmless error analysis applies to juvenile delinquency proceedings. Subchapter 3.900 of the court rules generally "govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code." MCR 3.901(A)(1). "Other Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides." MCR 3.901(A)(2). But, MCR 3.902(A) specifically incorporates the harmless error standard of the civil procedure court rules by providing, in part, that "[l]imitations on corrections of error are governed by MCR 2.613." MCR 2.613(A), provides, in pertinent part that "an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

Here, we conclude that not granting relief for error in complying with MCL 780.786b(1) is not "inconsistent with substantial justice." First, as the family court observed, and the prosecutor concedes, the victim in this case had actual notice that an adjudicative disposi-

tional hearing would be held but failed to appear. Second, the prosecutor was present to express his opposition to the case's transfer to the consent calendar. Also, the prosecutor had consulted the victim about diversion; the victim had completed a victim's impact statement, and the prosecutor was able to represent the victim's views in opposition to transferring the case to the consent calendar. In addition, the pretrial conference resulted in the prosecutor's agreeing to allow a plea to a lesser offense that is classified as a misdemeanor if committed by an adult, and, therefore, not within the definition of a CVRA offense under MCL 780.781(1)(f). Finally, the passage of time favors our finding that reversing the family court's order would be inconsistent with substantial justice. One of two outcomes is likely to have already occurred: the juvenile has either successfully completed a consent calendar case plan, MCR 3.932(C)(7), or the juvenile has been unsuccessful in that regard with the juvenile's own actions likely to have ended the special status conferred by assignment to the consent calendar, MCR 3.932(C)(8). We conclude after applying the criteria of MCR 2.613(A) to the facts and circumstances of this case that no relief is warranted. We affirm the order in Docket No. 282848.

B. DOCKET NO. 283562

In Docket No. 283562, the prosecutor filed its petition on April 25, 2007, alleging that the juvenile had committed the offense of second-degree home invasion, MCL 750.110a(3). A family court referee authorized the petition on May 21, 2007. The family court appointed counsel for the minor and scheduled the case for a pretrial conference on July 9, 2007. At the pretrial conference, the parties entered a plea bargain under

which the minor would plead guilty to an added count of third-degree home invasion, MCL 750.110a(4). In accordance with the plea agreement, the prosecutor amended its petition to add an allegation of third-degree home invasion. After receiving his advice of rights, the minor admitted the allegations of the newly added charge. The family court referee who presided at the pretrial conference accepted the minor's plea, made him a temporary ward of the court, and ordered that a dispositional hearing be held on September 7, 2007.

The parties, including the victim, appeared at the September 7, 2007, dispositional hearing. The family court's probation officer stated her recommendation for disposition. Further, the victim addressed the court regarding the effect the offense has had on her but noted that the minor was the only one of four offenders who had written her a sincere letter of apology. After the victim spoke, the family court recessed the proceedings for 12 minutes, apparently meeting in chambers with the attorneys and the court's probation officer, who left to attend another hearing before the proceedings reconvened. After the recess, the family court recognized the prosecutor who had talked to the victim about the minor's being assigned to the court's consent calendar. Although the victim acknowledged that the minor had accepted responsibility for his actions, she opposed transferring the case to the consent calendar because of the nature of the offense.

After receiving defense counsel's recommendations, the family court explained why it was inclined to assign the case to the consent calendar. The court noted that it had recessed the proceedings to consider assigning the case to the consent calendar, because after disposition it lost the opportunity to do so, citing MCR 3.932(C), which provides: "The court may transfer a case from

the formal calendar to the consent calendar at any time before disposition." The court observed that the court rule clearly provided that the court could transfer a juvenile case to the consent calendar "any time before disposition" but not after. The court continued:

> Now, to do that, there [has] to be notice under the Crime Victim's Rights Act, and the other things would need to happen. So I think, even if I wanted to today . . . I couldn't.
>
> Where the confusion comes . . . in the court rule is under [MCR 3.932(C)(2)]. It said: "Plea; adjudication. No formal plea may be entered in a consent calendar case, and the court must not enter an adjudication."
>
> So it's saying you can't do a formal plea in a consent calendar case. However, the first part of [MCR 3.932(C)] says: "The court may transfer a case from the formal calendar to [the] consent calendar any time before disposition."

The family court adjourned the dispositional hearing, noting the seriousness of the charge, its effect on the victim, and the court's obligation to protect the public while advancing the best interest of the juvenile.

The family court provided the parties notice of a hearing scheduled for November 2, 2007. The court's docket entries note a hearing was held that day, but there is no record of the proceedings. Apparently, the parties met in chambers. The family court indicated that it was still inclined to assign the case the to the consent calendar. Indeed, that is what the family court judge stated in a December 5, 2007, letter to counsel. In the letter, the court stated that during the conference in chambers the court continued to believe that the case was appropriate for the consent calendar, but the prosecutor who attended the conference objected to consent calendaring it because the minor had already pleaded guilty. The court observed that because nothing was

placed on the record, "it is appropriate for us to appear in court, on the record, so that all concerns and objections can be codified." The family court provided the parties notice of a hearing scheduled for January 4, 2008, and subsequently provided notice that the hearing was rescheduled for January 18, 2008.

At the January hearing, the prosecutor advanced several objections to transferring the case to the consent calendar. The prosecutor argued that the minor had not advanced a valid reason to withdraw his guilty plea, that there was an apparent conflict between MCR 3.932(C) and (C)(2)—with the latter rule precluding transferring the case to the consent calendar—and the court had not complied with MCL 780.786b.

The family court found no conflict in the court rules. Specifically, the court concluded that the court rules allowed the family court to place a juvenile case on the consent calendar after an initial plea but before disposition. The court relied on MCR 3.932(C) and MCR 3.932(D), which also provides, "At any time before disposition, the court may transfer the matter to the consent calendar." The family court reasoned that once it removed a case from the adjudicative process to the consent calendar, the court rules precluded both a plea, MCR 3.932(C)(2),[2] and an order of disposition, MCR 3.932(C)(6).[3] In essence, the court reasoned that until actually transferred to the consent calendar, a juvenile case is not a "consent calendar case" within the meaning of the court rules. With respect to complying with the CVRA, the court opined that scheduling a consent calendar conference and hearing would satisfy the no-

[2] MCR 3.932(C)(2) provides that"[n]o formal plea may be entered in a consent calendar case, and the court must not enter an adjudication."

[3] MCR 3.932(C)(6) provides that "[n]o order of disposition may be entered by the court in a case placed on the consent calendar."

tice requirements of the act. The court concluded that the case was appropriately placed on the consent calendar even though a plea had previously been entered.

On appeal, the prosecutor does not argue that because the minor had tendered a plea, MCR 3.932(C)(2) precluded the family court from removing the case to the consent calendar. We simply note our agreement with the family court's analysis of the court rules. Provided that the court has complied with the notice requirements of MCL 780.786b(1) with respect to juvenile cases alleging the minor committed a CVRA offense, the family court may remove a juvenile case from the adjudicative process to the consent calendar "at any time before disposition." MCR 3.932(C) and (D).

We disagree with the trial court's apparent conclusion that it can comply with MCL 780.786b(1) by scheduling a hearing after it has rendered its ruling to transfer a CVRA case to the consent calendar. Rather, the plain language of MCL 780.786b(1) requires notice to the prosecutor and the victim of the alleged offense of the time and place of a hearing "before the case is removed from the adjudicative process." *Id*. Still, we disagree with the prosecutor that the family court did not comply with the statute.

The victim was present at the first dispositional hearing in this matter. She expressed her views to the court, and the court informed counsel in chambers of its belief that the case was appropriate for the consent calendar. The court asked the prosecutor to confer with the victim regarding assigning the case to the consent calendar. The record reflects the prosecutor did so and stated both the prosecution's and the victim's objections to transferring the case to the consent calendar. So, it is clear that from the date of that first hearing on September 7, 2007, both the prosecutor and the victim

had actual notice of the court's intent to remove the case from the adjudicative process. The family court's intent remained the same through a conference in chambers with counsel on November 2, 2007. The prosecutor correctly notes the court's notice was oral, and not in writing as required by MCL 780.786b(1).

The family court, however, cured the defect of lack of "written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process" by its letter of December 5, 2007, informing the prosecutor and defense counsel that the court believed the case was an appropriate one for the consent calendar, and that "it is appropriate for us to appear in court, on the record, so that all concerns and objections can be codified." Although the court's notice of the time and place scheduled for the hearing did not specifically state that the purpose was to consider removing the case from the adjudicative process, the court's December letter and the prior proceedings constituted substantial compliance with MCL 780.786b(1) and MCR 3.932(B). Because the prosecutor does not assert that the family court otherwise abused its discretion, we affirm.

C. CONCLUSION.

In Docket No. 282848, we conclude that the family court erred by failing to comply with MCL 780.786b and MCR 3.932(B) before it removed a juvenile case in which it was alleged that the minor committed an offense defined in § 31(1)(f) of the Crime Victim's Rights Act, MCL 780.781(1)(f). Nevertheless, we conclude that reversal is unwarranted because it would not be in the interests of the public or the minor. MCR 2.613(A); MCR 3.902(A) and (B). Accordingly, we affirm the order in Docket No. 282848.

We affirm the order in Docket No. 283562.

PEOPLE v PARISH

Docket No. 280506. Submitted January 7, 2009, at Lansing. Decided January 15, 2009, at 9:05 a.m. Leave to appeal sought.

Curtis Parish pleaded guilty in the Jackson Circuit Court, Alexander C. Perlos, J., of first-degree criminal sexual conduct and was sentenced to imprisonment for 126 months to life. Years later, the Department of Corrections advised the court that the sentence violated MCL 769.9(2), which provides that a court shall not impose a sentence in which the maximum penalty is life imprisonment and the minimum is for a term of years. The court, Chad C. Schmucker, J., resentenced the defendant to imprisonment for 210 months to 360 months. The defendant appealed by leave granted, challenging the longer minimum sentence imposed at resentencing.

The Court of Appeals *held*:

A violation of MCL 769.9(2) renders the entire sentence invalid. A wholly invalid sentence must be vacated in its entirety, and the resultant resentencing must be de novo. Accordingly, the court at resentencing was not precluded from imposing a minimum sentence that was longer than the original minimum.

Affirmed.

SENTENCES — INVALID LIFE SENTENCES — RESENTENCING.

A sentence whose maximum term is life imprisonment and minimum term is a term of years is invalid in its entirety; resentencing after such an invalid sentence is de novo, and the resentencing court is not precluded from imposing a minimum term that is longer than the original minimum (MCL 769.9[2]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Gerald Ferry and Curtis Parish, *in propria persona.*

Before: MURRAY, P.J., and O'CONNELL and DAVIS, JJ.

DAVIS, J. Defendant appeals by leave granted his amended sentence of 210 months to 360 months of imprisonment, with 2,093 days of jail credit. Defendant pleaded guilty to one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*i*) (victim at least 13 but less than 16 years of age and member of same household), and he was originally sentenced to imprisonment for 126 months to life.[1] Several years later, the Department of Corrections noticed that this was an invalid sentence and advised the trial court of that fact. Defendant was then resentenced by a successor judge, the judge who imposed his original sentence having since retired. We affirm.

Defendant's original sentence violated MCL 769.9(2), which provides:

> In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

The original sentence contained a minimum of a term of years and a maximum of life. It is therefore not disputed that it was invalid. Defendant now contends that al-

[1] Defendant pleaded guilty in exchange for the prosecutor agreeing not to proceed on an habitual offender count. At that time, defendant affirmed to the trial court that he understood that he could be imprisoned for life or any term of years. Defendant's conviction is not at issue in this appeal.

though the trial court was obligated to impose a new and valid maximum term on resentencing, the trial court was *not* permitted to impose a longer minimum term. We disagree.

Ultimately at issue is whether a violation of MCL 769.9(2) renders invalid the entire sentence or only part of it. Where a sentence is partially invalid, only the invalid part is to be vacated for resentencing; however, a wholly invalid sentence is to be vacated in its entirety, and resentencing is to be de novo. *People v Williams* (*After Second Remand*), 208 Mich App 60, 63-65; 526 NW2d 614 (1994).

This Court has previously held that a violation of MCL 769.9(2) requires vacation of the entire sentence and a remand for resentencing. See *People v Foy,* 124 Mich App 107, 113; 333 NW2d 596 (1983); *People v Boswell,* 95 Mich App 405, 410-411; 291 NW2d 57 (1980); *People v Holcomb,* 47 Mich App 573, 590; 209 NW2d 701 (1973), rev'd on other grounds 395 Mich 326 (1975); *People v Harper,* 39 Mich App 134, 142-143; 197 NW2d 338 (1972). These cases were decided before the enactment of the "first out rule," MCR 7.215(J)(1), and technically do not bind us, and they do not contain any explicit consideration of the precise point now before us. However, we agree with the above cases that a violation of MCL 769.9(2) renders a sentence wholly invalid. The problem is not that the maximum exceeded some particular limit, but rather that the original sentence was an impermissible *combination of* terms. Therefore, it must be vacated in its entirety for a resentencing de novo.

We conclude that the trial court was not precluded from imposing a new sentence with a longer minimum term. Furthermore, a different judge imposed defendant's second sentence, so the presumption of vindic-

tiveness where a defendant is resentenced to a longer term does not apply. *People v Grady*, 204 Mich App 314, 317; 514 NW2d 541 (1994).

We therefore affirm defendant's sentence.

AVINK v SMG

Docket No. 280241. Submitted January 6, 2009, at Grand Rapids. Decided January 20, 2009, at 9:00 a.m.

James P. Avink, Sr., as personal representative of the estate of James P. Avink, Jr., deceased, brought a wrongful death action in the Kent Circuit Court against SMG, Electric Power Door, Inc., and Overhead Door Company of Grand Rapids. The decedent had sustained fatal injuries when part of an overhead door at DeVos Place fell on him. SMG is the general manager of DeVos Place, Overhead Door had installed the door, and Electric Power Door had designed and manufactured the door. SMG filed a cross-claim against Overhead Door for indemnification and breach of contract. SMG subsequently moved to disqualify the law firm of Plunkett and Cooney as Overhead Door's counsel, contending that the law firm's concurrent representation of SMG against a personal injury action brought by a performer who was injured on stage at DeVos Place and the law firm's representation of Overhead Door in this case constituted a conflict of interest that required the law firm's withdrawal as counsel for Overhead Door. The court, George S. Buth, J., denied the motion. SMG appealed by leave granted.

The Court of Appeals *held*:

The trial court erred by denying the motion. MRPC 1.7(a) provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. MRPC 1.10(a) provides that in a firm, an individual attorney's conflict of interest is imputed to the entire firm. The interests of Overhead Door and SMG were directly adverse as each disclaimed liability for the decedent's fatal injuries and blamed them on the other, and SMG did not consent to the dual representation. The dual representation violated MRPC 1.7(a), and the trial court should have ordered the law firm to withdraw, as required by MRPC 1.16(a)(1) when representation will result in a violation of the Michigan Rules of Professional Conduct.

Reversed.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg* and *Marilyn S. Nickell Tyree*) for SMG.

Plunkett Cooney (by *Christine D. Oldani* and *Mark H. Verwys*) for Overhead Door Company of Grand Rapids.

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM. Defendant/cross-plaintiff SMG appeals by leave granted the trial court's ruling that the Plunkett & Cooney law firm's representation of SMG in an unrelated matter did not create a conflict of interest that precluded it from representing defendant/cross-defendant Overhead Door Company of Grand Rapids in this matter. This ruling allowed Plunkett & Cooney to continue as counsel for Overhead Door in this matter. We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

SMG is the general manager of DeVos Place. In mid-December 2005, a panel in a multi-panel overhead door at DeVos Place collapsed and crushed the decedent, James P. Avink, Jr., killing him. Overhead Door installed the door and Electric Power Door, Inc., designed and manufactured it. This case began as a wrongful death action in late October 2006, when plaintiff James P. Avink, Sr., filed a negligence action against defendants SMG, Electric Power Door, and Overhead Door. (Avink also alleged claims of product liability and breach of warranty against Electric Power Door.) In mid-February 2007, SMG filed a cross-claim against Overhead Door for indemnification and breach of contract.

In late July 2007, SMG filed a motion to disqualify Overhead Door's counsel, Plunkett & Cooney, on the

basis of that firm's concurrent representation of SMG in another case, *Martin v SMG*.[1] In *Martin*, a portable staircase that Lucia Martin, a professional ballerina, had ascended on stage collapsed, injuring her.[2] Martin sued SMG for negligence, "alleging that the stairway collapsed because the stagehands hired by SMG failed to retract the casters, leaving the staircase unsecured."[3] SMG successfully moved for summary disposition pursuant to MCR 2.116(C)(10).[4] This Court affirmed that decision, holding that Martin had not presented sufficient evidence to establish that the stagehands' failure to retract the casters was a proximate cause of her accident because there was no evidence that the casters were not retracted.[5] At the time SMG filed its motion to disqualify in this case, an application for leave to appeal this Court's decision in *Martin* was pending in the Supreme Court. Later, in lieu of granting leave, the Supreme Court reversed and remanded to the circuit court.[6]

In its motion to disqualify in this case, SMG argued that Plunkett & Cooney's dual representation of it and Overhead Door constituted a conflict of interest that violated MRPC 1.7. SMG asserted that Plunkett & Cooney's representation of Overhead Door in this case was directly adverse to its interests because Overhead Door's theory in this case was that SMG was solely negligent, which SMG denied, and SMG had filed a cross-claim against Overhead Door for indemnification, which Overhead Door contested.

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[1] *Martin v SMG*, Kent Circuit Court No. 04-008611-NI.

[2] *Martin v SMG*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2007 (Docket No. 273528), at 1-2.

[3] *Id*. at 2.

[4] *Martin*, *supra* at 2.

[5] *Id*. at 3.

[6] *Martin v SMG*, 480 Mich 1043 (2008).

SMG also contended that Plunkett & Cooney would have learned numerous items of confidential information during the course of defending SMG in *Martin*, which SMG presumed the firm would use against it in this case in defending Overhead Door. It asserted that use of such information in this manner violated MRPC 1.6 and MRPC 1.8. SMG also argued that simply because different attorneys at Plunkett & Cooney handled the representation of SMG and Overhead Door did not mean that there was no conflict, because MRPC 1.10(a) provides that in a firm, an individual attorney's conflict of interest is imputed to the entire firm. Therefore, SMG asserted that, because it did not give Plunkett & Cooney its consent to represent Overhead Door in this matter, MRPC 1.16 required that the firm withdraw as Overhead Door's counsel.

Overhead Door responded that there was no conflict of interest because *Martin* and this case involved wholly unrelated matters with different plaintiffs, facilities, accidents, SMG personnel, witnesses, liability claims, insurers, and insurance claims representatives. It asserted that under these circumstances, no lawyer would reasonably believe that Plunkett & Cooney's relationship with SMG in *Martin* would adversely affect SMG in this case.

Overhead Door contended that its and SMG's positions in this case were only generally adverse because each party was asserting that Avink's liability claims had merit against another defendant, not it. However, Overhead Door later admitted that it agreed with Avink that SMG's negligence caused the accident in this case. Overhead Door also argued that SMG failed to demonstrate actual or potential prejudice. It contended that there was no evidence that Plunkett & Cooney received confidential information

from SMG. Therefore, Overhead Door asserted that it did not need SMG's consent to Plunkett & Cooney's representation of it in this case and there was no basis to disqualify the firm.

Overhead Door provided affidavits from all the attorneys involved in *Martin* and each averred that he did not receive any confidential information or have any substantive conversations about *Martin* with Mark Verwys, Plunkett & Cooney's attorney who was handling this case. It also provided Verwys's affidavit, in which he stated that he had no knowledge of *Martin* before June 12, 2007, had not received any confidential information regarding SMG, and had no substantive conversations about *Martin* with Plunkett & Cooney's attorneys. Verwys further averred that since SMG filed its motion to disqualify, all the information he learned about *Martin* was a matter of public record.

Overhead Door also asserted that no conflict existed until SMG filed its cross-claim and it appeared that SMG created this technical conflict for tactical purposes to disqualify Plunkett & Cooney. It asserted that given the difference in parties, theories, and attorneys involved in *Martin* and this case, SMG's motivation in filing its cross-claim was apparent; the trial court later dismissed this assertion, finding no evidence that SMG manufactured a conflict of interest claim. Overhead Door further contended that it would be severely prejudiced if the trial court disqualified Plunkett & Cooney at this point because the firm had already represented it in this case for 18 months.

At a hearing in mid-August, 2007, SMG argued that *Martin* and this case shared common factors: the same facility and maintenance staff, SMG's safety

training procedures for its contractors, and the issue of contractual indemnity. It also argued that it would be very surprised if Plunkett & Cooney had not learned some confidential information about SMG if it was zealously representing SMG in *Martin*. It stated that MRPC 1.10(a), which imputed individual attorney conflicts to the entire firm, made it irrelevant whether the attorneys assigned to *Martin* actually transmitted information to Verwys.

Overhead Door, in contrast, maintained that the matters were unrelated for the reasons it stated in its brief. It further contended that SMG failed to carry its burden because it failed to establish that Plunkett & Cooney learned confidential information from SMG or the firm passed along any such information to Verwys.

In rendering its decision, the trial court stated:

> I think the danger here in making a decision like this is putting form over substance. I think Mr. Verwys is correct that there was not an adverse relationship until the cross-claim was filed in March of this year. Again, I find no confidential information was passed along, so there would certainly be no prejudice to SMG. I certainly understand that they might be uneasy about that.
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> * * *
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> But what it comes down to here is, again, a conflict did not arise here until March of this year. As a practical matter, Mr. Verwys has no knowledge of the *Martin* case. The *Martin* case is essentially over. He has no confidential information.
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> The Court finds as a matter of law here that this is not a conflict which is directly adverse but only generally adverse, and again, the Court feels that if it were to rule in your favor, Ms. Tyree, again, it would be putting form over

substance and the Court's just not going to do that. So your motion is denied.

II. MOTION TO DISQUALIFY

A. STANDARD OF REVIEW

SMG argues that the trial court erred in denying its motion to disqualify Plunkett & Cooney. The determination of the existence of a conflict of interest that disqualifies counsel is a factual question that we review for clear error.[7] A trial court's findings of fact are clearly erroneous only if we are left with a definite and firm conviction that a mistake was made.[8] But we review de novo the application of "ethical norms" to a decision whether to disqualify counsel.[9]

B. MRPC 1.7(a)

MRPC 1.7(a) states:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

The comment to MRPC 1.7 states, in pertinent part:

> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some

[7] *Rymal v Baergen*, 262 Mich App 274, 316; 686 NW2d 241 (2004).

[8] *Id*. at 317.

[9] *Id*.

> other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

We note that the comments are to be used only as an instructive aid to the reader.[10] Only the text of the rule is authoritative.[11]

C. INTERESTS THAT ARE "DIRECTLY ADVERSE"

The first step in dealing with assertions of conflicts of interest under MRPC 1.7(a) is to determine whether a lawyer's representation of a client will be "directly adverse" to the interest of another client. Clients' interests are directly adverse when one client sues another client.[12] Therefore, we conclude that the interests of Overhead Door and SMG were directly adverse when SMG filed a cross-claim against Overhead Door. In addition, we conclude, contrary to the trial court, that Plunkett & Cooney's representation of Overhead Door was directly adverse to SMG at the time the firm initially began representing Overhead Door, even before the cross-complaint was filed. *Random House Webster's College Dictionary* defines "directly" as exactly or precisely.[13] Black's Law Dictionary defines "adverse" as "opposed" or "contrary."[14] Although SMG and Over-

[10] *Grievance Administrator v Deutch*, 455 Mich 149, 164 n 15; 565 NW2d 369 (1997).

[11] MRPC 1.0(c).

[12] *Barkley v Detroit*, 204 Mich App 194, 203-204; 514 NW2d 242 (1994).

[13] *Random House Webster's College Dictionary* (2001).

[14] Black's Law Dictionary (6th ed), p 53. The rules of statutory construction apply to the Michigan Rules of Professional Conduct. *Morris*

head Door were both named as defendants in Avink's lawsuit, it was Overhead Door's position that SMG was solely liable for the injuries the decedent sustained, whereas SMG sought to prove that Overhead Door and another defendant, Electric Power Door, were liable. Thus, Overhead Door and SMG do not merely have different interests driven by the nature of their businesses. Rather, Overhead Door's interest in eliminating its own liability depended on establishing that SMG was wholly liable. Therefore, the trial court clearly erred by finding that the interests of Overhead Door and SMG were not directly adverse, but only generally adverse.

D. REASONABLE BELIEF AND CONSENT

The second step in dealing with assertions of conflicts of interest under MRPC 1.7(a) has two elements. If the interests of the respective clients are directly adverse, the rule prohibits dual representation unless (a) the attorney reasonably believes the dual representation will not adversely affect the attorney-client relationship with the other client *and* (b) both clients consent after consultation. Although Overhead Door emphasizes that the matter in which Plunkett & Cooney represents SMG is unrelated to this case, as the comment to MRPC 1.7 indicates and as we repeat, the rule prohibits dual representation when it is directly adverse to another client, without both clients' consent, even if the two matters are wholly unrelated. Because Plunkett & Cooney's representation of Overhead Door in this case is directly adverse to SMG, and because SMG did not consent to the dual representation, the

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& Doherty, PC v Lockwood, 259 Mich App 38, 44; 672 NW2d 884 (2003). Under the rules of statutory construction, this Court may consult dictionaries to ascertain the meaning of a word. *Cain v Waste Mgt, Inc* (*After Remand*), 472 Mich 236, 247; 697 NW2d 130 (2005).

dual representation violates MRPC 1.7(a). Thus, the trial court should have required Plunkett & Cooney to withdraw from this case.[15]

E. SEPARATE ATTORNEYS AND "CHINESE WALLS"

Overhead Door argues that withdrawal is unnecessary because separate attorneys at Plunkett & Cooney are handling the two matters. This argument ignores MRPC 1.10(a), which states that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2." Therefore, we impute the conflict of interest to the entire firm. The so-called "Chinese wall" to which Overhead Door refers is only a permissible remedy under MRPC 1.10(b), which does not apply to concurrent representation.

Accordingly, we conclude that the trial court erred in denying SMG's motion for disqualification.

Reversed.

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[15] MRPC 1.16(a)(1).

NEW PROPERTIES, INC v GEORGE D NEWPOWER, JR, INC

Docket No. 280153. Submitted January 7, 2009, at Grand Rapids. Decided January 20, 2009, at 9:05 a.m.

New Properties, Inc., and Robert W. and Harriet Kitchen brought an action in the Grand Traverse Circuit Court against George D. Newpower, Jr., Inc., doing business as Hansen Realty, Lakes of the North Realty, Inc., George D. Newpower, Jr., Muriel Hart, Huntington National Bank, and others, seeking damages resulting from the embezzlement of funds by George D. Newpower, Jr. The court, Philip E. Rodgers, Jr., J., awarded the plaintiffs damages in the amount of $1.8 million against Hart and Huntington National Bank, jointly and severally. The court also granted summary disposition in favor of Lakes of the North and dismissed the Kitchens' claims against Lakes of the North. Hart and the bank appealed and the plaintiffs cross-appealed. The Court of Appeals, DAVIS, P.J., and SAWYER and SCHUETTE, JJ., affirmed in part, reversed in part (including the order of summary disposition in favor of Lakes of the North), and remanded for proceedings consistent with its opinion. Unpublished opinion per curiam of the Court of Appeals, issued September 14, 2006 (Docket No. 259932). On remand, the trial court entered a $300,000 judgment in favor of the plaintiffs against Lakes of the North Realty (three times the amount of the plaintiffs' actual damages of $100,000) and awarded attorney fees and costs to the plaintiffs. The attorney fees and costs did not include appellate attorney fees and costs. Lakes of the North appealed, and the plaintiffs cross-appealed.

The Court of Appeals *held*:

1. The legal determinations in the prior appeal of this case amount to a finding that Lakes of the North is liable on the basis of its imputed knowledge of the money transfer. The prior appeal established that this knowledge could not be imputed to New Properties. This law of the case was properly applied by the trial court on remand in finding Lakes of the North liable and requiring it to pay damages to the Kitchens.

2. MCL 600.2919a provides for treble damages for the concealment of stolen, embezzled, or converted property. The trial court

properly calculated and assessed against Lakes of the North treble damages as a penalty with regard to its liability for a $30,000 deposit.

3. The trial court properly awarded the Kitchens $300,000 in treble damages for the $100,000 actual damages they sustained. The treble damages are not to be awarded in addition to the actual damages sustained.

4. MCL 600.2919a permits the recovery of postjudgment fees related to this appeal. The judgment must be affirmed, but the case must be remanded for the entry of an amended judgment that includes the Kitchens' postjudgment fees and costs and appellate fees and costs.

Affirmed and remanded for the entry of an amended judgment regarding the award of fees and costs.

1. DAMAGES — TREBLE DAMAGES — STOLEN, EMBEZZLED, OR CONVERTED PROPERTY.

An award of treble damages pursuant to the statute governing damages for the concealment of stolen, embezzled, or converted property is calculated by multiplying the amount of actual damages by three; an award of treble damages is not calculated by adding the amount of actual damages to the amount determined by multiplying the amount of actual damages by three (MCL 600.2919a).

2. COSTS — ATTORNEY FEES — POSTJUDGMENT ATTORNEY FEES — APPELLATE ATTORNEY FEES — STOLEN, EMBEZZLED, OR CONVERTED PROPERTY.

Postjudgment attorney fees and costs, including appellate fees and costs, may be awarded under the statute that governs damages for the concealment of stolen, embezzled, or converted property (MCL 600.2919a).

Bowerman, Bowden, Ford, Clulo & Luyt, P.C. (by *Gregory M. Luyt*), for the plaintiffs.

Calcutt Rogers & Boynton, PLLC (by *Jack E. Boynton*), for Lakes of the North Realty, Inc.

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM. This case stems from a prior appeal in this Court, *New Properties, Inc v Newpower* (*New*

Properties I).[1] This present matter is an appeal from the trial court's decision on remand from *New Properties I*. Defendant Lakes of the North Realty, Inc., appeals as of right the trial court's judgment setting forth monetary damages payable to plaintiffs Robert W. Kitchen and Harriet Kitchen. We affirm, but remand for the entry of an amended judgment consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

No further facts were entered into the record on remand to the trial court. Thus, we quote verbatim the facts as set forth in *New Properties I*:[2]

> *Introduction*
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> George Newpower, Jr. (Newpower) was a prominent businessperson in the northern Michigan village of Mancelona. In 1996, Newpower embezzled $755,000.00 from plaintiffs Robert and Harriet Kitchen (the Kitchens), his business partners. In 1997, plaintiffs sued Newpower and the various recipients of the embezzled funds. Plaintiffs also sued the Bank and its Mancelona branch Manager Muriel Hart (Hart) for conversion under the Uniform Commercial Code (UCC) alleging that the Bank and Hart knowingly allowed and, in fact, facilitated the embezzlement. Newpower eventually pleaded guilty to embezzlement of over $100 and was sentenced to 6-10 years in prison.
>
> *Newpower and the Mancelona Community*
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> Newpower moved to Mancelona in 1976 and purchased Hansen Realty, a local real estate agency. For the next twenty years, Newpower's agency was actively engaged in the real estate business. Newpower formed another real estate company in 1994, Lakes of the North Realty, [Inc.,] which managed vacation rental properties in the area.

[1] *New Properties, Inc v Newpower*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2006 (Docket No. 259932).

[2] *Id*. at 2-7.

Newpower was the Principal Broker with Lakes of the North, served as its President, Vice President, Director, Chief Executive Officer and Chief Operating Officer and was the sole signatory of its trust accounts at the bank. Newpower kept the bank accounts for his business ventures at the Antrim County State Bank, where Muriel Hart was "his banker." Newpower helped recruit, FMB Northwestern State Bank[1] ("the Bank") to Mancelona and he recommended Hart to the Bank as an experienced and well-respected banker in the community who could bring them immediate business. Hart then opened the new branch in Mancelona as its manager. Newpower then moved his personal and business accounts to the Bank.

The Mancelona Area Health Clinic Scandal

Newpower was also president and a member of the board of directors of the Mancelona Area Health Clinic (MHC). Hart, too, was involved in the operation of the MHC, acting as the treasurer. In September 1993, Newpower suggested that $30,000 of MHC's money deposited into an account at the Bank could earn more interest in an investment account of his choosing. Upon taking the money from the MHC account, however, Newpower did not invest it but rather deposited it into his personal account at the Bank for his own uses. The money was eventually discovered to have been used by Newpower to make a $1400.74 mortgage loan payment to the Bank, a $165.30 personal loan payment to Hart, and a $91.67 personal loan payment to Hart and her mother.

In January or February 1995, Hart became suspicious of Newpower's investment of the money as she had not received any statements about its performance. As early as March 1995, she pulled copies of Newpower's accounts and determined that he had deposited the money into his personal account rather than investing it. Hart testified that she sought the advice of the Bank's Senior Lender, Daniel Spagnuolo, who told her to investigate the matter and seek the advice of Jack McKaig, an attorney on the MHC board. Spagnulo [sic] initially testified that he "may"

have been told by Hart that Newpower had deposited the money in his personal account, but later testified that she did not mention this fact.

David Brooks, [an] MHC Board member, also was concerned with the whereabouts of the money. He was told by Newpower that the investment was made with "Munson & Madison Financial Service Corp.," a Chicago investment firm, because they had a "means of pooling moneys" to get better interest rates. The Munson & Madison investment firm was fictitiously created by Newpower to attempt to hide his embezzlement. Thus, when Brooks inquired with Munson Hospital, he was unsuccessful in discovering the location of the funds. The first mention of the "investment" in MHC's records was not until February 16, 1995, when Hart recorded that Newpower had invested the money at Munson & Madison Financial Service Corp. and that Newpower reported the account was paying 8.65% and he had given instructions for the investment firm to send Hart statements and tax information. The only statement ever received was fraudulently created by Newpower, and Hart never received any tax information regarding the investment.

The money mysteriously reappeared after this series of inquiries. A check was issued from Munson & Madison to refund the investment; however, the check was not written on a Chicago investment firm account but rather [an] NBD Bank in Traverse City. Newpower created the NBD account solely to deposit embezzled money and to subsequently issue the fraudulent Munson & Madison check. The account at NBD was only open for five days. When MHC was made whole, all other inquiries into the use of the money were dropped.

Newpower and the Kim Biehl scandal

Kim Biehl was Newpower's secretary at Lakes of the North. Her husband, James Biehl, worked for Newpower at Hansen Realty. In August 1994, Mrs. Biehl discovered that checks she had written were bouncing because a check that Newpower had given to her husband for a commission had been dishonored. Mrs. Biehl went to the small Mancelona

branch of the Bank and complained loudly, asserting that the only way Newpower's check could have bounced from the trust account it was written on was if he was "cooking the books." This information was apparently communicated to Hart, although she was not in the Bank at the time. Hart later stated that she regarded the accusation as "hearsay."

Newpower and the Bank

Newpower and Muriel Hart's banking relationship

Muriel Hart had 26 years of banking experience. Hart was Newpower's banker for both his business endeavors[,] as well as his personal finances. When Newpower recruited the Bank to come to Mancelona, he personally recommended Hart as a qualified manager to run the new business. Hart continually practiced lenient banking procedures with regards to Newpower's various accounts. Hart often held checks to prevent overdrafts from occurring in Newpower's accounts until he could deposit funds to cover the check. More than once, Hart sat down and went extensively through Newpower's accounts to determine why his balance showed different amounts than the Bank's balance of his accounts. When Hart inquired as to why certain deposits were made to certain accounts, Newpower often replied that the secretary must have deposited into the wrong account, yet Hart never fixed such errors.

In addition to this banking relationship, Newpower and Hart had been friends for many years. Hart had personally loaned $12,000.00 to Newpower and had also arranged for her mother to loan him $10,000.00. Additionally, Hart lent approximately $28,800.00 to the corporation Newpower ran with Jerry [sic] Biehl, Mancelona Properties, Inc. [MPI]. Personally, financially and professionally, Hart and Newpower were closely connected.

Newpower and his other accounts at the Bank

Newpower had eight other accounts at the Bank for his own personal finances, as well as for his real estate business ventures with Lakes of the North, Hansen Real Estate[sic], and MPI. Each of these accounts experienced

significant overdrafts from 1993 to 1996. In particular, the trust accounts for the Mancelona trailer park that Newpower managed through Hansen Realty, as well as the trust accounts for Lakes of the North, experienced overdrafts despite the fact that they should not have been used to withdraw monies. In total, there were approximately 288 overdrafts in these accounts in this short three year period.

Newpower also had a $42,000.00 line of credit with the Bank. When Dan Spagnuolo took his position as Senior Lender at the Bank, one of his jobs was to reduce the outstanding debts of its customers. In 1994, Spagnuolo met with Newpower and reviewed his overdraft history with him. Spagnuolo advised Newpower that unless he paid in full his great debts to the Bank, his line of credit would not be renewed because of Newpower's breach of both trust and contractual agreements. Without explanation, Newpower paid off this large debt to the Bank within a month of this correspondence with Spagnuolo.

Muriel Hart and the Bank

Overdraft review responsibilities

As manager of the Bank, Hart's job included ensuring that the bank's financial security controls were implemented to protect the bank from fraudulent and criminal activity. Specifically, Hart was responsible for reviewing the daily overdraft report and deciding which overdrafts to pay and which ones to refuse. Despite Newpower's extensive overdraft history, Hart continually paid out his checks when his funds were insufficient. In particular, in March 1996, three of Newpower's checks were returned for insufficient funds. After Newpower transferred the majority of a wire transfer from plaintiffs from the NPI [New Properties, Inc.] account into his personal account, the bank cleared the three returned checks and paid them on the same day. No explanation could be given as to how this could occur on the same day in a small bank without direct intervention by a bank employee. Ironically, Newpower also wrote a check to Hart for his loan payment to her on the same day.

Other bank responsibilities

The Bank's procedures for managing its accounts requires [sic] a series of progressive disciplinary steps that begin with warning letters and end with the closing of an account. While the bank manager does have some discretion, in the end it is the manager's job to ensure that such fraudulent activities do not occur. To implement this, the Bank had clear policies and procedures to follow for monitoring suspicious activities of its customers. Suspicious activities include excessive overdrafts and large numbers of fund transfers between accounts and the unexplained and sudden pay-off of problem loans. While Hart often discussed her concerns about Newpower's management of his accounts with him, she never closed any of his accounts at the Bank nor flagged his activities as suspicious to the bank's other employees.

Newpower and the Kitchens

The formation of NPI

In 1995, the Kitchens decided to sell their interest in their potato farm to Robert Kitchen's brother, William.[2] Around the same time, Newpower and the Kitchens formed a property development business called New Properties, Inc. (NPI). The Kitchens and Newpower had a former business relationship through the Kitchens' potato farm. After forming NPI, the Kitchens moved to Alaska, leaving Newpower in charge. Newpower and the Kitchens were to each own 50% of the shares in the new company, and for each deposit the Kitchens made, Newpower was to deposit an equal amount into an NPI bank account. When Newpower opened the NPI account, Muriel Hart, the bank's manager, was involved. Newpower told Hart that he was going into business with the Kitchens and also told her that NPI was to have the same business model as MPI, Newpower's other real estate business venture. Newpower thus had broad authority to endorse, sign and draw checks on NPI's account. Newpower was the only signatory authority on the NPI account.

The embezzlement from NPI

In January 1996, Harriet Kitchen delivered Newpower two checks, one for $200,000.00 and another for $2,000.00. The former check was made out to Newpower personally and was intended as the payment for the Kitchens' half of a 320 acre parcel of land in Kalkaska (as indicated in the memo section of the check) while the latter check was made out to NPI and was intended as the payment for the Kitchens' shares of stock in NPI. Newpower took the Kitchens' checks to the bank and deposited the $200,000.00 check into his personal account. The $2,000.00 check was eventually used to open an account for NPI at the Bank in February 1996.

After Newpower deposited the Kitchens' $200,000.00 check into his personal account in January, he later made two deposits from his personal account into two Lakes of the North accounts at the bank. No other deposits were made into Newpower's personal account between the deposit of the plaintiffs' $200,000.00 check and Newpower writing the checks subsequently deposited into Lakes of the North's accounts. Thus, the source of the two deposits into the Lakes of the North accounts by Newpower was the plaintiffs' $200,000.00 check.

Additionally, about a month later, Newpower made a third deposit into a Lakes of the North account by directly transferring the funds from the NPI corporate account into the Lakes of the North account. All deposits into the NPI account were from the Kitchens. Thus, the third deposit into the Lakes of the North account was entirely plaintiffs' funds.

From February through October of 1996, the Kitchens made six wire transfers from their new home in Alaska to the NPI account, totaling $638,250. Newpower never matched any of these funds as he agreed to do when he formed NPI with Robert Kitchen. Robert Kitchen testified that with the first two or three wire transfers he called and personally talked to Hart to verify that they were going into the NPI account. Hart also testified that she was

aware of the wire transfers coming from the Kitchens and that she had personally handled at least one for $220,000.00.

The discovery of the embezzlement

The Kitchens corresponded with Newpower on a regular basis. Robert Kitchen spoke with him on the phone twice a week. The Kitchens would wire their half of the money needed to buy the property Newpower claimed to be purchasing. While they did not receive the property deeds they requested, this was consistent with their previous dealings with Newpower, which had not resulted in any negative transactions. The Kitchens did admit that they did not ask [for] or receive regular statements for the NPI bank account.

In December 1996, the Kitchens discovered that Newpower was embezzling their funds. They reported the behavior to the Michigan State Police, who then issued an order to freeze Newpower's accounts. Only the NPI corporate account was frozen, leaving Newpower's personal account open, and resulting in the loss of an additional $10,000.00. By pursuing all the beneficiaries of Newpower's largess, plaintiffs have recovered approximately $248,000.00 of their stolen funds.

Procedural history

During the proceedings, defendants filed three motions for summary disposition that were denied. Plaintiffs also filed a motion for partial summary disposition as to claims against defendant Lakes of the North Realty that was denied.

In its order and final judgment, the trial court found that the Bank, through Hart, had actual knowledge of Newpower's fraud and failed to exercise due diligence with notice of that fraud. The Bank was held liable for conversion of plaintiffs' funds. However, under MCL 440.4704, plaintiffs' failed to exercise ordinary care with respect to unauthorized orders of Newpower, and thus were not awarded interest on their recovery. Plaintiffs were, however, awarded treble damages under MCL 600.2919a. The

trial court found that in the absence of a clearly expressed legislative intent to repeal MCL 600.2919a, the statutory treble damage remedy must remain effective and that it was not inconsistent with the actual damage remedy provided by the UCC. The court declined to engage in a negligence analysis, and stated that since it was not awarding damages based upon negligence, it also declined to consider issues of contributory or comparative negligence. The court entered judgment against the Bank and Hart jointly and severally in the amount of $1,840,393.66.

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[1] FMB Northwestern State Bank is now known as The Huntington National Bank.

[2] Newpower also embezzled $220,000 from the [sic] Robert and William Kitchen's farming business that was discovered after the discovery of the embezzlement from NPI.

We additionally note that, before trial, the trial court granted Lakes of the North's motion for summary disposition and dismissed with prejudice the Kitchens' claims against Lakes of the North, reasoning as follows:

> If Newpower's knowledge that the funds were stolen from New Properties and being used to repay Lakes of the North can be imputed to Lakes of the North, the same rationale would cause that knowledge to be imputed to New Properties. Yet, no one seriously argues that New Properties countenanced Newpower's thefts from Lakes of the North or authorized the disbursements to Lakes of the North from its accounts. . . . There are no legal or equitable grounds that would entitle New Properties to recover against Lakes of the North.

After the trial, the Kitchens appealed the grant of summary disposition to Lakes of the North. This Court reversed the trial court's order, holding as follows:

> [T]he actual deposits of the money into the [Lakes of the North] accounts were within the scope of [Newpower's]

> employment [with Lakes of the North]. Additionally, he was in no way privileged not to disclose or act upon the knowledge he had that the funds were embezzled from plaintiffs. Thus, the knowledge of Newpower is considered the knowledge of Lakes of the North.[3]

This Court went on to state, "Lakes of the North should be liable for fraudulent conduct of Newpower" and stated that the Kitchens are entitled to treble damages, interest, attorney fees, and costs pursuant to MCL 600.2919a.[4] The case was affirmed in part, reversed in part, and remanded for the entry of a judgment consistent with the ruling.

On June 15, 2007, the trial court issued both an order and final judgment against Lakes of the North, granting the Kitchens treble damages in the amount of $300,000, and attorney fees and costs in the amount of $4,000. Lakes of the North now appeals.

II. "IMPUTED KNOWLEDGE" AND THE LAW OF THE CASE

A. STANDARD OF REVIEW

Lakes of the North argues that the trial court failed to properly comply with the decision in *New Properties I* because it did not apply the doctrine of imputable knowledge to *both* Lakes of the North and to New Properties. According to Lakes of the North, the trial court should have deemed the delivery of money to Lakes of the North to have been known by the Kitchens. Under this approach, Lakes of the North was equally a victim of Newpower's embezzlement scheme and should not be liable to the Kitchens, because they are both equally worthy of blame, or equally innocent, and because both parties knew about Newpower's actions.

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[3] *New Properties I, supra* at 21.

[4] *Id.*

Lakes of the North submitted objections to the Kitchens' proposed judgment, raising this issue in the trial court and thus properly preserving this issue.[5] This Court reviews de novo the application of the law of the case as established by this Court in a prior appeal.[6]

B. THE LAW OF THE CASE DOCTRINE

" 'The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue.' "[7] " '[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.' "[8]

C. THE RULING IN *NEW PROPERTIES I*

In *New Properties I*, this Court affirmed in part, reversed in part, and remanded for the entry of an order in accordance with its legal ruling. There was no change in, or addition to, the facts as established in the trial court record. Thus, we are bound by the law of the case, as established in *New Properties I*, and may not decide the previously determined legal questions differently. It is therefore necessary to set forth exactly how the legal questions were determined in *New Properties I*.

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[5] See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

[6] *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998).

[7] *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 91; 662 NW2d 387 (2003) (citation omitted).

[8] *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (citation omitted).

As the Kitchens point out, the *New Properties I* decision stated many times that Lakes of the North is liable to them for Newpower's actions:

> [1.] The trial court erred in finding that Lakes of the North Realty was not liable to plaintiffs for Newpower's actions. . . .
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> * * *
>
> [2.] Here, the Lakes of the North held plaintiffs' money subject to plaintiffs' interest. By refusing to return the money to plaintiffs, Lakes of the North has accepted Newpower's act as their own and must therefore be held liable for the conversion of plaintiffs' property.
>
> * * *
>
> [3.] Lakes of the North still has plaintiffs' money and thus in taking the gains of Newpower's fraud, it must also take the consequences of it. Lakes of the North should be liable for the fraudulent conduct of Newpower.
>
> * * *
>
> [4.] In sum, Lakes of the North is liable for the fraudulent conduct of Newpower.
>
> * * *
>
> [5.] The trial court also erred in finding that Lakes of the North was not liable for the fraudulent conduct of Newpower.[9]

Lakes of the North does not acknowledge these repeated statements. It focuses solely on this Court's statement that "the doctrine of imputed knowledge is applicable to this case."[10]

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[9] *New Properties I*, *supra* at 20, 21, 24.

[10] *Id*. at 20.

D. THE DOCTRINE OF IMPUTED KNOWLEDGE

The doctrine of imputed knowledge generally provides:

> When a person representing a corporation is doing a thing which is in connection with and pertinent to that part of the corporation business which he is employed, or authorized or selected to do, then that which is learned or done by that person pursuant thereto is in the knowledge of the corporation. The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents, who are authorized and charged with the doing of the particular thing[,] [acquire] while acting under and within the scope of their authority.[11]

Lakes of the North argues that, because the doctrine applies, it must be applied to both it and New Properties so that each is imputed with the knowledge of Newpower's actions, the two are equal victims, and neither is liable. In our prior decision, this Court did not expressly discuss the application of the doctrine of imputed knowledge in connection with New Properties. However, this Court did note that Newpower "acted outside of the scope of his authority with regards to NPI by embezzling plaintiffs' money and converting it for his own use."[12]

This Court thus applied a recognized exception to the doctrine of imputed knowledge, the "adverse interest" exception. "The general rule which imputes an agent's knowledge to his principal is subject to an exception where the agent acts in his own interest, adversely to his principal."[13] Here, Newpower was acting adversely

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[11] *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 214; 476 NW2d 392 (1991) (quotation marks and citations omitted).

[12] *New Properties I*, *supra* at 21.

[13] *Nat'l Turners Bldg & Loan Ass'n v Schreitmueller*, 288 Mich 580, 586; 285 NW 497 (1939). See also *MCA Financial Corp v Grant Thornton, LLP*, 263 Mich App 152, 164; 687 NW2d 850 (2004).

to the Kitchens' interests by embezzling money from them and therefore his knowledge cannot be imputed to New Properties.

For these reasons, we conclude that the legal determinations in *New Properties I* amount to a finding that Lakes of the North is liable on the basis of its imputed knowledge of the money transfer. We also conclude that *New Properties I* established that this knowledge is *not* imputed to New Properties. This is the law of the case, which the trial court applied properly, finding Lakes of the North liable and requiring it to pay damages to the Kitchens.

III. DAMAGES

A. STANDARD OF REVIEW

Lakes of the North argues that the Kitchens improperly recovered damages multiple times against two parties for one injury and, therefore, that Lakes of the North should not be required to pay $90,000 to the Kitchens. Lakes of the North submitted objections to the Kitchens' proposed judgment, raising this issue in the trial court and properly preserving this issue.[14] This Court reviews de novo the application of the law of the case as established by this Court in a prior appeal.[15]

B. FACTUAL PREDICATE

On January 5, 1996, Newpower deposited the Kitchens' $200,000 check into his personal account, which then had an initial balance of $32.67. On February 9, 1996, he transferred $30,000 from his personal account to Lakes of the North. Undoubtedly, this sum was the

[14] See *Fast Air, supra* at 549.

[15] *City of Kalamazoo*, *supra* at 134-135.

Kitchens' money. In *New Properties I*, this Court held defendants Northwestern State Bank and Hart liable to the Kitchens.[16]

C. MCL 600.2919a

At the time relevant to this appeal (the Legislature amended this statute during the course of the litigation; the statutory language we quote here is the applicable version of the statute that was valid during the course of the embezzlement), MCL 600.2919a provided:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

D. CONSTRUING THE STATUTE

The rules of statutory construction include the following:

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first step in determining legislative intent is to review the language of the statute itself. If the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed and judicial construction is neither required nor permitted. However, if reasonable minds can differ concerning the meaning of a statute, judicial construction of the statute is appropriate.[17]

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[16] *New Properties I*, *supra* at 11-12, 17-18.

[17] *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 372-373; 652 NW2d 474 (2002) (citations omitted).

Lakes of the North does not assert that the Kitchens have in fact recovered the full award of damages for which it is jointly and severally liable. Rather, Lakes of the North refers to one episode of embezzlement and suggests that it not share in liability for that episode. But *New Properties I* explicitly held that Lakes of the North shared liability along with Hart and Northwestern State Bank. That holding now stands as the law of the case. Lakes of the North thus shares in liability for the $30,000 deposit to which it refers.

Moreover, in accordance with MCL 600.2919a, the Kitchens are entitled to recover treble damages in addition to their other remedies. The trial court assessed treble damages against Lakes of the North as a *penalty*, not as a single award of damages. The purpose of this award extended beyond restoring the Kitchens to their original condition. The award was intended to *penalize* Lakes of the North. Thus, the trial court properly assessed $90,000 against Lakes of the North in this particular situation. That another defendant may have paid such a sum is immaterial, given that Lakes of the North does not assert that its own payment of such an amount would cause the Kitchens to recover more than their total damages award.

E. THE $300,000 AWARD OF DAMAGES

In their cross-appeal, the Kitchens argue that the trial court failed to properly apply the triple damages statute when it failed to award treble damages *in addition* to the single award of damages. The Kitchens raised the issue of damages in their proposed final judgment, thus preserving this issue for appellate re-

view.[18] Statutory interpretation is a question of law, which this Court reviews de novo.[19]

Once again, at the time relevant to this case, MCL 600.2919a provided as follows:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. *This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.* [Emphasis added.]

The Kitchens focus on the language in the last sentence of the statute to argue that the treble damages of $300,000 shall be *in addition to* the remedy of $100,000 to which they are entitled. However, the statutory language unambiguously states that a person "may recover 3 times the amount of actual damages sustained . . . ." It does not state that a person may recover four times the amount. The last sentence means that the remedy of "3 times the amount of actual damages sustained" is in addition to any other remedy, at law or otherwise, such as an equitable remedy or damages. Michigan's trial courts typically award only three times the actual damages sustained when awarding treble damages and the Kitchens have cited no authority for this Court to change this practice. We therefore affirm the trial court's grant of treble damages in the amount totaling $300,000.

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[18] See *Fast Air*, *supra* at 549.

[19] *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

IV. POSTJUDGMENT ATTORNEY FEES AND COSTS

A. STANDARD OF REVIEW

In their cross-appeal, the Kitchens argue that their entitlement to attorney fees and costs should include the amount incurred in this appeal because MCL 600.2919a does not explicitly exclude recovery for appellate or any other fees and costs. The Kitchens, in their proposed final judgment, requested attorney fees and costs incurred in collecting the judgment, thus preserving this issue for appellate review.[20] Statutory interpretation is a question of law that this Court reviews de novo.[21]

B. THE "AMERICAN RULE"

"Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award."[22] Here, MCL 600.2919a allows for the recovery of "costs and reasonable attorney's fees."

In *Haliw v Sterling Hts*,[23] the Supreme Court examined the nature of the court rule at issue, MCR 2.403(O)(6), and determined that the prevailing party was not entitled to appellate fees and costs because the rule focused on trial-related costs and case evaluation sanctions. Conversely, however, MCL 600.2919a does *not* focus on trial proceedings to the exclusion of appellate proceedings. It simply refers to "costs and reasonable attorney's fees." Thus, the statute (1) is broadly

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[20] See *Fast Air, supra* at 549.

[21] *Ambassador Bridge Co*, *supra* at 35.

[22] *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005).

[23] *Id*. at 706.

structured, (2) does not explicitly include any limitations on an award of costs and reasonable attorney fees, and (3) contains language expressly authorizing such an award of costs and reasonable attorney fees.

C. CONSTRUING THE STATUTE

The rules of statutory construction require us to ascertain whether the language of MCL 600.2919a is ambiguous in setting forth legislative intent.[24] Because the statute does not explicitly authorize or prohibit the recovery of postjudgment attorney fees, we must look beyond the words of the statute to discern its meaning.

In *Solution Source, Inc v LPR Assoc Ltd Partnership*,[25] this Court held that, under the Construction Lien Act, MCL 570.1101 *et seq*., appellate fees, and fees associated with postjudgment collection, are recoverable because the act does not specifically exclude them. The Court pointed out that there were several situations where it had ruled similarly. It stated:

> [T]his Court has determined in numerous other cases that attorney fees for services rendered in connection with appellate proceedings are recoverable under similarly worded statutes that likewise allow for the recovery of attorney fees and do not restrict the recovery to attorney fees incurred at the trial level. See *Leavitt v Monaco Coach Corp,* 241 Mich App 288, 311-312; 616 NW2d 175 (2000) (appellate fees recoverable under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 USC 2301 *et seq.*); *Grow v W A Thomas Co,* 236 Mich App 696, 720; 601 NW2d 426 (1999) (appellate attorney fees recoverable under the Civil Rights Act, MCL 37.2101 *et seq.*); *Bloemsma v Auto Club Ins Ass'n (After Remand),* 190 Mich App 686, 689-691; 476 NW2d 487 (1991) (appellate attorney fees available under Michigan's no-fault act, MCL

[24] *Solution Source, Inc*, *supra* at 372-373.

[25] *Id*. at 374-375.

> 500.3148 [1]); *Escanaba & L S R Co v Keweenaw Land Ass'n, Ltd,* 156 Mich App 804, 818-819; 402 NW2d 505 (1986) (appellate attorney fees available under the Uniform Condemnation Procedures Act, MCL 213.51 *et seq.,* even though the statute only allows recovery for expenses incurred in defending against the improper acquisition of the property at issue).
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> Therefore, because the Construction Lien Act does not specifically limit recovery of attorney fees incurred before a judgment[,] and in keeping with the purpose of attorney fee provisions, we hold that the Legislature intended that appellate and postjudgment attorney fees would be recoverable under the statute.[26]

The same reasoning applies here. We conclude that MCL 600.2919a permits the recovery of postjudgment fees related to this appeal. Moreover, as we have already stated, unlike the statute at issue in *Haliw*, the statute applicable here does not specifically focus on trial-related costs. We therefore remand this case to the trial court for entry of an amended judgment that includes the Kitchens' postjudgment fees and costs and appellate fees and costs.

Affirmed, but remanded for entry of an amended judgment that includes the Kitchens' postjudgment fees and costs, and appellate fees and costs.

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[26] *Solution Sources, supra* at 374-375. See also *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 297-298; 463 NW2d 261 (1990) (appellate attorney fees available under the Michigan Consumer Protection Act, MCL 445.901 *et seq.*).

In re PROJECT COST AND SPECIAL ASSESSMENT ROLL FOR CHAPPEL DAM

Docket No. 280236. Submitted January 7, 2009, at Lansing. Decided January 22, 2009, at 9:00 a.m.

The Gladwin County Board of Commissioners approved a special assessment on private property owners in the Chappel Dam assessment district for the repair of the dam, as calculated by the Gladwin County drain commissioner, who spread the cost of repairs among the property owners, Sage Township, and Gladwin County. The property owners filed a petition challenging the special assessment in the Gladwin Circuit Court. The court, Roy G. Mienk, J., granted a motion by the drain commissioner and the county board of commissioners to affirm the assessment and dismissed the property owners' petition. The property owners appealed.

The Court of Appeals *held*:

1. The Inland Lake Level Act, MCL 324.30701 *et seq*., authorizes counties to make policy determinations regarding the levels of their inland lakes and to build and finance dams as necessary for maintaining desired lake levels. MCL 324.30714(4) of the ILLA provides that a special assessment roll with the assessments listed shall be final and conclusive unless appealed in a court within 15 days after county board approval. Although MCL 324.30705(1) of the ILLA provides that the procedures of the Drain Code, MCL 280.1 *et seq*., are to be followed as close as possible in proceedings for levying special assessments and issuing assessment bonds, the ILLA does not provide that the appellate procedures of the Drain Code must be used in appeals of special assessment rolls for the establishment or maintenance of inland lake levels and dams. The circuit court properly determined that the appeal procedure was not subject to the requirements of the Drain Code.

2. The circuit court properly determined that the appeal in this case is governed by MCR 7.105. That court rule applies to administrative proceedings, the proceedings in this case are analogous to proceedings under the Drain Code, and Drain Code proceedings are administrative proceedings.

3. A hearing conducted pursuant to the ILLA satisfies due process requirements if it allows a circuit court to ensure that a

county has considered the varying public interests in reaching its policy decision and protects the public against arbitrary governmental action. The property owners in this case were not deprived of their rights to due process of law. They were provided notice of, and an opportunity to be heard at, the hearing conducted by the drain commissioner, the meeting held by the county board of commissioners, and the hearing conducted by the circuit court.

Affirmed.

TAXATION — INLAND LAKE LEVEL ACT — SPECIAL ASSESSMENTS — CIRCUIT COURT REVIEW.

An appeal in the circuit court of a special assessment roll approved by a county board of commissioners pursuant to the Inland Lake Level Act is not governed by the appellate procedures specified in the Drain Code; the court rule on appeals from administrative agencies in contested cases applies to such an appeal (MCL 324.30714[4]; MCR 7.105).

David E. Oppliger, PLLC (by *David W. Oppliger*), for private property owners in the Chappel Dam assessment district.

Braun Kendrick Finkbeiner, P.L.C. (by *C. Patrick Kaltenbach* and *William S. Cook*), for the Gladwin County Drain Commissioner and the Gladwin County Board of Commissioners.

Before: MURRAY, P.J., and O'CONNELL and DAVIS, JJ.

PER CURIAM. Petitioners appeal as of right an order of the circuit court granting respondents' motion to affirm respondents' special assessment roll and dismissing petitioners' appeal of the special assessment roll. We affirm.

I. FACTS

Chappel Dam is located on Wiggins Lake in Sage Township, Gladwin County. As far back as 2001, the Department of Environmental Quality communicated

with the Gladwin County Drain Commissioner, Sherry Augustine, that Chappel Dam required substantial repair and was a public health hazard. The costs of repairing the dam were estimated at $2.04 million and were to be divided among the property owners in a special assessment district, the county, and the township. The apportionment of the costs was computed on the basis of a determination of the relative benefit that each of the entities derived from the lake. The drain commissioner determined that two percent of the costs would be paid by the county, three percent by the township, and 95 percent by the property owners in the special assessment district. In previous special assessment rolls regarding the lake, the county was assessed 25 percent of the costs.

After determining the apportionment, pursuant to the Inland Lake Level Act (ILLA), MCL 324.30701 *et seq*., the drain commissioner held a public hearing in which many property owners in the Chappel Dam assessment district protested the apportionment. The next day the Gladwin County Board of Commissioners approved the special assessment roll, and ten days later respondents filed an appeal of the special assessment roll in the Gladwin Circuit Court. Seven days after the filing, a hearing was held and the parties were given five more days to file supplemental briefs. The circuit court then granted respondents' motion to affirm and dismissed petitioners' appeal. In affirming, the circuit court concluded that the commissioner's determination was rationally based, supported by more than a scintilla or preponderance of the evidence, and not arbitrary, capricious, fraudulent, or manifest error. The court determined that the commissioner properly based the apportionment on statewide research, lot size, and relative benefit derived from the lake.

II. ANALYSIS

On appeal, petitioners' arguments focus on how this case was handled procedurally by the circuit court. Specifically, petitioners' argument is that the circuit court erred by not applying the statutory review procedures set forth in the Drain Code, MCL 280.1 *et seq*., and misapplied the court rules by not allowing 14 days for petitioners to respond to respondents' motion to affirm. Therefore, petitioners claim, they were denied their due process rights without an opportunity to present evidence and question the drain commissioner to establish that the special assessment rolls were arbitrarily established. Questions of law are reviewed de novo, *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998), and statutory interpretation is a question of law. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 393; 651 NW2d 756 (2002).

As noted, petitioners challenge the process used in the appeal of the special assessment roll. The special assessment roll was determined to be in compliance with the procedures of the ILLA.[1] As a whole, the act authorizes counties to make policy determinations regarding the levels of their inland lakes and to build and finance dams as necessary to maintain the desired lake levels. *In re Van Ettan Lake,* 149 Mich App 517, 525-526; 386 NW2d 572 (1986). The initial appeal of the special assessment roll was filed in the circuit court in compliance with the ILLA. MCL 324.30714(4). In hearing and deciding respondents' motion to affirm and dismissing the case, the circuit court relied on court

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[1] The ILLA, MCL 281.61 to 281.86, was repealed in 1994 and reenacted without substantive change as Part 307 of the Natural Resource Environmental Protection Act in 1995. MCL 324.30701 *et seq.*; see *Yee, supra* at 386.

rules governing appeals from administrative agencies in contested cases. MCR 7.105.

Petitioners assert that the circuit court abrogated the appeals process by not following the appeals procedures provided in the Drain Code as mandated by the ILLA. The ILLA states in part:

> The special assessment district may issue bonds or lake level orders in anticipation of special assessments. All proceedings relating to the making, levying, and collection of special assessments authorized by this part and the issuance of bonds or lake level orders in anticipation of the collection of bonds or orders shall conform as nearly as possible to the proceedings for levying special assessments and issuing special assessment bonds or lake level orders as set forth in the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630. [MCL 324.30705(1).]

The Drain Code provides the following procedure for appeal in the probate court:

> The owner of any land in the drainage district or any city, township, village, district or county having control of any highway which may feel aggrieved by the apportionment of benefits so made by the commissioner, may, within 10 days after the day of review of such apportionments, appeal therefrom and for such purpose make an application to the probate court of the proper county for the appointment of a board of review, by filing with said probate court a notice of appeal and at the same time filing with said court a bond in such sum as the judge of probate may require, with 1 or more sureties to be approved by the judge of probate, conditioned upon the payment of all costs in case the apportionment made by the commissioner shall be sustained. . . . [MCL 280.155.]

Then a three-person panel is appointed by the probate court to review the apportionment:

> The probate court upon receipt of any such application as hereinbefore provided for shall forthwith notify the

> commissioner in writing of such appeal, and shall thereupon make an order appointing 3 disinterested and competent freeholders of such county, not residents of the township or townships affected by said drain, as members of a board of review. The persons so appointed shall constitute the board of review. The court shall thereupon, with the concurrence of the commissioner, immediately fix the time and place when and where said board of review shall meet to review said apportionments, which time shall not be less than 10 nor more than 15 days from the date of filing such appeal. The commissioner shall thereupon give notice to the persons so appointed of their appointment and of the time and place of meeting, and shall give notice of such meeting by posting notices in at least 5 public places in each township forming a part of the drainage district, and shall serve a like notice upon the appellant if he be a resident of any township affected. Such notice shall be made not less than 5 days before the day of hearing and shall be made by personal service. Proof of service of notice of appeal shall be made by the person serving said notice and be filed in the office of the judge of probate. At such hearing the board of review shall have the right, and it shall be their duty, to review all apportionments for benefits made by the commissioner on such drain. The persons so appointed shall be sworn by the commissioner to faithfully discharge the duties of such board of review. [MCL 280.156.]

In contrast, the ILLA provides a less elaborate mechanism for review. It states, "The special assessment roll with the assessments listed shall be final and conclusive unless appealed in a court within 15 days after county board approval." MCL 324.30714(4).

The circuit court's interpretation of the statutes was that the Legislature specifically provided for a circuit court review and knowingly excluded from the ILLA the Drain Code's procedures for review. We agree.

Statutory language can be rendered ambiguous by its interaction with other statutes. *Ross v Modern Mirror*

& Glass Co, 268 Mich App 558, 562; 710 NW2d 59 (2005). Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law. *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007). The object of the *in pari materia* rule is to effectuate the legislative purpose as found in harmonious statutes. *People v Shakur*, 280 Mich App 203, 209-210; 760 NW2d 272 (2008). If two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.*

The primary goal of judicial interpretation of statutes is to determine and implement the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). In *Yee*, this Court determined that the purpose of the ILLA is " 'to provide for the determination and maintenance of the normal height and level of the waters in inland lakes of this state, for the protection of the public health, safety and welfare and the conservation of the natural resources of this state.' " *Yee, supra* at 396 (citation omitted). By enacting such a comprehensive scheme for the establishment and maintenance of legal lake levels, including the maintenance of dams, the Legislature has signified its intent to give the circuit court sole authority to review such a proceeding. See *id.* at 395-396, 398. Conversely, the Drain Code provides "a full and complete procedure for reviewing the drain proceedings and, in the absence of fraud, the statutory procedures and the reviews provided are exclusive." *Battjes Builders v Kent Co Drain Comm'r*, 15 Mich App 618, 624; 167 NW2d 123 (1969).

The specific words of the Drain Code state that any owner of land in a drainage district may appeal an apportionment and a board of review will consider the benefits of the drain. See MCL 280.155; MCL 280.156.

The statute clearly refers to reviewing the apportionment for establishing a drain. The ILLA, in contrast, specifically provides for the maintenance of water levels and dams and provides a review process. It is apparent that the Legislature has provided different review procedures for drains and dams.

Petitioners maintain that the ILLA states that the Drain Code appeal procedures must be used. However, the ILLA imposes no such requirement. Instead, the ILLA provides for the use of Drain Code procedures to be followed as close as possible in the "proceedings for levying special assessments and issuing special assessment bonds . . . ." MCL 324.30705(1). Rather than repeat the procedures for levying special assessments, the Legislature refers those who use the ILLA for lake levels to the Drain Code for details of how to issue a special assessment, regardless of the purpose. Similarly, the Legislature provided for a notice of hearing in the ILLA and then referred users to tax provisions to detail the exact process of providing notice. MCL 324.30714(2)(b). The ILLA makes no such reference to the Drain Code concerning the review process. We therefore agree with the circuit court that a harmonious reading of the ILLA and the Drain Code is that the ILLA refers to the Drain Code for the procedures to levy special assessments and issue special assessment bonds, but provides different appeal procedures for the establishment of dams and the establishment and maintenance of lake levels.

We also agree with the trial court that MCR 7.105 is the most applicable court rule to this type of appeal because the appeal was filed in circuit court and proceedings under the analogous Drain Code, other than condemnation proceedings, are administrative proceedings. *Barak v Oakland Co Drain Comm'r*, 246 Mich App

591, 597; 633 NW2d 489 (2001).[2] Moreover, none of the other rules within MCR 7.101 *et seq*. applies. Since MCR 7.105(L) allows a trial court to shorten the time for briefs and hearings—a fact conceded by petitioners in the trial court—the 11-day period used by the trial court was permissible.

Petitioners also assert, citing *Westland Convalescent Ctr v Blue Cross & Blue Shield of Michigan*, 414 Mich 247, 268; 324 NW2d 851 (1982), that the review process used in this case deprived them of their constitutional right to due process of law, in that they should have had an opportunity to develop facts and to cross-examine the drain commissioner about the decision she made. What kind of hearing is due depends on the interests involved. *Id.* at 267. The right to due process of law is a flexible concept and must be analyzed by considering the particular circumstances presented in a given situation. *In re Van Ettan Lake, supra* at 526.

The ILLA guarantees notice and an opportunity to be heard before the determination of a special assessment roll. MCL 324.30714. This Court has determined that the hearing contemplated under the ILLA does not require a full trial. In *In re Van Ettan Lake, supra* at 526-527, this Court determined that the interests being protected by a hearing under the ILLA are those of the public being apprised of governmental actions and having an opportunity to present opposing viewpoints. This Court explained that the focus of the act is clearly on the public welfare, and not on individual riparian rights, because its purpose is to authorizes counties to make policy decisions about inland lake levels, and build and finance dams as necessary to maintain the desired lake levels. *Id.* at 525-526. In *Barak, supra* at

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[2] The Drain Code was one of three parts of Michigan law that determined the special assessment roll procedures.

602, this Court held that the role of the trial court in a Drain Code proceeding is limited to reviewing the record for competent, material, and substantial evidence supporting the commissioner's decision. This Court concluded that the trial court adequately made its determination by reviewing the matter pursuant to a motion for summary disposition. *Id.*

For purposes of the ILLA, a sufficient hearing is one that (1) allows the circuit court to ensure that the county has considered the varying public interests in reaching its policy decision and (2) protects the public against arbitrary governmental action. *In re Van Ettan Lake, supra* at 526-527. Here, all interested persons were properly notified of the hearing regarding the special assessment roll. A hearing was held at which petitioners registered their protests and the reasons for protesting, and the commissioner explained and took questions about her apportionment. The petitioners then had an opportunity to be heard at the county commissioners' meeting in which the roll was approved. Lastly, petitioners presented their arguments in a trial brief and at the hearing on the motion before the circuit court. The court considered all the evidence and welcomed any pertinent information in the parties' briefs. Opportunity to be heard was provided, and the court then decided that there was sufficient evidence to support the commissioners' decision.[3] Accordingly, petitioners were not denied their constitutional rights to due process of law.

No costs are awarded; a public question was involved. MCR 7.219(A).

Affirmed.

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[3] Again, this substantive issue is not before us.

PARENT v PARENT

Docket No. 287543. Submitted January 13, 2009, at Detroit. Decided January 22, 2009, at 9:05 a.m.

The Oakland Circuit Court, in a divorce action brought by Robert A. Parent against Barbara L. Parent, awarded the parties joint legal custody of their daughter and awarded the defendant sole physical custody of the child. After the child was homeschooled by the defendant for kindergarten and the parties could not agree on a plan for the child's future education, the plaintiff moved for a court order directing that the child attend public school. The court, Linda S. Hallmark, J., granted the motion. The defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by failing to make a determination regarding the child's established custodial environment. Changing a child's school does not constitute a change of the established custodial environment. The plaintiff does not have to prove by clear and convincing evidence that the modification he sought is in the child's best interest; he need only prove by a preponderance of the evidence that the modification is in the child's best interest.

2. The trial court erred by failing to consider the statutory best-interest factors, MCL 722.23, when making its determination. If parents who share joint legal custody of a child are unable to agree on the child's schooling, the trial court must resolve the dispute according to the child's best interest. This case must be remanded to allow the trial court to state its findings and conclusions with regard to the statutory best-interest factors, or, if necessary, to conduct a new hearing that may include consideration of up-to-date evidence.

Remanded.

1. DIVORCE — CHILD CUSTODY — CHANGE OF SCHOOLS.

Changing the school a child of divorced parents attends does not constitute a change in the child's established custodial environment; the parent seeking to effectuate the change through a modification of the child-custody provisions of a divorce judgment

must prove by a preponderance of the evidence that the change is in the child's best interest (MCL 722.23; MCL 722.27[1][c]).

2. DIVORCE — CHILD CUSTODY — CHILDREN'S EDUCATION.

A dispute between divorced parents who share joint legal custody of a child over the child's schooling must be resolved by the court according to the child's best interests (MCL 722.23; MCL 722.27[1][c]).

Hardig & Hardig, PLLC (by *Joseph L. Hardig, III*), for the plaintiff.

David A. Kallman for the defendant.

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

PER CURIAM. Defendant appeals as of right the trial court's order granting plaintiff's motion to enroll the parties' minor daughter in public school. We remand for further proceedings.

The parties were divorced on May 31, 2007, pursuant to a consent judgment of divorce. The parties share joint legal custody of their two children, and defendant received sole physical custody of the children. The consent judgment of divorce contained a provision regarding the children's[1] education:

> The parties agree that the minor children are currently being home schooled. They further agree that they will decide by August 15, 2007, whether they will continue to home school Emily and the details of her home schooling should they continue to do so. In addition, they agree that if they cannot agree that they will mediate the issue with [Ellen M. Craine]. If mediation fails, the parties will mutually agree upon an arbitrator.

Defendant began homeschooling Emily after the parties separated in December 2005, and continued to do so

[1] Only the education plan of the older child, Emily, is at issue in this case; the younger child is not yet of school age.

through Emily's kindergarten year. Plaintiff then filed a motion to enroll Emily in public school. The trial court granted that motion, and from that grant defendant now appeals.

Defendant first argues that the trial court should have made a determination regarding Emily's established custodial environment in order to determine plaintiff's burden of proof. We disagree.

In custody cases, all orders and judgments by the trial court shall be affirmed unless "the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Statutory interpretation is a question of law that this Court reviews de novo. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004). The issue of what burden of proof is to be applied in the instant situation is also a question of law. *Pickering v Pickering*, 253 Mich App 694, 698; 659 NW2d 649 (2002). Defendant did not preserve this issue for appeal by failing to raise it in the trial court; however, because it is a question of law that can be decided on the facts presented, we will consider it.

A court may modify or amend a child custody order "for proper cause shown or because of a change of circumstances." MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). Further, a court may not change a child's established custodial environment unless the moving party proves by clear and convincing evidence that the change is in the child's best interest. MCL 722.27(1)(c); *Berger v Berger*, 277 Mich App 700, 710; 747 NW2d 336 (2008). There appears to be no serious dispute that Emily has an established custodial environment with defendant. However, plaintiff appears to be seeking only a change

in Emily's educational environment, not her custodial environment. We are unable to find any Michigan law referring to an "established custodial/educational environment," which defendant contends the trial court should have considered.

Rather, MCL 722.27(1)(c) provides, in part:

> 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. The custodial environment of a child 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered. [Emphasis added.]

Plainly, not all modifications to previous judgments or orders require the heightened "clear and convincing evidence" standard of proof; rather, the burden of proof is heightened for only those modifications that change the child's established custodial environment. *Berger*, *supra* at 706. Changing the child's school does not constitute a change of custodial environment under the above definition. Therefore, the modification at issue here did not require the moving party to demonstrate clear and convincing evidence that the change is in the child's best interest; rather, the burden of proof in such circumstances is a preponderance of the evidence that the change is in the child's best interest. The trial court did not plainly err by failing to make a determination regarding an established custodial environment.

Defendant next argues that the trial court erred by failing to consider all the statutory best interest factors

in making its determination on this custody issue. On the basis of what we can discern from the record, we agree.

This Court stated in *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 295-296; 750 NW2d 597 (2008):

> When parents have joint legal custody of a child, the parents shall share decision-making authority as to the important decisions affecting the welfare of the child. Because [the child's] placement in a particular school district is an important decision affecting his welfare, both [parents] must agree on that decision. If they are unable to agree, the trial court must resolve the dispute according to [the child's] best interest. [Citations and quotation marks omitted.]

Further, when making a determination regarding a child's best interest, a trial court is required to state its factual findings and conclusions with regard to each relevant statutory best interest factor listed in MCL 722.23. *Rittershaus v Rittershaus*, 273 Mich App 462, 472-475; 730 NW2d 262 (2007). If a trial court fails to make reviewable findings of fact, the proper remedy is a remand for a new hearing. *Id*. at 475-476; *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993).

The trial court expressly stated that it did not believe that it had to address all the best interest factors in this case because the custody modification pertained only to education. This is not an unreasonable, or even necessarily incorrect, view: the modification at issue does not, as discussed, change the child's custodial environment, and some of the factors may not even be relevant. Thus, the trial court was partially correct in holding that such a limited change as the one at bar would not require exhaustive consideration of all factors or that all those factors are of equal weight. However, in a child

custody dispute, the "best interests of the child" is defined by statute as including a consideration of *all* factors enumerated in MCL 722.23. The trial court must at least make explicit factual findings with regard to the applicability of each factor.

This matter must be remanded to the trial court to afford the trial court the opportunity to place on the record its findings regarding the best interest factors enumerated in MCL 722.23, or, if necessary, a new hearing that may include consideration of up-to-date evidence. In the interests of maintaining as stable an environment for the child as possible, the trial court's present order shall remain in effect until the trial court has the opportunity to issue a new order based on the above analysis or hearing. We do not retain jurisdiction.

Remanded.

MARTIN v LEDINGHAM

Docket No. 280267. Submitted January 6, 2009, at Lansing. Decided January 27, 2009, at 9:00 a.m. Leave to appeal sought.

Sherri Martin brought a medical malpractice action in the Emmet Circuit Court against David Ledingham, M.D., and others, including Northern Michigan Hospital. The plaintiff alleged in part that the negligence of the hospital's nurses in failing to report her worsening postsurgical condition to physicians involved in her care was the proximate cause of her injuries. The court, Charles W. Johnson, J., granted summary disposition for the hospital, relying on affidavits from two physicians stating that they would not have changed the course of the plaintiff's treatment had the hospital's nurses informed them of the plaintiff's condition. The plaintiff appealed.

The Court of Appeals *held*:

The trial court properly granted summary disposition. Proof of causation requires both cause in fact and legal, or proximate, cause. The plaintiff presented deposition testimony suggesting that the standard of care required the hospital's nurses to provide earlier and better reports regarding the plaintiff's postsurgical condition to the operating surgeon and, if necessary, to other physicians higher in the chain of command. This evidence, however, was insufficient to create a genuine issue of material fact on the issue of causation because it only concerned what hypothetical physicians should have done had better reports been made. In contrast, the physicians actually involved in the plaintiff's care testified that they would not have changed the plaintiff's care or treatment had the nurses reported in the manner that the plaintiff alleged was necessary. The facts did not establish a reasonable inference of causation, and a finding of causation from these facts would at best be mere speculation. Liability can be imposed for failure to adequately report to a physician only if the physician would have altered a diagnosis or treatment had he or she received a better or earlier report.

Affirmed.

NEGLIGENCE — MEDICAL MALPRACTICE — PHYSICIANS AND SURGEONS — REPORTS OF PATIENT'S CONDITION.

The failure of a hospital nurse to adequately report a patient's postsurgical condition to a physician does not constitute the cause in fact of the patient's injuries if the physician would not have altered a diagnosis or treatment had he or she received a better or earlier report.

Sommers Schwartz, P.C. (by *Samuel A. Meklir*), for Sherri Martin.

Brian R. Garves for Northern Michigan Hospital.

Before: TALBOT, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order granting summary disposition to Northern Michigan Hospital (defendant). This case arises from a surgical procedure performed on plaintiff and the care that followed. Plaintiff alleges that defendant's nurses were negligent in their failure to report her worsening postsurgical condition to physicians and that this negligence was the proximate cause of her injuries. We conclude that, because there was no evidence showing that plaintiff's treatment would have been changed if better reporting had occurred, the trial court properly granted summary disposition. We have decided this appeal without oral argument pursuant to MCR 7.214(E).

Following the voluntary dismissal of the doctors who were sued in this case, defendant moved for summary disposition. It relied on affidavits from Dr. David Rynbrandt and Dr. Jeffrey Beaudoin stating that they would not have changed the course of plaintiff's treatment had nurses employed by defendant informed them of plaintiff's condition as plaintiff alleged they should have. Thus, defendant argued, plaintiff could not show that the alleged negligence of defendant's nurses was

the proximate cause of her injuries. The trial court agreed and granted the motion.

On appeal, plaintiff contends that summary disposition was inappropriate because she had produced evidence showing that, had the nurses properly reported, a notified doctor would have had the duty to change plaintiff's treatment. So, plaintiff argues, the affidavits of Dr. Rynbrandt and Dr. Beaudoin do not preclude plaintiff from presenting her failure-to-report theory to a jury. Additionally, plaintiff contends that those doctors' affidavits involved issues of credibility and state of mind and that summary disposition was not appropriate in light of those issues. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted, MCR 2.116(G)(5), in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and all reasonable inferences must be drawn in favor of the nonmovant, *Scalise, supra* at 10. The party opposing the motion must show that a genuine issue of disputed fact exists by producing

evidentiary materials setting forth specific facts. MCR 2.116(G)(4); *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). The disputed factual issue must be material to the dispositive legal claims. *Auto Club Ins Ass'n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). Speculation and conjecture are insufficient to create an issue of material fact. *Ghaffari v Turner Constr Co (On Remand),* 268 Mich App 460, 464; 708 NW2d 448 (2005).

Proof of causation requires both cause in fact and legal, or proximate, cause. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). Cause in fact generally requires a showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Craig v Oakwood Hosp*, 471 Mich 67, 86-87; 684 NW2d 296 (2004). Cause in fact may be established by circumstantial evidence, but, to be adequate, such evidence must give rise to reasonable inferences of causation, not mere speculation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994).

As cause-in-fact evidence, plaintiff presented deposition testimony from both a doctor and a nurse suggesting that the standard of care required defendant's nurses to provide earlier and better reports regarding plaintiff's postsurgical condition, both to the operating surgeon and up the chain of command beyond that physician if no appropriate action was taken. The doctor further testified that, had that occurred, a different course of treatment should have been undertaken that would have prevented or mitigated plaintiff's injuries.

This evidence was insufficient to create a genuine issue on factual causation because it only concerned what hypothetical doctors should have done had better

reports been provided.[1] In contrast to that, the real doctors involved with plaintiff's care testified about what they would actually have done had they received the nurse reports plaintiff claims should have been made. Dr. Rynbrandt, who had performed the surgery on plaintiff, was aware of postsurgical complications shortly thereafter and took steps to address them. Plaintiff's claim is that defendant's nurses should have done more to inform Rynbrandt about further developments in the complications. However, in his affidavit, Rynbrandt repeatedly stated that he had ample information regarding plaintiff and her situation throughout the period during which plaintiff alleges care was deficient, that he reviewed plaintiff's chart and was otherwise adequately apprised of developments, and that nothing the nurses could have done differently would have altered the care that he provided plaintiff.

Similarly, there is no factual support for plaintiff's claim that, had defendant's nurses gone up the chain of command to someone with higher authority, a better course of treatment would have been provided. Dr. Beaudoin was the chair of the general surgery section at the hospital, with authority over Dr. Rynbrandt. Dr. Beaudoin became involved with plaintiff's care about a week after the initial surgery and ultimately performed a second operation to address her complications. He testified by affidavit that, had he been called into the case earlier as plaintiff alleges the nurses should have done, he would have examined plaintiff and discussed

[1] Considering plaintiff's hypothetical argument, we note that, had the doctors negligently failed to change plaintiff's treatment upon receiving better reports from defendant's nurses, no liability would be imposed on defendant as a result. Had all this occurred, those facts could well present another theory of liability against the doctors, but, unlike the nurses, they are not agents of the hospital. See *Seef v Ingalls Mem Hosp*, 311 Ill App 3d 7, 16; 724 NE2d 115 (1999).

her care with Rynbrandt. However, Dr. Beaudoin further testified that his earlier involvement would have yielded no additional information not already available to Dr. Rynbrandt and that he would not have suggested or requested any change in the care or treatment being provided by Dr. Rynbrandt.

In sum, the facts presented in this case demonstrate that, had defendant's nurses made the reports plaintiff alleges they should have, plaintiff's care and treatment would not have been changed whatsoever. Thus, the facts simply do not support plaintiff's claim that the nurses' failure to report was a cause in fact of the injuries she suffered as a result of her postsurgical treatment. The facts did not establish a "reasonable inference[] of causation," and a finding of causation from these facts would be "mere speculation" at best. *Skinner*, *supra* at 164. We note that courts in other states have similarly concluded that liability can be imposed for a failure to adequately report to a physician only if the physician would have, in fact, altered a diagnosis or treatment had a better or earlier report been received. See, e.g., *Albain v Flower Hosp*, 50 Ohio St 3d 251, 265; 553 NE2d 1038 (1990), overruled on other grounds by *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435 (1994); *Seef v Ingalls Mem Hosp*, 311 Ill App 3d 7, 19-20; 724 NE2d 115 (1999).

Finally, we conclude that a fact-finder's determination that there was cause in fact merely because the fact-finder disbelieved the doctors involved would be exactly the kind of speculation that *Skinner* disapproved in the absence of any affirmative cause-in-fact proof advanced by plaintiff. See also MCR 2.116(G)(4) (indicating that plaintiff was required to "set forth specific facts" in response to defendant's summary

disposition motion). We conclude that the trial court properly granted defendant summary disposition under the principles explained by our Supreme Court in *Skinner*.

In light of our resolution of this issue, we need not consider defendant's other argument.

We affirm.

LANSING SCHOOLS EDUCATION ASSOCIATION, MEA/NEA v LANSING BOARD OF EDUCATION

Docket No. 279895. Submitted December 2, 2008, at Lansing. Decided January 27, 2009, at 9:05 a.m. Leave to appeal sought.

The Lansing Schools Education Association, MEA/NEA, and four of its member teachers who alleged that they were physically assaulted by students in grade six or above brought an action in the Ingham Circuit Court against the Lansing Board of Education and the Lansing School District. The plaintiffs sought a declaratory judgment regarding the parties' rights and legal relations under MCL 380.1311a, which concerns physical assaults by students in grade six or above against a person employed by or engaged as a volunteer or contractor by a school board. The plaintiffs also sought a writ of mandamus ordering the defendants to expel, rather than suspend, the students and a permanent injunction prohibiting the defendants from allegedly violating the statute in the future. The court, Thomas L. Brown, J., granted summary disposition for the defendants, ruling that the school board has the discretion to determine whether a physical assault occurred within the meaning of the statute and concluding that the court should not oversee the individual disciplinary decisions of a local school board. The plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court correctly dismissed the teachers' claims because they failed to establish the elements of constitutional standing. The injuries that the teachers sustained were not caused by the defendants. Therefore, the cited "injuries in fact" do not meet the injury-in-fact element of constitutional standing. The injuries were caused by students who are not parties to the action and there is no connection between the injuries alleged and any conduct by the defendants. Therefore, the teachers failed to meet the causal-connection element of constitutional standing.

2. The teachers' allegation that they were injured by the defendants' failure to expel the students because the defendants' inaction invaded the teachers' legally protected interest in working in a safe school environment does not give them standing because the alleged injury is not concrete, particularized, actual, or imminent.

3. The Lansing Schools Education Association, MEA/NEA also lacks standing. Because the members lack standing as individual plaintiffs, the organization also lacks standing to bring suit.

4. The Legislature may not confer standing on a party that does not meet the constitutional test for standing because doing so violates the separation of powers. Except in a few narrowly prescribed circumstances not applicable here, if a party lacks constitutional standing, a claim may not proceed on the basis of statutorily conferred standing. Therefore, there is no need to analyze whether MCL 380.1311a confers standing on the plaintiffs in this case.

Affirmed.

1. ACTIONS — STANDING — CONSTITUTIONAL STANDING.

Constitutional standing to bring an action, at a minimum, consists of three elements: first, the plaintiff must have suffered an injury in fact, an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct complained of, the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

2. ACTIONS — STANDING — ORGANIZATIONS' STANDING TO BRING ACTIONS.

An organization lacks standing to bring an action to advocate the interests of its individual members if the individual members lack standing to bring the action.

3. ACTIONS — STANDING.

A statute that confers standing to bring an action broader than the limits imposed by the Michigan Constitution is unconstitutional; the Legislature may not confer standing on a party by statute if the party does not meet the constitutional test for standing.

White, Schneider, Young & Chiodini, P.C. (by *Michael M. Shoudy* and *Dena M. Lampinen*), for the plaintiffs.

Thrun Law Firm, P.C. (by *Donald J. Bonato* and *Margaret M. Hackett*), for the defendants.

Before: SAAD, C.J., and FITZGERALD and BECKERING, JJ.

SAAD, C.J. Plaintiffs appeal the trial court's order that granted summary disposition to defendants. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs, Lansing Schools Education Association, MEA/NEA, Cathy Stachwick, Penny Filonczuk, Ellen Wheeler, and Elizabeth Namie, filed their complaint for a declaratory judgment, a writ of mandamus, and injunctive relief on April 9, 2007. Stachwick, Filonczuk, Wheeler, and Namie are teachers in the Lansing public school system and are members of the Lansing Schools Education Association, MEA/NEA, which is the exclusive bargaining representative for Lansing public school teachers. According to plaintiffs' complaint, students hit two of the teachers with a chair, one student slapped one of the teachers, and one student threw a wristband toward one of the teachers and it struck the teacher in the face. Plaintiffs further assert that school administrators were informed of each incident and the students were suspended, but they were not expelled.

Plaintiffs alleged in their complaint that expulsion of the students is required by § 1311a(1) of the Revised School Code (RSC), MCL 380.1311a(1). Plaintiffs asked the trial court for a declaratory judgment on the rights and legal relations of the parties under the statute. Plaintiffs asserted that each incident constituted a physical assault by a student in grade six or above and that expulsion of each student was mandatory. In addition to a declaratory judgment, plaintiffs asked the trial court for a writ of mandamus ordering defendants to follow the statute and expel the students and to issue a permanent injunction to enjoin defendants from future violations of MCL 380.1311a(1). Plaintiffs further asked the court to find the school officials who failed to

follow the statute guilty of a misdemeanor and to cancel the contract of the school superintendent or principal who failed to comply with the statute.

In lieu of an answer, defendants filed a motion for summary disposition under MCR 2.116(C)(8). Defendants argued that plaintiffs lack standing to assert their claims under the RSC because they have no legally protected interest in the district's decision to suspend or expel students under MCL 380.1311a(1). Defendants further argued that the RSC does not create a private cause of action by teachers or education associations, but merely sets forth the powers and duties of the school board in disciplinary proceedings. According to defendants, a private cause of action cannot be inferred under the statute because exclusive remedies are set forth in MCL 380.1801 to 380.1816. Defendants maintain that, if plaintiffs had standing to bring their claim, MCL 380.1311a(1) provides that the school board has the sole power to determine whether a student physically assaulted a teacher and findings by a school board are generally deemed conclusive by our courts. Defendants claim that plaintiffs are not entitled to a writ of mandamus or declaratory judgment because there is no clear legal right of performance and the decision whether to expel the students involves the exercise of discretion.

In response, plaintiffs asserted that the Legislature enacted MCL 380.1311a(1) to provide safe environments for teachers and, therefore, teachers have a legal interest in teaching in a safe environment. Plaintiffs further asserted that the plaintiff teachers suffered injuries in fact when they were assaulted and their legally protected interest in their own safety was invaded when the assaults occurred. Further, plaintiffs opined, "By refusing to expel students as required by

statute, Defendants invaded the Plaintiff Teachers' legally protected interest in having a safe work environment . . . ." According to plaintiffs, they have standing to assert their claims for the above reasons and because, as a remedial statute, MCL 380.1311a(1) should be liberally construed in favor of the teachers. Alternatively, plaintiffs argue that a private cause of action should be inferred because there is no other adequate remedy or procedure to enforce the statute. Plaintiffs also maintained that the school board does not have the exclusive power to determine whether an assault occurred and that its duty to expel a student who commits an assault is not discretionary.

The trial court heard oral argument on June 20, 2007, and granted defendants' motion for summary disposition. The trial court reasoned that, while MCL 380.1311a(1) requires the expulsion of a student who commits a physical assault, the Lansing School Board has the discretion to determine whether a physical assault occurred within the meaning of the statute. The court further concluded that trial courts should not oversee the individual disciplinary decisions of a local school board. Accordingly, the court issued a written order that granted summary disposition to defendants.

II. ANALYSIS

A. SUMMARY OF HOLDING

This case centers on the question whether plaintiff teachers and their union have standing to maintain their lawsuit against the defendant school board and district. Standing is a constitutional principle that ensures that the judiciary considers only those cases in which a claimant has, or is about to suffer, a concrete injury. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726,

734; 629 NW2d 900 (2001). As our Supreme Court reiterated in *Lee*, " '[i]t is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.' " *Id.* at 735-736, quoting *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996). Constitutional standing requires a three-part analysis of whether a plaintiff has suffered an injury in fact caused by the defendant, and whether that injury can be redressed by the court.

Plaintiffs claim that they have established each element of constitutional standing. However, under well-established Michigan law, we must disagree. At the same time, we are aware that the safe schools legislation at issue here is intended to make schools safer for both students and teachers and it is unfortunate that the statute does not confer a right to require enforcement of provisions of the safe schools act if the school board fails to comply with the law or for teachers to pursue claims under the act when they experience the kind of student behavior cited in plaintiffs' complaint.[1]

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[1] In other factual contexts, federal courts have found an implied private cause of action for damages for students or teachers under federal statutes if a school district fails to take appropriate action in the face of continued, discriminatory harassment, e.g., *Gebser v Lago Vista Independent School Dist*, 524 US 274; 118 S Ct 1989; 141 L Ed 2d 277 (1998); *Davis v Monroe Co Bd of Ed*, 526 US 629; 119 S Ct 1661; 143 L Ed 2d 839 (1999); *Patterson v Hudson Area Schools*, 551 F3d 438 (CA 6, 2009); *Plaza-Torres v Rey*, 376 F Supp 2d 171 (D PR, 2005), but see *Stevenson v Martin Co Bd of Ed*, 2001 WL 98358 (CA 4, 2001), and *Moore v Dallas Independent School Dist*, 557 F Supp 2d 755 (ND Tex, 2008) (rejecting 42 USC 1983 claims for injuries caused by student violence). In some state cases, courts have held that liability may be imposed on a school board or district for a teacher's injuries if administrators assumed a duty to act on the teacher's behalf and knew that a failure to act could result in harm, e.g., *Taubin v City of New York*, 187 Misc 2d 327; 723 NYS2d 601 (2001).

However, it is within the province of the Legislature to enact such a process and we are bound by the language of the statute.

Plaintiffs argue that the statute at issue, MCL 380.1311a(1), directly, and by implication, confers standing on them to bring this action. However, our courts have held that, in almost all cases, if a plaintiff has not met the constitutional minimum criteria for standing, he or she may not proceed on the theory that standing is statutorily conferred because to do so "would inappropriately involve the judiciary in 'deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government.' " *Michigan Ed Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 8; 724 NW2d 478 (2006), quoting *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 615; 684 NW2d 800 (2004). Accordingly, and because plaintiffs have failed to satisfy the constitutional standing requirement, the trial court properly dismissed their case.

B. LAW AND ANALYSIS

Plaintiffs filed their complaint pursuant to MCL 380.1311a, which provides, in relevant part:

In contrast, here, plaintiffs seek to compel the school board to expel each student for an individual assault against one of their teachers. Plaintiffs do not allege any discriminatory or ongoing harassment and they do not seek monetary damages. Accordingly, the theories raised in the above cases offer little guidance for our analysis. We note, however, that other federal courts have specifically held that no private cause of action arises under the federal Safe and Drug-Free Schools and Communities Act, 20 USC 7101 *et seq*., because, like here, the statute does not create an enforceable substantive right and does not put schools on notice that they can be sued for violating its terms. See *Stevenson, supra*.

> (1) If a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board and the physical assault is reported to the school board, school district superintendent, or building principal by the victim or, if the victim is unable to report the assault, by another person on the victim's behalf, then the school board, or the designee of the school board as described in section 1311(1) on behalf of the school board, shall expel the pupil from the school district permanently, subject to possible reinstatement under subsection (5). A district superintendent or building principal who receives a report described in this subsection shall forward the report to the school board.
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> * * *
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> (12) As used in this section:
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> * * *
>
> (b) "Physical assault" means intentionally causing or attempting to cause physical harm to another through force or violence.

i. CONSTITUTIONAL STANDING

Defendants argued in the trial court that plaintiffs lack constitutional standing to maintain their claim. As summarized above, "[t]he concept of standing in the context of a legal proceeding means that a party must have suffered an actual, particularized impairment of a *legally protected* interest, that the opposing party can in some way be shown to be responsible for that impairment, and that a favorable decision by a court could likely redress that impairment." *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008) (emphasis in original). Accordingly, as our Supreme Court explained in *Nat'l Wildlife Federation, supra* at 628-629:

> At a minimum, standing consists of three elements:
>
> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " [Citations omitted.]

The trial court correctly dismissed plaintiffs' claims because they failed to establish the elements of constitutional standing. Plaintiffs alternatively characterize their "injury in fact" as the individual "physical assaults" endured by the four teachers and the school board's failure to expel the four students. On one hand, the allegations indicate that the students struck each teacher and, therefore, the teachers sustained what could be characterized as "injuries." However, these injuries are not traceable to defendants. Neither the school board nor the school district caused the teachers' injuries and, therefore, these cited "injuries in fact" do not meet the second element of standing. The injuries were caused by students who are not parties to this action and there is no connection between the injuries alleged and any conduct by defendants.[2]

Plaintiffs also claim, however, that they were injured by defendants' failure to expel the four students because defendants' inaction allegedly invaded the plaintiff teachers' legally protected interest in working in a safe school environment. We hold that this asserted injury does not confer standing because it is not con-

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[2] Indeed, nothing prohibits teachers from filing claims against those who have committed torts or engaged in criminal behavior.

crete, particularized, actual, or imminent. Though we agree that teachers have an interest in working under safe conditions, this is a general proposition and defendants' failure to expel the four students would only hypothetically invade that interest. It is also conjectural to assume, in light of the conduct set forth in the complaint, that the mere suspension of the students, as opposed to their expulsion, would place the teachers' safety in jeopardy. There is no allegation that the students pose a continuing threat and this does not meet the requirement that a plaintiff's injury be particularized and imminent. For the same reasons, plaintiffs' allegations do not meet the third prong of the test to establish standing. Were plaintiffs to prevail on the writ of mandamus and were the trial court to force the school board to commence expulsion proceedings, it is speculative whether this would redress plaintiffs' alleged injuries. The expulsion proceedings may or may not result in the expulsion of the students, depending on the factual and legal determinations that are the province of the school board. Further, here, the incidents occurred between 2005 and January 2007, and there is no allegation that the students remain in the school or in plaintiffs' classrooms.[3]

For the reasons set forth above, the individual teachers lack standing to sue defendants for their alleged injuries. In turn, the Lansing Schools Education Association, MEA/NEA, also lacks standing. "An organization will have standing to advocate the interests of its members 'where the members themselves have a suffi-

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[3] Defendants asserted in the trial court that only one of the four students returned to the same school after the assault, and none of the students returned to plaintiffs' classrooms. Plaintiffs appear to accept this assertion as true. However, because this Court must limit its review to the allegations in plaintiffs' complaint, we do not rely on this fact as part of our analysis.

cient stake or have sufficiently adverse and real interests in the matter being litigated.' " *MOSES, Inc v Southeast Michigan Council of Government*, 270 Mich App 401, 414; 716 NW2d 278 (2006), quoting *Trout Unlimited, Muskegon-White River Chapter v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992). However, if the members lack standing as individual plaintiffs, the organization also lacks standing to bring suit. *MOSES, supra* at 414. Because the teachers do not have standing, the union also lacks standing.

ii. STATUTORY STANDING

The above analysis addresses plaintiffs' lack of constitutional standing to maintain their claims. Plaintiffs also contend that MCL 380.1311a(1) confers standing to bring a private cause of action to enforce its provisions. "Statutory standing 'simply [entails] statutory interpretation: the question it asks is whether [the Legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.' " *Miller v Allstate Ins Co*, 481 Mich 601, 607; 751 NW2d 463 (2008), quoting *Graden v Conexant Sys, Inc*, 496 F3d 291, 295 (CA 3, 2007) (emphasis in original). However, our courts have held that, except in a few narrowly prescribed circumstances not applicable here,[4] if a party lacks constitutional standing, a claim may not proceed on the basis of statutorily conferred standing. As this Court explained in *Michigan Ed Ass'n, supra* at 9, the Legislature may not confer standing on a party who does not meet the constitutional test for standing because it

[4] These exceptions include "the ability of the Michigan Supreme Court to offer advisory opinions, the ability of taxpayers to sue to enforce the Headlee Amendment, and the ability of any citizen of the state to bring injunctive or mandamus proceedings to enforce state civil service laws." *Michigan Ed Ass'n, supra* at 8 n 1, citing *Nat'l Wildlife Federation, supra* at 624-625.

violates the separation of powers. Citing *Nat'l Wildlife Federation, supra* at 615-616. Indeed, if a statute "confers standing broader than the limits imposed by Michigan's constitution," it is unconstitutional. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 87; 709 NW2d 174 (2005), rev'd in part on other grounds 479 Mich 280 (2007).[5] Accordingly, we need not analyze whether MCL 380.1311a(1) confers standing on plaintiffs because, for the reasons set forth above, plaintiffs have not satisfied the elements of constitutional standing.[6]

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[5] In support of their position, defendants cite an unpublished opinion, *Johnson v Detroit Federation of Teachers*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket No. 256289). In *Johnson*, the plaintiff teacher, Debra Johnson, alleged that she was sexually assaulted by three students at school. None of the students was suspended or transferred out of the school. Among other claims, Johnson sought damages for the school district's alleged failure to expel the students under MCL 380.1311a(1). This Court held that Johnson failed to properly present her issue for appeal, but also ruled that there is no private cause of action under the statute. The Court reasoned that the statute provides no specific right to relief for the plaintiff, and it also contains an adequate means of enforcement of its provisions as set forth in MCL 380.1804. Though *Johnson* is unpublished, MCR 7.215(J)(1), and it involved a claim for damages and this case does not, we agree with the Court's reasoning to the extent that the statute provides for criminal prosecution if a board member fails to comply with the statute.

[6] In any case, the statute does not specifically confer standing on plaintiffs to maintain a cause of action against the school board and district. MCL 380.1311a(1), and the RSC generally, set forth the powers and duties of the school board. Nothing in the plain language of MCL 380.1311a(1) indicates that a teacher may bring a cause of action to ensure that a student is expelled from school. The RSC also contains specific enforcement provisions. Pursuant to MCL 380.1804, "a school official or member of a school board or intermediate school board or other person who neglects or refuses to do or perform an act required by this act, or who violates or knowingly permits or consents to a violation of this act, is guilty of a misdemeanor punishable by a fine not more than $500.00, or imprisonment for not more than 3 months, or both." Thus, a school board member or other official who fails to perform a duty under

For the above reasons, we affirm the trial court's dismissal of plaintiffs' case under MCR 2.116(C)(8). We also observe that the trial court was arguably correct when it opined that, to find that individual teachers have standing to enforce the expulsion provisions in MCL 380.1311a(1) would essentially authorize our courts to review school boards' individual expulsion decisions across the state when teachers or other school personnel disagree with a particular outcome. Not only would this burden our courts, the Legislature's chosen language in no way suggests that it intended for courts to oversee such individual decisions when complaints are brought by third parties. As defendants assert, MCL 380.1311a(1) necessarily requires a school board to use its discretion to determine whether a student has committed a "physical assault" on a school employee, volunteer, or contractor. Pursuant to MCL 380.1311a(12)(b), a " '[p]hysical assault' means intentionally causing or attempting to cause physical harm to another through force or violence." The reporting by a teacher of the conduct outlined in plaintiffs' complaint does not *require* expulsion as plaintiffs maintain. Rather, expulsion is required if the student committed such an assault, but it is necessarily within the

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the act may be held criminally liable, presumably through charges filed by a prosecutor or by the Attorney General's office.

We also disagree with plaintiffs that standing can be *inferred* because the means for enforcing MCL 380.1311a(1) are inadequate. The means of enforcement are set forth in MCL 380.1804, and MCL 380.1311a(1) creates no private cause of action. While plaintiffs contend that the reference to criminal liability is insufficient because "[t]here is no clear procedure established in MCL 380.1804 or elsewhere in the RSC, which actually addresses the reporting of or handling of complaints or violations," we found no caselaw in which standing was conferred on a party merely because a statute lacked "clear" procedures, particularly where the means of enforcement are plainly articulated in the statute. We presume that potential criminal liability would arise through the normal course of filing a criminal complaint with the appropriate law enforcement agency and that further explication of that process is unnecessary.

discretion of the school board to determine whether such an assault actually occurred. Accordingly, we disagree with plaintiffs' description of the school board's responsibility as merely "ministerial." In any case, plaintiffs' characterization would not confer standing on plaintiffs where it is otherwise lacking.

Affirmed.

GADIGIAN v CITY OF TAYLOR

Docket No. 279540. Submitted September 9, 2008, at Lansing. Decided November 20, 2008. Approved for publication January 27, 2009, at 9:10 a.m. Leave to appeal sought.

Diane Gadigian brought a negligence action in the Wayne Circuit Court against the city of Taylor, seeking damages for injuries she sustained when she slipped and fell on a public sidewalk. She alleged negligent maintenance of the sidewalk and invoked the highway exception to governmental immunity, MCL 691.1402. The defendant moved for summary disposition on the ground that the alleged sidewalk defect was less than two inches, arguing that it was thus entitled under MCL 691.1402a(2) to a statutory inference that it had maintained its sidewalk in reasonable repair. The court, John H. Gillis, Jr., J., denied the motion, and the defendant appealed.

The Court of Appeals *held*:

MCL 691.1402(1) imposes on governmental agencies a duty of care to maintain sidewalks in reasonable repair. Under MCL 691.1402a(2), a discontinuity defect of less than two inches gives rise to a rebuttable inference that the municipality has maintained its sidewalk in reasonable repair. An inference does not equate with a presumption, however. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them, while a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. An inference of negligence, standing alone, does not support summary disposition because the trier of fact is still free to accept or reject the inference. A presumption inherently involves compulsion because the trier of fact must take account of the presumed facts when assessing the other, basic facts of the case. In the absence of contrary evidence, the trier of fact must find that the presumed facts exist once the facts from which the presumed facts spring are established. An inference, however, does not carry a corresponding obligation to find a certain fact. The rebuttable inference described in MCL 691.1402a(2) allows a trier of fact to conclude that a municipality properly maintained its sidewalk, but does not compel the trier of fact to do so. If the

plaintiff offers contrary evidence in a case involving that statute, the trier of fact weighs all the evidence to reach a verdict. In this case, the plaintiff's evidence, including the affidavit of an engineer, was sufficient to rebut the statutory inference and create a question for the jury. The trial court properly denied the defendant's summary disposition motion.

Affirmed.

Raftery, Janeczek & Hoelscher, P.C. (by *James J. Raftery*), for the plaintiff.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Marcelyn A. Stepanski* and *Edward D. Plato*), for the defendant.

Before: O'CONNELL, P.J., and SMOLENSKI and GLEICHER, JJ.

PER CURIAM. Defendant appeals by right the circuit court's order denying its motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). Because plaintiff presented sufficient evidence to create a jury-submissible question concerning whether defendant maintained its sidewalk in reasonable repair, we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained injuries when she tripped and fell on a public sidewalk located within defendant city of Taylor. She filed this action, alleging negligent maintenance of the sidewalk and invoking the highway exception to governmental immunity, MCL 691.1402. Defendant moved for summary disposition on the ground that the alleged sidewalk defect measured less than two inches. Defendant argued that it was thus entitled to a statutory inference that it had maintained its sidewalk in reasonable repair. MCL 691.1402a(2). The circuit court denied defendant's motion.

We review de novo a circuit court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The application of the highway exception to governmental immunity presents a question of law, which we also review de novo. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000), overruled in part on other grounds by *Grimes v Dep't of Transportation*, 475 Mich 72 (2006).

> "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact." [*Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997) (citation omitted).]

If no material facts are in dispute, " 'and reasonable minds could not differ on the legal effect of those facts,' " whether the plaintiff's claim is barred is a question for the court as a matter of law. *Id*. (citation omitted).

Because defendant is a governmental entity, the following principles in MCL 691.1402(1) govern this case:

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

It is undisputed that the statutory term "highway" encompasses "sidewalks." MCL 691.1401(e); *Buckner Estate v City of Lansing*, 480 Mich 1243, 1244 (2008). Accordingly, MCL 691.1402(1) imposes a duty of care on governmental agencies to maintain sidewalks under their control in reasonable repair.

We acknowledge that the Legislature has relieved municipal corporations of liability for sidewalk-related injuries unless (1) the municipal corporation had notice of the defect at least 30 days before the injury and (2) the defect proximately caused the injury. MCL 691.1402a(1)(a) and (b). But these two conditions undisputedly exist in this case. We further acknowledge that the Legislature has provided that a "discontinuity defect of less than 2 inches" gives rise to "a rebuttable inference" that a municipality has maintained its sidewalk in reasonable repair. MCL 691.1402a(2). Nevertheless, for the reasons that follow, we conclude that plaintiff presented sufficient documentary evidence in the instant case to overcome this statutory rebuttable inference.

A longstanding common-law two-inch rule predated the rebuttable inference contained in MCL 691.1402a. This common-law rule absolutely prohibited recovery for injuries caused by sidewalk defects less than two inches deep. *Harris v Detroit*, 367 Mich 526, 528; 117 NW2d 32 (1962). But 10 years after *Harris* reiterated the common-law rule, our Supreme Court entirely abrogated the rule, explaining in *Rule v Bay City*, 387 Mich 281, 282; 195 NW2d 849 (1972), that the Court no longer regarded its enforcement "as desirable."

In 1986, the Legislature amended the general governmental immunity statute, MCL 691.1407. One amendment added the following language: "Except as otherwise provided in this act, this act shall not be

construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed." MCL 691.1407(1), as amended by 1986 PA 175. In *Glancy v City of Roseville*, 457 Mich 580, 582; 577 NW2d 897 (1998), two municipalities asserted that the amended governmental immunity law codified the two-inch rule as it had existed before 1972, when *Rule* struck it down. Alternatively, the municipalities urged the Supreme Court to adopt the two-inch rule as a common-law "threshold for lack of 'reasonable repair' under MCL 691.1402(1)." *Id*. The Supreme Court held that the amendment of MCL 691.1407(1) did not "resuscitate" the two-inch rule after its abolition in *Rule*. *Id.* at 589. The *Glancy* Court also refused to create a new two-inch rule, explaining that

> while the judiciary has authority to formulate policy regarding common-law issues, which could include adopting a bright-line rule, it may not adopt rules that change statutes on the basis of policy arguments. Rather, the judiciary's role in determining the policy behind a statute is to attempt to determine the policy choice the Legislature made. [*Id*. at 590.]

The *Glancy* Court concluded, "Policy arguments in favor of adopting the two-inch rule as a bright-line threshold for lack of 'reasonable repair' under [MCL 691.1402(1)] should be addressed to the Legislature." *Id*. at 591.

In 1999, the Legislature responded by enacting MCL 691.1402a, which specifically addresses municipal liability for sidewalk-related injuries. In crafting this statute, the Legislature could have adopted the former common-law rule, which flatly prohibited claims involving discontinuity defects of less than two inches. Alternatively, the Legislature could have granted municipal

corporations a rebuttable *presumption* of proper maintenance with respect to all defects of less than two inches. Indeed, our Supreme Court in *Glancy* specifically referred to MCL 257.625a(9) as an "example of the adoption of a bright-line rule by statutory presumption . . . ." *Glancy*, *supra* at 590 n 6.[1] Many similar "rebuttable presumptions" exist in other statutes as well.[2]

But rather than eliminating all sidewalk-injury claims arising from defects of less than two inches, and instead of creating a rebuttable presumption that defects of less than two inches are consistent with reasonable maintenance, the Legislature used the term "rebuttable inference." Given this selection of a legal term of art, "the judiciary's role in determining the policy behind [the] statute is to attempt to determine the policy choice the Legislature made." *Glancy*, *supra* at 590. We must begin by following the Legislature's pronouncement that legal terms of art that "have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a.

Under Michigan law, an "inference" does not equate with a "presumption." In *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005), our Supreme Court observed that the "trial court's instructions to the jury blurred the distinction between pre-

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[1] The version of MCL 257.625a(9) effective in 1998 set forth "presumptions" regarding the impairment of a "defendant's ability to operate a motor vehicle . . . due to the consumption of intoxicating liquor." MCL 257.625a(9)(a) and (b), as amended by 1996 PA 491. The presumptions derived from specific blood and urine alcohol levels. In *People v Calvin*, 216 Mich App 403, 408-409; 548 NW2d 720 (1996), this Court held that the statutory presumptions qualified as "rebuttable."

[2] See, e.g., MCL 436.1801(8) (providing for a "rebuttable presumption" in dramshop actions); MCL 125.985(2); MCL 168.472a.

sumptions and inferences and were not tailored to the evidence submitted by the parties." Black's Law Dictionary (8th ed) defines an "inference" as a "conclusion reached by considering other facts and deducing a logical consequence from them." According to MRE 301, however, in a civil case "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption . . . ."

An examination of the doctrine of res ipsa loquitur, which involves the use of an inference rather than a presumption, illustrates the important differences between these two legal concepts. The doctrine of res ipsa loquitur "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." *Jones v Porretta*, 428 Mich 132, 150, 155-156; 405 NW2d 863 (1987). Once a plaintiff establishes an inference of negligence, a defendant may attempt to explain away or avoid the inference. *Neal v Friendship Manor Nursing Home*, 113 Mich App 759, 765; 318 NW2d 594 (1982). The question whether the inference has been successfully avoided belongs to the trier of fact. *Id*.

In *Neal*, the trial court granted summary disposition to the plaintiff after finding no genuine issue of material fact concerning whether the defendant's agent had negligently caused a serious burn by placing a hot water bottle on a child's bare skin. *Id*. at 762. This Court reversed, explaining that although the plaintiff had satisfied the conditions for application of the doctrine of res ipsa loquitur and that "an inference of negligence could therefore be drawn," the trial court had incorrectly concluded "that such an inference was *necessary* . . . ." *Id.* at 765 (emphasis in original). This Court continued: "In essence, the trial court failed to distinguish between evidentiary facts and the inferences or

conclusions to be drawn from those facts. By making the inference of defendant's negligence a conclusive one, the trial court usurped the fact-finding role of the jury ultimately impaneled." (Citation omitted.)

As *Neal* makes clear, an *inference* of negligence—standing alone—does not support summary disposition because the jury is still free to accept or reject the inference. We likewise conclude that while the "rebuttable inference" described in MCL 691.1402a(2) allows the trier of fact to conclude that a municipality has properly maintained its sidewalk when a "discontinuity defect of less than 2 inches" exists, it does not compel the trier of fact to do so.

In short, a presumption operates differently than an inference. "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption . . . ." MRE 301. A presumption inherently involves "compulsion" because the trier of fact *must* take account of the presumed fact when assessing the other, basic facts of the case. 21B Wright & Graham, Federal Practice & Procedure: Evidence (2d ed) § 5124, p 489. "The fundamental effect of a presumption in a civil case is that once the so-called 'basic' facts are established—that is, the facts from which the presumed facts spring—the jury *must* find that the presumed facts exist in the absence of contrary evidence." 1 Robinson, Longhofer & Ankers, Michigan Court Rules Practice, Evidence (2d ed), § 301.1, p 134 (emphasis supplied). An inference does not carry a corresponding obligation to find a certain fact. As Wright and Graham explain:

> Like the presumption, an inference involves a relationship between two facts; the fact proved and the fact to be inferred from it. But unlike the presumption, an inference lacks the element of compulsion; the judge or jury can

> choose whether or not to infer fact B from proof of fact A irrespective of the presence or absence of contrary evidence of fact B. [*Id*. at 490.]

Despite its evidentiary power, even a presumption may be overcome by the production of evidence rebutting it. Indeed, the "usual standard required to overcome a rebuttable presumption" is "competent and credible evidence." *Reed v Breton*, 475 Mich 531, 539; 718 NW2d 770 (2006). With the introduction of evidence rebutting a presumption, a question of fact arises. For example, in a will contest involving alleged undue influence, certain circumstantial evidence regarding the existence of a confidential relationship between a testator and a fiduciary may give rise to a presumption of undue influence. *In re Cox Estate*, 383 Mich 108, 116; 174 NW2d 558 (1970). But a jury question is created simply by the introduction of contrary evidence:

> [T]he testimony of the fiduciaries that they did not exert influence over the testatrix in the making of her will does not overcome the presumption as a matter of law but leaves it as a permissible inference to be weighed with that and other evidence, sufficient to sustain a jury verdict of undue influence. [*Id*.]

Moreover, as our Supreme Court observed in *Johnson v Secretary of State*, 406 Mich 420, 441; 280 NW2d 9 (1979):

> If the trier of fact finds the fact which supports the presumption, the ultimate fact must be found in the absence of evidence to the contrary. *If contrary evidence is offered, the trier is free from the compulsion of the presumption and weighs all the evidence, including the evidence of the basic fact. The trier is free to infer the existence of the ultimate fact, but the law does not require it*. [Emphasis added.]

The statute at issue in this case provides that a "discontinuity defect of less than 2 inches creates a rebuttable inference" of reasonable repair. MCL 691.1402a(2). These

words mean that a municipal corporation may defend a negligence claim by simply relying on the statutory language. If the plaintiff offers "contrary evidence," as in any other case involving an inference, the trier of fact "weighs all the evidence" to reach a verdict. *Johnson*, *supra* at 441. If the plaintiff fails to offer contrary evidence, the inference results in summary disposition or a directed verdict for the municipality.[3]

Turning to the facts of the present case, James Moran, Jr., the foreman of defendant's Department of Public Works, conceded awareness that the sidewalk defect had existed for approximately three years before plaintiff's fall. Plaintiff rebutted the inference that defendant had maintained the sidewalk in reasonable repair by presenting an affidavit signed by Theodore Dziurman, an engineer, opining that the raised sidewalk slab "was a trip hazard" given "the height difference between adjoining slabs." Dziurman further averred:

> [1.] Ms. Gadigian clearly fell when her left toe struck the raised portion of the sidewalk, propelling her forward. Her husband, who was standing next to her, was not cause [sic] to fall because he was stepping over the opposite edge of the sidewalk, which was actually raised over the adjacent side by one inch.
>
> [2.] This "teeter-tauter" [sic] effect of the slabs of the sidewalk adjacent to one another caused a trip hazard for

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[3] Unquestionably, a municipal corporation bears a statutory duty to maintain its sidewalks in reasonable repair once it has notice of a defect. MCL 691.1402; MCL 691.1402a. Whether a defendant in a negligence case breached its duty of reasonable care is a question for the jury unless all reasonable persons would agree. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977). Once introduced, evidence of unreasonable maintenance creates a jury question. "It is only when all reasonable men must agree on the issue of negligence or contributory negligence that a court may decide a question as a matter of law rather than allowing it to go to the jury." *Wilhelm v Detroit Edison Co*, 56 Mich App 116, 158; 224 NW2d 289 (1974).

> traffic walking in either direction along the sidewalks, as well as for ponding of water on adjacent sidewalk slabs.
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> [3.] It is further my professional opinion that this sidewalk is even more dangerous in its current condition than a sidewalk that is raised two inches or more (but consistently across). This is so because if a sidewalk was raised only on one side at two inches or more, it would be readily visible and would create a trip hazard to traffic walking only in one direction. In this case, because the sidewalk slab was angled, it created a trip hazard to traffic in either direction along the sidewalk, and also made it more difficult to observe to the casual pedestrian because the trip hazard was not present across the entire slab in any one direction and, depending on the direction one looked at the sidewalk, it would appear safe when, in fact, it was a trip hazard.
>
> [4.] Furthermore, it is my understanding that the City of Taylor knew about this dangerous condition within the sidewalk in excess of two years. It would have been a simple repair for the City to either replace the offending slab of sidewalk and/or other type of repair to eliminate the trip hazard.

We conclude that plaintiff's proffered evidence, including the expert's affidavit, sufficed to rebut the statutory inference that defendant's sidewalk was in reasonable repair when plaintiff fell. The Dziurman affidavit set forth specific facts and drew reasonable expert conclusions based on those particular facts. Cf. *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987). It is well settled that this Court may not assess credibility or weigh competing facts when reviewing a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Because the Dziurman affidavit tended to rebut the statutory inference that defendant maintained its sidewalk in reasonable repair, the affidavit created a jury-submissible question of fact.

The Legislature selected the term "rebuttable inference," and was surely aware of the definitional distinction between "inferences" and "presumptions" when it enacted the statute at issue in this case. *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465, 480 n 8; 242 NW2d 3 (1976); *People v Endres*, 269 Mich App 414, 419; 711 NW2d 398 (2006). We must remain faithful to the policy choice made by the Legislature and may not substitute an evidentiary standard of our own creation. We therefore decline the invitation to transform the statutory rebuttable inference into a virtually conclusive presumption. In MCL 691.1402a(2), the Legislature plainly required only that a plaintiff rebut an *inference* of reasonable maintenance. Plaintiff presented evidence that the longstanding sidewalk defect was known to defendant, that it created a teeter totter effect, and that its unique physical properties made it difficult to observe. This evidence sufficiently rebutted the statutory inference that defendant maintained its sidewalk in reasonable repair. Consequently, the circuit court properly denied defendant's motion for summary disposition on this ground.[4]

Affirmed.

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[4] We note that the open-and-obvious-danger doctrine is inapplicable on the facts of this case. See *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) (observing that MCL 691.1403 "contemplates that a city may, in appropriate circumstances, be held liable for defects in a highway that are 'readily apparent to an ordinarily observant person'—or in other words, are open and obvious").

PEOPLE v SMITH

Docket No. 277736. Submitted January 7, 2009, at Detroit. Decided January 29, 2009, at 9:00 a.m. Leave to appeal sought.

A jury in the Wayne Circuit Court, Bruce U. Morrow, J., convicted Anthony T. Smith of two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct stemming from the sexual assault of his daughter when she was 10 or 11 years old. At trial the testimony of the victim's stepsister (LL) was admitted under MRE 404(b)(1). LL testified that when she lived with the defendant while she was between the ages of 11 or 12 and 15 years old, the defendant exposed his penis to her three times. The Court of Appeals, MURRAY, P.J., and TALBOT and ZAHRA, JJ., denied the defendant's delayed application for leave to appeal in an unpublished order, entered August 30, 2007 (Docket No. 277736). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted, directing the Court of Appeals to consider: whether the trial court erred in admitting the testimony of LL under MRE 404(b); whether, if it was error, the error requires reversal; whether the testimony was admissible under MCL 768.27a; and whether the prosecution's failure to rely on MCL 768.27a precludes sustaining admission of the testimony based on that provision. 480 Mich 1059 (2008).

The Court of Appeals *held*:

1. The testimony regarding all three incidents was properly admitted under MRE 404(b). The trial court did not err in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

2. The first two incidents of indecent exposure do not qualify as a listed offense under MCL 750.335a(2)(b) and are thus not admissible under MCL 768.27a. The third incident, involving indecent exposure and fondling of genitals, could have been found to be a listed offense but the incident did not result in a conviction and therefore was not admissible under MCL 768.27a.

3. Evidence of the first two incidents would not be admissible under MCL 28.722(e)(*iv*)(B) because, even though there were violations of MCL 750.335a(2)(a), only a third or subsequent

violation of MCL 750.335a(2)(a) is admissible. Evidence of the third incident that constituted a violation of MCL 750.335a(2)(a) was admissible.

4. The term "violation" in MCL 28.722(e)(*iv*)(B) means a breach or infringement of MCL 750.335a(2)(a) not resulting in a "judgment of conviction."

5. The catch-all exception in MCL 28.722(e)(*xi*) does not apply in this case because the more specific provisions of MCL 28.722(e) apply.

6. The Legislature intended a court to consider admission of other-acts evidence under MCL 768.27a even if the evidence is excludable under MCL 768.27 or MRE 404(b). The proper analysis chronologically is to begin with MCL 768.27a when other-acts evidence involving a sexual offense against a minor is involved and then make a determination whether "listed offenses" are at issue relative to the crime charged and the acts sought to be admitted. Where listed offenses are at issue, the analysis begins and ends with MCL 768.27a. MCL 768.27a is not at issue if listed offenses are not at issue, even where an uncharged offense may generally constitute an offense committed against a minor that was sexual in nature. The analysis turns to MRE 404(b) to decipher admissibility where MCL 768.27a is not at issue

Affirmed.

EVIDENCE — CRIMINAL LAW — OTHER-ACTS EVIDENCE — LISTED OFFENSES.

Evidence that a defendant previously committed another listed offense against a minor is admissible under MCL 768.27a in a prosecution against the defendant for a listed offense against a minor even if the evidence is excludable under MCL 768.27 or MRE 404(b); a listed offense for purposes of MCL 768.27a means that term as it is defined in § 2 of the Sex Offenders Registration Act, MCL 28.722; admission under MCL 768.27a is not appropriate where listed offenses are not at issue, even where an uncharged offense may generally constitute an offense committed against a minor that was sexual in nature.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kim L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jeffrey Caminsky*, Principal Attorney, Appeals, for the people.

Robin M. Lerg for the defendant.

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

DONOFRIO, J. Defendant was convicted by a jury on May 5, 2006, of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and one count of second-degree CSC, MCL 750.520c(1)(a). This Court denied defendant's delayed application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, has remanded the case to this Court for consideration as on leave granted of

> (1) whether the circuit court erred in admitting the testimony of [LL] under MRE 404(b); (2) whether the error in admitting the testimony, if any, was reversible; (3) whether the testimony was admissible under MCL 768.27a; and (4) whether the prosecutor's failure to rely on MCL 768.27a precludes sustaining its admission based on that provision. [*People v Smith*, 480 Mich 1059 (2008).]

Because LL's testimony with regard to all three incidents of indecent exposure is admissible under MRE 404(b), and evidence regarding the third incident of indecent exposure constituting a violation of MCL 750.335a(2)(a) was also separately admissible under MCL 28.722(e)(*iv*)(B), we affirm.

Defendant was convicted of sexually assaulting his daughter when she was 10 or 11 years old. The victim testified that on two separate occasions when she was in the fourth grade, defendant came into the bedroom, pulled down her pants and underwear, and penetrated her vagina with his penis. During one of the incidents, defendant also touched her chest under her shirt. At trial, the victim's stepsister, LL, testified that she formerly lived with defendant when she was between the ages of 11 or 12 years old and 15 years old. LL testified that defendant exposed his penis to her on

three occasions while they lived together. The trial court admitted the evidence under MRE 404(b)(1).

I

Initially, we note that the Supreme Court's remand order is limited to the admissibility of LL's testimony. On appeal, however, defendant also challenges the admissibility of the testimony of FH (the mother of the victim and LL) concerning a separate "peeping" incident. Because FH's testimony is beyond the scope of the Supreme Court's remand order, that issue is not properly before this Court and we do not consider it. *Taxpayers of Michigan Against Casinos v Michigan*, 478 Mich 99, 111-112; 732 NW2d 487 (2007).

II

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Because an abuse of discretion standard contemplates that there may be more than a single correct outcome, there is no abuse of discretion where the evidentiary question is a close one. *Id*.; see also *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In deciding whether to admit evidence of other bad acts, a trial court must decide: first, whether the evidence is being offered for a proper purpose, not to show the defendant's propensity to act in conformance with a given character trait; second, whether the evidence is relevant to an issue of fact of consequence at trial; third, whether its probative value is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and fourth, whether a cautionary instruction is appropriate. *People*

v Sabin (After Remand), 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994).

In *Sabin*, the Court clarified that "prohibiting the *use* of evidence of specific acts to prove a person's character to show that the person acted in conformity with character on a particular occasion . . . does not preclude using the evidence for other relevant purposes." *Sabin*, *supra* at 56 (emphasis in original). "That the prosecution has identified a permissible theory of admissibility and the defendant has entered a general denial, however, does not automatically render the other acts evidence relevant in a particular case." *Id*. at 60. Rather, the trial court must still find that the evidence is *material* (related to a fact that is "at issue," "in the sense that it is within the range of litigated matters in controversy"), and that it has *probative* force ("any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence"). *Id*. at 57, 60 (quotation marks and citation omitted). "Materiality, however, does not mean that the evidence must be directed at an element of a crime or an applicable defense." *Id*. at 57 (quotation marks and citation omitted).

In *Sabin*, evidence of the defendant's other bad acts of sexual contact with a minor was admitted to show a plan or scheme, intent, lack of mistake or accident, and to bolster the complainant's credibility. *Sabin*, *supra* at 59. In this case, the trial court permitted LL's testimony to be used to show opportunity, scheme, or plan, which are proper purposes under MRE 404(b)(1).

Defendant's theory at trial was that the charged incidents never occurred. In such a case, "evidence of other instances of sexual misconduct that establish a

scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin*, *supra* at 62. One way of doing so is to show that "the defendant allegedly devis[ed] a plan and us[ed] it repeatedly to perpetrate separate but very similar crimes." *Id*. at 63 (quotation marks and citation omitted). In other words, evidence of *sufficiently similar* prior bad acts can be used "to establish a definite prior design or system which included the doing of the act charged as part of its consummation." *Id*. at 64 (quotation marks and citation omitted). "[T]he result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed." *Id*. (quotation marks and citation omitted).

However, general similarity between the charged act and the prior bad act is not enough to show a pattern. *Id.* at 64. Rather, there must be "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id*. at 64-65 (quotation marks, citation, and emphasis omitted). A high degree of similarity is required—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive. *Id*. at 65-66.

In *Sabin*, the Supreme Court found that the defendant's sexual assault of his stepdaughter shared sufficient features in common with the defendant's assault of his daughter to infer a plan, scheme, or system. *Sabin*, *supra* at 66. Beyond both being acts of sexual abuse, the victims were of similar age, both were in a father-daughter relationship with the defendant, and defendant allegedly played on their fear of breaking up the family in order to keep them silent. *Id*. The Court noted that although there were some differences between the acts, such as the type of sexual assault (intercourse vs. cunnilingus), the time of

day of the assaults (afternoon vs. nighttime), and the frequency of the assaults (once vs. a weekly pattern), the Court agreed that reasonable persons could differ concerning whether the charged act and the prior bad acts were sufficiently similar to infer the existence of a common system, plan, or scheme. *Id*. at 67. However, the Court noted that there is no abuse of discretion if an evidentiary question is a close one, and upheld the trial court's decision. *Id*. at 67-68.

In the present case, both victims were approximately the same age at the time of the events, and both were in a father-daughter relationship with defendant. The evidence supports a finding that the charged and the uncharged acts were part of defendant's common plan or system to act out sexually with preteen girls living in the same household, over whom he had parental authority. As in *Sabin*, there were also some differences between the acts. The prior bad acts against LL involved incidents of indecent exposure, whereas the charged acts in this case involved intercourse and sexual contact. There was no evidence that LL was warned not to disclose the acts, whereas the victim in this case was told not to say anything. It appears that others persons were present in the home during two of the three indecent exposure incidents with LL, whereas defendant was alone with the victim during the charged acts. However, these differences do not compel the conclusion that the charged and the uncharged acts were so dissimilar that they precluded admission for purposes of showing a common plan or system. As in *Sabin*, reasonable persons could disagree concerning whether the charged acts and the prior bad acts were sufficiently similar to show (by probability) the existence of a scheme, plan, or system that tends to prove (by probability) that the charged acts were committed. Because the evidentiary issue was a close one, the trial

court did not abuse its discretion in admitting the evidence of defendant's prior acts of indecent exposure.

We additionally conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was damaging to defendant, but all evidence elicited by the prosecution is presumably prejudicial to a defendant to some degree, and MRE 403 seeks to avoid *unfair* prejudice, which was not shown here. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994).

III

Because we have concluded that LL's testimony was admissible under MRE 404(b)(1), it is unnecessary to consider whether it was also admissible under MCL 768.27a, which was not argued as a basis for admission in the trial court. However, because our Supreme Court's remand order directs this Court to consider this issue, we shall do so.

Questions of statutory interpretation are reviewed de novo. *People v Williams,* 475 Mich 245, 250; 716 NW2d 208 (2006). When construing a statute, the primary goal is to give effect to the intent of the Legislature. *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003). When a statute is clear and unambiguous, the Legislature is presumed to have intended the plain meaning of the statute, and the statute must be enforced as written. *Id*. Only if a statute is ambiguous may a court go beyond its language to ascertain the Legislature's intent. *Id*.

MCL 768.27a, which became effective January 1, 2006, states:

> (1) Notwithstanding section 27, in a criminal case *in which the defendant is accused of committing a listed*

offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

(2) As used in this section:

(a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(b) "Minor" means an individual less than 18 years of age. [Emphasis added.]

In pertinent part, § 2 of the Sex Offenders Registration Act (SORA), MCL 28.722, states:

(e) "Listed offense" means any of the following:

* * *

(*iii*) A violation of section 335a(2)(b) of the Michigan penal code, 1931 PA 328, MCL 750.335a, *if that individual was previously convicted* of violating section 335a of that act.

(*iv*) A third or subsequent violation of any combination of the following:

* * *

(B) Section 335a(2)(a) of the Michigan penal code, 1931 PA 328, MCL 750.335a.

* * *

(*x*) A violation of section 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g.

(*xi*) Any other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. [Emphasis added.]

Here, it is undisputed that the charged offenses, first- and second-degree CSC, are listed offenses under § 2(e)(*x*) of the SORA, thereby satisfying the first part of the test under MCL 768.27a. The circumstances are that LL's testimony described prior incidents of indecent exposure, which are proscribed by the indecent exposure statute, MCL 750.335a. The testimony the prosecutor sought to admit involves three separate incidents. One day, LL was walking to her basement room and saw defendant "sitting on an exercise bike with his private out of—and he was like waiving his hand telling me to come over." On another occasion, LL was walking by and saw defendant standing in the dining room with his pants "halfway down to his knees." Defendant waved his hand at LL. On a third occasion, defendant went up to the door of LL's bedroom, where she was sleeping. Defendant called out to LL, "Psst, psst." LL woke up and saw that defendant had his penis in his hand, and that he was "wagging his self," motioning to LL.

MCL 750.335a, states:

(1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.

(2) A person who violates subsection (1) is guilty of a crime, as follows:

(a) Except as provided in subdivision (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(b) If the person was *fondling his or her genitals*, pubic area, buttocks, or, if the person is female, breasts, while

> violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> (c) If the person was at the time of the violation a sexually delinquent person, the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life. [Emphasis added.]

One of the incidents the prosecutor seeks to introduce in evidence involved defendant's "wagging" his genitals at LL. It could reasonably be inferred from the description of the event that defendant was fondling himself as proscribed by MCL 750.335a(2)(b) and, therefore, could have been found to have committed a listed offense under MCL 768.27a. The record, however, contains no evidence that defendant was convicted of indecent exposure as a result of LL's allegations. Also, the record fails to reflect any other conviction of MCL 750.335a. For testimony regarding the proscribed behavior identified in MCL 750.335a(2)(b) (fondling) to be admissible under MCL 768.27a, there must be a coexisting conviction under MCL 750.335a at a time before the trial for the charged offenses. MCL 28.722(e)(*iii*). Under these circumstances, while the proffered bad-act testimony (fondling) is admissible at trial under MRE 404(b), it fails to separately qualify for admission at trial under MCL 768.27a. We point out with regard to evidence of the other two identified bad acts (genital exposure) that, while it is admissible under MRE 404(b), both acts fail to separately qualify for admission at trial under MCL 768.27a because neither is a MCL 750.335a(2)(b) offense (fondling).

Our inquiry does not end there, however. MCL 28.722(e)(*iv*)(B) provides that a "[l]isted offense" includes "[a] third or subsequent violation" of MCL 750.335a(2)(a). Unlike MCL 28.722(e)(*iii*), which re-

quires the individual to be "previously *convicted*" of violating MCL 750.335a, MCL 28.722(e)(*iv*)(B) requires the individual to have a "third or subsequent *violation*" of MCL 750.335a(2)(a). (Emphasis added.) The term "convicted" is defined in MCL 28.722(a)(*i*) as "[h]aving a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses[.]" The term "violation" is not defined in the statute. When a statutory term is not defined by the statute, this Court construes the term according to its plain and ordinary meaning. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Thus, we construe the term "violation" in MCL 28.722(e)(*iv*)(B) by its plain and ordinary meaning as a breach or infringement of MCL 750.335a(2)(a) not resulting in a "judgment of conviction."

Here, the prosecutor sought to introduce evidence of three separate occasions of indecent exposure proscribed by MCL 750.335a(2)(a) where defendant exposed his genitals to LL. The evidence showed that during the first and second incidents, defendant exposed his genitals to LL but did not fondle himself. These two incidents constitute violations of MCL 750.335a(2)(a). During the third incident, defendant exposed his genitals and "wagged" himself in front of LL, which could reasonably be inferred to be fondling. This last incident constitutes a violation of MCL 750.335a(2)(a) for the indecent exposure of defendant's genitals or MCL 750.335a(2)(b) for indecent exposure with fondling. Again, MCL 28.722(e)(*iv*)(B) provides that a "[l]isted offense" includes "[a] third or subsequent violation" of MCL 750.335a(2)(a). Because this case involves three distinct violations of MCL 750.335a(2)(a), pursuant to the plain language of MCL 28.722(e)(*iv*)(B), evidence regarding the third violation of MCL 750.335a(2)(a) would have been admissible at

trial. But evidence of the first two violations would not have been admissible under MCL 28.722(e)(*iv*)(B) because only the third or any subsequent violations of MCL 750.335a(2)(a) are admissible under the statute. Though, had there been any "subsequent" violations of MCL 750.335a(2)(a) in this case, those violations would have been admissible pursuant to the plain language of MCL 28.722(e)(*iv*)(B).

The prosecutor offers as an alternative basis for admissibility, the catch-all exception found in § 2(e)(*xi*) of the SORA. The catch-all exception, MCL 28.722(e)(*xi*) applies only to "[a]ny *other* violation of a law . . . that by its nature constitutes a sexual offense . . . ." (Emphasis added.) As a general rule of statutory construction, when statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *People v Houston*, 237 Mich App 707, 714; 604 NW2d 706 (1999); *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997). Because there is a specific provision of the SORA that particularly addresses indecent exposure, defendant's acts of indecent exposure cannot qualify as "[a]ny *other* violation of a law" under the general provisions of MCL 28.722(e)(*xi*) and thus are not admissible under the catch-all exception. *Id*. (emphasis added).

Finally, it is prudent to provide some reasoning explaining why evidence of the two instances of indecent exposure that were not "listed offenses" under MCL 28.722(e) is nonetheless admissible given that the evidence conforms to the requirements of MRE 404(b). This is so despite the fact that the acts entailed sexual offenses against a minor; a subject ostensibly governed by MCL 768.27a. In *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007), the Court explained

that MCL 768.27a controlled over MRE 404(b) when "listed offenses" against minors are at issue, but we do not read this language as suggesting that if past sex offenses against children do not qualify as "listed offenses" under MCL 768.27a the evidence is inadmissible where the evidence could be properly introduced pursuant to MRE 404(b).

It is quite evident that the Legislature's intent in enacting MCL 768.27a was to broaden the range of acts that could be admitted into evidence, going beyond the evidence admissible under MRE 404(b), with respect to trials in which a defendant is charged with sex crimes against children. MCL 768.27a "allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted[.]" *People v Pattison,* 276 Mich App 613, 619; 741 NW2d 558 (2007). The Legislature clearly did not intend MCL 768.27a to be a barrier that could be invoked to preclude the admission of evidence. Indeed, the language of MCL 768.27a supports our conclusion. MCL 768.27a(1) begins with the phrase, "Notwithstanding section 27," before moving on to state that evidence of certain sexual offenses against minors is admissible if relevant. Section 27, which is MCL 768.27, is essentially the Legislature's version of MRE 404(b), providing:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

Thus, consistent with the prefatory language to MCL 768.27a, when the two statutes are read in unison, it becomes abundantly clear that the Legislature intended a court to contemplate admission of other-acts evidence under MCL 768.27a even if the evidence is excludable under MCL 768.27 or its counterpart MRE 404(b). The Legislature, acting to extend safeguards for the protection of children against sexual predators, see House Legislative Analysis, HB 4937, June 29, 2005, intended to prevent continuing imposition of MCL 768.27 and MRE 404(b) to exclude relevant evidence showing the predatory history of certain defendants. As stated by the panel in *Pattison, supra* at 620:

> [MCL 768.27a] reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords. Naturally, a full and complete picture of a defendant's history will tend to shed light on the likelihood that a given crime was committed.

Utilizing MCL 768.27a as a rule of exclusion and not inclusion would directly conflict with the Legislature's intent in enacting MCL 768.27a. If evidence is admissible under MCL 768.27 or MRE 404(b), there is no real need to consider MCL 768.27a in order to satisfy legislative intent; however, the proper analysis chronologically is to begin with MCL 768.27a when addressing other-acts evidence that can be categorized as involving a sexual offense against a minor and make a determination whether "listed offenses" are at issue relative to the crime charged and the acts sought to be admitted. *Watkins, supra* at 364-365; *Pattison, supra* at 618-619. Where listed offenses are at issue, the analysis begins and ends with MCL 768.27a. If listed offenses are not at issue, even where an uncharged offense may genuinely constitute an offense committed against a minor that

was sexual in nature, MCL 768.27a is not implicated, but this is not to say that evidence of the offense is inadmissible. We do not construe MCL 768.27a as suggesting that evidence of an uncharged sexual offense committed against a minor is inadmissible if the offense does not constitute a listed offense. Rather, the analysis simply turns to MRE 404(b) to decipher admissibility. Only where the evidence does not fall under the umbrella of MCL 768.27a, nor is otherwise admissible under MRE 404(b), should the court exclude the evidence.

IV

For the reasons stated, we conclude that LL's testimony regarding any of the three incidents of indecent exposure would not have been separately admissible under MCL 768.27a. However, testimony regarding the third violation of MCL 750.335a(2)(a) was admissible as a listed offense under MCL 28.722(e)(*iv*)(B). MCL 768.27a. Nonetheless, LL's testimony with regard to all three incidents is admissible under MRE 404(b).

Affirmed.

FISHER & COMPANY, INC v DEPARTMENT OF TREASURY

Docket Nos. 280476 and 280498. Submitted January 6, 2009, at Lansing. Decided January 29, 2009, at 9:05 a.m.

Fisher & Company, Inc., brought an action in the Court of Claims against the Department of Treasury, seeking a refund of use taxes paid under protest with regard to the plaintiff's purchase in North Carolina of a partial interest in an airplane. The purchase was pursuant to an agreement whereby the multiple owners shared maintenance, administration, and access to their respective airplanes and in return received transportation on the other airplanes in the fleet maintained by the seller's sister company. The airplane co-owned by the plaintiff never entered Michigan; however, the plaintiff did utilize within Michigan the benefit of transportation on the other airplanes in the fleet. The Court of Claims, William E. Collette, J., granted summary disposition in favor of the defendant, ruling that the transaction constituted a purchase of tangible personal property rather than services and that the plaintiff used its property in the state of Michigan within the meaning of the Use Tax Act, MCL 205.91 *et seq*. The Court of Claims also determined that under MCL 205.94(1)(e) the plaintiff was entitled to a refund of three percent of the use tax it paid because it had paid sales tax to North Carolina, which imposed a sales tax at the "rate of three percent" up to a maximum of $1,500. Both parties appealed, and the appeals were consolidated.

The Court of Appeals *held*:

The Court of Claims properly determined that the transaction constituted a purchase of tangible personal property rather than services and that the plaintiff used the property in the state within the meaning of the Use Tax Act.

Affirmed.

DAVIS, J., stated that the nature of the transaction constituted a purchase of tangible personal property rather than services and that the plaintiff used the property in the state within the meaning of the Use Tax Act. However, the amount of the refund to which the plaintiff is entitled should be limited to the $1,500 in sales tax actually paid in North Carolina. Taxpayers are not entitled to credits or refunds for money they have not actually paid. The order

of the Court of Claims should be affirmed in part and reversed in part, and the case should be remanded to the Court of Claims for further proceedings as the Court of Claims deems necessary.

MURRAY, P.J., stated that the nature of the transaction constituted a purchase of tangible personal property rather than services and that the plaintiff used the property in the state within the meaning of the Use Tax Act. The Court of Claims did not err in determining that the North Carolina tax rate of three percent of the purchase price should be deducted from the plaintiff's Michigan use tax liability. The order of the Court of Claims should be affirmed.

O'CONNELL, J., dissenting, stated that when the transaction is analyzed using the "incidental to services" test set forth in *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13 (2004), it is clear that the plaintiff purchased transportation services, not tangible personable property, and is not subject to the Michigan use tax. The order of the Court of Claims should be reversed.

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas, Angela M. Brown*, and *Angela Emlet-Dardas*) for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for the defendant.

Before: MURRAY, P.J., and O'CONNELL and DAVIS, JJ.

DAVIS, J. Each of the parties separately appealed as of right the same summary disposition order. We consolidated the appeals. This case involves a dispute between the parties regarding the applicability of the Michigan Use Tax Act (UTA), MCL 205.91 *et seq*., to plaintiff's purchase of a partial interest in an aircraft. The Court of Claims held that the nature of the transaction constituted a purchase of tangible personal property rather than services, but it also held that plaintiff was entitled to a refund of three percent. I would affirm in part, reverse in part, and remand.

The parties do not dispute the bare facts, although, as will be evident later, the legal implications of those facts are not so straightforward. Plaintiff is a Michigan corporation. It purchased a "25% undivided interest" in a small turbofan jet airplane.[1] That partial interest was formally considered to be a tenant-in-common ownership interest, along with several other part owners; plaintiff was designated as the "buyer." Each part owner, including plaintiff, was entitled to share in the airplane's depreciation, gain, loss, deduction, or other tax benefit that might arise therefrom. The seller's sister company, NetJets Aviation, Inc., (NJA), maintained the airplane and coordinated its use by plaintiff and by the other part owners, and the "owner's agreement" precluded plaintiff from placing any lien on the airplane without approval by the maintenance entity. The airplane was specifically identified, and that particular airplane never entered Michigan. However, part of the benefit to plaintiff was the use of other airplanes in the NJA fleet, consistent with plaintiff's rights under the six "operative documents" that made up the transaction.[2] Plaintiff did utilize that benefit for transportation in Michigan.

The Use Tax Act is complementary to the Michigan General Sales Tax Act, MCL 205.51 *et seq.*, and is designed to cover those transactions not subject to the sales tax. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). This tax is

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[1] It purchased an interest in one airplane from Executive Jet Sales, Inc. (EJS), in 2001, and in 2003 it then traded that interest for another interest in a different airplane from NetJets Sales, Inc. (NetJets). We are only concerned with the 2003 transaction, because the subject of this dispute is the use tax plaintiff paid regarding the 2003 contract.

[2] These documents consisted of the purchase agreement, the owner's agreement, an interchange agreement, a management agreement, an acceptance form, and a bill of sale.

collectable from each taxpayer in Michigan and is assessed "for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price." MCL 205.93(1). " ' "A sales-use tax scheme is designed to make all tangible personal property, whether acquired in, or out of, the state subject to a uniform tax burden. Sales and use taxes are mutually exclusive but complementary, and are designed to exact an equal tax based on a percentage of the purchase price of the property in question." ' " *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 52; 703 NW2d 822 (2005), quoting *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 19 n 3; 678 NW2d 619 (2004), quoting 85 CJS2d, Taxation, § 1990, p 950.

Critically, the use tax applies, by its plain language, to *tangible personal property*. It does not apply to services. The most significant issue in this case is whether plaintiff *actually* purchased an *actual* airplane (albeit as a co-owner). Plaintiff argues that it only purchased "nominal" title. Rather, it claims that the "purchase" was merely a convenient way to express plaintiff's purchase of a particular number of hours of flight time to be provided by a corporate travel services provider. Indeed, plaintiff argues that this was the only way the provider would permit a purchase of more than 200 hours of flight time to be structured. Moreover, plaintiff stresses the fact that, once all the required transaction documents were executed, plaintiff's practical rights to the airplane fell far short of anything a lay person would recognize as "ownership." Defendant argues that the contractual documents all reflect a purchase of the airplane itself, albeit only as a part owner, and further points out that plaintiff actually did, in fact, claim depreciation for the airplane on its taxes. Defendant does not seem to dispute that some services were involved in the transaction, but it asserts that the partial purchase of the airplane itself was a fundamental

part thereof. Furthermore, defendant points out that contracting to relinquish control over something is itself the exercise of an ownership right.

We appreciate the fact that, at the end of the day, plaintiff ultimately just wanted to have on-demand corporate jet transportation without the need to purchase and maintain a whole airplane. However, the dispositive issue is not so much plaintiff's motivation as what *actual transaction* plaintiff entered into. The documents involved all reflect a sale of an ownership interest in an airplane, coupled with a contractual arrangement under which multiple airplane owners shared maintenance, administration, and access to their airplanes. In effect, this is a time share in an item of tangible personal property; in this case, an airplane.

Traditionally, time shares involve real property, where "a purchaser would buy occupancy rights in one or more week-long 'intervals,' along with a corresponding undivided interest in the property . . . [a]s is typical in time-sharing arrangements, interval owners could place their occupancy rights in commercial pools that facilitate trades with those who have occupancy rights in homes at other resorts." *O'Connor v Resort Custom Builders*, *Inc,* 459 Mich 335, 338; 591 NW2d 216 (1999).[3] The airplane fleet involved in this case appears to be precisely such a commercial-pool time share.

The transaction involved was, therefore, a purchase of tangible personal property coupled with a contract controlling how that personal property would be used. The fact that plaintiff has contracted away some (or even

[3] In that case, our Supreme Court concluded that a week-long time share did not really constitute a residential purpose because of the lack of permanence, or at least the right for owners to come whenever they want to. It did not suggest in any way that a time share was not a real ownership interest.

most) of its practical control over its airplane does not preclude plaintiff from having purchased it. It is therefore clear that there was a transfer of tangible personal property and a contemporaneous but nevertheless separate contract for services involving that property.

Plaintiff further argues that the use tax does not apply because even if it purchased tangible personal property in the form of an interest in the airplane, the airplane was not used "in this state" because it never entered this state. We note that, under MCL 205.93(1)(a), it will be presumed that property is intended for use in this state if it is brought into the state within 90 days of purchase. However, that provision only sets forth a presumption. More importantly, "use" is defined very broadly by MCL 205.92(b) as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." Thus, "use" in the context of the UTA is not limited to physical actions performed directly on the property. It includes any exercise of a right that one has to that property by virtue of having an ownership interest in it. Something need not necessarily be physically present in Michigan for it to be "used" in Michigan.

We are persuaded that plaintiff "used," within the meaning of the UTA, its fractional ownership interest in the airplane in Michigan. The right to control what happens—in layman's terms—to one's property is one of the most fundamental rights incident to ownership. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534-535; 676 NW2d 616 (2004); see also *People v Gallagher*, 4 Mich 244, 262 (1856) (PRATT, P.J., dissenting).[4] Entering into a

[4] The *Gallagher* case involved a challenge to the "prohibitory liquor law" of 1855. The majority in *Gallagher* did not dispute Justice PRATT's point, but rather held that the courts could only declare a legislative enactment void if it is unconstitutional, not for violating "natural rights."

contract to give up some of one's rights to possession or control is, itself, an exercise of those rights. It would be an exercise of an ownership right for a person in a time share pooling arrangement to use someone else's share in exchange for that person's own share. We conclude that plaintiff's use of *any* airplane in the fleet at issue was *pursuant to* its contracts to share ownership rights to its own airplane. Therefore, we conclude that plaintiff "used" its property in Michigan within the meaning of the UTA.

We therefore affirm the ruling of the Court of Claims that the transaction entailed a transfer of tangible personal property to which the use tax applied by virtue of its use in this state.

However, I would hold that the Court of Claims erred in calculating the amount of the tax refund to which plaintiff was entitled. Pursuant to MCL 205.94(1)(e):

> If the sale or use of property was already subjected to a tax under the law of any other state or local governmental unit within a state in an amount less than the tax imposed by this act, this act shall apply, but at a rate measured by the difference between the rate provided in this act and the rate by which the previous tax was computed.

The relevant purchases were made in North Carolina, which imposed a sales tax at the "rate of three percent" up to a maximum of $1,500. NC Gen Stat § 105-164.4(a)(1b) (2008). The UTA does not specifically address the implications of an out-of-state purchase where the amount of sales or use tax collected has a cap.

Nevertheless, I find the intent of the Legislature clear: as discussed above, the UTA is part of the Legislature's scheme to impose a uniform and equal tax burden. *By Lo Oil Co*, *supra* at 52. In that context, MCL 205.94(1)(e) is clearly designed to ensure that a taxpayer is only liable for the use tax to the extent the

taxpayer has not already remitted to a sister state the sister state's own sales or use tax. The word "rate" is undefined in the UTA, I therefore turn to the dictionary.

According to the *Random House Webster's College Dictionary* (2001), "rate" means "the amount of a charge or payment with reference to some basis of calculation"; it can also mean, in relevant part, "a certain amount of one thing considered in relation to a unit of another thing" or "a fixed charge per unit of quantity." Black's Law Dictionary (8th ed) defines "rate" either as "the proportion by which quantity or value is adjusted" or "[a]n amount paid or charged for a good or service." Any of these definitions, however, would produce the same result: both the proportional amount and the absolute amount of sales tax paid in North Carolina was $1,500. Black's Law Dictionary defines the more specific term "tax rate" as "[a] mathematical figure for calculating a tax, usu. expressed as a percentage." Although this latter definition could support the view that only the three percent calculation should be considered, that view would be inconsistent with the known purpose of Michigan's statute: taxpayers are not entitled to credits or refunds for money they have not actually paid.

Therefore, I would include North Carolina's sales tax cap in our computation of plaintiff's refund entitlement in order to give effect to the *entirety* of both North Carolina's statute and our own. And, finally, this is the only way to accomplish the Legislature's goal of making the tax burden uniform. Plaintiff was entitled to a refund of $1,500 because that sum was "the rate by which the previous tax was computed."

The holding of the Court of Claims that the UTA applies to the transactions at issue should be affirmed. The computation by the Court of Claims of the amount

of refund to which plaintiff was entitled should be reversed. I would remand for further proceedings as the Court of Claims deems necessary. We do not retain jurisdiction. No costs, a public question being involved.

MURRAY, P.J. (*concurring in part and dissenting in part*). I concur in Judge DAVIS's opinion to the extent it concludes that the transactions at issue primarily constitute a purchase of tangible personal property rather than services. In my view, and as espoused in Judge DAVIS's opinion, plaintiff Fisher & Company, Inc., purchased an ownership interest in the aircraft and then exercised that right of ownership in signing and agreeing to the terms set forth in the owner's agreement, management agreement, and other related agreements. However, I disagree with Judge DAVIS's conclusion that the Court of Claims erred in calculating the amount of tax refund to which plaintiff was entitled. Accordingly, I disagree with the part of Judge DAVIS's opinion where he states that, under MCL 205.94(1)(e), plaintiff was entitled to only deduct the cap of $1,500 under the North Carolina statute from the amount owed to Michigan.

As our courts have repeated since they were established in the 1800s, our focus in interpreting statutes is to discern and give effect to the intent of the Legislature as found in the statutes' plain language. *Houdek v Centerville Twp*, 276 Mich App 568, 581; 741 NW2d 587 (2007). When, as in this case, a term or phrase is undefined by the Legislature and has a peculiar meaning under the law, we resort to a legal dictionary to help determine its meaning. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 510; 675 NW2d 847 (2003).

As noted in Judge DAVIS's opinion, MCL 205.94(1)(e) provides that for those sales or uses of property that

were already taxed by another state, the Michigan use tax is subject to "a rate measured by the difference between the rate provided in this act and the rate by which the previous tax was computed." The North Carolina sales tax statute to which plaintiff's ownership interest was taxed provides for a "rate of three percent," but also contains a maximum cap of $1,500. NC Gen Stat § 105-164.4(a)(1b) (2008). According to Black's Law Dictionary (7th ed), "tax rate" is defined as "[a] mathematical figure for calculating a tax, usu. expressed as a percentage." Utilizing this definition, the tax rate, i.e. the mathematical figure used for calculating a tax, was three percent under the North Carolina statute. Accordingly, three percent is the "rate by which the previous tax was computed." The fact that the North Carolina legislature included a cap for larger purchases does not change the fact that the "tax rate" utilized in North Carolina is three percent.

Utilization of caps or similar tax schemes is not uncommon, and our Legislature could have indicated in the Michigan use tax statute that it would be subject to any cap or that the Michigan liability would be reduced by whatever amount was actually paid by the taxpayer in another state. However, the Legislature was not that specific and instead used the phrase "tax rate," which under the dictionary and common parlance means the percentage used to calculate a tax. As indicated, that was three percent under the North Carolina statute; therefore, three percent of the purchase price should be deducted from plaintiff's Michigan use tax liability.

O'CONNELL, J. (*dissenting*). I respectfully dissent, because I believe that plaintiff Fisher & Company, Inc. (Fisher), purchased transportation services, not tangible personal property. Therefore, I would hold that Fisher should not be subject to Michigan's use tax.

In my opinion, the majority errs when it attempts to fit this transaction under the definition of a "sale of goods" so the transaction can be taxed under the Michigan Use Tax Act, MCL 205.91 *et seq*. Instead, this panel should accept this transaction for what it really is: a sale of transportation services. Admittedly, Fisher signed an agreement to "purchase" a 25-percent interest in an airplane from NetJets Sales, Inc. (NetJets). However, this purchase agreement cannot be divorced from the larger contractual agreement that Fisher and NetJets entered into and the purpose of this agreement. Fisher's intent in entering into this contract was not to own part of an airplane; in fact, Fisher never used the airplane of which it was technically a partial owner. Instead, Fisher wanted NetJets to provide it with transportation services, and Fisher's acquisition of partial ownership of one of the jets in the NetJets fleet was one aspect of the overall agreement that NetJets required Fisher to enter into in order to receive transportation services. The Court of Claims should have analyzed the transaction using the "incidental to services" test set forth in *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), to determine whether the transaction involved the sale of services or the transfer of tangible personal property.

In *Catalina*, *supra* at 24, our Supreme Court adopted the "incidental to services" test that this Court had articulated in *Univ of Michigan Bd of Regents v Dep't of Treasury*, 217 Mich App 665; 553 NW2d 349 (1996), to determine whether a business transaction involved the sale of services or the transfer of tangible personal property. Under the "incidental to services" test, a court must look objectively "at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or a provision of

a service." *Catalina*, *supra* at 24-25. The *Catalina* Court identified six factors to consider when making this determination:

> [1] what the buyer sought as the object of the transaction, [2] what the seller or service provider is in the business of doing, [3] whether the goods were provided as a retail enterprise with a profit-making motive, [4] whether the tangible goods were available for sale without the service, [5] the extent to which intangible services have contributed to the value of the physical item that is transferred, and [6] any other factors relevant to the particular transaction. [*Id*. at 26.]

After applying these factors to this case, I conclude that the transaction between Fisher and NetJets was an agreement for transportation services and, therefore, is not subject to the Michigan use tax. The first *Catalina* factor asks us to consider what the buyer (in this case, Fisher) sought as the object of the transaction. Fisher makes quite clear its objective in entering into this agreement with NetJets: Fisher wanted NetJets to provide transportation services to the company. Fisher presented no other evidence indicating that the company wanted to own or otherwise have responsibility for an airplane. Fisher did not hire a pilot and crew, store, or maintain the airplane. Instead, Fisher assigned these duties to NetJets as part of the transportation services agreement. In fact, Fisher's employees and agents never even used the airplane that Fisher technically co-owned; instead, they were content to use whatever airplane NetJets sent to them.

The second *Catalina* factor asks us to consider what NetJets is in the business of doing. NetJets is not in the business of selling airplanes. Instead, NetJets offers transportation services to corporate clients like Fisher, and it advertises itself as a provider of these services.

The third *Catalina* factor asks us to consider whether the goods were provided as a retail enterprise with a profit-making motive. NetJets' motive was not to make money by simply selling interests in an airplane—this company is in the transportation services business, not the airplane sales business. Instead, the sale of partial interest in an aircraft was a component of a larger agreement to provide transportation services that NetJets offered to corporations like Fisher. NetJets' motive was not to profit from the sale of an interest in an airplane, but to profit from providing transportation services.

Fourth, we must consider whether the tangible goods (namely, the interest in an airplane) were available for sale without the associated transportation services. Fisher wanted to purchase a particular package of transportation services from NetJets. In order to receive the level of services from NetJets that it wanted, Fisher was required to enter an agreement that included the purchase of a partial interest in an airplane.[1] Further, NetJets was not in the business of selling interests in airplanes; it only "sold" airplanes as part of a larger transportation services package that it offered its clients.

The fifth *Catalina* factor requires us to consider the extent to which the intangible services offered by Net-

[1] If Fisher wanted to receive the level of transportation services that it needed from NetJets, Fisher's only option was to enter into a service agreement with NetJets that included acquiring partial ownership interest in a NetJets airplane. Although NetJets apparently had a Marquis Jet Card program that offered NetJets transportation services without acquisition of an ownership interest in an airplane, each Marquis Jet Card only provided 25 hours of occupied flight time. NetJets did not offer an option for purchasing the amount of transportation services that Fisher required without acquiring partial ownership of a NetJets airplane.

Jets contributed to the value of the physical item (the interest in an airplane) that Fisher received in the transaction. The acquisition of 25-percent interest in an airplane held no value to Fisher without the associated transportation services. None of Fisher's agents knew how to fly an airplane, nor did Fisher indicate that it had any desire to oversee the maintenance and upkeep of an airplane, either independently or in conjunction with another entity. In fact, in the bundle of agreements that Fisher signed when it purchased transportation services from NetJets, it relinquished its right to exert control over the airplane that it partially "owned" back to NetJets, and none of Fisher's agents ever set foot in that airplane. The airplane over which Fisher had partial ownership had no value to Fisher except as a conduit to receive what it really wanted: transportation services provided by NetJets.

These factors, considered together, lead to one inescapable conclusion: the purchase of a 25-percent interest in a NetJets airplane was simply an incidental component of the principal transaction for transportation services that the parties entered into. And in light of the sixth *Catalina* factor, which permits consideration of any other factors relevant to this transaction, I note that two additional points support this conclusion.

First, Fisher never exerted any sort of actual control over the airplane in which it held a partial ownership interest. NetJets' records indicate that Fisher's agents did not use this airplane; in fact, the records indicate that the airplane was never even flown in the state of Michigan. Further, the parties provide no indication that Fisher ever attempted to exert any control over the airplane or requested that NetJets dispatch that airplane for Fisher to use. The ambivalence that both Fisher and NetJets expressed regarding Fisher's use of

the airplane in which it had a partial ownership interest supports the conclusion that neither Fisher nor NetJets cared whether Fisher used the specific airplane in question, but instead cared whether NetJets provided Fisher with the transportation services it needed.

Second, several other jurisdictions have determined that this purchase would be considered an agreement for services and not a sale of tangible personal property. Of particular note are the rulings of the Internal Revenue Service (IRS) and the United States Court of Appeals for the Federal Circuit: both entities have found that such a transaction is for the sale of transportation services. See IRS Private Letter Ruling 9314002 (December 22, 1992), IRS Private Letter Rule 9404006 (October 12, 1993); *Executive Jet Aviation, Inc v United States*, 125 F3d 1463 (CA Fed, 1997). In addition, advisory opinions issued by officials in the taxation departments of both Texas and New York have recognized that such a transaction is for the purchase of transportation services and not a sale of tangible personal property. New York Advisory Opinion No. TSB-A-00(3)S (January 28, 2000); Texas Policy Letter Ruling No. 200011036L (November 9, 2000).

Because Fisher purchased transportation services, not tangible personal property, it is not subject to the Michigan use tax. I would reverse the order of the Court of Claims on this ground.

PIERRON v PIERRON

Docket No. 282673. Submitted January 13, 2009, at Detroit. Decided February 3, 2009, at 9:00 a.m. Leave to appeal sought.

Timothy Pierron obtained a divorce from Kelly Pierron in the Wayne Circuit Court. Under an amended judgment of divorce, the parties have joint legal custody and shared parenting time with regard to their two minor children. The judgment also provided that the defendant's residence is the primary residence and that each party's residence is the children's legal residence. At the time of the divorce, both the plaintiff and the defendant resided in Grosse Pointe Woods and the children attended the Grosse Pointe Public Schools. When the defendant moved to Howell and attempted to enroll the children in the Howell Public Schools, the plaintiff moved for an order directing that the children attend the Grosse Pointe Public Schools and that the plaintiff be awarded sole custody of the children. The court, Lita M. Popke, J., conducted an evidentiary hearing to determine whether it was in the best interests of the children to remain in the Grosse Pointe Public Schools or to be enrolled in the Howell Public Schools. The court then ruled that the defendant had failed to establish by a preponderance of the evidence, much less clear and convincing evidence, that it is in the best interests of the children to change their school district. The defendant appealed from the court's order requiring the children to remain enrolled in the Grosse Pointe Public Schools and the court's refusal to consider the merits of her request for attorney fees.

The Court of Appeals *held*:

1. The defendant was free to relocate the children's residence to Howell, approximately 60 miles from Grosse Pointe Woods, without first seeking the permission of the circuit court or the consent of the plaintiff because such permission or consent is statutorily required only where the move is more than 100 miles.

2. A relocating parent who shares legal custody with another parent does not have the authority to unilaterally make important decisions affecting the welfare of the children, such as where their children will attend school, even if the relocating parent is the primary physical custodian. Where parents who are joint legal custodians cannot agree on important matters such as education,

the court must determine the issue in the best interests of the children by holding an evidentiary hearing and considering the relevant best-interest factors contained in MCL 722.23. Where the proposed change will not alter the children's established custodial environment, the proponent of the change has the burden of proving by a preponderance of the evidence that the change would be in the children's best interests. Where the change would alter the established custodial environment, the proponent must prove by clear and convincing evidence that the change would be in the children's best interests.

3. The circuit court's determination that an established custodial environment existed in both parents' homes was not contrary to the great weight of the evidence.

4. The circuit court erred by determining that the proposed change of school districts would alter the children's established custodial environment. The proposed change would not have altered the actual custodial arrangements in this case. The change would require only minor modifications to the plaintiff's parenting time and does not amount to a change of the established custodial environment. The circuit court erred by requiring the defendant to prove by clear and convincing evidence, rather than a preponderance of the evidence, that the change of school districts would be in the children's best interests.

5. The circuit court erred in several respects, both legally and factually, in its consideration of some of the statutory best-interest factors. The court failed to narrowly focus its consideration of each factor on the specific important decision affecting the welfare of the children at issue.

6. The defendant likely satisfied her burden of proof on the change-of-school issue.

7. The order directing that the minor children remain enrolled in the Grosse Pointe Public Schools must be vacated and the matter must be remanded for reevaluation of the change-of-school issue consistent with the opinion of the Court of Appeals. On remand, the circuit court should consider up-to-date information including, but not necessarily limited to, the current and reasonable preference of the children and any other changes that may have arisen in the interim period.

8. If the circuit court determines on remand that the children should remain enrolled in the Grosse Pointe Public Schools, the result would be tantamount to a de facto change of physical custody from the defendant to the plaintiff and necessitate an additional review of the best-interest factors to determine whether

the plaintiff could prove, by clear and convincing evidence, that the change of custody would be in the children's best interests. If the plaintiff were to meet this burden, the circuit court would be free to make the plaintiff the children's primary physical custodian. If the plaintiff were to fail to meet this burden, the circuit court may realistically have no alternative but to determine which parent shall have sole custody of the children.

9. If the circuit court determines on remand that the defendant satisfied her burden of proving that it is in the best interests of the children to attend the Howell Public Schools, the plaintiff could move for a change of custody. The defendant's 60-mile move to Howell, coupled with the accompanying change in the children's school environment, would likely constitute a sufficient change of circumstances that warrants consideration of a change of custody. The circuit court would be required to hold a full change-of-custody hearing to consider the best-interest factors if the plaintiff established proper cause or a change of circumstances, and the plaintiff would be required to prove by clear and convincing evidence that the requested change of custody would be in the children's best interests.

10. If the circuit court determines on remand that it is in the children's best interests to attend the Howell Public Schools and the plaintiff carries his burden in a full change-of-custody hearing of proving that a change of custody would be in the children's best interests, the circuit court may have no alternative but to determine which parent shall have sole custody of the children.

11. The circuit court did not err by refusing to consider the merits of the defendant's request for attorney fees that was raised for the first time in a motion for reconsideration. That determination must be affirmed.

Affirmed in part, vacated in part, and remanded for further proceedings.

1. PARENT AND CHILD — CHILD CUSTODY — RESIDENCE CHANGE BY ONE PARENT — 100-MILE LIMIT.

Where a child's custody is governed by court order, a custodial parent can move the child's residence by less than 100 miles without first obtaining permission from the court or the consent of the other parent (MCL 722.31[1]).

2. PARENT AND CHILD — CHILD CUSTODY — JOINT LEGAL CUSTODY — DECISION-MAKING AUTHORITY.

Parents sharing joint legal custody of a child share decision-making authority regarding the important decisions that affect the welfare

of the child such as where the child will attend school; where such parents cannot agree on important decisions, it is the court's duty to determine the issue in the best interests of the child by focusing its consideration of each best-interest factor on the specific important issue affecting the welfare of the child (MCL 722.23).

3. PARENT AND CHILD — CHILD CUSTODY — BEST-INTEREST FACTORS — WORDS AND PHRASES — PREFERENCES OF CHILD.

A circuit court considering the best-interest factors stated in the Child Custody Act must consider the reasonable preference of the child where the court deems the child to be of sufficient age to express a preference; a child's preference need not be accompanied by detailed thought or critical analysis, but may not be arbitrary or inherently indefensible, in order to be a reasonable preference (MCL 722.23[i]).

Scott Bassett and *Miller, Canfield, Paddock and Stone, P.L.C.* (by *Lynn Capp Sirich*), for the plaintiff.

Beverly Safford for the defendant.

Before: CAVANAGH, P.J., and JANSEN and METER, JJ.

JANSEN, J. In this child custody dispute, defendant appeals by right the circuit court's order requiring that the minor children remain enrolled in the Grosse Pointe Public Schools. Defendant also challenges the circuit court's refusal to consider the merits of her request for attorney fees. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I

Plaintiff and defendant were married in October 1993, and were divorced in April 2000. The parties had two children during the marriage—Andrew Pierron, born May 6, 1994, and Madeline Pierron, born January 25, 1999. The judgment of divorce granted the parties

joint legal custody of the children, but granted defendant sole physical custody of the children. Plaintiff was granted "reasonable and liberal parenting time with the minor children, in a manner consistent with the children's best interests, which shall include alternate weekends, alternate holidays, time during school and summer vacations, and as otherwise agreed between the parties." The judgment of divorce specifically provided that "[b]oth parents shall be fully informed with respect to the children's progress in school and shall be entitled to participate in all school conferences, programs and other related activities in which parents are customarily involved," and that "[b]oth parents shall have full access to the children's school records, teachers, [and] counselors . . . ." The judgment further provided that "[t]he State of Michigan shall be the domicile and residence of the minor children, and the domicile and residence of the minor children shall not be removed from the State of Michigan without the approval of the Judge who awarded custody, or his successor, until the children attain the age of eighteen (18) or until further order of the Court."

An amended judgment of divorce, entered in June 2001, stated in relevant part that "the Judgment of Divorce shall be amended to provide that the parties shall have joint legal custody and shared parenting time." The amended judgment also provided that "[defendant's] residence continues as primary residence; each party's residence is the child's legal residence pursuant to statute. . . . In all other respects and except as herein stated the Judgment of Divorce shall remain in full force and effect." At the time of the amended judgment of divorce, both plaintiff and defendant resided in Grosse Pointe Woods and the children attended the Grosse Pointe Public Schools.

Sometime in mid-2006, defendant inherited money from her late father. Defendant decided to use the money to purchase a new home.[1] In April 2007, defendant made an offer to purchase a home in Howell. Upon learning of defendant's actions in this regard, plaintiff's attorney sent defendant a letter on April 27, 2007, which stated in relevant part, "While [plaintiff] certainly understands your desire to move to Howell and be closer to your sister, he believes that such a move at this time is not in the best interest of the minor children." The letter alleged that defendant's planned move to Howell would "hamper [the children's] access" to plaintiff and would "have a profound and negative impact on the children's relationship with their father . . . ." Plaintiff's attorney wrote that plaintiff was "willing to go to great lengths to find a workable solution that will allow the children to remain in their community and physically close to both parents," and continued:

> To demonstrate his commitment and concern for the minor children, [plaintiff] is willing to move out of his current Grosse Pointe Woods residence and sell it to you for $150,000, the identical price of the Howell condo you are currently planning on purchasing. [Plaintiff] is willing to do this, despite the fact that his house is worth approximately $250,000 in today's market. As you know, [plaintiff] has made significant improvements to this house and would basically be giving you $100,000 in free equity. The insurance and taxes on the Grosse Pointe Woods residence are somewhat comparable to the taxes, insurance and association dues which you would pay for your new condominium. Moreover, the taxes and insurance would be deductible and provide a significant savings towards your income tax. The offer to purchase [plaintiff's] residence at a $100,000 below-market value is contingent upon you agreeing to remain within 20 miles of

[1] Since the divorce, defendant had been renting a home in Grosse Pointe Woods.

> Grosse Pointe Woods until the minor children graduate from high school or further agreement.

The letter urged defendant to seriously consider plaintiff's offer and asked that defendant "take into account the potentially devastating effects a move to Howell could have on the children at this time . . . ."

On May 23, 2007, in anticipation of defendant's planned move to Howell, plaintiff's attorney sent a second letter, accompanied by a proposed stipulated order regarding parenting time. In addition to requesting significant parenting time for plaintiff, the proposed stipulated order would have required defendant to "be responsible for all transportation for parenting time" and to "deliver the children to Plaintiff-Father's home at the commencement of his parenting time and pick up the children at the end of Plaintiff-Father's parenting time." In response to this proposed stipulated order, defendant expressed that she was "unwilling and unable to drive in both directions for parenting time exchanges" between Howell and Grosse Pointe Woods, and that she was "willing to drive one (1) way" only.

In June 2007 defendant moved to Howell, and in July 2007 defendant attempted to enroll her children in the Howell Public Schools. Plaintiff remained opposed to defendant's move with the children, and therefore filed a motion on July 13, 2007, in an effort to prevent the change of school districts.[2] The motion alleged that plaintiff had learned that defendant "intended to move with the children from Grosse Pointe Woods to Howell, Michigan, more than sixty (60) miles away," and that he had "discovered, from the minor children, that Defendant intended to remove the children from the Grosse Pointe school system and enroll them in Howell Public Schools

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[2] This motion of July 13, 2007, was entitled "Plaintiff's Motion Regarding School, Change of Custody, Etc."

for the 2007-2008 school year." The motion asserted that plaintiff had "made several attempts to talk with Defendant and propose alternatives that would allow for the children to remain in the Grosse Pointe Woods area," but that plaintiff had been "rebuffed and ignored." Plaintiff argued that defendant's "unilateral decision to move the children more than an hour from Plaintiff's home and completely uproot them from their school district" was both "a violation of the joint legal custody provision of the parties' Judgment of Divorce" and "a significant modification of the children's established custodial environment and a proper cause for the court to consider a modification of the custodial arrangement." Plaintiff requested "that an order be entered directing that the minor children attend Grosse Pointe . . . schools" and that the court "render an award of sole custody to the Plaintiff."

The circuit court conducted a six-day evidentiary hearing during September and October 2007 for the purpose of determining whether it was in the best interests of the minor children to remain enrolled in the Grosse Pointe Public Schools or to be enrolled in the Howell Public Schools. The court considered both the testimony of witnesses and a stipulated statement of facts that had been jointly submitted before the hearing. Substantial evidence was presented concerning the relative quality of the Grosse Pointe and Howell school districts. The court also heard significant evidence concerning the available amenities, recreational opportunities, crime rates, and quality of life in the communities of Grosse Pointe Woods and Howell.

At the conclusion of the evidentiary hearing, the circuit court read its decision from the bench:

> Parents who enjoy joint legal custody are entitled to share in decisions concerning their children's education . . . .

Neither parent may unilaterally decide which school a child attends nor may a parent change the school without attempting to consult and obtain the agreement of the other parent. Where a dispute arises, the Court must decide the issue utilizing the applicable best interest factors contained in the Child Custody Act, MCL 722.23. . . .

In school cases, as in all cases where the custody analysis is triggered, the Court must initially ascertain whether a prior order has been entered by the Court. If a prior order addressing the relevant custody issue exists, MCL 722.27(1)(c) provides that a court may not modify that prior order absent a showing of proper cause or change in circumstances. This threshold determination may be made by the Court without an evidentiary hearing. . . .

* * *

[A]s in the present case, if there is no prior order addressing the school, generally it must be established by a preponderance of the evidence that the change in schools is in the best interests of the child.

If, however, the change in schools will also impact the established custodial environment as defined in MCL 722.27(1)(c), the moving party has the burden of proving by clear and convincing evidence that the change of schools is in the best interests of the child.

In that situation the Court may address not only the change in schools but whether there should be a change in custody. The Court must make specific findings concerning each of the . . . best interest factors outlined in MCL 722.23. The Court must also address the factors separately as to each child. . . .

In the present case there was no prior court order addressing where the Pierron children would attend school. Until the 2007, 2008 school year, the parents were in agreement that the children would attend the Grosse Pointe public school system.

The Court must next address whether the proposed school change to Howell would change the established

custodial environment of the children. MCL 722.27 defines the established custodial environment, quote, "the custodial environment of a child 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. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." End quote.

The Court must look at the substantive situation including the psychological and physical relationship between the parents and the child in order to determine the existence of an established custodial environment with the parents. This is the reason why the law disregards how the established custodial environment was created and requires the Court to ascertain the realities of the situation and not how it came to occur. . . .

It is also important to remember that an established custodial environment can occur in both homes or in neither. If an established custodial environment exists, it may not be changed without a showing of clear and convincing evidence. MCL 722.27(1)(c) . . . .

Quote, "on the contrary, if the Court finds that no established custodial environment exists, then the Court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interest." Unquote. . . .

The underlying intent of the Child Custody Act is to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an established custodial environment except in the most compelling cases. . . .

This policy applies to changing schools as well.

In the present case the last custody order was entered on June 6th, 2001, and provided, quote, ["T]he parties shall have joint legal custody and shared parenting time. The husband's parenting time shall include overnights and all mutually agreeable times including first option of parent-

ing time when and if wife/defendant resumes and/or returns to full-time employment or continued education that requires night classes.["]

"Wife's residence continues as primary residence. Each parties' residence is the child's legal residence pursuant to statute. Nothing in the judgment shall be deemed the basis for the shared economic formula to apply." End quote.

The mother's proposed change of schools will impact this agreed upon parenting time schedule. Howell is 60 miles from Grosse Pointe. Week night overnights and a first option for parenting time would be impractical. The change in schools would require a modification in parenting time. The distance factor would also impinge on the father's ability to provide educational guidance, discipline, and the necessities of life.

The testimony established that Dr. Pierron was involved on a continuing basis with [the] children's education. He visited the schools regularly, took the children to lunch on occasions, picked them up from tutoring, and saw them regularly despite the absence of a specific parenting time schedule.

This established custodial environment was one of flexibility and continued involvement. The Court finds that the proposed school change would alter the established custodial environment of these children; as a result Ms. Pierron has the burden of establishing by clear and convincing evidence that the change is in the best interests of the children.

The Court will . . . now apply the 12 best interest factors utilizing the burden just referenced.

The best interests of the child are codified in MCL 722.23. The Court must look at each factor as it relates to Ms. Pierron's request to change schools and state its conclusion. . . .

The circuit court then addressed each of the best-interest factors contained in MCL 722.23, purporting to limit its consideration of each factor to the change-of-school issue only. The court made findings of fact with respect to each factor.

The circuit court first delivered its findings of fact with respect to factor a, MCL 722.23(a):

> The testimony established that the parties are both devoted to their children. While the parties are in agreement that Madeline is a daddy's girl, the testimony also established a strained relationship between Andrew and his father since the school issue surfaced.
>
> Andrew has exhibited resistance to the Grosse Pointe school system, argued with his father, swore at him, and even ran away from school. His resentment toward his father suggests that the emotional ties between him and his father are strained.
>
> There was no testimony to suggest, however, that the emotional ties between Andrew and his father were not strong prior to the school issue being raised.
>
> While there was some limited discussion of the proposed move between the parents, the lack of a serious discussion about the issue was clearly the catalyst to the current turmoil the children are facing and the deterioration in the children's attitude toward their father.
>
> Ultimately it is Ms. Pierron who must bear responsibility for the current struggles facing her children. She should have ensured the school issue was resolved before moving to another community. She claims she thought her ex[-]husband wasn't opposed since he told her he wouldn't sue her for moving to Howell. However, such an analysis is hardly akin to an agreement that the children should be enrolled in another school district.
>
> Ms. Pierron also failed to timely respond to offers on behalf of Dr. Pierron for housing arrangements. Since this factor is geared primarily, however, toward the existence of love and emotional ties, the Court finds that the parties are equal.

Next, with respect to factor b, MCL 722.23(b), the court determined:

> Both parties are equally capable and generally disposed to give the children love, affection, and guidance. The

> testimony established, however, that Dr. Pierron has the better capacity and disposition to educate and raise the children in their religious creed. The children, [D]r. Pierron, and his parents all attend the Grosse Pointe United Methodist Church and have done so throughout their lives. They are active members. Madeline is involved in choir or has expressed an interest to be involved in choir.
>
> Ms. Pierron, on the other hand, does not attend church nor does she take the children to church. This factor favors Dr. Pierron.

The circuit court then considered factor c, MCL 722.23(c):

> Dr. Pierron is a radiologist with an annual income of over $200,000. He provides all health insurance for his children.
>
> Ms. Pierron is unemployed. She does some upholstery work an[d] teaches figure skating earning approximately $8,000 to $11,000 per year. Her primary source of income, however, is the over $28,000 per year in child support she receives from her ex[-]husband. While she states that living in Howell is more conducive to obtaining full-time employment, she has not done so. Nor was there any testimony of her efforts to obtain employment. There is no certainty that she will be able to obtain employment. She has not even explored part-time employment opportunities.
>
> Hence, Ms. Pierron failed to show that moving the children to the Howell school district would improve her ability to provide for the children financially. Her financial situation has not changed.
>
> Her allegations that Dr. Pierron did not pay his child support in a reliable manner simply were not supported by the evidence.
>
> Ms. Pierron provided photographs of her new condominium in Howell[,] which is newer and larger than her home in Grosse Pointe [Woods]. While her home is lovely, the Court simply cannot base a change in schools on the size of the parties' homes. The focus must be on whether it

is in the children's best educational interest to change school districts. There was no showing that the size and quality of her home impacted her children's education.

In addition, the parties stipulated that the children would continue to see their same dentist and doctor, both located on the east side. Dr. Pierron has been involved in the children's dental and medical health. Based on the evidence, Ms. Pierron has failed to establish how changing the school district would benefit the children in terms of their health care.

The court then addressed factor d, MCL 722.23(d):

Analyzing this factor in a school decision case requires the Court to look at the educational environment which existed for the children and whether it was stable and satisfactory. It is under this factor that the Court can compare the suitability of the particular schools for the parties' children.

The Court need not determine which school is the better district in general, but whether the existing school serves the needs of the children and whether there is any reason to change that school environment.

The existing school environment in this case is the Grosse Pointe public school system. Ms. Pierron has the burden of showing that the Grosse Pointe schools do not provide a stable and satisfactory environment for her children.

Andrew and Madeline have attended school in this district throughout their educational lives. The children and their parents are known to their teachers and administrators. The schools are located in close proximity to the parties' home. Dr. Pierron has regularly attended parent/teacher conferences. Ms. Pierron attended the conferences but failed to do so in 2006 [and] 2007 claiming it was unnecessary to do so.

Grosse Pointe scores at the top of the scale in terms of graduation rates, MEAP scores, and student/teacher ratios. Susan Allen, the Assistant Superintendent for Curriculum Development, testified regarding the Grosse Pointe school

system and the programs it offers students. Counselors and student support teams are available for shy or struggling students such as Andrew. No-cut athletic programs are also available for less athletically competitive students like Andrew. The school system is stable and satisfactory.

Ms. Pierron argued that the Grosse Pointe schools were not satisfactory because the[y] did not properly address the bullying of Andrew. Other than her testimony no evidence was introduced to support the argument that Andrew was, in fact, bullied or that this was any significant educational occurrence. In fact, Andrew's tutor, Deb Dixon, testified that Andrew said he was teased. Both Grosse Pointe and Howell have antibullying policies to address inappropriate behavior. Neither policy appears to be superior.

Ms. Pierron also argues that Howell has busing which will benefit her children. Ms. Pierron failed to establish, however, how busing the children will help their educational development. Moreover, the evidence established that Madeline will be on the bus 25 minutes each way, and Andrew as long as 1 hour and 10 minutes at the end of the school day.

Ms. Pierron claims this will assist her ability to obtain . . . employment, but she failed to show how it would benefit her children's education. Moreover, there was testimony regarding sexually inappropriate activity on the Howell buses on two occasions. Dr. Pierron attended a School Board meeting and expressed concern as did other Howell parents regarding the handling of the bus issue. There was no showing that busing will benefit the Pierron children.

While the testimony of the Assistant Superintendent, Lynn Parrish, regarding the Howell public school system was quite impressive, there was no showing the Pierron children would be better served in Howell. Howell, although it does well, does not score as high as Grosse Pointe in graduation rates, MEAP scores, or student/teacher ratio.

While Howell appears to be a fine school district, there is no showing that the Pierron children's school district should be changed.

Concerning factor e, MCL 722.23(e), the circuit court determined:

> Ms. Pierron maintains that one of the reasons she moved to Howell was to be closer to her sister and her mother. In fact, Ms. Pierron's sister lives about 25 minutes away and her mother lives in West Bloomfield. The move to Howell did not improve the family unit of the children.
>
> [On the] other hand, the move to Howell does impact the family unit of Dr. Pierron. The testimony established that Dr. Pierron's parents have been actively involved in the children's lives including driving Madeline to dance and previously taking Andrew to archery. The grandparents are also involved in the children's religious development.
>
> Ms. Pierron admitted the children have a close and loving relationship with their paternal grandparents. This family relationship would be greatly interrupted by a change to the Howell school district. This factor favors the children remaining in the Grosse Pointe school district.

Next, with regard to factor f, MCL 722.23(f), the court determined:

> This factor is not an issue in this school determination case. Both parents appear to be morally fit. Sadly, however, Ms. Pierron did attempt to introduce evidence that Dr. Pierron's brother had a drug problem, presumably to favor herself on this factor. It was established, however, that Dr. Pierron's brother's substance abuse problems occurred 20 years ago and he has obtained employment with the National Zoo since that time.
>
> As I said, the parties are equal on this factor.

In considering factor g, MCL 722.23(g), the circuit court opined:

> Both parties are mentally and physically able to care for their children. The only relevant testimony on this issue was the fact that Dr. Pierron's medical condition of multiple sclerosis limits his ability to relocate to other areas since he feels he would have difficulty obtaining a position

> at another hospital. He, therefore, would not have the option of moving closer to his children.
>
> On the other hand, Ms. Pierron has no physical limitations that would limit the location where she could live.
>
> Both parties are equal on this factor.

And with respect to factor h, MCL 722.23(h), the court found:

> Andrew Pierron has struggled academically, but Madeline has performed well in the Grosse Pointe school system. Although Andrew appears to have few extracurricular activities, Madeline is involved in a dance program. She has also exhibited an interest in participating in the church choir in her father's church in Grosse Pointe.
>
> The children had a private educational tutor in Grosse Pointe paid for exclusively by their father. Ms. Pierron would not take the children to the tutor after she moved to Howell. The proximity of the school to Dr. Pierron's home permitted him to attend functions during the day on occasion including having lunch with his children, attending graduation ceremonies, ice cream socials, and other activities.
>
> Dr. Pierron would be unable to participate in daytime and after school functions in Howell because of the distance and his work schedule.
>
> When Andrew left school in September 2007, Dr. Pierron was able to immediately address the issue because of his close proximity to the school. Having both parents available to attend school functions and address emergency situations is in a child's best interest.
>
> It is also important to note that Andrew's attitude towards school changed dramatically after his mother expressed her interest in moving to Howell. His tutor testified that his attitude changed at the time he indicated they might move. Andrew told his father he had no interest in going to college but simply wanted to get a job after high school. An opinion he apparently did not espouse earlier.
>
> In fact, the tutor opined that Andrew was influenced in his opinion by his mother and older brother. Ms. Dixon also

testified that, in her opinion, Andrew needed structure and discipline to succeed in his education.

The parties presented extensive evidence on the communities of Grosse Pointe and Howell. Both communities offer a wide variety of cultural, educational, and athletic opportunities to their citizens. The evidence did not establish, however, that the Howell community offered more to the Pierron children than the Grosse Pointe community such that the Court should change their school system.

Again, the focus is not on the communities, but on whether there are substantial reasons to change the school district the children currently attend. There was also extensive testimony regarding crime statistics and the convicted sexual felon registry. Ms. Pierron claims the crime rate is lower in Howell than Grosse Pointe. The evidence did not establish, however, that the criminal activity level in Howell warrants a move to that school district. While the area of Grosse Pointe in which Ms. Pierron lived bordered the higher crime neighborhoods of Detroit, there is also criminal activity in Howell and convicted sexual offenders within a relatively close proximity to her home in Howell. The evidence simply did not support Ms. Pierron's position on this issue.

Ms. Pierron also argued that the country atmosphere in Howell would benefit Andrew because he could ride his bike. Although the rural atmosphere is appealing, the evidence simply did not establish that Andrew could not adequately address his physical activity in Grosse Pointe.

This factor [favors] the father's request that the children remain in their current school district.

The circuit court next addressed factor i, MCL 722.23(i):

The Court has interviewed Andrew and Madeline Pierron and taken their views into consideration.

Dr. Pierron and Ms. Pierron both concede that the children would prefer the Howell school system. The Court notes, however, the children have not attended Howell

> schools as a result of this Court's order that they remain in the Grosse Pointe schools until the Court determines the issue. Therefore, the preference of the children cannot be based on any factual comparison between the two school districts.

The court then made findings of fact concerning factor j, MCL 722.23(j):

> Dr. Pierron was opposed to the change in school districts from the beginning. While he may have told his ex[-]wife he wouldn't sue her, he certainly did not consent to change in the school district.
>
> In fact, Dr. Pierron offered to sell his house to his ex[-]wife at a price nearly $100,000 below market value in order to encourage her to remain in the Grosse Pointe school district. He offered her his home at the price she paid for her Howell condominium. He also attempted to negotiate a parenting time schedule while she lived in Howell.
>
> While this motion was pending, Dr. Pierron [also] offered to lease a home for her and the children in Grosse Pointe so the children would not have to travel 60 miles each way to school. During the trial he stated that he would have assisted with the taxes for the Grosse Pointe home if that was necessary.
>
> Ms. Pierron rejected or failed to respond to all of Dr. Pierron's efforts. Her desire to move her children 60 miles away from their father suggests a desire to frustrate the parent/child relationship.
>
> The testimony of several witnesses suggests that once the children, particularly Andrew, became aware of their mother's desire to move, they reacted negatively to their father's efforts to prevent the move. Thus creating a wedge in the parent/child relationship. Andrew swore at his father for the first time, refused to visit with him, and even ran away from school, all out of anger over Dr. Pierron's position on the school issue.
>
> There was even testimony that the older child of Ms. Pierron, Ian, had met with her attorney to discuss this

case. Ms. Pierron contacted the newspaper which printed a story entitled, quote, "Divorce Judge to Pick Kids' School," unquote.

There are numerous other communities closer to Grosse Pointe that offer many of the same opportunities as Howell but would also permit a close relationship between the children and their father. The options of nearby communities were not adequately explored. Ms. Pierron did not work with a realtor in her effort to relocate.

Dr. Pierron repeatedly stated his strong conviction that children need both parents actively involved in their lives. He felt the move to the Howell school district would impede his ability to participate in their educational and every day lives. Without both parents in their lives on a daily basis, Dr. Pierron feels the children face a higher potential for failure. This is especially true in his opinion because Andrew struggles academically. He wants to be there for his son to help guide his educational development.

Ms. Pierron feels Dr. Pierron can still participate adequately from Grosse Pointe, but she did not otherwise address his concerns nor the general philosophy of the need for two parents to raise their children actively and on a daily basis.

She listed Dr. Pierron third on the emergency card for Howell primarily because the distance prevented him from being contacted in case of an emergency. Such an issue was not present while the parties resided in close proximity of their children's school in Grosse Pointe.

Testimony also established that Dr. Pierron and Ms. Pierron had a fairly amicable relationship before the school issue was raised. They were able to reach workable parenting time solutions. The decision to move the children to the Howell school district has been detrimental to that relationship as the parties have been entrenched in costly litigation for the last several months. The animosity and financial costs are clearly not in the best interests of the children.

This factor favors Dr. Pierron's request to keep the children in the Grosse Pointe school system.

Finally, in considering factor k, MCL 722.23(k), the circuit court determined that "[t]here was no evidence regarding domestic violence, and the issue is not relevant to the school issue," and with respect to factor *l*, MCL 722.23(*l*), the court found that there were no other relevant considerations and that "[t]he Court has addressed all major factors considered in this school decision issue."

In sum, the circuit court determined that factors b, c, d, e, h, and j favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools, and that the parties were equally situated with respect to factors a, f, g, and k. With respect to factor i, the court determined that because the children had never attended the Howell Public Schools, they had no factual basis to form a reasonable preference with respect to the change-of-school issue. The circuit court therefore ruled that defendant had "failed to establish by a preponderance of the evidence, much less the clear and convincing standard that it is in the best interests of the minor children to change their school district. The Pierron children shall remain enrolled in the Grosse Pointe school system until further order of the Court."

II

All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (BRICKLEY, J.), 900 (GRIFFIN, J.); 526 NW2d 889 (1994); *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). The great weight of the evidence standard applies to all findings of fact; the circuit court's findings should be affirmed

unless the evidence clearly preponderates in the opposite direction. *Id*. at 705; *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). In reviewing the circuit court's findings, we defer to the court's determination of witness credibility. *Id*. The abuse of discretion standard applies to the circuit court's discretionary rulings. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). A ruling concerning an important decision affecting the welfare of a child is such a discretionary ruling. A circuit court commits legal error "when it incorrectly chooses, interprets, or applies the law.' " *Id*. at 508 (citation omitted).

We review de novo questions concerning the interpretation and application of a statute. *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002). "The applicable burden of proof presents a question of law that is reviewed de novo on appeal." *FACE Trading Inc v Dep't of Consumer & Industry Services*, 270 Mich App 653, 661; 717 NW2d 377 (2006). Which party bears the burden of proof is also a question of law that we review de novo on appeal. *Pickering v Pickering*, 253 Mich App 694, 697; 659 NW2d 649 (2002).

III

The Child Custody Act, MCL 722.21 *et seq*., "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." MCL 722.26(1). The purposes of the act are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes. *Thompson v Thompson*, 261 Mich App 353, 361 n 2; 683 NW2d 250 (2004); *Vodvarka*, 259 Mich App at 511. Once the circuit court has entered an order or judgment in a child custody action, that order or judgment may be modified or amended only "for proper

cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c); see also *Spires v Bergman*, 276 Mich App 432, 444 n 4; 741 NW2d 523 (2007). Upon finding proper cause or a change in circumstances sufficient to revisit an existing custody order, the circuit court's "threshold determination . . . is whether an established custodial environment exists." *LaFleche v Ybarra*, 242 Mich App 692, 695-696; 619 NW2d 738 (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). Our Supreme Court has described an established custodial environment as "a custodial relationship of a significant duration in which [the child is] provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which 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). Factors to be considered in determining whether an established custodial environment exists "include '[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship.' " *LaFleche*, 242 Mich App at 696, quoting MCL 722.27(1)(c). An established custodial environment may exist in more than one home, *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007), and "can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order," *Berger*, 277 Mich App at 707.

If the circuit court finds that an established custodial environment exists, then the circuit 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." MCL 722.27(1)(c); see also *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). This higher "clear and convincing evidence" standard also applies when there is an established custodial environment with both parents. *Id*. If, on the other hand, the court finds that no established custodial environment exists, then the court may change custody or enter a new order "if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests." *Id*. at 7; see also *Baker*, 411 Mich at 582.

IV

As an initial matter, we wish to make clear that defendant did not act illegally by moving the children's residence to Howell without first seeking the permission of the circuit court or the consent of plaintiff. The Legislature has declared 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." MCL 722.31(1). In other words, when a child's custody is governed by court order, neither parent may move that child's residence by more than 100 miles without first obtaining permission from the court or consent from the other party. *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 293; 750 NW2d 597 (2008). Implicit in MCL 722.31(1), however, is that a custodial parent *may* move a child's residence by *less* than 100 miles without first obtaining permission from the court or consent from the other party. See *id*. The undisputed evidence in this case established

that Howell is roughly 60 miles from defendant's former home in Grosse Pointe Woods. We therefore conclude that defendant was free to relocate the children's residence to Howell without first seeking the permission of the circuit court or the consent of plaintiff. See MCL 722.31(1).

V

But the mere fact that one parent may be entitled to move a child's residence by less than 100 miles without permission of the court or consent of the other parent does not relieve the circuit court of its obligation "to resolve disputes regarding important decisions affecting the welfare of a child according to the best interests of the child." *Bowers*, 278 Mich App at 296. Indeed, a relocating parent who shares legal custody with another parent does not have the authority to unilaterally make important decisions affecting the welfare of the child, even if the relocating parent is the primary physical custodian. *Lombardo v Lombardo*, 202 Mich App 151, 159-160; 507 NW2d 788 (1993). This is because when parents share joint legal custody—as plaintiff and defendant did in this case—they also "share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b). A decision concerning the child's schooling and education is just such an important decision affecting the welfare of the child. *Bowers*, 278 Mich App at 296; *Shulick v Richards*, 273 Mich App 320, 327; 729 NW2d 533 (2006) (stating that "educational decisions are clearly 'important decisions affecting the welfare of' the children").[3] Therefore, parents with joint custody must

[3] Other "important decisions affecting the welfare of the child" within the meaning of MCL 722.26a(7)(b) include decisions concerning a child's

agree concerning where their children will attend school. *Bowers*, 278 Mich App at 296; *Lombardo*, 202 Mich App at 159.

At times, of course, joint legal custodians will not be able to agree on important decisions, such as schooling, that affect their children's welfare. Thus, "where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child." *Id.*; see also *Bowers*, 278 Mich App at 297. The court must do so by holding an evidentiary hearing and considering the relevant best-interest factors contained in MCL 722.23. *Lombardo*, 202 Mich App at 160. We refer to such an evidentiary hearing, held for the purpose of deciding an important issue affecting the welfare of the child, as a "*Lombardo* hearing." During a *Lombardo* hearing, the circuit court "must consider, evaluate, and determine each of the factors listed at MCL 722.23" for the purpose of "resolving disputes concerning 'important decisions affecting the welfare of the child' that arise between joint custodial parents." *Lombardo*, 202 Mich App at 160.

In general, a *Lombardo* hearing will involve one parent seeking to change the child's position with respect to an important issue, and another parent seeking to maintain the child's status quo with respect to that issue. For example, in the present case, defendant sought to change the minor children's school district by enrolling them in the Howell Public Schools, but plaintiff sought to maintain the status quo with regard to the issue of education by keeping the children enrolled in the Grosse Pointe Public Schools. When this

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medical care, religious upbringing, and discipline. *Shulick*, 273 Mich App at 327; *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982).

occurs, and the proposed change would not alter the child's established custodial environment, the proponent of the change has the burden of proving by a preponderance of the evidence that the change would be in the child's best interest. However, when the proposed change would alter the child's established custodial environment, the proponent of the change must prove by clear and convincing evidence that the change would be in the child's best interest. See MCL 722.27(1)(c).

Following the *Lombardo* hearing in this case, the circuit court first determined that an established custodial environment existed with both plaintiff and defendant at the time that plaintiff brought his motion. The testimony established that although defendant had primary physical custody and the children lived with her the majority of the time, the children did look to both of their parents "for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). The testimony further showed that the children had permanent, secure, and lasting relationships with both plaintiff and defendant. *Baker*, 411 Mich at 579-580. Although the children's relationship with their father may have become strained after the change-of-school issue arose, and even though the evidence suggested that the children were not as close with their father as they were with their mother, the circuit court properly found that an established custodial environment existed in both parents' homes. See *Rittershaus*, 273 Mich App at 471. The circuit court's finding in this regard was not contrary to the great weight of the evidence. MCL 722.28.

The circuit court erred, however, when it found that the proposed change of school districts would alter the children's established custodial environment. We first note that the proposed change of school districts would not have changed the actual custody arrangements in

this case. Defendant has at all times had primary physical custody of the children since the parties' divorce, and plaintiff has seen and interacted with the children only during his parenting time. Enrollment of the children in the Howell Public Schools would not alter this arrangement in any way—defendant would still maintain primary physical custody, and plaintiff would still be free to exercise liberal and reasonable parenting time just as he had done before the change of school districts.

We do acknowledge that any ultimate enrollment of the children in the Howell Public Schools might require minor modifications to plaintiff's parenting time schedule. When a modification in parenting time would amount to a change of the established custodial environment, it should not be granted unless the circuit court "is persuaded by clear and convincing evidence that the change would be in the best interest of the child." *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004); see also *Stevenson v Stevenson*, 74 Mich App 656, 659; 254 NW2d 337 (1977). But the proposed change of school districts in this case would require only minor modifications to plaintiff's parenting time, and therefore would not affect the children's established custodial environment with plaintiff. As this Court has implicitly recognized on several occasions, not all modifications of one party's parenting time amount to a change of the established custodial environment that exists with that party. See *Brown*, 260 Mich App at 595; *Stevens v Stevens*, 86 Mich App 258, 270; 273 NW2d 490 (1978). Nor do all geographic moves necessarily alter a child's established custodial environment. *Brown*, 260 Mich App at 590 (observing that "it 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) (stating that, where the children resided principally with their mother in Michigan before moving with her to Ohio, the children's "custodial environment was not disturbed by the move from Michigan to Ohio"). The mere 60-mile distance between Howell and Grosse Pointe Woods would not be a substantial barrier to plaintiff's continued parenting time, and the mere change of school districts would not necessarily alter or materially reduce plaintiff's opportunity to exercise visitation with the minor children.

Since the divorce, defendant has always been the primary physical custodian of the minor children. In contrast, plaintiff has seen the children and exercised parenting time only when his personal and work schedules have accommodated it. Enrolling the children in the Howell Public Schools quite simply would not alter this arrangement. Plaintiff would still be free to exercise parenting time with the children after school and on weekends and holidays. Such a schedule would not be materially different than plaintiff's current parenting time schedule. We cannot conclude that enrollment of the children in the Howell Public Schools would so alter plaintiff's parenting time schedule as to change the established custodial environment. Consequently, defendant was merely required to prove by a preponderance of the evidence that the proposed change of school districts would be in the children's best interests.[4] The circuit court committed a

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[4] We acknowledge that in *Taylor v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2008 (Docket No. 281555), at 4, a panel of this Court concluded that "the clear and convincing standard applies to all disputes regarding education where the parties have joint legal custody," irrespective of whether the court's ultimate decision would alter the established custodial environment. In support of this proposition, the *Taylor* panel cited *Lombardo*, 202 Mich App at 159, which in turn cited MCL 722.27(1)(c). However, MCL 722.23(1)(c) clearly states that the clear and convincing evidence standard is applicable only when the circuit court's decision would "change the established custodial environment of a

clear legal error on a major issue by requiring defendant to prove by clear and convincing evidence that the proposed change of school districts would be in the children's best interests. MCL 722.28.

VI

The circuit court also erred in several respects, both legally and factually, in its consideration of the statutory best-interest factors of MCL 722.23.

After making the abovementioned findings concerning the children's established custodial environment, and upon observing that there was "no prior court order addressing where the Pierron children would attend school,"[5] the circuit court proceeded to consider whether changing the children's school district would be in their best interests according to the statutory best-interest factors of MCL 722.23.

As noted earlier, at a *Lombardo* hearing, the circuit court "must consider, evaluate, and determine each of the factors listed at MCL 722.23" for the purpose of "resolving disputes concerning 'important decisions affecting the welfare of the child' that arise between joint custodial parents." *Lombardo*, 202 Mich App at 160. MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

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child . . . ." Accordingly, the *Taylor* panel erred when it held that the clear and convincing evidence standard should be applied irrespective of whether the court's ultimate decision would change the established custodial environment. We are not bound by the unpublished opinion in *Taylor*, which lacks precedential effect under the rule of stare decisis. MCR 7.215(C)(1).

[5] No previous order had been issued in this case concerning the children's schooling, and as the circuit court properly observed, "[u]ntil the 2007-2008 school year, the parents were in agreement that the children would attend the Grosse Pointe public school system."

(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.

Unlike the practice required for general change-of-custody hearings, during *Lombardo* hearings the court must narrowly focus its consideration of each best-interest factor on the specific "important decision[]

affecting the welfare of the child"[6] that is at issue. Following the *Lombardo* hearing in this case, the circuit court concluded that factors b, c, d, e, h, and j favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools, and that the parties were equally situated with respect to factors a, f, g, and k. The court refused to consider the children's preferences under factor i. We now address seriatim the court's findings with respect to the best-interest factors.

We first conclude that the court's finding that the parties were equally situated with respect to factor a, MCL 722.23(a), was against the great weight of the evidence presented at the *Lombardo* hearing. MCL 722.28. While the testimony established that both plaintiff and defendant were equally capable of providing love and affection for the minor children, this evidence was relevant to factor b rather than to factor a. The evidence relevant to factor a demonstrated that the children's relationship and bond with plaintiff had severely deteriorated since the change of school districts was proposed. As the circuit court observed, "Andrew has exhibited resistance to the Grosse Pointe school system, argued with his father, swore at him, and even ran away from school. His resentment toward his father suggests that the emotional ties between him and his father are strained." In addition, the evidence clearly established that the children had already grown emotionally attached to the idea of living with their mother in Howell and attending the Howell Public Schools. Factor a favored defendant's request to enroll the children in the Howell Public Schools.

In concluding that factor b, MCL 722.23(b), favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools, the circuit court commit-

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[6] MCL 722.26a(7)(b).

ted clear legal error on a major issue by failing to narrowly focus its consideration of the factor to the specific important decision affecting the welfare of the child that was pending before it. MCL 722.28. As the circuit court properly recognized, both plaintiff and defendant were equally capable of providing love and affection for the minor children, and the proposed change of school districts would not have affected either parent's ability to do so. But the court ultimately decided that factor b favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools because plaintiff regularly took the children to church in the Grosse Pointe area. It is true that plaintiff regularly took the children to a Methodist church in Grosse Pointe and that defendant did not regularly attend church with the children. However, issues concerning the children's church attendance were simply not relevant to the particular change-of-school issue pending before the court during the *Lombardo* hearing. There was no evidence that the proposed change of school districts would affect plaintiff's ability to take the children to church in Grosse Pointe—presumably on Sundays when neither the Grosse Pointe Public Schools nor the Howell Public Schools would be in session. The evidence presented indicated that the parties were equally situated with respect to factor b.

The circuit court committed further legal error on a major issue by failing to narrowly focus its consideration of factor c, MCL 722.23(c), to the specific important decision affecting the welfare of the children that was pending before it. MCL 722.28. We acknowledge that plaintiff earns far more money than defendant and is therefore better able to provide the children with food, clothing, and medical care *in general*. However, this disparity in income had nothing to do with the proposed change of school districts. There was simply

no showing that enrollment of the children in the Howell Public Schools would affect the parties' respective abilities to provide for the children. Indeed, as the circuit court recognized, the parties had stipulated that the children would continue to see the same doctors and dentists and that plaintiff would remain involved in the children's health care. Moreover, the children already principally resided with defendant, and there was no showing that plaintiff's child support payments were insufficient to allow defendant to provide for the children's needs. It goes without saying that any change of school districts would not have affected plaintiff's obligation to pay child support to defendant. In the limited context of the specific change-of-school issue pending before the court, the parties were equally situated with respect to factor c.

We agree with the circuit court that factor d, MCL 722.23(d), favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools. The children's status quo educational environment was the Grosse Pointe school system. The circuit court properly focused its consideration of factor d on the specific change-of-school decision that was pending before it, and the court's findings of fact concerning this factor were not against the great weight of the evidence. MCL 722.28.

Next, we conclude that the circuit court committed legal error on a major issue by failing to narrowly focus its consideration of factor e, MCL 722.23(e), to the specific change-of-school decision pending before it. MCL 722.28. The circuit court found that factor e favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools because the proposed change of school districts would hamper the children's relationship with their paternal grandpar-

ents. While defendant's move to Howell may have already hampered the relationship between the children and their paternal grandparents, the proposed change of school districts, itself, would not further affect this relationship. Nor would the proposed change of school districts, itself, further the children's relationship with defendant's sister or mother. The parties were equally situated with respect to factor e.

We agree with the circuit court that, within the context of the particular change-of-school issue pending before it, the parties were equally situated with respect to factor f, MCL 722.23(f), and factor g, MCL 722.23(g). The moral fitness and health of the parties had no direct bearing on whether the children should remain in the Grosse Pointe Public Schools or be enrolled in the Howell Public Schools.

We conclude that the circuit court's finding with respect to factor h, MCL 722.23(h), was against the great weight of the evidence presented at the *Lombardo* hearing. MCL 722.28. The court determined, following extensive testimony, that the Grosse Pointe Public Schools and the Howell Public Schools were rated equally, were approximately equal in quality, and that both school districts offered numerous educational, social, athletic, and recreational opportunities. The court also determined that the crime rates surrounding the two school districts were roughly equivalent. It is true that Madeline had performed well in the Grosse Pointe Public Schools. However, the evidence established that Madeline was bright and curious, and that it was therefore just as likely that she would perform equally as well in the Howell Public Schools. It is also true that Andrew had a private tutor in the Grosse Pointe area and that he struggled in school at times. However, the evidence established the availability of

similar tutoring and other educational programs for students in the Howell area. There was simply no showing that Andrew could not receive the same type of specialized tutoring in Howell that he had received in the Grosse Pointe area or that his education and development would suffer in any way if enrolled in the Howell Public Schools. Although it is likely true that plaintiff would not be able to attend as many of the children's daytime school activities if the children were enrolled in the Howell Public Schools, he would still be able to attend after-school and evening school events and programs.

Also with respect to factor h, we conclude that the circuit court disregarded certain important evidence concerning Andrew's likelihood to prosper in the Howell Public Schools. Considerable testimony established that Andrew had been either bullied or teased in the Grosse Pointe Public Schools. Whether Andrew was actually "bullied," as suggested by defendant, or "teased," as suggested by his tutor, is not material to this calculus. What is material is that Andrew had expressed a renewed interest in school and education upon learning of the proposed change of school districts. Defendant attributed this to the fact that Andrew, who suffered from low self-esteem, had been taunted in the Grosse Pointe Public Schools regarding the fact that he had repeated a grade. Defendant believed that "it would do Andrew a world of good to be in an environment where nobody knows that he was held back" and that this was "the essential source of [Andrew's] low self esteem." Defendant also believed that the relaxed environment of the Howell Public Schools—in contrast to the extreme competitiveness of the Grosse Pointe Public Schools—would benefit the minor children. The circuit court wholly failed to consider defendant's testimony in this regard.

The circuit court's determination that factor h, MCL 722.23(h), favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools was against the great weight of the evidence. MCL 722.28. With respect to Andrew, factor h clearly favored defendant's request to enroll him in the Howell Public Schools. And with respect to Madeline, the parties were equally situated under factor h.

We next conclude that the circuit court clearly erred on a major legal issue when it refused to consider the reasonable preferences of the children under factor i, MCL 722.23(i). With respect to factor i, the circuit court observed that "Dr. Pierron and Ms. Pierron both concede that the children would prefer the Howell school system." Nonetheless, the court determined that because the children had never attended the Howell Public Schools, they had no factual basis to form a reasonable preference with respect to the change-of-school issue. Accordingly, the circuit court refused to consider the preference of the children.

Under factor i, the circuit court "*must* consider-. . . the 'reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.' " *Treutle v Treutle*, 197 Mich App 690, 694; 495 NW2d 836 (1992), quoting MCL 722.23(i) (emphasis added). At the time of the *Lombardo* hearing, Andrew was 13 years old and Madeline was 8 years old. The children were consequently "of sufficient age to express preference" within the meaning of MCL 722.23(i). *Bowers v Bowers*, 190 Mich App 51, 56; 475 NW2d 394 (1991) (holding that a six-year-old child is old enough to have his preference given some weight under factor i).[7] Thus, assuming that the children's

[7] We recognize that *Treutle* and *Bowers* both involved full change-of-custody hearings. But we perceive no reason why the law concerning

preferences were "reasonable," the circuit court was required to take them into consideration in ruling on the choice-of-school issue.

The circuit court found, and plaintiff argues on appeal, that because the children had never attended the Howell Public Schools, any preference that they might have had for the Howell Public Schools could not have been "reasonable." We disagree. MCL 722.23(i) merely requires that the child's preference be "reasonable." It is true that the word "reasonable" is susceptible to multiple meanings. See *People v Gregg*, 206 Mich App 208, 213; 520 NW2d 690 (1994). But we cannot conclude that by including the word "reasonable" in MCL 722.23(i), the Legislature intended to require that a child's preference be accompanied by detailed thought or critical analysis. Instead, we think it clear that by including the word "reasonable" in the language of MCL 722.23(i), the Legislature simply intended to exclude those preferences that are arbitrary or inherently indefensible.

In this case the children had defensible reasons for preferring the Howell Public Schools to the Grosse Pointe Public Schools. It made eminent sense for the children to prefer to attend school in the community where they lived with their primary custodial parent. In addition, the evidence showed that Andrew was unhappy and struggling in the Grosse Pointe Public Schools and that he would have a greater potential for success in a new educational environment where he could effectively "start over." And although Madeline was apparently not as unhappy in the Grosse Pointe Public Schools as was Andrew, her preference for the Howell Public Schools was not unreasonable merely

factor i should be applied any differently in the context of *Lombardo* hearings than in the context of full change-of-custody hearings.

because it was influenced by her feelings and her emotional attachment to defendant. See *Carson v Carson*, 156 Mich App 291, 300; 401 NW2d 632 (1986).

The minor children were of sufficient age to express their preferences with respect to the change-of-school issue, *Bowers*, 190 Mich App at 56, and we conclude that their preferences were "reasonable" within the meaning of MCL 722.23(i). The circuit court clearly erred on a major legal issue when it failed to consider the children's preference for enrollment in the Howell Public Schools. MCL 722.28. With respect to both Andrew and Madeline, factor i favored defendant's request to enroll the children in the Howell Public Schools.

While we disagree with much of the circuit court's unnecessary and sprawling discussion concerning factor j, MCL 722.23(j), we do agree with the court's ultimate finding that factor j favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools. Quite simply, keeping the children enrolled in the Grosse Pointe Public Schools would increase the likelihood that the children would maintain stronger and closer ties with their father. Factor j consequently favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools.

Finally, we agree with the circuit court that the parties were equally situated with respect to factor k, MCL 722.23(k), and factor *l*, MCL 722.23(*l*). There were no allegations of domestic violence in this case, and no other relevant considerations were identified that would have affected the circuit court's ultimate decision on the change-of-school issue.

As noted previously, defendant, as the proponent of the proposed change of school districts, was required to prove by a preponderance of the evidence that removing the children from the Grosse Pointe Public Schools and

enrolling them in the Howell Public Schools would be in their best interests. We note that "the statutory best interests factors need *not* be given equal weight." *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998) (emphasis in original). Neither the circuit court nor this Court is required to "mathematically assess equal weight to each of the statutory factors." *Id*. Nor does a finding regarding one factor necessarily countervail the findings regarding the other factors. *Winn v Winn*, 234 Mich App 255, 263; 593 NW2d 662 (1999). In light of our analysis above, we conclude that defendant likely satisfied her burden of proof on the change-of-school issue in this case. *Heid v Aaasulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995) (observing that "a finding of equality or near equality on the factors set out in MCL 722.23; MSA 25.312(3) will not necessarily prevent a party from satisfying the burden of proof"). Moreover, we cannot omit mention that it is certainly in the children's best interests to attend school in the community where they live with their primary physical custodian. When all else is equal, "[t]he overwhelmingly predominant factor is, as always, the welfare of the child," *Winn*, 234 Mich App at 263, and, in the end, we are "duty-bound to examine all the criteria in the ultimate light of the child's best interests," *Heid*, 209 Mich App at 596. Lastly, as both parties acknowledged during the *Lombardo* hearing, the children clearly preferred the Howell Public Schools to the Grosse Pointe Public Schools. While it is true that "[t]he child's preference does not automatically outweigh the other factors," *Treutle*, 197 Mich App at 694, in close cases, the children's reasonable preference may be the ultimate determining factor, see *Lustig v Lustig*, 99 Mich App 716, 731; 299 NW2d 375 (1980).

We conclude that the circuit court committed legal errors on a number of major issues and made several findings of fact that were against the great weight of the

evidence. MCL 722.28. We may not simply remand for entry of an order directing that the minor children be enrolled in the Howell Public Schools because, on a finding of error, "[d]e novo review of the ultimate custodial disposition is inappropriate." *Fletcher*, 447 Mich at 889. Therefore, we vacate the circuit court's order directing that the minor children remain enrolled in the Grosse Pointe Public Schools and remand for reevaluation of the change-of-school issue consistent with this opinion. See *id*. On remand, the court should consider up-to-date information in its determination of the choice-of-school issue, including, but not necessarily limited to, the current and reasonable preferences of the minor children and any other changes that may have arisen in the interim period. See *id*.

VII

This is not the end of the inquiry, however. Regardless of how the circuit court decides the change-of-school issue, it might well be required to also ultimately decide a change-of-custody issue.

We first consider what may happen if the circuit court determines on remand that the minor children should remain enrolled in the Grosse Pointe Public Schools. Because defendant remains the primary physical custodian and now lives in Howell, keeping the minor children enrolled in the Grosse Pointe Public Schools would be tantamount to a de facto change of physical custody from defendant to plaintiff. Such an effective change of custody would necessitate an additional review of the statutory best-interest factors of MCL 722.23 to determine whether plaintiff could prove, by clear and convincing evidence, that the change of custody would be in the children's best interests. See *Brown*, 260 Mich App at 590-591. If the court first

determines on remand that it is in the children's best interests to remain in the Grosse Pointe Public Schools, and if plaintiff is then able to carry his burden of establishing that a change in physical custody from defendant to plaintiff would be in the children's best interests, the circuit court would be free to make plaintiff the children's primary physical custodian. On the other hand, if the court concludes on remand that it is in the children's best interests to remain in the Grosse Pointe Public Schools, but plaintiff is then unable to meet his burden of proving that a change in physical custody from defendant to plaintiff would be in the children's best interests, the court may realistically have "no alternative but to determine which parent shall have sole custody of the children." *Fisher*, 118 Mich App at 233.

Of course, the circuit court may ultimately conclude on remand that defendant has satisfied her burden of proving that it is in the best interests of the children to attend the Howell Public Schools. In such a case, it is possible that plaintiff may move for a change of custody. To do so, plaintiff would first have to demonstrate "proper cause" or a "change of circumstances" sufficient to reopen the circuit court's prior custody orders. MCL 722.27(1)(c); *Vodvarka*, 259 Mich App at 508. We note that defendant's 60-mile move to Howell with the children would not, by itself, constitute proper cause or a sufficient change in circumstances to revisit the court's earlier custody orders. See *Sehlke v VanDer-Maas*, 268 Mich App 262, 263; 707 NW2d 603 (2005), rev'd in part on other grounds 474 Mich 1053 (2006). However, defendant's 60-mile move to Howell with the children, coupled with the accompanying change in the children's school environment, would likely constitute a sufficient change of circumstances to warrant consideration of a change of custody. *Sinicropi*, 273 Mich App at

177-178. Assuming that plaintiff could establish proper cause or a change of circumstances, the circuit court would then be required to hold a full change-of-custody hearing and to consider the statutory best-interest factors of MCL 722.23. Because any change of custody sought by plaintiff in this regard would alter the children's established custodial environment with defendant, plaintiff would be required to prove by clear and convincing evidence that the requested change of custody would be in the children's best interests. MCL 722.27(1)(c); *Foskett*, 247 Mich App at 6.[8]

VIII

Lastly, we affirm the circuit court's refusal to consider the merits of defendant's request for attorney fees. Defendant first raised her request for attorney fees before the circuit court by way of her motion for reconsideration. A circuit court does not err by declining to consider legal arguments raised for the first time in a motion for reconsideration. *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). We perceive no error with respect to this issue.

IX

We affirm the circuit court's refusal to consider the merits of defendant's request for attorney fees. We vacate the circuit court's order directing that the minor

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[8] We can envision a scenario in which the circuit court might first determine on remand that it is in the best interests of the children to attend the Howell Public Schools, but subsequently determine after a full change-of-custody hearing that plaintiff has carried his burden of proving that a change of custody from defendant to plaintiff would be in the children's best interests. If this occurs, the circuit court may again have "no alternative but to determine which parent shall have sole custody of the children." *Fisher*, 118 Mich App at 233.

children remain enrolled in the Grosse Pointe Public Schools and remand the case. On remand, the circuit court shall first determine whether defendant has proven, by a preponderance of the evidence, that it is in the children's best interests to attend the Howell Public Schools. After making this determination, the court shall undertake further proceedings, if necessary, which are consistent with this opinion.

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

OAKLAND COUNTY v OAKLAND COUNTY DEPUTY SHERIFF'S ASSOCIATION

Docket No. 280075. Submitted November 13, 2008, at Detroit. Decided February 3, 2009, at 9:05 a.m. Leave to appeal sought.

The Oakland County Deputy Sheriff's Association, a union, filed an unfair-labor-practice charge with the Michigan Employment Relations Commission. The union also petitioned for compulsory arbitration under 1969 PA 312, MCL 423.231 *et seq.* (Act 312), for uniformed Oakland County Sheriff's Department employees below a certain rank. Asserting that some classes of employees were ineligible for Act 312 arbitration, the respondents, Oakland County and the Oakland County Sheriff's Department, moved to dismiss the petition for arbitration or to clarify the existing bargaining unit and declare some groups of employees ineligible. The commission granted the respondents' motion in part and severed the union into separate bargaining units, only one of which was eligible under Act 312. The ineligible unit included corrections officers. The union appealed.

The Court of Appeals *held*:

1. An employer may seek severance of a mixed bargaining unit, even in the absence of a request by an employee to do so. An employer has the same right under the act to raise a representation issue as an employee or a labor organization acting on the employee's behalf. Act 312 is intended to protect both employers and employees. The commission provided factual support for its conclusion that severance was appropriate under the circumstances of this case, given that the parties had been operating without a collective bargaining agreement since 2003 and the bargaining process had been hindered by the parties' inability to resolve the dispute-resolution mechanism applicable to a majority of the employees. The commission's decision was neither arbitrary nor capricious, and it was supported by competent, material, and substantial evidence on the whole record.

2. The hearing referee did not abuse his discretion by failing to hold an evidentiary hearing to establish the classes of employees eligible for Act 312 arbitration. He gave the union several oppor-

tunities to show the existence of disputed factual issues that required an evidentiary hearing, but the union did not do so.

3. The commission had authority under its rules to require the briefing of issues, to treat an issue under Act 312 as one involving an action to clarify bargaining units, and to enter the dismissal order.

Affirmed.

O'CONNELL, J., dissenting, stated that the commission improperly denied the union its opportunity to have an evidentiary hearing regarding whether certain sheriff's department employees, including corrections officers, are eligible for Act 312 arbitration. One element of the test to determine whether members of a bargaining unit are entitled to Act 312 arbitration requires that they be employees of a critical-service department promoting public safety, order, and welfare, so that a work stoppage by those employees would threaten community safety. The commission should employ a totality-of-the-circumstances test and consider a number of factors to determine whether a strike by corrections officers would threaten community safety. The commission's decision should be vacated, and the case remanded for an evidentiary hearing on that issue.

LABOR RELATIONS — PUBLIC EMPLOYEES — ARBITRATION — COLLECTIVE BARGAINING.

An employer may seek severance of a mixed collective bargaining unit in a matter before the Michigan Employment Relations Commission under MCL 423.231 *et seq.*, even in the absence of a request by an employee to do so.

Butzel Long (by *Malcolm D. Brown*) for Oakland County and the Oakland County Sheriff's Department.

Webb, Engelhardt and Fernandes (by *L. Rodger Webb*) for the Oakland County Deputy Sheriff's Association.

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

JANSEN, P.J. Charging party, the Oakland County Deputy Sheriff's Association (the union), appeals by right the decision and order of the Michigan Employment Relations Commission (MERC), which dismissed

in part the union's petition for binding arbitration under 1969 PA 312, MCL 423.231 *et seq*. (commonly referred to as "Act 312"), and severed the union's existing bargaining unit into two units—one consisting of employees eligible for Act 312 arbitration and the other consisting of employees not eligible for Act 312 arbitration. We affirm.

The union represents a bargaining unit of approximately 750 uniformed employees of respondent Oakland County Sheriff's Department. In August 2006, the union filed an unfair-labor-practice charge against the Sheriff's Department and a petition seeking Act 312 compulsory arbitration for "all sworn sheriff's department employees below the rank of sergeant." Respondents, Oakland County and the Oakland County Sheriff's Department, moved to dismiss the petition for arbitration, alleging that several classes of employees were ineligible for Act 312 arbitration, or to clarify the existing bargaining unit and declare certain groups of employees ineligible for arbitration.[1] The MERC granted respondents' motion to dismiss in part and severed the union into two separate bargaining units—namely (1) a unit consisting of all employees eligible under Act 312, consisting of "all positions previously

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[1] The public employment relations act (PERA), MCL 423.201 *et seq.*, prohibits public employees from striking. MCL 423.202. " '[A]s a necessary tradeoff for the prohibition against striking' " in police and fire disputes, the Legislature enacted 1969 PA 312, MCL 423.231 *et seq.*, which provides for compulsory arbitration for labor disputes in police and fire departments. *Jackson Fire Fighters Ass'n, Local 1306 v City of Jackson (On Remand)*, 227 Mich App 520, 523; 575 NW2d 823 (1998) (citation omitted). Only certain employees are eligible for arbitration under Act 312, specifically, "employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department." MCL 423.232(1).

within the bargaining unit that are assigned to the Patrol Services Division (including the complex control [sic] assignments), or assigned to the Investigative and Forensic Services Division (excluding forensic laboratory specialists), and require [certification under the Commission on Law Enforcement Standards Act] or are assigned to positions as dispatchers" and (2) a unit consisting of "all positions previously within the bargaining unit that are assigned to the Corrections Division or to circuit court investigator or forensic laboratory specialist positions."

In *Branch Co Bd of Comm'rs v Int'l Union, United Automobile, Aerospace & Agriculture Implement Workers of America*, 260 Mich App 189, 192-193; 677 NW2d 333 (2003), this Court set forth the standard that governs our review of MERC decisions:

> We review MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). MERC's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. In contrast to . . . MERC's factual findings, its legal rulings are afforded a lesser degree of deference because review of legal questions remains de novo, even in MERC cases. [Citations and quotation marks omitted.]

The union argues that there was no legal or factual reason for the MERC to sever the bargaining unit for the benefit of the employer and that severance improperly served only to punish the union for filing the unfair labor practice charges. We disagree.

Although less deference is afforded an agency's legal conclusions, appellate courts traditionally have acknowledged " 'the MERC's expertise and judgment in the area of labor relations.' " *Port Huron Ed Ass'n v*

Port Huron Area School Dist, 452 Mich 309, 323 n 18; 550 NW2d 228 (1996) (citation omitted). Further, a determination of the appropriate bargaining unit " 'is a finding of fact, not to be overturned . . . if it is supported by competent, material and substantial evidence.' " *Mich Ed Ass'n v Alpena Community College*, 457 Mich 300, 307; 577 NW2d 457 (1998) (citation omitted); see also *Police Officers Ass'n of Michigan v Grosse Pointe Farms*, 197 Mich App 730, 735; 496 NW2d 794 (1993).

As an initial matter, we find no error in the MERC's legal determination that an employer is permitted to seek severance of a mixed bargaining unit, even in the absence of a request by an employee. Although the MERC recognized the general policy against disturbing existing bargaining units and acknowledged that severance at the request of an employer had not previously been considered, it also noted that it had not been rejected either. In any event, the MERC is permitted to reexamine prior decisions, depart from precedents, promulgate law though rulemaking, break from past decisions, or reconsider previously established rules. *Melvindale-Northern Allen Park Federation of Teachers, Local 1051 v Melvindale-Northern Allen Park Pub Schools (After Remand)*, 216 Mich App 31, 37-38; 549 NW2d 6 (1996). "If the departure from precedent is explained, appellate review is limited to whether the rationale is so unreasonable as to be arbitrary and capricious." *Id*. at 38.

As the MERC observed, an employer has the same statutory right to raise a representation issue as an employee or a labor organization acting on the employee's behalf. See MCL 423.212. The MERC also properly observed that Act 312 is intended to protect both employers and employees. The union did not identify below, and has not identified on appeal, any law prohib-

iting an employer from seeking severance of a mixed bargaining unit. Against this backdrop, the MERC concluded that there was

> no basis under PERA or under Act 312 to hold that a covered employer may never seek severance of a mixed bargaining unit, where the circumstances make severance appropriate. It is the employer that is principally burdened by Act 312, by having its ordinary prerogatives truncated. . . . There is no logical basis for precluding an employer from seeking clarification of a unit's coverage by Act 312, where the statutory structure expressly allows that same employer to petition for arbitration under the Act in precisely the same fashion as a union may initiate proceedings.

Additionally, although the MERC acknowledged its past practice of avoiding severance of preexisting mixed units, it stated that this practice should not be inflexibly applied:

> We must have always foremost in mind our obligation to "decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and to otherwise effectuate the purposes of this act, the unit appropriate for the purpose of collective bargaining" taking into account the need to define a unit which "will best secure to the employees their right of collective bargaining." MCL 423.213 and 423.9e. Here, we find that the existing mixed unit is not effectuating the purposes of the Act; to the contrary, the continued existence of this mixed unit has interfered in the normal and healthy give and take of bargaining anticipated under PERA and under Act 312.

The union has not shown that MERC's decision to sever its bargaining unit violated any constitutional or statutory provision or that the decision was based on a substantial and material error of law. Further, contrary to the union's argument, the MERC provided factual

support for its conclusion that severance was appropriate under the circumstances of this case. As the MERC explained, the

> parties' collective bargaining agreement expired in 2003. This has left the parties frozen in place, with no immediate mechanism for adjusting conditions of employment. By a significant margin, the majority of the existing bargaining unit are in job categories not covered by Act 312. The Act 312 arbitration petition seeks to have an arbitrator set conditions of employment for County road patrol officers and for over 400 employees who clearly function as jail guards. The bargaining process itself has been skewed by the inability of the parties to agree, or otherwise resolve, which groups of employees are covered by which dispute resolution mechanism. The intractable nature of the dispute between the parties was evidenced by the filing of an extraordinary number of unfair labor practice charges.
>
> Severing the existing unit results in one Act 312 covered unit of nearly 350 employees and a non-Act 312 unit of over 400 employees. Both resulting units are large by comparison with other public employee bargaining units and would clearly be of sufficient size to effectively engage in collective bargaining with the Employer over issues peculiar to their respective unit members. The two separate units may continue to be represented by the Union, which will act separately on behalf of each unit. The Employer will be able to bargain separate agreements with the two units without having issues that should properly be limited to one group impinging on negotiations involving the other. Therefore, we find it appropriate to direct the severing of the existing unit in order to foster more productive bargaining and to thereby effectuate the purposes of the Act.

We find no support in the record for the union's assertion that the MERC punished it for filing unfair labor practice charges. Rather, the MERC observed that the parties had been operating without a collective bargaining agreement since 2003 and that the bargain-

ing process had been hindered because of disagreement over the appropriate dispute resolution mechanism applicable to a majority of the employees. The MERC's severance decision was intended to foster more productive bargaining for all affected employees, all of whom would still be represented by the union. The MERC's decision was neither arbitrary nor capricious, and it was supported by competent, material, and substantial evidence on the whole record.

Nor do we find merit to the union's argument that the proceedings below were procedurally flawed. The union argues that it was entitled to an evidentiary hearing before a hearing referee to allow it to establish that various classes of employees qualified for Act 312 arbitration. The decision whether to hold an evidentiary hearing is within the discretion of the MERC. *Sault Ste Marie Area Pub Schools v Michigan Ed Ass'n*, 213 Mich App 176, 182; 539 NW2d 565 (1995).

The referee who was assigned to this matter originally scheduled an evidentiary hearing, recognizing that the parties were disputing whether certain classes of employees were eligible for Act 312 arbitration and that an evidentiary hearing would likely be necessary to resolve the disputed issues of fact. The referee issued a pretrial order directing the parties to, among other things, provide specific information regarding the disputed factual issues. The union responded by filing a brief that listed a number of areas in which it intended to present proofs, but did not state what the proofs would show. Further, it did not even discuss several positions that respondents had asserted were not eligible for Act 312 arbitration, such as positions in the crime lab, circuit court investigators, circuit and district court staff, and complex patrol officers. The referee found that the union's brief had failed to comply with

the pretrial order, but agreed to give the union additional time to file a conforming supplemental brief. The referee also issued a supplemental pretrial order directing the union to substantively address its claim that the Oakland County Sheriff's Department was "factually unique," to identify any material disputes of fact regarding each of the contested employee groups,[2] and to list and address any material disputes of fact regarding the appropriate treatment of each classification under Act 312, including specific offers of proof. Despite being granted this extension, the union failed to timely submit a supplemental brief. Consequently, the referee granted respondents' petition to dismiss the issue of Act 312 arbitration with respect to employees working in the crime lab, in the circuit and district courts, and as circuit court investigators. However, the referee declined to dismiss the petition with respect to officers assigned to complex patrol and granted oral argument for further consideration of that issue.[3] A week later, the union filed a supplemental brief and a motion for reconsideration, but the referee declined to grant reconsideration because the supplemental brief still failed to establish the existence of a material factual dispute.

The union was given several opportunities to show the existence of disputed factual issues that required an evidentiary hearing, but repeatedly failed to do so. Under these circumstances, the referee did not abuse his discretion by failing to hold an evidentiary hearing. See *Swickard v Wayne Co Med Examiner*, 184 Mich App 662, 668; 459 NW2d 92 (1990) (observing that "since

[2] These groups specifically consisted of the corrections division, crime lab employees, circuit court investigators, circuit court and district court staff, and complex patrol officers.

[3] Respondents later conceded that complex patrol officers were eligible for arbitration under Act 312.

there were no disputed issues of fact, an evidentiary hearing would have served no purpose").

The union also challenges the referee's authority to order briefing, to "morph" an Act 312 issue into a unit clarification action, and to enter an order of dismissal. However, the MERC rules clearly provide authority for these matters. See Mich Admin Code, R 423.173 (providing that a referee "may direct the filing of briefs when the filing is, in the opinion of the commission or administrative law judge, warranted by the nature of the proceedings or the particular issues involved"); Mich Admin Code, R 423.172(2) (permitting a referee to hold pretrial conferences, dispose of motions, regulate the course of the hearing, and take other actions as necessary and authorized by the rules); Mich Admin Code, R 423.165(1) (stating that the "commission or administrative law judge designated by the commission may, on its own motion or on a motion by any party, order dismissal of a charge").

The union also claims that the hearing referee mischaracterized the facts. The union, however, advised the referee that there were no "significant issues of fact" and failed to take advantage of several opportunities to present offers of proof and to identify disputed issues of fact. The union's refusal to brief below the factual disputes that it now asserts on appeal precludes appellate relief. See *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006), aff'd 478 Mich 348 (2007); see also *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

Finally, the union argues that the MERC erroneously construed MCL 423.232(1) by concluding that the statutory language "or subject to the hazards thereof" modifies only the phrase "engaged . . . in fire fighting"

and does not modify the phrase "engaged as policemen." We find it unnecessary to resolve this issue of statutory construction because it is not necessary to the outcome of this case. However, even assuming arguendo that the language "subject to the hazards thereof" could be construed as modifying the phrase "engaged as policemen" in MCL 423.232(1), it is well settled that county corrections officers and other employees who are not police officers are not subject to the hazards of police work. *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580, 593-596; 599 NW2d 504 (1999); *Capital City Lodge No 141, Fraternal Order of Police v Ingham Co Bd of Comm'rs*, 155 Mich App 116, 118-119; 399 NW2d 463 (1986); *Local No 214, Teamsters v Detroit (On Remand)*, 103 Mich App 782; 303 NW2d 892 (1981). Moreover, as discussed previously, the union was given an opportunity to demonstrate why its corrections officers and other employees who were not police officers were factually unique, such that they might be entitled to coverage under the language "subject to the hazards thereof." Nonetheless, the union failed to do so. In other words, even if some police employees who are not actually police officers might potentially qualify for coverage under Act 312, the union failed to establish a factual issue with respect to whether its corrections officers could so qualify in this case.

Affirmed.

OWENS, J., concurred.

O'CONNELL, J. (*dissenting*). I respectfully dissent. The central issue in this case requires this Court to decide whether Oakland County corrections officers, as well as others employed by the Oakland County Sheriff's Department, are entitled to an evidentiary hearing to

determine whether they are eligible for arbitration pursuant to what is commonly known as Act 312, the act providing for compulsory arbitration of labor disputes in police and fire departments, MCL 423.231 *et seq*. In my view, the Michigan Employment Relations Commission (MERC) improperly denied the Oakland County Deputy Sheriff's Association (the union) its opportunity to have an evidentiary hearing on this important issue, particularly with regard to the status of the corrections officers. I would vacate the MERC's decision and remand this case to the administrative hearing officer for an evidentiary hearing.[1]

Public employees are prohibited by statute from striking. MCL 423.202. However, in passing Act 312, the Legislature provided that "public police and fire departments" could enter into compulsory, binding arbitration to settle labor disputes.[2] *Capitol City Lodge No*

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[1] Initially, I wish to emphasize that this case concerns whether a work stoppage by corrections officers would threaten community safety. To my knowledge, neither the MERC nor any court has addressed the issue in its proper framework. I would instruct the hearing officer to determine, on the basis of the totality of the circumstances, whether a work stoppage by the corrections officers represented by the union would threaten public safety. At the hearing, the hearing officer need not and should not focus on the issue of replaceability. Instead, the hearing officer should address the central issue of this case, namely, whether a work stoppage by corrections officers threatens community safety. In my opinion, whether ameliorative actions by the employer can be taken to reduce the threat is irrelevant.

[2] In MCL 423.231, the Legislature identified its reasons for providing compulsory arbitration of labor disputes in police and fire departments:

> It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

141, Fraternal Order of Police v Ingham Co Bd of Comm'rs, 155 Mich App 116, 117-118; 399 NW2d 463 (1986). "Public police and fire departments" that are eligible for Act 312 arbitration include "any department of a city, county, village, or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof . . . ." MCL 423.232(1). Act 312 "reflects the Legislature's concern that employees of public police and fire departments, who provide vital services to their communities and who are prohibited by law from striking, have a binding procedure for resolving labor disputes which is more expeditious, more effective and less expensive than courts." *Capitol City Lodge*, 155 Mich App at 118.

In *Metro Council No 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299, 335; 294 NW2d 578 (1980), a plurality of our Supreme Court set forth two conditions that a union must establish before it is eligible for Act 312 arbitration:

> First, the particular complainant employee must be subject to the hazards of police work . . . . Second, the interested department/employer must be a critical-service county department engaging such complainant employees and having as its principal function the promotion of the public safety, order and welfare so that a work stoppage in that department would threaten community safety . . . .

Although *Metro Council No 23* provided direction, MERC panels still weighed the duties and responsibilities of corrections officers represented by different bargaining units to determine whether the circumstances of their employment indicated that they were entitled to Act 312 arbitration. And, in particular, MERC rulings issued before 1986 indicated that corrections officers employed by a county sheriff's department were eligible for Act 312 arbitration.

The MERC panel in *Washtenaw Co Sheriff's Dep't v Teamsters Local 214*, 1979 MERC Lab Op 671, 677, had determined before *Metro Council No 23* was issued that corrections officers who performed standard security duties, as well as corrections officers working as cooks and nurses in the jail, "performe[d] a security-type function" and were exposed to the hazards of police work; therefore, they were eligible for Act 312 arbitration. The MERC panel in *Bay Co v Bay Co Sheriff's Deputies Ass'n*, 1985 MERC Lab Op 377, applied the two-part test presented in *Metro Council No 23* to determine that corrections officers employed by the Bay County Sheriff's Department were eligible for Act 312 arbitration. First, the panel determined that the correctional facility officers (CFOs) working at the Bay County jail were exposed "to risks substantially similar to those of sworn police officers so that the CFOs should be deemed to be subject to the hazards of police work." *Id.* at 383. The panel then addressed the second part of the *Metro Council No 23* test, explaining that the

> second part of the test . . . pertains not to the employee himself, but to his employer. That is, according to the Supreme Court, the employee must not only be an employee "subject to the hazards of police work," but also must be employed by a "critical service police department (or fire department) having as its principal function the promotion of the public safety, order and welfare so that a work stoppage in that department would threaten community safety." . . . [T]here is no question that the Bay County Sheriff's Department, the department/employer of the CFOs in this case, meets the definition of a "critical service police department."
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> As our cases subsequent to that decision have indicated, [*Metro Council No 23*] holds that both the employee and the employing department must have "critical service status" in order to effectuate Act 312's intent as (1) requisite to the high morale of (the department); (2)

> requisite to the efficient operation of (the department); or (3) necessary for averting critical service strikes which would likely impede the public safety, order and welfare. In this regard, we believe that it is clear from this record that the functions performed by the CFOs at the Bay County jail are essential to the public safety, order and welfare of the County. Moreover, regardless of what arrangements might be made for employee replacement or transfer of prisoners in the event of a strike, a strike or unresolved labor dispute involving these employees would, we believe, clearly undermine the morale and efficient operation of the Bay County Sheriff's Department. Thus we conclude that the inclusion of the CFOs in this case within the scope of Act 312 would be in accord with the intent of and would further the purposes of the Act.
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> In making Act 312 applicable not only to police officers and firefighters, but also employees of police departments "subject to the hazards" of police officers, the legislature clearly did not intend to limit the coverage of this Act only to sworn and certified police officers and firefighters. As the CFOs in this case are critical service employees subject to the hazards of police work and employed by a police department within the meaning of that statute, we find they are covered by the provisions. [*Id.* at 383-384.]

The *Bay Co* panel properly applied the requirements that the *Metro Council No 23* Court placed on it to determine if an employee's "critical service status" would cause a threat to community safety if that employee went on strike, taking a holistic view of the effect of a strike on community safety rather than making this determination on the basis of one factor.

However, in *Capitol City Lodge*, 155 Mich App at 119, this Court challenged the MERC's understanding that corrections officers could be eligible for Act 312 arbitration, holding instead that even if corrections officers at the Ingham County jail were subject to the hazards of police work, insufficient evidence supported a finding that a work stoppage at the jail would threaten commu-

nity safety. Notably, though, the *Capitol City Lodge* Court did not simply claim that the MERC panel in that case had made an evidentiary holding regarding whether a threat to community safety occurred. Instead, the Court recognized that "the commission did not discuss whether a strike by jail security officers would threaten community safety." *Id.* at 120. Yet, rather than remand the case to the MERC for an evidentiary hearing to determine if a strike by the corrections officers would pose a threat to community safety, the *Capitol City Lodge* Court made an independent factual decision, without the benefit of a complete lower court record, that such a strike would not threaten community safety. *Id.* at 120-121. In particular, the Court noted that the sheriff and the undersheriff of Ingham County had testified that they had a plan[3] to staff the jail in the event of a strike by the jail security officers and opined that, under these circumstances, such a strike would pose no threat to community safety. *Id.* at 120. Relying on these statements and other information in the record, the *Capitol City Lodge* Court determined that in the event of a strike, the sheriff could take law enforcement officers and command officers from road patrol and other assignments to assume the duties of the striking jail security officers and could transfer inmates to other jails. *Id.* at 120-121. In addition, the Court noted, the sheriff would be able to hire "adequate replacements for striking jail security

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[3] I note that the fact that the sheriff has a plan, whether written or unwritten, to replace striking corrections officers does not in and of itself answer the question whether such a strike would threaten community safety. A deeper examination of the plan is necessary. I am reminded of the old saying: The best-laid plans of mice and men often go awry. It would be better, therefore, to ask whether community safety is threatened if corrections officers go on strike. When the question is asked in its proper framework, the answer appears to be self-evident.

officers, who are not required to be certified, . . . within three to five days." *Id.* at 120. Finally, after noting that the union did not present any contrary evidence and determining that the security guards could be replaced, the *Capitol City Lodge* Court concluded that a strike by the jail security guards would not threaten community safety. *Id.* at 121.

Although the *Capitol City Lodge* Court should not have even made these factual determinations, it was still a fact-based decision. It was not intended to be a blatant statement of the law, and it should not be treated as such. The *Capitol City Lodge* Court reached its conclusion without the benefit of either contrary evidence or any findings of fact and conclusions of law by a lower tribunal on this important topic. And, at most, *Capitol City Lodge* merely stands for the proposition that in that case, in light of the lack of specific facts presented to that MERC panel (and then to the *Capitol City Lodge* Court), the union failed to establish that a strike by its members would threaten community safety. The opinion does not stand, and never has stood, for the proposition that if an employee can be replaced, then no threat to community safety exists.[4] Instead, the second element of the *Metro Council No 23* test remains intact: members of a bargaining unit are only entitled to Act 312 arbitration if they are employees of a critical-service department promoting public safety, order, and welfare, so that a work stoppage by those employees would threaten community safety. The *Capitol City Lodge* Court merely considered whether the

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[4] Such a conclusion would be equivalent to saying that if a police officer can be replaced, then a strike by the police would not be a threat to the safety of a community. Anyone can be replaced. Replacing a police officer with an unqualified individual, in my opinion, would pose a threat to the community.

corrections officers at the Ingham County jail were replaceable to determine whether this second element was established.[5]

Regardless, subsequent MERC panels treated the *Capitol City Lodge* opinion as a legal determination, holding that the opinion bound them to find that no threat to community safety existed as long as the striking corrections officers could be replaced.[6] See *Kent Co v Kent Co Deputy Sheriff's Ass'n*, 1991 MERC Lab Op 549, 554 ("As interpreted by the Court of Appeals [in *Capitol City Lodge*], the second part of the test turns on

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[5] Unfortunately, in *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580; 599 NW2d 504 (1999) (*POAM*), this Court compounded the errors in *Capitol City Lodge* by adopting the *Capitol City Lodge* Court's line of reasoning. Regardless, the *POAM* Court addressed this issue in the context of responding to different appellate arguments than those raised in this case, namely, whether the commission "erred in failing to consider the jail inmates as 'members of the community' for purposes of deciding whether a 'threat to community safety' existed in determining the eligibility of the corrections officers for Act 312 arbitration" and whether the commission's "decision was defective for failing to consider the safety of the inmates as part of the public-safety analysis." *Id.* at 593, 595.

[6] In two MERC opinions issued soon after *Capitol City Lodge*, the MERC panels noted that the rationale in *Capitol City Lodge* regarding whether a strike by corrections officers constituted a threat to community safety diverged from the MERC panel's finding with regard to this issue in *Bay Co*. *Detroit v Michigan Fraternal Order of Police*, 1986 MERC Lab Op 966; *Detroit Police Dep't v Michigan Fraternal Order of Police*, 1986 MERC Lab Op 972. However, the MERC panels also noted that the parties did not contend that in the event of a strike, corrections officers could be adequately replaced without a threat to community safety and that the records in these cases provided no evidence to support a finding that the city could transfer adequate manpower from other public safety duties to man the jail or could swiftly hire adequate replacements. *Detroit*, 1986 MERC Lab Op at 969; *Detroit Police Dep't*, 1986 MERC Lab Op at 975. In both cases, the MERC panel concluded that "[i]n the absence of such evidence," the "fact that [corrections officers] are employed by a police department and perform a function essential to public safety is sufficient to establish their 'critical service' status." *Detroit Police Dep't*, 1986 MERC Lab Op at 975; see also *Detroit*, 1986 MERC Lab Op at 969.

whether or not striking employees could be replaced."). In *Washtenaw Co v Police Officers Ass'n of Michigan*, 1990 MERC Lab Op 768, 770, the county presented evidence indicating that the corrections officers could be replaced in the event of a strike.[7] Relying on *Capitol City Lodge* and another panel's decision in *Mecosta Co v Police Officers Ass'n of Michigan*, 1989 MERC Lab Op 607, the *Washtenaw Co* MERC panel concluded that the record did not "contain sufficient competent, material, or substantial evidence that a strike by the Washtenaw County correction officers would pose a threat to community safety" and determined that the corrections officers were not eligible for Act 312 arbitration. *Washtenaw Co,* 1990 MERC Lab Op at 772. In particular, the panel noted that the precedent established by those

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[7] The MERC panel noted that the

> Undersheriff, when questioned about what would happen if the [corrections officers] engaged in a work stoppage as part of a bargaining procedure, stated that the first effort of the County would be to reduce the number of inmates in the facility. This would be done by transporting prisoners to other facilities and getting court permission to release misdemeanor prisoners. The second effort on the part of the County would be to staff the jail, which he claims could be done by calling in the road patrol deputies. In this regard, the president of the [union] testified that he would advise the deputies not to do the [corrections officers'] work should the [corrections officers] be on strike. The record does not disclose whether or not the sworn deputies or road patrol deputies would disobey an order to man the jail. Another effort to man the jail would be to call in the 20 command officers. The undersheriff estimates there would be about 42 officers in a core group able to staff the jail.
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> The largest percentage of the County jail inmates, about 38 to 42 percent, are those convicted of misdemeanors whose offenses allow the Department to release them when the jail has become too crowded. The record also discloses that felony prisoners may be locked down in the maximum security block. This block could be supervised by experienced deputies called in from the road patrol. [*Washtenaw Co*, 1990 MERC Lab Op at 770.]

cases led to a finding that community safety would not be threatened as long as some set of circumstances existed under which the striking corrections officers could be replaced. *Id.* at 771. The panel stated:

> In the [*Capitol City Lodge*] case, as here, the union argued that using road patrol deputies and other deputies would threaten the safety of the county residents by diminishing available personnel in other areas of law enforcement. The [*Capitol City Lodge*] Court specifically stated in this regard, "We agree with this Court's rejection of a similar argument in *Lincoln Park Detention Officers* v *City of Lincoln Park*, [76] Mich App 358, 256 NW2d 593 (1977).["] The [*Capitol City Lodge*] Court emphasized that reserves, as well as command officers and deputies, could take the place of striking [corrections officers]. The head of the Union in the instant case indicated he would recommend that the deputies not work in the jail and, therefore, the public and the prisoners would be endangered by a strike. This argument was considered in [*Mecosta Co*, 1989 MERC Lab Op at 612]. As in *Mecosta*, no evidence in this case indicates that deputies would disobey orders to fill in for striking [corrections officers]. In the *Mecosta* case, we stated as follows:
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> "In the case at hand, however, apparently in an effort to distinguish the [*Capitol City Lodge*] case, we have testimony of the president of the union that if the security officers struck, the road deputies would "honor" the strike, thus, the deputies would also engage in a strike, contrary to [the public employment relations act]. This, however, does not take the case beyond the consideration of the [*Capitol City Lodge*] case. The testimony of the sheriff was that he was available and the undersheriff was available, as well as the officer in charge of the jail, and a nonunion captain of the sheriff's department. This alone would take care of more than the three shifts requiring one man. If more than one person was necessary, the record establishes that the four part-time security officers would be available as non-union personnel. The record contains no evidence that

> would justify the conclusion they would strike in support of the security officers." [*Id.*, quoting *Mecosta Co*, 1989 MERC Lab Op at 612.]

Similarly, in *Kent Co*, another MERC panel determined that although no formal plans were in place to replace corrections officers in the event of a strike, testimony by the sheriff and the undersheriff regarding emergency matters that would be implemented if a strike occurred was sufficient to establish that the corrections officers could be replaced and, therefore, no threat to community safety would occur. *Kent Co*, 1991 MERC Lab Op at 554-555; see also *Macomb Co Sheriff's Dep't v Michigan Fraternal Order of Police*, 1991 MERC Lab Op 558 (finding that because corrections officer supervisors could be replaced in the event of a strike, a threat to community safety would not occur if they went on strike and, therefore, they were not entitled to Act 312 arbitration).

In his concurring opinion in *Kent Co*, panel member David S. Tanzman explained the changes that *Capitol City Lodge* triggered concerning the manner in which MERC panels determined whether a strike by corrections officers would pose a threat to community safety, as well as the policy changes that opinion implemented:

> I concur with my colleagues' conclusion that the corrections officers and radio technician in this case are not eligible to have their dispute with their employer arbitrated under 1969 PA 312, but only because I believe *Capitol City Lodge* compels this conclusion.
>
> Under the [*Capitol City Lodge*] Court's interpretation of [*Metro Council No 23*], an employee who is not a certified police officer or firefighter must meet three tests before he can be found 312-eligible. First, his job must be subject to the hazards of police or firefighting work. We have repeatedly held that correction officers or jail guards are subject to the hazards of police work, and no court has disagreed

with us on this point. *See, e.g. Washtenaw County Sheriff's Department*, 1979 MERC Lab Op 671; *County of Bay*, 1985 MERC Lab Op 377; *Local 214, Teamsters* v *City of Detroit*, 91 Mich App 273 [283 NW2d 722] (1979) [vacated 410 Mich 876 (1980)]. Secondly, the employee must be employed in a critical service department having as its principal function the promotion of the public safety, order, and welfare so that a work stoppage in that department would threaten community safety. The Kent County Sheriff Department is such a department. Moreover, were the Kent County jails to cease to function as a result of a work stoppage, a serious threat to community safety would arise. However, under [*Capitol City Lodge*], an employee must also meet a third test. That is, he must be an employee who could not be adequately replaced in the event of his striking.

I disagree with the [*Capitol City Lodge*] Court that an employee who performs a function critical to public safety is not covered by Act 312 if his employer asserts that his function could be performed by some other persons on a temporary basis in the event of a strike. I do not read this in [the *Metro Council No 23* Court's] holding that the prosecutor's investigators in that case were not covered by Act 312 because their department was not a critical service department in which a work stoppage could threaten community safety. I also note that many sworn police officers, a group clearly intended to be covered by Act 312, might not qualify under the [*Capitol City Lodge*] test because in the event of a strike their law enforcement functions might be assumed by the State Police or by neighboring police departments.

In addition, I also disagree with the [*Capitol City Lodge*] Court's analysis of whether the corrections officers in that case could be replaced in the event of a strike without a threat to community safety. In [*Capitol City Lodge*], the Employer described certain measures it would take to replace striking corrections officers. These measures included assigning road patrol deputies to the jail, hiring replacements, and transferring prisoners to other jails. The Court in [*Capitol City Lodge*] rejected the union's argument that moving road patrol deputies from their usual

> duties to man the jail would result in a threat to community safety, citing the pre-[*Metro Council No 23*] decision in *Lincoln Park Detention Officers*. That decision noted that a [*sic*] work stoppages by almost any category of public employee, including street and highway personnel, could theoretically cause an extra burden on the police department. However, the [*Capitol City Lodge*] Court failed to note that in its case the number of correction officers exceeded the number of deputies with whom the Employer intended to replace them. Therefore, adequately manning the jail with deputies would require the Employer to essentially cease its law enforcement activities. The Court in [*Capitol City Lodge*] also failed to note that since the corrections officers and deputies were in the same bargaining unit, both groups would likely be on strike at the same time. Thirdly, the [*Capitol City Lodge*] Court did not question the Employer's assertion that it could operate its jail with untrained replacements without creating a risk to the public.
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> In the instant case, the sheriff and undersheriff testified that in the event of a strike by corrections officers they would utilize road patrol deputies and supervisory employees, hire replacements, extend shifts, transfer prisoners, and request assistance from the State Police to take over the law enforcement functions of its transferred deputies. I agree with my colleagues that there are no significant differences between the facts in [*Capitol City Lodge*] and those of the instant case. Therefore I reluctantly agree with their conclusion that the employees in this case are not eligible for arbitration under Act 312. [*Kent Co*, 1991 MERC Lab Op at 555-557 (citation omitted).]

In my opinion, the MERC has misinterpreted the extent of this Court's holding in *Capitol City Lodge*. The *Capitol City Lodge* Court acknowledged that the commission had not discussed whether a strike by jail security officers would threaten community safety, and it noted that the "record does not contain competent, material and substantial evidence that a strike by the Ingham County jail security officers would pose a threat

to community safety." *Capitol City Lodge*, 155 Mich App at 121. However, *Capitol City Lodge* does not stand for the proposition that employees are not eligible for Act 312 arbitration if they can be adequately replaced in the event of a strike.

In addition, *Capitol City Lodge* does not support the conclusion that corrections officers must meet the three-part test developed by MERC panels to be eligible for Act 312 arbitration. The MERC concluded that *Capitol City Lodge* compelled a determination that the employees in question must not be adequately replaceable in the event of a strike in order to establish that a strike by these employees would threaten community safety. See *Washtenaw Co*, 1990 MERC Lab Op at 771. However, this is only one factor that should be considered when determining whether a strike by corrections officers would threaten community safety. Rather, the MERC should employ a totality-of-the-circumstances test[8] and consider, among other things, the following additional factors: (1) the size and safety of the inmate population, (2) whether the transfer of inmates to another facility is feasible, (3) whether inmates would be released early in the event of a strike, (4) the effect that moving road patrol officers to the jail would have on public safety,[9] (5) the number of corrections officers needed to staff a jail in the event of a strike and whether it exceeds the number of police officers available, (6) whether police officers and corrections officers are on strike at the same time, (7) whether corrections officers could be replaced with untrained personnel, (8)

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[8] Such a test requires the MERC panel to ask, Under the totality of the circumstances, does a strike by corrections officers threaten community safety?

[9] For example, transferring road patrol officers to act as corrections officers would leave a shortage of road patrol officers to contain threats and respond to emergencies in the community.

whether untrained replacements would create a risk to the public,[10] and (9) the effect that replacing union employees with unqualified, nonunion members would have on the morale and efficiency of the department. This is by no means an exhaustive list, and both the union and the employer are free to present additional factors at an evidentiary hearing. Nevertheless, this factors-based totality-of-the-circumstances approach is more sensitive to the highly factual nature of a determination whether a threat to community safety exists.[11]

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[10] For example, in the rush to replace striking officers, one can envision a sheriff not having time to properly vet applicants and inadvertently hiring a relative or friend of a current inmate. An untrained guard or sympathetic friend or relative guarding a dangerous prisoner is a recipe for disaster and could threaten the safety of the community. Even with trained, professional security guards, jail escapes have occurred. The days of the Mayberry Police Department with Barney Fife guarding the jail have long since passed us by. If Deputy Fife were guarding the Oakland County jail, this certainly would pose a "threat" to community safety.

Similarly, we must remember that even experienced corrections officers face a certain amount of danger each day they report for work. Jails contain murderers, rapists, armed robbers, and other dangerous felons; they are not nice places. Corrections work is significantly more dangerous than being a security guard at your local seminary.

[11] I note that the scope of the phrase "pose a threat to community safety" does not mean that an occurrence is imminent. It is sufficient that a danger, risk, hazard, menace, or peril is created as a result of a strike. *Random House Webster's College Dictionary* (1997) defines "threat" in part as "an indication or warning of probable trouble." The fact that the threat can be avoided by other means does not mean that the threat does not exist; potential avoidance of the threat does not change the character of the evil or harm that may ensue.

I note that if "replaceability" were the only factor to be considered, then, hypothetically, even sworn police officers might not qualify for Act 312 arbitration because, in the event of a strike, their law enforcement functions could be assumed by the state police or by neighboring police departments. The phrase "threat to community safety" is broad in scope and does not contemplate an actual occurrence; it is sufficient if a danger,

I would vacate the decision of the MERC and remand this case for an evidentiary hearing. At the hearing, I would direct the MERC to decide, on the basis of the totality of circumstances, whether a strike by the union's members would threaten community safety. I note that "replaceability" of the employees is only one factor in the commission's decision. The main factor is whether a work stoppage would threaten community safety.

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risk, hazard, or menace might occur as a result of a strike. Act 312 was passed so that employers would not be forced to take extraordinary measures in case of a work stoppage.

GREEN v ZIEGELMAN

Docket No. 280624. Submitted January 7, 2009, at Detroit. Decided February 3, 2009, at 9:10 a.m.

Sanford Green, Jack R. Hendrickson, and Thomas Esper brought an action in the Oakland Circuit Court against Norman H. Ziegelman (Ziegelman), seeking a declaratory judgment on the proper interpretation of an arbitration agreement contained in the operating agreement of Libwag, LLC, which was formed by Green, Hendrickson, Esper, and Ziegelman to undertake a real estate development project. The court, Denise Langford Morris, J., granted summary disposition in favor of the plaintiffs, determined that the dispute must be arbitrated by four arbitrators, and ordered the case to arbitration. Pursuant to an arbitration agreement executed by Green, Hendrickson, Esper, Libwag, Ziegelman, Norman H. Ziegelman Architects, Inc. (NZA) (of which Ziegelman is the sole shareholder and which entered into a contract with Libwag to provide architectural services), and Continental Construction Company (of which Ziegelman is the sole shareholder and which entered into a contract with Libwag to provide construction services), the parties agreed to resolve in arbitration disputes that they specified in a list. No mention was made regarding any claim against Ziegelman individually for breach of the architectural agreement between NZA and Libwag, including any claim that Ziegelman was liable for a breach of the architectural agreement predicated on a liability theory of piercing the corporate veil of NZA. The arbitration panel concluded, in relevant part, that NZA breached the architectural agreement and that the plaintiffs were entitled to damages from NZA for the breach. The plaintiffs then filed a motion in the circuit court to reopen the case, add Libwag as a plaintiff and NZA and Continental as defendants, and have a judgment entered on the arbitration award. The plaintiffs again did not advance any claim against Ziegelman individually or based on theories of piercing the corporate veil. The court granted the plaintiffs' motion and entered a money judgment in favor of the plaintiffs and against NZA. Nowhere in the judgment did it provide that Ziegelman was liable for breach of the architectural agreement. The plaintiffs then filed an ex parte motion under the proceedings supplementary to judgment act (PSJA), MCL

600.6101 *et seq*., and MCR 2.621, seeking, in part, to depose Ziegelman about the assets of NZA. The court granted the motion. Following the deposition, the plaintiffs filed a motion to pierce the corporate veil and impose personal liability on Ziegelman in the amount equal to the plaintiffs' judgment against NZA for breach of the architectural agreement. The court granted the motion and entered a judgment against Ziegelman individually. The defendants appealed with regard to the judgment against Ziegelman individually.

The Court of Appeals *held*:

The plaintiffs could not use the proceedings supplementary to the initial judgment against NZA to have another judgment entered holding Ziegelman personally liable because there was no underlying arbitration award or judgment to that effect. In a proceeding supplementary to an initial judgment, MCR 2.621 and the PSJA do not provide any authority for entering an additional judgment against a party not previously subject to a judgment on the claim at issue if the additional judgment is based on a theory of piercing the corporate veil of the defendant corporation against which the original judgment was entered. Neither the court rule nor the statute gave the circuit court authority to pierce NZA's corporate veil and hold Ziegelman personally liable. The judgment against Ziegelman for breach of the architectural agreement and predicated on the piercing of the corporate veil must be vacated.

Vacated.

Stephen M. Ryan, P.L.L.C. (by *Stephen M. Ryan*), for the plaintiffs.

Mark Granzotto, P.C. (by *Mark Granzotto*), for the defendants.

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

MURPHY, P.J. Defendants appeal as of right a $156,313 judgment entered by the circuit court in favor of plaintiffs and against defendant Norman H. Ziegelman (Ziegelman), individually, on plaintiffs' claim of breach of an agreement for architectural services. Ziegelman's

liability for the breach was determined postjudgment through proceedings supplementary to the initial judgment, and liability was predicated on an alter ego theory, with the court piercing the corporate veil of a corporation owned by Ziegelman. The initial judgment on the claim for breach of the architectural agreement, which judgment was founded on an arbitration award, was entered solely against defendant Norman H. Ziegelman Architects, Inc. (NZA). We vacate the judgment at issue.

Plaintiffs Sanford Green, Jack R. Hendrickson, and Thomas Esper, along with defendant Ziegelman, were all members of plaintiff Libwag, LLC, which was formed to undertake a real estate development project. The Libwag operating agreement contained an arbitration provision for purposes of settling disputes arising out of the agreement. Shortly after the development project commenced, Libwag entered into architectural and construction contracts with, respectively, NZA and defendant Continental Construction Company (Continental). Ziegelman was the sole shareholder of both NZA and Continental.

A dispute arose concerning the development project and the operating agreement, and Ziegelman demanded arbitration for an alleged breach of the operating agreement, which plaintiffs denied, making their own claim that Ziegelman breached the operating agreement. The parties also disagreed regarding the proper composition of the arbitration panel and the scope of the arbitration provision. Given the dispute, plaintiffs, except for Libwag, filed a declaratory judgment action in the circuit court against Ziegelman, seeking the proper interpretation of the arbitration provision contained in the operating agreement with respect to its scope and the number of arbitrators to sit in judgment. Ziegelman

then filed a motion for summary disposition and to compel arbitration. The circuit court, pursuant to MCR 2.116(I)(2), granted summary disposition in favor of plaintiffs, ruling that it had the authority to address the issue concerning the number of arbitrators to be selected and that the dispute must be arbitrated by four arbitrators, as argued by plaintiffs, and not one, as argued by Ziegelman. The circuit court ordered the case to arbitration.

Pursuant to an arbitration agreement thereafter executed by all plaintiffs and all defendants, the parties agreed to arbitrate: (1) all issues by and between Libwag and NZA arising under the architectural agreement, with the arbitration award being final and binding upon the parties to that agreement, (2) all issues by and between Libwag and Continental arising under the construction contract, with the arbitration award being final and binding upon the parties to that agreement, and (3) all issues by and between NZA and Libwag and Hendrickson that were currently pending in a federal district court lawsuit involving copyright infringement claims.[1] The agreement expressly superseded the arbitration provisions found in the architectural and construction contracts. Pursuant to the Libwag operating agreement, the alleged breaches of the agreement were also set to be arbitrated under the agreement's arbitration provision. It is abundantly clear that the parties had decided to resolve all their disputes in arbitration. No mention was made regarding a claim against Ziegelman individually for breach of the architectural agreement, let alone a claim that he was liable for a breach of

[1] The arbitration award indicates that NZA and Continental had earlier initiated separate arbitration proceedings against plaintiffs alleging contractual breaches arising out of the architectural and construction contracts, which both had their own arbitration provisions.

the architectural agreement predicated on a liability theory of piercing the corporate veil.

The issues and disputes were arbitrated, and the arbitration panel rendered an award concluding that NZA had breached the architectural agreement and that plaintiffs were entitled to a damages award of $156,313 against NZA for the breach.[2] The arbitration panel also found that Ziegelman himself had breached the operating agreement and that his membership interest in Libwag had to be reduced to 7½ percent because of the breach.[3] Further, the arbitration panel ruled that neither side had demonstrated a breach of the construction contract. Finally, the arbitration panel concluded that NZA had failed to establish its copyright infringement claims, which had been the subject of the federal lawsuit.

Plaintiffs then proceeded to file a motion in the circuit court to reopen the case, to add Libwag, NZA, and Continental as parties, given that they were not named in the complaint seeking declaratory relief, and to enter judgment upon the arbitration award. Plaintiffs made no attempt at this point to pursue a claim against Ziegelman personally for breach of the architectural agreement, nor was any theory posited regarding the need to pierce the corporate veil. Subsequently, the circuit court entered an order granting plaintiffs' motion. The order provided that judgment was to be entered pursuant to the arbitration award. A judgment, entered the same day that the order granting plaintiffs' motion was granted, provided, in relevant part, that NZA had breached the architectural agreement. The judgment also stated:

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[2] The arbitration panel rejected NZA's claim alleging breach of the architectural agreement.

[3] The arbitration panel rejected Ziegelman's claim that plaintiffs had breached the operating agreement.

> IT IS FURTHER ORDERED AND ADJUDGED that Libwag and Green and Hendrickson and Esper shall have Judgment in favor of them and against [NZA] in the amount of $156,313.00, plus statutory interest from and after April 27, 2006, and execution shall so issue therefore.

Nowhere in the judgment is it provided that Ziegelman was liable for breach of the architectural agreement.

Approximately three months later, plaintiffs filed an ex parte motion under the proceedings supplementary to judgment act (PSJA), which is found at MCL 600.6101 *et seq.*, and MCR 2.621. In the motion, plaintiffs requested an order requiring NZA to produce a laundry list of financial records and documents, requiring Ziegelman, as president of NZA, to appear for a discovery hearing in order to testify regarding NZA assets, and requiring NZA to produce certain documents at the discovery hearing. Plaintiffs also sought an order restraining NZA from transferring assets. Plaintiffs further requested that, "if it appears on hearing hereof that other parties hold in their names property beneficially or equitably belonging to [NZA], such parties may be joined in this proceeding." An order granting the motion was subsequently entered, but it said nothing about any other party being joined in the supplementary proceedings. Ziegelman then submitted to a discovery deposition as president of NZA. The deposition revealed that NZA had no assets and only $400 in accounts receivable. It also revealed evidence that arguably could serve as a basis for piercing NZA's corporate veil and holding Ziegelman personally liable, suggesting that NZA was nothing more than Ziegelman's alter ego.[4] On the strength of the deposition, plaintiffs filed a motion to

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[4] "The law treats a corporation as an entirely separate entity from its shareholders, even where one individual owns all the corporation's

pierce the corporate veil, asking the circuit court to impose personal liability on Ziegelman in the amount of $156,313, which represented the judgment against NZA for breach of the architectural agreement. The circuit court granted the motion to pierce NZA's corporate veil and ruled that Ziegelman was personally liable in the amount of $156,313. The circuit court, ruling from the bench, reasoned:

> Contrary to defendant's assertion, MCR 2.621 allows the plaintiff[s] to, by motion or by a separate action, obtain relief supplementary to entry of the judgment.
>
> MCL 600.6104 provides that after money judgment has been rendered the judge may on motion in that action or in a subsequent action make any order as within their discretion whatever seems appropriate in regard to the carrying out the full intent and purpose and to subject any nonexempt assets of any judgment debtor to the satisfaction of judgment.
>
> Therefore, after careful examination of the relevant facts and the Court having heard the representations here

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stock." *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004). The protection afforded by a corporate veil can be pierced under certain circumstances:

> "The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations." . . .
>
> For the corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity. Further, the corporate entity must have been used to commit a wrong or fraud. Additionally, and finally, there must have been an unjust injury or loss to the plaintiff. There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification to determine if the corporate form has been abused. [*Id.* at 293-294 (citations omitted).]

> in open court, this court finds that all of the factors required for piercing the corporate veil are present[.]

Judgment against Ziegelman individually was entered, and his attempts to have the circuit court reconsider or reexamine its ruling were rejected. Defendants appeal as of right.

On appeal, defendants argue that the circuit court erred by entering the judgment against Ziegelman,[5] given that plaintiffs failed to satisfy the compulsory joinder rule, MCR 2.203, by not joining a claim for breach of the architectural agreement, predicated on piercing of the corporate veil, against Ziegelman individually. Defendants also argue that res judicata barred entry of the judgment against Ziegelman individually, that the court erred in deciding the corporate veil issue in the context of a postjudgment motion comparable to summary disposition, and that the court erred in its initial decision ordering arbitration before a panel of four arbitrators. We conclude that plaintiffs could not use a proceeding supplementary to the initial judgment to have another judgment entered holding Ziegelman personally liable where there was no underlying arbitration award or judgment to that effect.

Many of the arguments presented by the parties concern legal questions, including interpretation of MCR 2.203, MCR 2.621, and the PSJA, as well as the applicability of res judicata. Questions of law, such as statutory interpretation, court rule construction, and whether the doctrine of res judicata should have been

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[5] When we refer to the judgment against Ziegelman, we are speaking of the judgment awarding plaintiffs $156,313 in damages, which has as its foundation the breach of the architectural agreement and the piercing of the corporate veil; the judgment against Ziegelman that reduced his membership interest in Libwag for breach of the operating agreement is not at issue on appeal.

invoked, are reviewed de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007); *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002); *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). Additionally, with respect to defendants' argument that the circuit court erred in its summary disposition ruling that ordered the case to be heard by four arbitrators, we review summary disposition determinations de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

We start with the issue concerning the composition of the arbitration panel. As now argued by defendants, there does appear to be some ambiguity in the arbitration provision contained in the Libwag operating agreement regarding the number of arbitrators. It indicates that each member, within an allotted time, could appoint an arbitrator if there was no agreement on the selection of a single arbitrator, but it then provides that "[t]he *two arbitrators* [so selected] shall then select a third arbitrator . . . ." (Emphasis added.) Libwag, however, had four members. Defendants maintain that this contractual ambiguity precluded the entry of the order granting summary disposition and required resolution at trial. We need not further address this issue because Ziegelman never presented this argument below. Instead, Ziegelman argued that the parties' disputes must be arbitrated, that determining the proper number of arbitrators to hear the case was itself an issue to be resolved in arbitration proceedings by the single arbitrator appointed by Ziegelman, and that he disagreed with plaintiffs' contention that three more arbitrators should be appointed, given that their "nominations were not timely." An issue is not properly preserved for appeal if not raised in the circuit court, and we need not address arguments first raised on appeal. *Booth News-*

papers, Inc v Univ of Michigan Bd of Regents, 444 Mich 211, 234; 507 NW2d 422 (1993); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005); *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). Accordingly, we decline to address defendants' argument that the arbitration provision was ambiguous with respect to the composition of the arbitration panel.[6]

We next turn to the issue concerning the proper interpretation and application of MCR 2.621 and the PSJA.

The principles that apply to statutory construction apply equally to interpretation of court rules. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000). Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascer-

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[6] We do disagree with plaintiffs' argument that this Court lacks jurisdiction to address the issue because defendants never appealed the order granting summary disposition, nor the subsequent money judgment entered against NZA. Pursuant to MCR 7.203(A)(1), we have "jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court[.]" A final judgment or order in a civil case is defined as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties[.]" MCR 7.202(6)(a)(i). Here, the summary disposition order at issue and the money judgment against NZA were not final orders or judgments because the circuit court subsequently entered the judgment holding Ziegelman personally liable for breach of the architectural agreement. The summary disposition order merely sent the case to arbitration, where it would be arbitrated and then returned to the circuit court for entry of a judgment on the arbitration award. "[A] party claiming an appeal of right from a final order is free to raise issues on appeal related to prior orders." *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 315; 760 NW2d 699 (2008). Accordingly, we do have jurisdiction over the summary disposition issue.

taining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases, as well as their placement and purpose in the statutory scheme. *Id*. If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Id.* "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

MCR 2.621, which addresses proceedings supplementary to judgment, provides in pertinent part:

> (A) Relief Under These Rules. When a party to a civil action obtains a money judgment, that party may, by motion in that action or by a separate civil action:
>
> (1) obtain the relief formerly obtainable by a creditor's bill;
>
> (2) obtain relief supplementary to judgment under MCL 600.6101–600.6143; and
>
> (3) obtain other relief in aid of execution authorized by statute or court rule.

MCR 2.621(A)(2) is the provision implicated in this case, and it directs attention to the PSJA. MCL 600.6104, which is the relevant statute here under the PSJA, provides:

> After judgment for money has been rendered in an action in any court of this state, the judge may, on motion in that action or in a subsequent proceeding:
>
> (1) Compel a discovery of any property or things in action belonging to a judgment debtor, and of any property, money, or things in action due to him, or held in trust for him;

> (2) Prevent the transfer of any property, money, or things in action, or the payment or delivery thereof to the judgment debtor;
>
> (3) Order the satisfaction of the judgment out of property, money, or other things in action, liquidated or unliquidated, not exempt from execution;
>
> (4) Appoint a receiver of any property the judgment debtor has or may thereafter acquire; and
>
> (5) Make any order as within his discretion seems appropriate in regard to carrying out the full intent and purpose of these provisions to subject any nonexempt assets of any judgment debtor to the satisfaction of any judgment against the judgment debtor.
>
> The court may permit the proceedings under this chapter to be taken although execution may not issue and other proceedings may not be taken for the enforcement of the judgment. It is not necessary that execution be returned unsatisfied before proceedings under this chapter are commenced.

For purposes of the question posed to us, § 6104(5) is the only provision that could conceivably support the circuit court's ruling; however, on close examination of the language in § 6104(5), it is clear that it did not authorize the entry of the judgment against Ziegelman. MCL 600.6104(5) begins with very broad language, allowing the court, at its "discretion," to make "any order" that "seems appropriate." But these actions must relate to "carrying out the full intent and purpose of these provisions to subject any nonexempt assets of any *judgment debtor* to the satisfaction of any judgment against the *judgment debtor*." *Id.* (emphasis added). Ziegelman was not a judgment debtor in regard to breach of the architectural agreement; the judgment debtor was solely NZA. The circuit court essentially used a proceeding *supplementary to judgment* to enter an additional judgment against a party not previously

subject to a judgment on the claim at issue. MCR 2.621 and the PSJA do not provide any authority for such a ruling in the context of piercing the corporate veil. And we emphasize that this case does not involve allegations of an unlawful transfer of property from NZA to Ziegelman in avoidance of attempts to collect on the judgment, nor allegations that Ziegelman possessed assets legally belonging to NZA. See MCL 600.6110, 600.6116, 600.6119, 600.6122, and 600.6134.

Our sister state of Illinois, under its rules and procedures, has similarly rejected efforts to hold a third party liable under a corporate veil piercing theory in the course of proceedings supplementary to judgment, ruling that it is improper to do so. *Miner v Fashion Enterprises, Inc*, 342 Ill App 3d 405, 415; 794 NE2d 902 (2003) (nothing in the code of civil procedure authorizes a judge to adjudicate the merits of corporate veil allegations in supplementary proceedings); *Pyshos v Heart-Land Dev Co*, 258 Ill App 3d 618, 624; 630 NE2d 1054 (1994) ("[A] party who has secured a judgment against a corporation may not seek to pierce the corporate veil in supplementary proceedings."). The Georgia Supreme Court has ruled in comparable fashion. *C-Staff, Inc v Liberty Mut Ins Co*, 275 Ga 624, 626; 571 SE2d 383 (2002) (the general assembly has established certain statutory proceedings to enforce judgments and "holding liable persons who were not parties to [a] judgment are not among them"). Here, neither MCR 2.621 nor the PSJA gave the circuit court authority to pierce NZA's corporate veil and to hold Ziegelman, NZA's sole shareholder, personally liable. Accordingly, the judgment against Ziegelman, which was for breach of the architectural agreement and predicated on the piercing of the corporate veil, is vacated.

In light of our ruling, it is unnecessary to address the remaining issues presented on appeal. We do note that

in *Miner, supra* at 415, the Illinois Appellate Court ruled that "a judgment creditor may choose to file a new action to pierce the corporate veil of a judgment debtor in order to hold individual shareholders and directors liable for a judgment against the corporation." We will not answer the questions whether plaintiffs are legally entitled to file a new and separate action against Ziegelman, outside the PSJA, under a corporate veil piercing theory and whether res judicata or the compulsory joinder rule, MCR 2.203, would bar such an action. Given that this event has not occurred, and perhaps may never take place, and that, even if such a lawsuit had been filed, it would fall outside this particular panel's jurisdiction at the present time, it would be improper and inappropriate to render any ruling on these speculative questions. See *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006) (doctrine of ripeness precludes the adjudication of contingent or hypothetical claims before an actual injury has been sustained; a matter is not ripe for judicial consideration if it rests on contingent future events that may not occur as anticipated or may not occur at all).[7]

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[7] While defendants raise res judicata and compulsory joinder arguments, they are necessarily made in the context of implicitly treating plaintiffs' motion to pierce the corporate veil and the circuit court's ruling granting the motion as if they were part of a second lawsuit. However, the motion and the court's ruling were made under MCR 2.621 and the PSJA, and not in the context of a lawsuit independent of those provisions. Because the court rule and the PSJA did not authorize the court's ruling, no more analysis is currently required. We recognize that both MCR 2.621(A) and the PSJA, specifically MCL 600.6104, allow a separate and subsequent action to collect on a judgment in regard to a judgment debtor, but, for the reasons stated above, a separate action *under these provisions* could not reach Ziegelman personally, because he was not a judgment debtor with regard to the initial judgment. The question whether an action, independent of the PSJA, can be used to hold Ziegelman personally liable for breach of the architectural agreement under a corporate veil piercing theory is a question for another day and another court.

The judgment at issue is vacated. Defendants, having fully prevailed on appeal, are awarded costs under MCR 7.219.

PEOPLE v HENDERSON
PEOPLE v MERCIER

Docket Nos. 285677, 285678, and 285773. Submitted January 13, 2009, at Detroit. Decided February 3, 2009, at 9:15 a.m. Leave to appeal sought.

The Jackson Circuit Court, Chad C. Schumucker, J., reversed orders of the 12th District Court that bound over on three felony charges of animal torture James E. Henderson, Jr., the owner of three horses allegedly tortured, and Matthew P. Mercier, the primary caretaker of the horses. The circuit court did not reverse the parts of the orders that bound the defendants over on one misdemeanor charge of failing to provide adequate care for the horses, but did reverse the order of the district court for the forfeiture of 69 horses owned by Henderson. The prosecution appealed by leave granted the orders reversing the district court's orders. The appeals were consolidated.

The Court of Appeals *held*:

1. The prosecution was not required to show that the defendants intended to harm the animals. The prosecution was only required to show probable cause to believe that the defendants acted with conscious disregard of known risks in order to show that the defendants willfully, maliciously, and without just cause or excuse tortured three horses in violation of MCL 750.50b(2).

2. The prosecution, for a conviction under MCL 750.50b(2), needed to establish probable cause to believe that the defendants willfully (did something that resulted in torture to the animals), maliciously (knowing it to be wrong, acted either intentionally or with conscious disregard of the known risks), and without just cause or excuse tortured the three horses. The evidence established that the defendants willfully failed to seek necessary veterinary care and treatment in conscious disregard of the known risk that the horses would continue to decline in health and without just cause or excuse, thereby causing the horses to suffer torture.

3. The defendants' alleged lack of intent to violate MCL 750.50b(2) or cause the three horses to suffer torture is of no consequence. The district court properly bound both defendants over on all three felony counts. The circuit court order reversing the district court's bindover order regarding the felony counts must be reversed and the case must be remanded.

4. The term "torture," when applied to animals, includes every act or omission that causes or permits an animal to suffer unjustifiable or unreasonable pain, suffering, or death. Under this definition or the definition that the district court applied (severe physical or mental pain, and agony or anguish), the evidence supports a finding that the three horses suffered torture under MCL 750.50b(2). The definition relied on by the district court does not warrant appellate relief. The three felony counts against both defendants must be reinstated.

5. The circuit court erred by reversing the order of forfeiture under MCL 750.50(3). An owner, possessor, or person having charge or custody of an animal may violate MCL 750.50(2)(a) by failing to provide adequate care for the animal. The evidence supports the district court's determination that Henderson failed to provide adequate care for horses that he owned. The circuit court's order reversing the district court's forfeiture order must be reversed and the case must be remanded.

Reversed and remanded.

1. CRIMINAL LAW — ANIMALS — ANIMAL TORTURE.

The prosecution, in order to support a conviction of animal torture, is not required to show that a defendant intended to harm an animal; the prosecution is only required to show that the defendant acted with conscious disregard of the known risks in order to establish that the defendant willfully, maliciously, and without just cause or excuse tortured an animal in violation of MCL 750.50b(2).

2. CRIMINAL LAW — ANIMALS — ANIMAL TORTURE — WORDS AND PHRASES — TORTURE.

The term "torture," as used in the statute prohibiting the torture of animals, includes every act or omission that causes or permits an animal to suffer unjustifiable or unreasonable pain, suffering, or death (MCL 750.50b[2]).

3. CRIMINAL LAW — ANIMALS — CARE OF ANIMALS.

A person may be found to have failed to provide an animal with adequate care in violation of MCL 750.50(2)(a) as owner of the animal, as possessor of the animal, or as a person having charge or custody of the animal.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Dungan, Kirkpatrick & Dungan, P.L.L.C. (by *Michael Dungan*), and *Richard B. Ginsberg* for James E. Henderson, Jr.

State Appellate Defender (by *Susan M. Meinberg*) for Matthew P. Mercier.

Amici Curiae:

Mary Chartier and *Rose Stern* for the Animal Law Section of the State Bar of Michigan.

Alice Anna Phillips for the American Humane Association.

Robert K. Gaecke, Jr., for Leelanau Horse Rescue, Inc., and Laura Steenrod.

Before: CAVANAGH, P.J., and JANSEN and METER, JJ.

CAVANAGH, P.J. The prosecution appeals by leave granted the circuit court's reversal of the district court's order binding over defendants on three felony counts of animal torture, MCL 750.50b(2). We reverse and reinstate the charges against both defendants. The prosecution also appeals by leave granted the circuit court's reversal of the district court's forfeiture order that was entered pursuant to MCL 750.50(3). We reverse that order as well.

Between January 1, 2007, and March 20, 2007, defendant James Edward Henderson, Jr., owned most, if not all, of the 69 horses that were on the Turn Three Ranch located in Grass Lake Township. Defendant Matthew Patrick Mercier was the primary caretaker of the horses, while Henderson primarily paid the bills associated with the horses and the horse farm. On March 13, 2007, when some of the horses were found

outside the farm, as had happened several times in the past, Jackson County Animal Control was contacted. After animal control conducted a limited inspection of the farm, a detailed investigation followed. Thereafter, the farm was seized. Three felony charges of animal torture, MCL 750.50b(2), and one misdemeanor charge of failing to provide adequate care to the horses, MCL 750.50(2)(a), were filed against both defendants. A civil forfeiture action was also filed against Henderson.

Extensive testimony regarding the general condition of the land, barn, buildings, fences, horse shelters, hay, water tanks, and the horses was presented at the preliminary examination. Three horses were the subject of the felony charges: Ice, also known as Wire; Moose (a grulla mare); and Lucky Seven, also known as Elvis. Ice had a severely infected leg wound caused by having wire embedded in her leg for three weeks or more. Moose was severely emaciated and heavily infested with parasites. Lucky Seven was severely emaciated, had severe lice, was rendered significantly lame by an extremely painful degenerative arthritic condition, and was ultimately euthanized. The testimony also included that many, if not all, of the horses at the farm had lice, worms, parasites, hair loss, and long hooves. Many were significantly underweight. There was also testimony that there was inadequate food, water, shelter, and veterinary care, as well as unsanitary conditions. At the conclusion of the seven-day preliminary examination, defendants were bound over on all the charges and the district court entered an order of forfeiture pursuant to MCL 750.50(3).

The forfeiture order was subsequently appealed to the circuit court. The circuit court reversed the order, holding that the evidence did not establish that Henderson had charge or custody of the animals. In fact, the

court held, Henderson was an innocent owner under the circumstances. Defendants also filed a motion to quash the information in the circuit court. The circuit court granted defendants' motion with regard to the three felony counts, but denied the motion with respect to the misdemeanor counts. The court held that the district court's findings suggested negligence, as opposed to an intent to cause harm. Citing *People v Fennell*, 260 Mich App 261; 677 NW2d 66 (2004), the court noted "[t]he elements from *Fennell* require that the Defendant knew that his actions were wrong at the time he intended to commit the crime and intended to cause physical or mental harm to an animal." The court also concluded that Henderson's mere ownership of the horses or farm did not make him responsible for animal torture and that his presence on the farm was not sufficient to establish that he was aware of the horses' condition.

After the proper orders were entered, the prosecution sought leave to file interlocutory appeals regarding the order granting defendants' motion to quash the felony counts and the order reversing the forfeiture order. We granted these applications for leave to appeal and consolidated the appeals. We also granted motions to file amicus curiae briefs on behalf of (1) the Animal Law Section of the State Bar of Michigan, (2) the American Humane Association, and (3) Leelanau Horse Rescue, Inc., and Laura Steenrod.

FELONY COUNTS, DOCKET NOS. 285677 AND 285678

First, the prosecution argues that, in light of the evidence, the district court did not abuse its discretion by finding probable cause to believe that defendants "willfully, maliciously and without just cause or excuse" tortured three horses in violation of MCL 750.50b(2).

Specifically, the prosecution argues that the circuit court misread *Fennell*, *supra*, and ignored *People v Iehl*, 100 Mich App 277, 280; 299 NW2d 46 (1980), which require only a showing of probable cause that defendants acted with conscious disregard of the known risks, and not that they acted with an intent to cause harm. We agree.

The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001). Probable cause that the defendant has committed a crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. *Id*. Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003). If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for trial, where the questions can be resolved by the trier of fact. *Yost*, *supra* at 128.

A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo for error, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003); *People v Hotrum*, 244 Mich App 189, 191; 624 NW2d 469 (2000). In reviewing the bindover decision, a circuit court must consider the entire record of the preliminary

examination and may not substitute its judgment for that of the district court. *People v McKinley*, 255 Mich App 20, 25; 661 NW2d 599 (2003). The decision to bind over a defendant may only be reversed if it appears on the record that the district court abused its discretion. *Id*. This Court also reviews the bindover decision de novo to determine whether the district court abused its discretion. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Thus, this Court gives no deference to the circuit court's decision. *People v Harlan*, 258 Mich App 137, 145; 669 NW2d 872 (2003).

MCL 750.50b(2) provides that "[a] person who willfully, maliciously and without just cause or excuse kills, tortures, mutilates, maims, or disfigures an animal . . . is guilty of a felony . . . ."

Here, defendants were charged under the torture provision of MCL 750.50b(2). Thus, defendants were charged with three counts of willfully, maliciously, and without just cause or excuse torturing three horses, i.e., Ice, Moose, and Lucky Seven. The statutory requirements were examined in *Fennell*, *supra*. All the parties rely on *Fennell*, but offer different interpretations of its holding and the "intent" required under the statute. The prosecution argues that in order to show that defendants willfully and maliciously tortured an animal, it is sufficient to show that defendants acted with conscious disregard of the known risks. Defendants argue that the prosecution must prove that defendants intended to harm the animals.

In *Fennell*, the defendant threw a firecracker into a horse stable, causing the stable to burn to the ground and killing 19 horses. *Fennell*, *supra* at 263-264. The defendant was convicted of 19 counts of willfully and maliciously torturing or killing animals, MCL 750.50b(2). *Fennell*, *supra* at 262. At issue in that case was the degree

of intent required under the animal torture statute. *Id.* The trial court instructed the jury that to convict the defendant, it must find that he "(1) killed or tortured an animal or did anything that resulted in such an outcome; (2) knew that his actions were wrong at the time he committed this crime; (3) intended to cause physical or mental harm to an animal; and (4) had no just cause or excuse for his actions." *Id.* at 269.

The defendant in *Fennell* argued on appeal that the trial court erred by refusing to instruct the jury that the prosecution was required to show that he specifically intended to kill or torture the horses. *Id.* at 264. This Court interpreted the "willfully" and "maliciously" requirements of the statute and considered whether they connoted a specific intent crime. On the "willfulness" element, the defendant argued that the Legislature's use of the term "willfully" meant that the crime required a criminal intent beyond merely an intent to do the act. *Id.* at 266. This Court disagreed, first explaining that "[a] crime requiring a particular criminal intent beyond the act done is generally considered a specific intent crime; whereas, a general intent crime merely requires 'the intent to perform the physical act itself.' " *Id.* (citations omitted).

Then, because the statute does not define "willfully," the *Fennell* Court examined several sources for guidance, including its dictionary definition that described an action that is " '[v]oluntary and intentional, but not necessarily malicious.' " *Id.* at 267, quoting Black's Law Dictionary (7th ed). The *Fennell* Court also considered the statute's language in light of its predecessor statute and subsequent developments. *Fennell*, *supra* at 268. Specifically, MCL 750.377[1] made it a crime for any person to " 'willfully and maliciously kill, maim, or

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[1] MCL 750.377 was repealed by 1994 PA 126, effective March 30, 1995.

disfigure any horses, cattle, or other beasts of another[.]' " *Fennell*, *supra* at 268. The similarity to the language of MCL 750.50b(2) was deemed significant:

> This language is almost identical to that used in MCL 750.50b(2). This is noteworthy because several cases discussing MCL 750.377 have held that it only required a showing of general malice. In determining that malice need not be directed toward the animal or the animal owner, the Court in *People v Tessmer* noted that the requisite malice required was the general malice of the law of crime. Further, in *Culp*, this Court specifically distinguished the statutory crime of willfully and maliciously killing an animal from the specific intent crime of malicious destruction of property. [*Fennell*, *supra* at 268, citing *People v Tessmer*, 171 Mich 522, 526-527; 137 NW 214 (1912), and *People v Culp*, 108 Mich App 452, 457-458; 310 NW2d 421 (1981).]

The Court concluded that the portion of MCL 750.50b(2) relating to killing or torturing an animal is a general intent crime. *Fennell*, *supra* at 263, 269.[2] Accordingly, the jury was not required to find that the defendant intended to kill or torture the animals in order to find that he acted willfully, i.e., the jury was properly instructed that the defendant could be convicted of this crime if he " 'killed and/or tortured an animal or did anything that resulted in the killing or torturing of an animal.' " *Id*. at 269.

Then the *Fennell* Court turned to the malice element of MCL 750.50b(2) and adopted a definition of malice from *Iehl*, *supra*, an animal torture case under the predecessor statute, MCL 750.377. The *Fennell* Court held:

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[2] As the American Humane Association's amicus curiae brief explains in great detail, this conclusion that the statute is a general intent crime is consistent with animal cruelty laws across the nation.

> Malice has been described an [sic] essential element in a conviction for animal cruelty. . . . [I]n *People v Iehl*, this Court held that the element of malice under MCL 750.377, "requires only that the jury find that defendant 1) committed the act, 2) while knowing it to be wrong, 3) without just cause or excuse, and **4) did it intentionally *or* 5) with a conscious disregard of known risks** to the property of another." Considered as a whole, we find that the trial court's instructions properly conveyed the element of malice to the jury. [*Fennell*, *supra* at 269-270, citing *Iehl*, *supra* at 280 (emphasis added).]

In this case, defendants argue that an intent to harm the animal is required on the basis of the *Fennell* Court's holding that the jury instructions given in *that* case, which did not include the "conscious disregard of known risks" language, were deemed sufficient. But, as the amicus curiae brief of the Animal Law Section of the State Bar of Michigan aptly points out, the facts in the *Fennell* case were that the defendant intentionally threw a firecracker into a barn full of horses. *Fennell*, *supra*, at 263-264. The "conscious disregard" instruction was not warranted by the facts of that case. Nevertheless, the *Fennell* Court clearly recognized that malice can be established by showing that the defendant acted either intentionally or with conscious disregard of known risks. Obviously, if the statute requires a showing that the defendant acted with *either* an intent to harm *or* a conscious disregard of known risks, and the *Fennell* jury convicted the defendant on the basis of an instruction that included only an intent to harm, then no instructional error occurred. Therefore, defendants' and the circuit court's interpretation of *Fennell* is incorrect. The prosecution need not prove that defendants intended to harm the animals.

Next, we consider whether the district court abused its discretion by finding probable cause to bind defen-

dants over on the felony counts. The testimony in this case was extensive. There was a plethora of evidence regarding (1) the poor, unsanitary, or hazardous conditions of the land, barn, horse stalls, buildings, fences, and horse shelters, (2) the lack of quality hay or food for the horses for a lengthy period, and (3) the lack of quality water for the horses, including evidence that the horses were likely drinking from a county drainage ditch that was contaminated with *E. coli*. Defendant Mercier, who was the primary caretaker of the horses, lived with a friend about 45 minutes of driving time from the farm during the relevant period. There was also abundant evidence regarding the condition of the horses. Several veterinarians and animal control officers with extensive experience with horses testified that at least 11 horses were considered severely emaciated, most of the others were considered very thin, and only some were found to be in fair condition. The horses had long hooves and were heavily infested with parasites, both externally with lice, causing hair loss, and internally with worms.

The felony charges against defendants pertain to three horses. First, we consider Ice. The evidence showed that wire, likely from the extensive debris strewn about the farm, had been wrapped completely around her leg and had formed a knot. The wire was embedded in her leg for at least three weeks and had cut through to the bone. The wire was protruding about 1½ inches from the open wound and the wound was obviously severely infected. Ice also was emaciated and had a large lump on the back of her right leg, a very large hernia, and a cut on her forehead. Defendants did not have Ice treated by a veterinarian. Dr. Richard Hammer, a veterinarian for 19 years who practiced primarily equine medicine, testified that "[i]t is very unusual to deal with a wound that's that neglected." The evidence also showed that defendants had extensive experience with horses and were aware of the

wire injury to Ice. And Dr. James Irving, a veterinarian, testified that Mercier contacted him about Ice on March 16 seeking to bring Ice in for treatment, two days after animal control became involved in this matter.

Second, we consider Moose, a four- to five-year-old grulla mare. The evidence indicated that Moose was severely emaciated and heavily infested with parasites. An animal control officer described her as a walking skeleton. Dr. Hammer testified that Moose was severely emaciated to the point that you could see all the bones in her body and no fat whatsoever. She should have weighed 1,100 pounds but weighed 685 pounds. Dr. Hammer also testified that Moose had no medical problems that would have caused her to be in that condition. In fact, he testified that about 30 days after he first saw her, Moose had shown marked improvement with only a parasite control program and feeding initiated by animal control. Mercier admitted to an animal control officer that he "dropped the ball" with regard to Moose, which, in December 2006, "had lost a little weight," supposedly from gas colic. Although there was no evidence of any medical condition, defendants' veterinarian, Dr. Robert Sray, testified that Moose was "probably thin" because of "sickness." According to Dr. Sray, none of the horses, including this 685-pound horse, looked starved.

Third, we consider Lucky Seven, a paint. The evidence included that he was severely emaciated, heavily infested with parasites, and significantly lame because of an extremely painful degenerative arthritic condition. He ultimately had to be euthanized. When animal control became involved in this matter, an officer noticed that Lucky Seven could not bear weight on one leg and was dragging it. Dr. Hammer testified that Lucky

Seven was severely emaciated, severely lame on the right rear leg, had an enlarged stifle joint, and was very tender in the hips. Dr. Hammer also testified that the pathology report indicated a severely starved, chronic condition, with basically bone-to-bone contact in the hip, stifle, and hock joints, which would be extremely painful. The pathology report also showed heavy damage to Lucky Seven's intestinal tract because of parasites and that it would have affected his body's ability to absorb nutrients. Dr. Judith Marteniuk, a veterinarian for 32 years, testified that she treated Lucky Seven at the Michigan State University veterinary large animal clinic and that he was about a year old. He had one of the worst cases of lice she had ever seen, and she took pictures of it for teaching purposes. Dr. Marteniuk testified that Lucky Seven had severe degenerative arthritis of the right hip and that it was a longstanding condition—probably months—and would have been extremely painful. Nevertheless, defendants' veterinarian, Dr. Sray, testified that, although he saw that Lucky Seven was "sore in the hip," he was not very concerned about him. And Dr. Kurt Williams, who performed the necropsy on Lucky Seven, testified that Lucky Seven would have been severely lame from his condition.

When this extensive evidence is considered as a whole, it is clear that the prosecution established that a crime was committed and that probable cause exists to believe that defendants committed it. See *Glass (After Remand)*, *supra*. To establish that a crime has been committed, the prosecution only had to present some evidence of each element. *Yost*, *supra*. Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *Greene*, *supra*. Under the portion of MCL 750.50b(2) at issue here, the prosecution needed to establish probable cause to believe that defendants willfully (i.e., did something that resulted in torture to

the animal), maliciously (i.e., knowing it to be wrong, acted either intentionally *or* with conscious disregard of known risks), and without just cause or excuse tortured the three horses. See *Fennell*, *supra* at 268-270.

Here, at a minimum and as charged in the information, the evidence established probable cause to believe that defendants willfully failed to seek necessary veterinary care and treatment for these three horses, despite defendants' extensive experience with horses, the longstanding and obvious nature of the horses' problems, and defendants' knowledge that the horses were not healthy, in conscious disregard of the known risk that they would continue to decline in health to the point of having to be euthanized and that without just cause or excuse, defendants caused them to suffer "torture," which the district court defined as "severe physical or mental pain, agony or anguish." Dr. Hammer testified that these three horses were "tortured," i.e., suffered severe physical or mental pain, agony, or anguish. And Dr. Marteniuk testified that Lucky Seven suffered torture, i.e., agony of body or mind, as a result of his condition. The testimony was consistent—the abhorrent conditions at the farm, as well as the unhealthy conditions of the horses, existed for several months.

Defendant Henderson argues on appeal that because he had no responsibility for the day-to-day care of the horses, the felony charges against him were not supported by probable cause. We disagree. Henderson relies on the case of *People v Johnson*, 104 Mich App 629; 305 NW2d 560 (1981), in support of his "innocent or absentee owner" defense. The circuit court did as well. However, Henderson fails to note in his argument that the statute under which the *Johnson* Court held that "an innocent or absentee owner cannot be held criminally liable for mistreatment of a horse that he owns

but that is cared for by someone else" is clearly distinguishable from MCL 750.50b(2), the statute at issue in this case. And the statute in the *Johnson* case, MCL 752.21, has been repealed. Suffice it to say that we are not persuaded by this argument. And although we are not persuaded that an "innocent or absentee owner" defense exists, if it did exist, it would not be applicable under the facts of this case.

Throughout his arguments, Henderson refers us to, and relies on, his and Mercier's preliminary examination testimony in support of his argument that dismissal of the felony charges against him was proper. But, as was noted during closing arguments and by the district court, MCL 750.50(3) provides that the testimony of a person at a forfeiture proceeding is generally not admissible against him in a criminal proceeding and does not waive the person's constitutional right against self-incrimination. Because the preliminary examination and the forfeiture proceeding were combined in this case, we have not considered either defendant's testimony with regard to our resolution of this criminal matter.

The record evidence showed that Henderson had a significant investment in this farm and the 69 horses, most of which he owned. He leased the property on which the farm was situated and paid the bills associated with the farm and the horses. The property, barn, buildings, shelters, and fences had been in a severe state of disrepair—to the point of being hazardous—for a long time. Although the amount of hay that would be required to feed 69 horses daily is significant—typically 25 to 30 pounds of hay for each horse according to Dr. Vicki Chickering, a field veterinarian on the staff of the Department of Agriculture who had been a veterinarian for 31 years—there was no stockpile of hay in the barn.

Thus, Henderson would have had to purchase hay regularly. According to Perry Haag, defendants' witness, a round bale of hay, weighing between 1,000 and 1,500 pounds, costs $30 to $40. There was no evidence of regular hay purchases except for the testimony of Haag and Arthur Feldkamp, both of whom claimed to have sold hay on occasion to Mercier. The thin and emaciated, as well as severely parasitic, condition of the horses were several months in duration. And there was testimony from three witnesses to the effect that Henderson was seen at the farm in December 2006, as well as multiple times in January, February, and March 2007. One witness testified that he had seen Henderson drive up Maute Road, in the direction where the farm was located, two to three times a week from January through March 2007.

In summary, there was significant evidence of Henderson's involvement in this farm, as well as the long-standing nature of the poor condition of both the farm and the horses. He was the primary source of funding for the farm and for the care, including veterinary care, of the horses. Caring for and feeding the horses was costly. He was seen at the farm during the relevant months. Circumstantial evidence and reasonable inferences from the evidence establish probable cause to believe that Henderson willfully failed to seek necessary veterinary care and treatment for these three horses, despite his extensive experience with horses, the long-standing and obvious nature of the horses' problems, and his knowledge that the horses were in unhealthy conditions, in conscious disregard of the known risk that they would continue to decline in health to the point of having to be euthanized and that without just cause or excuse, he caused them to suffer "torture," which the district court defined as "severe physical or mental pain, agony or anguish." See *Fennell*, *supra* at

270-271 ("Minimal circumstantial evidence is sufficient to prove an actor's state of mind."); see, also, *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Were we to consider defendants' preliminary examination testimony, as both defendants urge, we would find that our conclusions are bolstered by that testimony. Further, any conflicts in the evidence must be resolved by the trier of fact. *Yost*, *supra* at 128.

Accordingly, the district court properly bound both defendants over on all three felony counts. See *Libbett*, *supra*. That defendants did not intend to violate MCL 750.50b(2) or that they did not intend to cause these three horses to suffer torture is of no consequence. Thus, the circuit court's reversal of the bindover decisions, which was premised on an erroneous interpretation of MCL 750.50b(2), is reversed.

Because additional proceedings will follow for the felony counts, we find it necessary to address defendants' repeated claims in their briefs on appeal that the district court's definition of "torture" was erroneous, even though they had not previously challenged this definition. The *Fennell* Court did not define the statutory term "torture." Referenced in the *Fennell* opinion is the jury instruction given by the trial court to the *Fennell* jury, which defined "torture" as " 'severe physical or mental pain, and agony or anguish.' " *Fennell*, *supra* at 266. It is unclear how this definition was derived, but it was not an issue on appeal. The district court in this case adopted that definition for purposes of this preliminary examination.

The statutory term "torture" is not defined in our animal cruelty statutes. We are mindful of the directives that statutory language should be construed reasonably and that the fair and natural import of the terms employed, in view of the subject matter of the law, governs.

People v Green, 260 Mich App 710, 715; 680 NW2d 477 (2004); *People v Spann*, 250 Mich App 527, 530; 655 NW2d 251 (2002). Turning to the dictionary in this instance is of little assistance. Meanings similar to the jury instruction definition discussed above can be found. Considering the subject matter at issue—animals—a determination of "severe physical or mental pain, and agony or anguish" may be confusing or arduous.

Turning to the law of our sister states for guidance, we find that many have provisions specifically defining "torture" as the term relates to their animal offense statutes. See *Glass v Goeckel*, 473 Mich 667, 674 n 4; 703 NW2d 58 (2005). After considered review, we note that the term "torture" is commonly defined to include every act or omission that causes or permits an animal to suffer unjustifiable or unreasonable pain, suffering, or death. See, e.g., *People v Sitors*, 12 Misc 3d 928, 931; 815 NYS2d 393 (2006), citing NY Agriculture and Markets Law 350(2); *People v Thomason*, 84 Cal App 4th 1064, 1067; 101 Cal Rptr 2d 247 (2000), citing Cal Penal Code 599b; *State v Howell*, 137 Ohio App 3d 804, 817; 739 NE2d 1219 (2000), citing Ohio Rev Code Ann 1717.01(B); *In re William G*, 52 Md App 131, 132; 447 A2d 493 (1982), citing Md Code Ann art 27, § 62 (1982); see, also, SD Codified Laws 40-1-2.2; Tenn Code Ann 39-14-201(4). We are persuaded that this definition is an appropriate and reasonable construction of the term "torture," as it uniquely pertains to animals, and accomplishes the statute's purpose; namely, to ensure that animals are treated humanely. See MCL 750.49 *et seq.*; *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996).

In this case, whether "torture" was defined for purposes of the preliminary examination as "severe physical or mental pain, and agony or anguish" or as

"every act or omission that causes or permits an animal to suffer unjustifiable or unreasonable pain, suffering, or death," the evidence supported a finding that these three horses suffered torture under MCL 750.50b(2). Thus, the definition of "torture" relied on by the district court does not warrant appellate relief. Accordingly, the three felony counts against both defendants are reinstated for further proceedings consistent with this opinion.

FORFEITURE ACTION, DOCKET NO. 285773

Next, the prosecution argues that the circuit court erred by reversing the district court's order of forfeiture of 69 horses under MCL 750.50(3). We agree. This Court reviews questions of statutory interpretation de novo. *People v Herrick*, 277 Mich App 255, 256-257; 744 NW2d 370 (2007).

MCL 750.50(3) establishes a procedure by which forfeiture of animals may occur before the disposition of criminal charges of animal cruelty or animal torture under MCL 750.50(2) or MCL 750.50b(2). In a civil forfeiture action, the prosecution must prove its case by a preponderance of the evidence. MCL 750.50(3). The misdemeanor charge that underlies the instant forfeiture action was an alleged violation of MCL 750.50(2)(a), which provides:

> An owner, possessor, or person having the charge or custody of an animal shall not do any of the following:
>
> (a) Fail to provide an animal with adequate care.

Adequate care is "the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health." MCL 750.50(1)(a). " 'Sanitary conditions' means space free from health hazards in-

cluding excessive animal waste, overcrowding of animals, or other conditions that endanger the animal's health." MCL 750.50(1)(i).

The district court held that, on the basis of all the evidence previously discussed, the prosecution established the misdemeanor count of inadequate care by a preponderance of the evidence to support the forfeiture of the horses. The court stated that "there was not sufficient provision, sufficient food, water, shelter, sanitary conditions, exercise, veterinary medical condition [sic] in order to maintain the animals in a state of good health." The district court rejected defendant Henderson's claim that he was an innocent owner on the ground that the evidence placed him on the farm. The circuit court disagreed, holding that there was insufficient evidence of Henderson's presence on the farm. Specifically, the court held: "It's clear that Mr. Mercier was the caretaker and the one in charge of the horses and therefore I do find that Mr. Henderson not [sic] have charge or custody of the animals and is in fact an innocent owner in these circumstances based on the record even taking everything in the light most favorable to the prosecution."

The dispute here is the proper interpretation of MCL 750.50(2). The statute prohibits "[a]n owner, possessor, or person having the charge or custody of an animal" from failing to provide adequate care. The prosecution argues that as the owner of the horses, Henderson is liable for failure to provide adequate care, regardless of whether the horses were in his charge or custody. The prosecution urges an interpretation of the statute that identifies three separate statuses, i.e., (1) owner, (2) possessor, or (3) person having charge or custody. Under this construction, the phrase "having charge or custody" pertains only to "person," distinct from an owner or possessor of the animal.

In contrast, Henderson argues that, although he owned the horses, he did not have charge or custody of them. He maintains that ownership alone is insufficient for liability. The horses were in Mercier's care and custody, and Mercier was the person responsible for them in Henderson's absence. In essence, Henderson reads the statutory phrase "having the charge or custody" as describing all three preceding statuses, i.e., owner, possessor, or other person, so that he must be an owner having charge or custody of the horses in order to be liable for failure to provide adequate care.

In support of his position, Henderson again relies on *Johnson*, *supra*, a case in which this Court construed an earlier version of the animal cruelty statute, MCL 752.21, repealed by 1994 PA 126, which prohibited cruelty to an animal by a person "having the charge or custody of any animal, either as owner or otherwise[.]" In that case, this Court reversed a defendant's conviction that was solely based on his co-ownership of a mistreated horse, because the other owners had assumed responsibility for the horse's care. *Johnson*, *supra* at 633-634. The prosecution was required to present evidence that the horse was in that defendant's charge or custody. *Id*. at 632-633. This Court explained that the statutory phrase " 'as owner or otherwise' refers to the fact that a person having charge or custody of an abused animal may be held liable without regard to ownership." *Id*. at 633. However, the Legislature repealed MCL 752.21 in 1994. The statutory language construed in *Johnson*, which applied to a person "having the charge or custody of any animal, either as owner or otherwise," made ownership irrelevant to the "having the charge or custody" requirement. The present animal cruelty statute, MCL 750.50(2), is worded differently; it applies to "[a]n owner, possessor, or person having the charge or custody of an animal . . . ."

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Spann*, *supra*. We are also guided by several rules of construction. Relevant to this case is the tenet that, when a statute is repealed and another statute is enacted that covers the same subject area, a change in wording is presumed to reflect a legislative intent to change the statute's meaning. *Williams v Auto Club Group Ins Co (On Remand)*, 224 Mich App 313, 319; 569 NW2d 403 (1997). In this case, the change in the statutory language appears to be an effort to make owners of an animal legally responsible for their failure to provide adequate care to the animal. The repealed statute made the fact of ownership irrelevant. Under the present statute, the owner of an animal cannot just give that animal to someone to care for it without the attendant responsibility to ensure that the animal receives adequate care. If a person does not want to be bothered with the detail of ensuring that his animal receives adequate care, he should not own the animal.

Another rule of statutory construction relevant here is the rule of the last antecedent, as the amicus curiae brief of Leelanau Horse Rescue and Laura Steenrod sets forth. Generally, a modifying clause will be construed to modify only the last antecedent, unless something in the subject matter or dominant purpose requires a different interpretation. *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004). Here, the last antecedent to the modifying clause "having the charge or custody of an animal" is "person." There is nothing in the subject matter or grammatical construction that leads us to conclude that the rule does not apply here. If the modifying clause applied to, for example, "pos-

sessor," the resulting clause would be redundant because a "possessor" in this instance is a person who has possession of an animal. Further, the Legislature is presumed to have known the rules of grammar. *People v Beardsley*, 263 Mich App 408, 412-413; 688 NW2d 304 (2004). Thus, if the modifying clause was meant to be applied to an owner, possessor, or person, the clause would have been set off by a punctuation mark so that the provision would read "[a]n owner, possessor, or person, having the charge or custody of an animal, shall not . . . ." See, e.g., *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 71; 718 NW2d 784 (2006). There is no such punctuation. Accordingly, we conclude that MCL 750.50(2) prohibits an owner of an animal from failing to provide that animal with adequate care.

In this case, it is undisputed that Henderson was the owner of the horses that were the subject of the forfeiture order. Thus, we turn to whether he failed to provide those horses with adequate care. As discussed above, Henderson leased the property on which the horses were located and he was responsible for paying for their care. As discussed above, extensive evidence was presented at the hearing. The evidence included that there were poor, unsanitary, or hazardous conditions on the land, in the barn, in the horse stalls, and in the buildings. For example, debris including wire, nails, boards, steel siding, and hoses cluttered the pastures and fields on which the horses roamed. The barn also contained significant debris, and the horse stalls, most of which had inappropriate gates, were overcrowded and were filled with several inches of urine and manure to the extent that there were no dry spots for the horses to stand or lie. The fences were in disrepair and inadequate, allowing the horses to repeatedly leave the farm and cross major roads. Because of a lack of water, the horses were allowed, or forced, to drink water from

an *E. coli* contaminated county ditch that ran at the bottom of a steep hill. The horse shelters were abysmal. There was insufficient or poor quality hay.

Further, several veterinarians and animal control officers with extensive experience with horses testified that many of the horses were severely emaciated and only a few were in fair condition. The horses had long hooves—some of which were split—and all the horses were heavily infested with parasites, both externally with lice, causing hair loss, and internally with worms. Many were injured and did not receive veterinary care. Clearly, the prosecution established by a preponderance of the evidence that Henderson failed to provide every horse on this farm with adequate care during the relevant period. That Mercier was supposed to take care of the horses is of no consequence because he did not. Accordingly, the circuit court's order reversing the forfeiture of the 69 horses under MCL 750.50(3) is reversed.

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

PONTIAC FOOD CENTER v
DEPARTMENT OF COMMUNITY HEALTH

Docket No. 277281. Submitted August 5, 2008, at Detroit. Decided October 16, 2008. Approved for publication February 3, 2009, at 9:20 a.m.

The Department of Community Health, which administers a nutritional program for women, infants, and children whose physical and mental health are at risk (WIC program), terminated a contract it had with Pontiac Food Center, a vendor in the WIC program, and disqualified Pontiac Food Center from program participation for three years. A hearing officer in the department affirmed the termination and disqualification, and the director of the department's administrative tribunal affirmed the hearing officer's decision. Pontiac Food Center appealed in the Oakland Circuit Court, Gene Schelz, J., which, on motion by the department, dismissed the appeal as untimely filed. Pontiac Food Center appealed by leave granted, contending, in part, that its circuit court appeal was filed within 60 days of the department's final decision, as provided in § 104(1) of the Administrative Procedures Act, MCL 24.304(1), for contested cases.

The Court of Appeals *held*:

The 60-day period for appeals prescribed by the Administrative Procedures Act does not apply to this case. The procedures for administrative hearings involving food vendors in the WIC program are controlled by an agreement between the Department of Community Health and the United States Department of Agriculture, which agreement does not incorporate the Administrative Procedures Act.

Affirmed.

ADMINISTRATIVE LAW — DEPARTMENT OF COMMUNITY HEALTH — WOMEN, INFANTS, AND CHILDREN PROGRAM — ADMINISTRATIVE HEARINGS — FOOD VENDORS — JUDICIAL REVIEW.

The procedures for administrative hearings in the Department of Community Health involving food vendors in the Women, Infants, and Children Program are controlled by a contract between the Department of Community Health and the United States Depart-

ment of Agriculture and by federal regulations promulgated pursuant to the Child Nutrition Act, not by the Administrative Procedures Act (42 USC 1771 *et seq*.; 7 CFR 246.1 *et seq*.).

Fried Porter PLLC (by *Louis J. Porter*) for the petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Santiago Rios*, Assistant Attorney General, for the respondent.

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

PER CURIAM. Petitioner appeals by leave granted a circuit court order dismissing its appeal from a final decision of respondent's administrative tribunal, which affirmed respondent's termination of petitioner's contract. The circuit court did not address the issues on their merits and dismissed the matter for failure to file a timely appeal, and we granted leave to appeal. For the reasons set forth in this opinion, we affirm.

Respondent operates a federally funded supplemental food program for women, infants, and children (WIC program), which was established as part of the Child Nutrition Act, 42 USC 1771 *et seq*., and subject to regulations in 7 CFR 246.1 *et seq.* The purpose of the WIC program is to provide "supplemental foods and nutrition education through any eligible local agency that applies for participation in the program" to certain women, infants, and children "at special risk with respect to their physical and mental health." 42 USC 1786(a). Petitioner contracted with respondent to serve as a vendor for the WIC program. The vendor contract provided petitioner with a right to administrative review of certain adverse decisions by respondent.

In January 2006, respondent notified petitioner that it was terminating its contract and disqualifying it from

the WIC program for three years because a compliance investigation showed that petitioner had submitted three WIC coupons for payment that exceeded the purchase price of the food purchased with the WIC coupons by a total of $8.29. Petitioner sought review of the decision by respondent's administrative tribunal. On June 27, 2006, after conducting an evidentiary hearing, an administrative hearing officer affirmed the termination and disqualification decisions. In August 2006, after the director of the administrative tribunal dismissed petitioner's motion for rehearing or reconsideration, petitioner filed an appeal in the circuit court. Petitioner moved for a stay, while respondent moved to dismiss the circuit court appeal on the ground that it was not timely filed. Respondent also argued that petitioner had not sought leave to file a delayed appeal, and then proceeded to argue that the requirements for granting a delayed appeal were not present. The circuit court granted respondent's motion to dismiss the appeal.

In this appeal, petitioner treats the substance of the circuit court's decision granting respondent's motion to dismiss as a decision on the merits of its petition for review and argues that the circuit court erred by considering the merits before petitioner had the opportunity to file a brief addressing the merits of the petition.

Petitioner misconstrued the circuit court's ruling as a decision on the merits of the petition. The circuit court did not affirm the hearing officer's decision, but rather granted respondent's motion to dismiss for failure to timely appeal the decision, thereby depriving it of jurisdiction to consider the petition for review. We agree that the circuit court did comment on evidence that petitioner violated the vendor contract; however, that remark was preceded by the court's consideration of the

argument raised in respondent's motion regarding whether a delayed appeal would be appropriate. The circuit court stated:

> Defendant's [sic] reiterate the arguments made in their [sic] response [to the motion for stay] and add the following in their [sic] Motion to dismiss: *Should the Court grant leave,* the Court's standard of review is very limited; whether the prior decision was supported by competent, material, and substantial evidence on the whole record.
>
> The Court Grants the Department of Community Health's Motion to Dismiss this matter. The Court acknowledges that the violation may have only been for $8.29, but it does violate the contract, and there is no evidence to the contrary. [Emphasis added.]

Examined in context, it is apparent that the circuit court considered the merits of the petition only for the purpose of evaluating whether it should entertain a delayed appeal. Because the record shows that the circuit court stayed within the scope of the matters raised in respondent's motion, petitioner's reliance on Judge (now Justice) CORRIGAN's concurring opinion in *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84; 492 NW2d 460 (1992), is misplaced. This case does not involve the circuit court's sua sponte consideration of unbriefed issues that were found to raise due process concerns in *Haji*. Therefore, even if we were to assume for purposes of review that petitioner established the requisite liberty or property interest in the vendor contract to invoke due process protections, appellate relief is not warranted because petitioner was not deprived of procedural due process. It is clear from the record that petitioner had notice of respondent's motion to dismiss and had a meaningful opportunity to be heard. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004).

Petitioner next argues that the circuit court erred by granting respondent's motion to dismiss. Petitioner argues that it timely filed the petition for review in the circuit court.[1]

Our review of this jurisdictional issue is de novo. See *Bass v Combs*, 238 Mich App 16, 23; 604 NW2d 727 (1999) (issues of subject-matter jurisdiction are reviewed de novo as questions of law), and *Davis v Dep't of Corrections*, 251 Mich App 372, 376; 651 NW2d 486 (2002) (timely administrative appeal is a jurisdictional requirement). Issues involving the interpretation of statutes or court rules are also reviewed de novo as questions of law. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). The primary goal of statutory interpretation is to give effect to the Legislature's intent and, if statutory language is unambiguous, it is to be applied as written. See *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005).

In general, three possible avenues of relief are available to a party seeking judicial review of an administrative agency's decision:

> (1) review pursuant to a procedure specified in a statute applicable to the particular agency, (2) the method of review for contested cases under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, or (3) an appeal pursuant to § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631, and Const 1963, art 6, § 28, in conjunction with MCR 7.104(A). [*Hopkins v Parole Bd*, 237 Mich App 629, 637-638; 604 NW2d 686 (1999).]

Here, petitioner relies solely on the method for reviewing contested cases under the APA to argue that its appeal was timely. MCL 24.304(1) provides:

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[1] Petitioner does not argue that the circuit court should have allowed a delayed appeal.

> A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms.

A "contested case" is defined as "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). The APA's provisions have been found applicable to a particular controversy that fits within the definition and is not specifically controlled by another statute or constitutional provision. *Cooper Twp v State Tax Comm*, 393 Mich 58, 69; 222 NW2d 900 (1974).

It is arguable that the instant controversy falls within the definition of a "contested case" because federal law is involved. Under 7 CFR 246.3(c)(1), "[e]ach State agency desiring to administer the Program shall annually submit a state plan and enter into a written agreement with the Department for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part."[2] Under former 7 CFR 246.4(17), the state plan must contain the administrative appeal procedures for food vendors.[3] The minimum administrative due process that the state agency must provide to the food vendor is set forth in 7 CFR 246.18. *East Food & Liquor, Inc v*

[2] "Department" is defined in 7 CFR 246.2 as the United States Department of Agriculture.

[3] The regulation was amended, effective May 2, 2008. The amended regulation moved this requirement to 7 CFR 246.4(a)(18).

United States, 50 F3d 1405, 1408 n 2 (CA 7, 1995). This regulation requires a full administrative review of adverse decisions to terminate a contract for cause or to disqualify a vendor. 7 CFR 246.18(a). At a minimum, the state agency must develop procedures to provide the vendor with written notice, an opportunity for an administrative appeal, and an opportunity for an evidentiary hearing. 7 CFR 246.18(b).

But because the procedures for administrative hearings are specifically controlled by an agreement between respondent and the Department of Agriculture that does not incorporate the APA, we conclude as a matter of law that the APA does not apply.[4] *Cooper Twp*, *supra.*

We find no merit to petitioner's claim that a "contested case," for purposes of applying the APA's time requirements for appeals, can be established by treating the controversy as one implementing its constitutional or contractual rights. With regard to the contract claim, the procedures for administrative appeals established pursuant to 7 CFR 246.18 were specifically incorporated into the vendor contract executed by petitioner and respondent. The vendor contract does not reference the APA, and we must refrain from reading into the contract a term that was not placed there by the parties. See *Cottrill v Michigan Hosp Service*, 359 Mich 472, 476; 102 NW2d 179 (1960). With respect to petitioner's constitutional claim, we agree that the "contested case" definition in MCL 24.203(3) has been treated as encompassing both statutory and constitutional law. *Bisco's,*

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[4] We decline to consider petitioner's unpreserved argument in its reply brief that respondent should have promulgated rules under the APA relative to WIC vendors. A party may not raise a new or additional argument in a reply brief. *Kinder Morgan Michigan, LLC v City of Jackson,* 277 Mich App 159, 174; 744 NW2d 184 (2007).

Inc v Liquor Control Comm, 395 Mich 706, 720; 238 NW2d 166 (1976) (opinion of LEVIN, J.) But even where it is shown that the Due Process Clause applies, the question remains what process is due. *Cleveland Bd of Ed v Loudermill*, 470 US 532, 541; 105 S Ct 1487; 84 L Ed 2d 494 (1985). Therefore, the material question is no different than that underlying petitioner's claim concerning federal law. As a matter of law, the APA does not apply, even if we assume that the Due Process Clause is implicated, because procedural matters are controlled by contract.

Accordingly, we conclude that petitioner was not entitled to the 60-day period for appeals prescribed in MCL 24.304(1). Because this is the sole basis of petitioner's claim that the appeal was timely, we uphold the circuit court's decision granting respondent's motion to dismiss. Because the dismissal was proper on jurisdictional grounds and the circuit court did not decide the merits of petitioner's appeal, we decline to consider petitioner's challenge to the merits of the decisions of the hearing officer and the director of the administrative tribunal.

Affirmed.

ROBERTS v TITAN INSURANCE COMPANY
(ON RECONSIDERATION)

Docket No. 280776. Submitted November 12, 2008, at Grand Rapids. Decided February 5, 2009, at 9:00 a.m. Leave to appeal sought.

Kyle Roberts, a minor, by his next friend and mother, Lillian Irwin, brought an action in the Kalamazoo Circuit Court against Titan Insurance Company, seeking personal protection insurance (PIP) benefits for injuries he sustained at age 12 in an automobile accident involving a Ford Explorer owned by Steven Vandenberg, Roberts and Irwin's landlord and housemate. Roberts had taken the Explorer without permission for a joyride that ended when he hit a tree. Vandenberg had let Irwin use the vehicle for all her needs for more than 30 days before the accident occurred; however, he retained title to the vehicle and did not intend that Irwin have permanent use of the vehicle. Before the accident, Irwin obtained no-fault insurance for her own vehicle, a Jeep, then changed the policy to instead cover a Ford Escort, without informing Titan that the Escort was titled in the name of her 19-year-old son, Vernon Austin, III, or that it was Austin who would be using the Escort. Titan claimed that Roberts was not entitled to PIP benefits under MCL 500.3113(a) because he had taken the Explorer "unlawfully" and also that the insurance policy was void *ab initio* because of Irwin's misrepresentation that she owned the Escort. The court, Gary C. Giguere, Jr., J., granted summary disposition for the defendant, holding that the family member joyriding exception to the application of MCL 500.3113(a), adopted by the Court of Appeals in *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244 (1997), did not apply to this case. Roberts appealed. The Court of Appeals, WHITBECK and TALBOT, JJ. (HOEKSTRA, P.J., concurring in the result only), reversed and remanded the case to the circuit court, stating that were it not compelled by MCR 7.215(J)(1) to follow *Butterworth*, it would, instead, hold that there is no family member joyriding exception to MCL 500.3113(a). The Court of Appeals declared a conflict between this case and *Butterworth* pursuant to MCR 7.215(J)(2). 281 Mich App 551 (2008). Following a poll of the judges of the Court of Appeals pursuant to MCR 7.215(J)(3)(a), an order was entered directing that a special conflict panel would not be convened. 281 Mich App 801 (2008).

The defendant then filed a motion for reconsideration of the December 4, 2008, judgment of the Court of Appeals. The Court of Appeals granted the motion for reconsideration and vacated the opinion issued on December 4, 2008. 282 Mich App 801 (2009).

On reconsideration, the Court of Appeals *held*:

1. MCR 7.215(J)(1) constrains this panel to follow *Butterworth*, which held that MCL 500.3113(a) does not apply to any person who takes a family member's vehicle for joyriding purposes and only operates to exclude coverage if the person had an actual intent to steal the vehicle.

2. There is no reasonable dispute that Vandenberg gave the Explorer to Irwin to use because her vehicle broke down right after she moved into his house and thereafter she had exclusive use of the Explorer. Under the facts of this case, Irwin's use of the Explorer qualifies her as an "owner" of the vehicle under MCL 500.3101(2)(h) because she had possessory use of the vehicle for more than 30 days.

3. There is no evidence that Roberts intended to steal the vehicle. Because he was a member of the owner's family joyriding rather than attempting to steal the vehicle, under the holding of *Butterworth*, Roberts did not "unlawfully" take the vehicle for purposes of the exclusion from coverage in MCL 500.3113(a).

4. Were this panel not compelled to follow *Butterworth*, it would, instead, hold that there is no family member joyriding exception to MCL 500.3113(a). A conflict between this case and *Butterworth* must be declared pursuant to MCR 7.215(J)(2).

5. The provision in the insurance contract excluding coverage for injuries sustained by any person using an automobile taken unlawfully must be construed to not apply to a joyriding family member in order for the provision to be compatible with existing public policy.

6. Although the Titan policy was procured through Irwin's intentional misrepresentation of a material fact in the application, the "innocent third party" doctrine applies here because Roberts was not involved in the misrepresentation. Titan may not deny Roberts coverage on the basis of Irwin's improper actions.

7. There is no requirement that an insured actually own or be the registrant of the vehicle in order to have an insurable interest adequate to support PIP coverage. The fact that Irwin did not have an insurable interest in the Escort does not preclude recovery of PIP benefits.

Reversed and remanded.

HOEKSTRA, P.J., concurred in the result only.

1. INSURANCE — NO-FAULT — WORDS AND PHRASES — OWNERS OF MOTOR VEHICLES.

There may be more than one "owner" of a vehicle for purposes of applying the no-fault automobile insurance act's definition of "owner" (MCL 500.3101[2][h]).

2. INSURANCE — NO-FAULT — WORDS AND PHRASES — OWNERS OF MOTOR VEHICLES — USE OF A MOTOR VEHICLE.

The phrase "having the use" of a motor vehicle for purposes of defining "owner" under the no-fault automobile insurance act means using the vehicle in ways that comport with concepts of ownership; the focus is on the nature of the person's right to use the vehicle; ownership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another; it is a regular pattern of unsupervised usage (MCL 500.3101[2][h]).

3. INSURANCE — FRAUD — THIRD PARTIES — INNOCENT THIRD PARTIES.

An intentional misrepresentation by an insured in procuring an insurance policy may bar a claim by the insured who made the misrepresentation, but does not bar the claim of any insured under the policy who is innocent with regard to such misrepresentation.

Jonathan W. Willoughby, PLC (by *Jonathan W. Willoughby*), for the plaintiff.

James, Dark & Brill (by *John C. Fish*) for the defendant.

ON RECONSIDERATION

Before: HOEKSTRA, P.J., and WHITBECK and TALBOT, JJ.

PER CURIAM. In this first-party no-fault automobile insurance action, plaintiff Kyle Roberts, by his next friend and mother, Lillian Irwin, appealed as of right the trial court's order granting defendant Titan Insurance Company (Titan) summary disposition under MCR 2.116(C)(10). In our opinion issued December 4, 2008, we reversed but stated that, were it not for the

statements in the lead opinion in *Priesman v Meridian Mut Ins Co*[1] that were adopted by this Court in *Butterworth Hosp v Farm Bureau Ins Co,*[2] we would have affirmed. Necessarily, our opinion of December 4, 2008, declared a conflict with *Butterworth*.[3] The judges of this Court were polled pursuant to the court rule and an order was entered on December 18, 2008, directing that a special conflict panel would *not* be convened pursuant to MCR 7.215(J).[4] Appellee's motion for reconsideration of our opinion was filed December 19, 2008. By order of this same date we grant reconsideration and issue this opinion *on reconsideration* in which we have changed only the bolded words in the paragraph on page 356. In all other respects, the opinion is unchanged, the result is unchanged, and any duty under MCR 7.215(J) has been disposed of through the poll that was previously conducted.

I. BASIC FACTS AND PROCEDURAL HISTORY

In June 2005, Roberts, at age 12, was seriously injured when he crashed a Ford Explorer into a tree. Roberts was intoxicated at the time of the accident. Following the accident, Roberts spent three weeks in the hospital and required follow-up care for months.

Steven Vandenberg, Roberts and Irwin's landlord and housemate, was the title owner of the Explorer that Roberts was driving at the time of the accident. Irwin and Roberts moved into Vandenberg's home on or about May

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[1] *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992). The lead opinion was signed by three justices; one justice concurred only in the result of the lead opinion; three justices signed a dissenting opinion.

[2] *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304 (1997).

[3] MCR 7.215(J)(2).

[4] 281 Mich App 801 (2008).

1, 2005; they were looking for a place to live, and Vandenberg needed someone to take care of his dog when he went out of town. There is no dispute that Roberts was not legally or biologically related to Vandenberg. There is also no dispute that Roberts did not have permission to drive the Explorer on the day of the accident.

During his deposition, Vandenberg explained that when Irwin moved in he noticed that there was water spilling out from underneath Irwin's Jeep. According to Vandenberg, it turned out that the water pump was in need of repair. At that time, Vandenberg had three vehicles: the Explorer, a Ford Expedition, and a Jaguar. Because he drove the Expedition "all the time" and did not need to use the Explorer, he offered to let Irwin use the Explorer. Irwin thanked him, and he gave her the keys to the Explorer.

Vandenberg stated, to the best of his knowledge, that from May 2005 until the accident in June 2005, Irwin used the Explorer for all her daily needs. According to Vandenberg, Irwin did not pay him anything for the use of the Explorer, and they had no arrangement for the sale of the Explorer to Irwin. Vandenberg and Irwin also had no agreement regarding how long Irwin would be allowed to use the Explorer, but Vandenberg did not intend that Irwin have "permanent" use of the vehicle. Vandenberg agreed that, during the times that Irwin was not using it, he probably could have used the Explorer anytime that he wanted, but he explained that he would probably have asked Irwin for permission first "because [he] gave it to her to use." However, he also agreed that Irwin was using the vehicle with his permission and that he could have told her anytime that he did not want her to use the vehicle anymore. Vandenberg admitted that he did not tell his insurance carrier that Irwin was driving the Explorer.

Vandenberg testified that his insurance company "totaled out" the Explorer after the accident, but he was responsible for the $1,000 deductible, which he paid. Irwin agreed to pay back Vandenberg for the deductible, which he told her was only $500, to give her a break after "what she had been through with her son," but she never paid him.

During her deposition, Irwin testified that when Vandenberg gave her the Explorer to use, she felt that she owned it because she drove it all the time, she was the only person who used it, and all her stuff was in it. Irwin explained, "I just took it that it was mine and I could use it. I could go wherever I wanted. If I wanted to go to Georgia, I could go there. I could do anything in the vehicle." Despite her belief that she owned the Explorer, Irwin later admitted that she did not believe that she had the right to sell the vehicle because she knew she was not the title owner. Irwin confirmed that she did not pay Vandenberg for her use of the Explorer, nor was there any agreement that she pay him for her use. Irwin also admitted that Vandenberg never told her that she owned the Explorer. But, despite confirming that the Explorer was titled in Vandenberg's name and that he paid the insurance for it, Irwin stated that she did not believe Vandenberg had the right to tell her she could no longer use the vehicle because he "gave it to" her. Irwin stated that she paid all the general maintenance costs for the Explorer, including gas, oil, transmission fluid, and windshield washer fluid. Irwin also stated that if the Explorer had broken down, she would have paid for the repairs.

On further questioning, Irwin admitted that she lied to a Titan agent who interviewed her after the accident. When the agent asked her who had use of the Explorer before the accident, Irwin told him that Vandenberg

had sole use of the vehicle. Indeed, she specifically denied ever driving the Explorer. Irwin explained that she lied because she did not want Vandenberg to "get in any trouble." However, she could not specify what kind of trouble she was worried about. Irwin confirmed that she agreed to pay Vandenberg $500 for the deductible, and although she planned to do so, she had not yet paid him. Irwin confirmed that she also lied to the Titan agent when she told him that she had already paid Vandenberg $500 for the deductible.

Roberts testified that when he took the Explorer on the night of the accident, he believed that it belonged to Irwin because "[s]he was always driving it around, had everything in it." Roberts stated that he had never driven any vehicle before, and he admitted that neither Irwin nor Vandenberg gave him permission to drive the Explorer on the night in question. Roberts also admitted that, after Irwin and Vandenberg had gone to bed on the night of the accident, he drank some tequila that he found in the kitchen cupboard. Roberts explained that after drinking the tequila he sat down to watch television and then noticed the car keys in the mesh pocket of Irwin's backpack, which was on the kitchen counter. Roberts could not explain exactly why he took the car. He stated that he just felt like going for a drive. Roberts stated that the next thing he remembered after pulling out of the driveway was waking up in the hospital.

Vandenberg testified that he did not know how Roberts obtained the keys to the Explorer on the night of the accident. Vandenberg stated that he had a spare set of keys for the Explorer that he kept "locked up" and that he did not know where Irwin kept the set of keys that he had given to her. Vandenberg also denied knowing where Roberts obtained the alcohol that he consumed that night, but he admitted that he noticed that some alcohol was missing from his home after the accident.

Although she stated that she often let Roberts start up the Explorer in the mornings, Irwin confirmed that she did not give Roberts permission to drive the Explorer on the night of the accident or at any other time before the accident. Irwin stated that she did not know that Roberts had taken the Explorer on the night of the accident until the police came to the house in the morning. Irwin stated that she normally kept her car keys in her backpack, her purse, or on a set of hooks near the back door. However, she did not know where she put the keys on the night of the accident.

At the time of the accident, Irwin was covered by a no-fault automobile insurance policy that Titan issued to her in March 2005. Irwin had initially purchased the policy to cover a Jeep Grand Cherokee, but in April 2005, she changed the policy to instead cover a Ford Escort. When she applied for the Escort coverage, Irwin provided Titan with a copy of the previous owner's title without any of the buyer information filled in. During her deposition, Irwin first claimed that the title to the Escort was in her name. However, Irwin later revealed that she did not own it and had never even driven the Escort at the time she sought the insurance coverage. Irwin also confirmed that the Escort was never stored at her house. Irwin explained that the Escort was for her son, Vernon Austin, III. Irwin admitted during her deposition that she did not tell the Titan agent that she would not be using the Escort, or that Austin would be using it. However, she clarified that the agent did not ask her who would be using the car. A title search later revealed that the Escort was in fact titled in Austin's name. Irwin stated that she insured the Escort in her name because Austin needed insurance and he was not responsible enough to obtain it for himself.

Citing MCL 500.3113(a), Titan denied Roberts personal protection insurance (PIP) benefits on the ground

that Roberts had unlawfully taken the Explorer. And in June 2006, Roberts filed a complaint, alleging that Titan breached the insurance policy by denying Roberts recovery. Titan then moved for summary disposition under MCR 2.116(C)(10), arguing that Roberts's claim was barred because (1) Roberts unlawfully took the Explorer and (2) the insurance policy issued by Titan was void *ab initio* because of Irwin's misrepresentation that she owned the Escort. Roberts responded, arguing that the trial court should (1) deny Titan's motion for summary disposition because there were genuine issues of material fact regarding whether Roberts "unlawfully" took the Explorer in light of the family member joyriding exception to MCL 500.3113(a) and (2) grant partial summary disposition in his favor instead with regard to Titan's misrepresentation defense because there was no genuine issue of material fact that Roberts was an innocent third party to Irwin's alleged misrepresentation.

After hearing oral arguments on the motion, the trial court issued its written opinion and order in which it concluded that, as a matter of law, the family member joyriding exception to MCL 500.3113(a) was not binding in this case and that, therefore, the statute barred Roberts's recovery. The trial court's full analysis consisted of the following paragraph:

> Without question [Roberts] unlawfully took the Explorer. [Roberts] did not have a reasonable belief that he was entitled to take and use the vehicle. The family joyriding exception to MCL 500.3113(a) as stated by the *Priesman* court is not binding on this court or case. Recovery is barred pursuant to MCL 500.3113(a) and the language contained in [Titan's] policy. As such, it is not necessary for this court to address [Titan's] misrepresentation argument, whether Irwin qualified as an owner, whether Irwin had an insurable interest, whether the innocent third party doctrine applies, or whether [Titan's] policy bars recovery.

Accordingly, the trial court granted Titan's motion for summary disposition and denied Roberts's motion for partial summary disposition. Roberts now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is, therefore, entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[5] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[6] We review de novo the trial court's ruling on a motion for summary disposition.[7] Construction of unambiguous contract language and interpretation of statutes are questions of law that this Court also reviews de novo.[8]

B. *PRIESMAN* AND MCL 500.3113(a)

1. MCL 500.3113

Section 3113 of the no-fault insurance act[9] provides, in pertinent part, as follows:

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[5] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[6] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[7] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[8] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997); *Hafner v Detroit Automobile Inter-Ins Exch*, 176 Mich App 151, 156; 438 NW2d 891 (1989).

[9] MCL 500.3101 *et seq*.

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.[10]

Thus, under the plain language of the statute, if a person is injured while using a vehicle that he or she took unlawfully, that person is not entitled to PIP benefits. And, under the plain language of the statute, the only exception to this exclusion is where the person had a reasonable belief that he or she was entitled to take and use the vehicle.

2. *PRIESMAN*

In *Priesman v Meridian Mut Ins Co*,[11] the Michigan Supreme Court considered whether "an underage, unlicensed driver injured while driving his mother's automobile without her knowledge or consent may recover medical benefits from the no-fault insurer of her automobile." Similar to the facts in the present case, in *Priesman* a 14-year-old boy sustained serious bodily injuries from an automobile accident after he took his mother's car without her permission during the night while she was asleep.[12] Citing MCL 500.3113(a), the insurer argued that the boy was not entitled to no-fault medical benefits because he was using his mother's car unlawfully at the time of the accident.[13] The insurer contended that the boy's use of the vehicle was "un-

[10] MCL 500.3113(a).

[11] *Priesman*, *supra* at 61 (opinion by LEVIN, J.).

[12] *Id*. at 62.

[13] *Id*. at 62-63.

lawful" because, under Michigan law, it is a misdemeanor to take or use a vehicle "without authority."[14]

After recognizing that the no-fault act does not define the term "taken unlawfully," three members of the Court stated in the lead opinion that MCL 500.3113(a) did not apply to "joyriding" family members, who most commonly were teenagers driving their parents' cars without permission.[15] In so stating they first noted that the Uniform Motor Vehicle Accident Reparations Act (UMVARA), which was a model for Michigan's no-fault act, excluded from coverage persons injured while driving a stolen vehicle, *unless* that person was covered under an insurance contract issued to that person, his or her spouse, or a relative living in the same household.[16] Also acknowledging this provision, the insurer argued that by substituting "taken unlawfully" for "converts" the Michigan Legislature intended to exclude not only thieves who intend to steal the vehicles, but also joyriders.[17] The lead opinion rejected this argument, stating that the Legislature's modification of the UMVARA model merely showed its intent to deny coverage to any thief regardless of his or her insurance coverage, "not necessarily to except joyriders from coverage."[18] In other words, they wrote, "the Legislature did not intend any substantial difference in scope or meaning from the prototypical UMVARA concept excepting

[14] *Id*. at 63, citing MCL 750.414.

[15] *Id*. at 63, 68.

[16] *Id*. at 66, citing § 21 of the UMVARA, 14 ULA 87-88 ("[A] person who converts a motor vehicle is disqualified from basic or added reparation benefits, including benefits otherwise due him as a survivor, from any source *other than an insurance contract under which the converter is a basic or added reparation insured* . . . ." [Emphasis added.]), and § 1(i) and (ii) of the UMVARA, 14 ULA 42.

[17] *Priesman*, *supra* at 67 (opinion by LEVIN, J.).

[18] *Id*.

thieves from no-fault coverage . . . ."[19] They reasoned that the Legislature's intent could not have been to deny coverage to joyriding family members, noting that teen joyriding was a common occurrence: "Legislators generally are also parents and sometimes grandparents. Some may have had experience with children, grandchildren, nephews, nieces, and children of friends who have used a family vehicle without permission. Some may have themselves driven a family vehicle without permission."[20] Accordingly, the lead opinion favored a judicially created family member joyriding exception to MCL 500.3113(a).

Despite the fact that a majority of the *Priesman* Court did not agree on the existence of this joyriding exception, Roberts argues that the trial court erred by ruling as a matter of law that the exception was not binding in this case. Roberts acknowledges that *Priesman* itself is not precedentially binding.[21] However, Roberts argues that the rationale of the lead opinion in *Priesman* is binding because it has been adopted in subsequent decisions of this Court.

In *Butterworth Hosp v Farm Bureau Ins Co*,[22] this Court recognized that *Priesman* was not binding precedent and even commented that "any joyriding exception seems to be in derogation of the clear language of the statutes." Nonetheless, this Court felt "compelled" to follow the reasoning of the lead opinion in *Priesman* and extended the exception to adult family members from another household who take a relative's vehicle joyriding.[23] In doing so, this Court clarified that MCL

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[19] *Id*. at 67-68.

[20] *Id*. at 68.

[21] See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 58; 664 NW2d 776 (2003).

[22] *Butterworth Hosp*, *supra* at 248, 249 n 2.

[23] *Id*. at 248-249.

500.3113(a) did not apply to any person who takes a family member's vehicle for joyriding purposes; rather, the statute only operated to exclude a person from coverage if he or she had an actual intent to steal the vehicle.[24]

In *Mester v State Farm Mut Ins Co*,[25] three girls were skipping school together and took a stranger's truck that they eventually crashed during a police chase. The plaintiff argued that the joyriding exception should be extended to anyone who merely joyrides without intent to steal.[26] This Court rejected the plaintiff's argument, noting that, by statute,[27] "[a]n unlawful taking does not require an intent to permanently deprive the owner of the vehicle," and reasoning that "[h]ad the Legislature intended to exempt from subsection 3113(a) all joyriding incidents, it would have chosen a different term than 'unlawful taking,' such as 'steal' or 'permanently deprive.' "[28] This Court then explained that the lead opinion in *Priesman* "recognized a joyriding exception . . . not because joyriding does not involve an unlawful taking, but only because of special considerations attendant to the joyriding use of a family vehicle by a family member."[29] This Court then concluded that those "special considerations" did not "warrant expansion of the exception beyond the family context."[30]

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[24] *Id*. 249-250.

[25] *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 85-86; 596 NW2d 205 (1999).

[26] *Id*. at 88.

[27] Citing MCL 750.413.

[28] *Mester*, *supra* at 88.

[29] *Id*.

[30] *Id*.; see also *Allen v State Farm Mut Automobile Ins Co*, 268 Mich App 342, 346; 708 NW2d 131 (2005) (declining to extend exception to nonfamily members who reside in the same household as the vehicle owner).

As Roberts concedes and this Court has repeatedly acknowledged, the lead opinion in *Priesman* is not binding precedent because it was adopted by only three of the seven justices.[31] Further, in urging us to disregard the *Priesman* decision, Titan points out that in recent years the Michigan Supreme Court has more strictly enforced the dictate that "[s]tatutory—or contractual—language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court."[32] Accordingly, the Court has stated that "[a]lthough stare decisis is generally ' "the preferred course," ' [the Court] will nevertheless depart from erroneous precedent 'when governing decisions are unworkable or are badly reasoned.' "[33] Titan therefore contends that the current membership of the Supreme Court would likely conclude that the justices signing the lead opinion in *Priesman* improperly sought to legislate from the bench and judicially create a joyriding exception when the plain language of MCL 500.3113(a) shows no such intent.

Although we are persuaded by Titan's position, we cannot render decisions based on speculation regarding what the current membership of the Supreme Court may decide. As stated, this Court in *Butterworth Hosp* specifically adopted the reasoning stated in the lead opinion in *Priesman*, and we are now bound by court rule to follow that decision.[34] However, were we not so bound to follow the *Butterworth* decision, we would

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[31] See *Mester*, *supra* at 87; *Butterworth Hosp*, *supra* at 248.

[32] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005).

[33] *Id*. at 584, quoting *Robinson v Detroit*, 462 Mich 439, 463-464; 613 NW2d 307 (2000) (citations omitted).

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

instead follow Justice GRIFFIN's dissent in *Priesman*, in which he concluded that, by creating the joyriding exception, the lead opinion improperly "depart[ed] from the clear and unambiguous language of § 3113(a) . . . ."[35] As Justice GRIFFIN stated, although there may be "emotional appeal" to the rationale of the lead opinion that the legislators could not have meant to exclude coverage to young, joyriding family members given their own likely experience with that common occurrence, such an exception is not supported by the plain, unambiguous language of the statute.[36]

3. APPLYING THE FAMILY MEMBER JOYRIDING EXCEPTION

(a) FAMILY MEMBER'S VEHICLE

Having concluded that the family member joyriding exception is binding on this Court, we now turn to application of that exception to the present case. Therefore, we must determine whether Roberts's conduct falls within that scope of that exception; that is, whether Roberts was joyriding in a family member's vehicle.

Roberts concedes that the vehicle was titled to and owned by Vandenberg and that, therefore, the joyriding exception would seem to not apply.[37] However, Roberts argues that Irwin's use of the vehicle qualified her as an "owner" of the vehicle sufficient to fall within the scope of the exception.

The no-fault insurance act defines the term "owner" as:

> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.

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[35] *Priesman*, *supra* at 69 (GRIFFIN, J., dissenting).

[36] *Id*. at 73.

[37] See *Allen*, *supra* at 346.

> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.
>
> (*iii*) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.[38]

Here, there is no dispute that Irwin did not hold legal title to the Explorer; Vandenberg was the title owner. Therefore, subsection (*ii*) does not apply. Further, there is no dispute that Irwin was not purchasing the vehicle under an installment sale contract. Therefore, subsection (*iii*) does not apply. Accordingly, we must determine if Irwin's use of the Explorer for a period greater than 30 days, as referred to in subsection (*i*), operated to classify her as an "owner" of the vehicle.

We first note that in applying the no-fault act's definition of "owner," this Court has recognized that there may be more than one "owner" of a vehicle.[39] For example, this Court has held that both a lessee and the legal titleholder could be owners under the no-fault act's definition of "owner," thereby requiring them both to maintain security for payment of benefits under PIP insurance.[40]

Where there is no lease agreement, " 'having the use' of a motor vehicle for purposes of defining 'owner' . . . means using the vehicle in ways that comport with concepts of ownership."[41] The focus must be on the

[38] MCL 500.3101(2)(h). We note that MCL 500.3101 was amended, effective July 17, 2008, redesignating the previous subsection 2(g) as 2(h). 2008 PA 241. However, the substance of the subsection remains unchanged.

[39] *Integral Ins Co v Maersk Container Service Co, Inc,* 206 Mich App 325, 332; 520 NW2d 656 (1994).

[40] *Id*., citing MCL 500.3101(1).

[41] *Ardt v Titan Ins Co*, 233 Mich App 685, 690; 593 NW2d 215 (1999).

nature of the person's right to use the vehicle.[42] "[O]wnership follows from *proprietary* or *possessory* usage, as opposed to merely incidental usage under the direction or with the permission of another."[43] It is a "regular pattern of unsupervised usage" rather than "spotty and exceptional" usage that will support a finding of ownership.[44]

Here, given Vandenberg's and Irwin's testimonies, there can be no reasonable dispute that Vandenberg gave the Explorer to Irwin to use because her Jeep broke down right after she moved into his house and that thereafter she had exclusive use of that vehicle.[45] As stated, there was no dispute in the record that Irwin used the vehicle for all her daily needs, and Vandenberg testified that if he had wanted to use the Explorer, he probably would have asked Irwin for permission first "because [he] gave it to her to use." Therefore, we conclude that Irwin's use of the car comports with the concepts of ownership. Further, the record indicates that Irwin had possessory use of the Explorer from approximately **May 1, 2005**,[46] until June 14, 2005. Therefore, the record establishes that Irwin had use of the vehicle for a period greater than 30 days. Accordingly, viewing the evidence in the light most favorable to Roberts, we conclude that there was no question of fact concerning Irwin's ownership.[47]

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[42] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 530; 676 NW2d 616 (2004).

[43] *Ardt*, *supra* at 691 (emphasis in original).

[44] *Id*.

[45] Material in bold type was changed during reconsideration of our December 4, 2008, opinion.

[46] Material in bold type was changed during reconsideration of our December 4, 2008, opinion.

[47] See *Botsford Gen Hosp v Citizens Ins Co*, 195 Mich App 127, 134; 489 NW2d 137 (1992).

(b) ROBERTS'S INTENT

In *Butterworth*, this Court explained that MCL 500.3113(a) "does not apply to cases where the person taking the vehicle unlawfully is a family member doing so without the intent to steal but, instead, doing so for joyriding purposes."[48] Here, there was no evidence that Roberts intended to steal the vehicle. According to his testimony, after becoming intoxicated, he simply decided to take the vehicle for a drive.

Therefore, because Roberts was a family member joyriding rather than attempting to steal the car, under the precedent that *Butterworth* set by adopting the reasoning of the lead opinion in *Priesman*, he did not "unlawfully" take the car for purposes of MCL 500.3113(a) of the no-fault act and is thus not excluded from coverage under that provision.

C. THE POLICY LANGUAGE

When presented with a contractual dispute, a court must read the contract as a whole with a view to ascertaining the intention of the parties, determining what the parties' agreement is, and enforcing it.[49]

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[48] *Butterworth*, *supra* at 249. See MCL 750.413 ("Any person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . ."); *Mester*, *supra* at 88 ("An unlawful taking does not require an intent to permanently deprive the owner of the vehicle . . . ."); see also MCL 750.414 ("Any person who takes or uses without authority any motor vehicle without intent to steal the same . . . is guilty of a misdemeanor . . . ."); *Landon v Titan Ins Co*, 251 Mich App 633, 644; 651 NW2d 93 (2002), quoting *People v Laur*, 128 Mich App 453, 455; 340 NW2d 655 (1983) (" 'To be convicted of this offense, a defendant must have intended to take or use the vehicle, knowing that he had no authority to do so.' ").

[49] *Detroit Trust Co v Howenstein,* 273 Mich 309, 313; 262 NW 920 (1935); *Whitaker v Citizens Ins Co*, 190 Mich App 436, 439; 476 NW2d 161

Absent ambiguity, a contract must be construed to adhere to its plain and ordinary meaning.[50] Technical and constrained constructions are to be avoided.[51]

> It is a cardinal principle of construction that a contract is to be construed as a whole; that all its parts are to be harmonized so far as reasonably possible; that every word in it is to be given effect, if possible; and that no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable.
>
> . . . Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument.[52]

"[C]lear and specific exclusions in an insurance policy should be given effect."[53]

1. UNLAWFULLY TAKEN VEHICLE

Under the terms of Irwin's Titan insurance policy, "coverage does **not** apply to **bodily injury** sustained by: 1. Any person using an **auto** taken unlawfully." (Emphasis in original.) Relying on this provision, Titan argues that the insurance policy alone clearly precludes coverage for Roberts's claims. However, "[t]o the degree that the contract is in conflict with the statute, it is

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(1991); *Perry v Sied*, 461 Mich 680, 689 & n 10; 611 NW2d 516 (2000), citing 3 Corbin, Contracts, § 549, pp 183-186 (contracts are to be interpreted and their legal effects determined as a whole).

[50] *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998).

[51] *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991).

[52] *Laevin v St Vincent de Paul Society*, 323 Mich 607, 609-610; 36 NW2d 163 (1949) (citations and quotation marks omitted).

[53] *Huggins v MIC Gen Ins Corp*, 228 Mich App 84, 90; 578 NW2d 326 (1998).

contrary to public policy and, therefore, invalid."[54] But "contracting parties are assumed to want their contract to be valid and enforceable," and "we are obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute."[55] Therefore, preferring a construction of the contract that renders it legal and enforceable, we construe this contract in a manner that renders it compatible with the existing public policy by concluding that the exclusion does not apply to a joyriding family member.[56]

2. MISREPRESENTATION

Although the trial court did not rule on the issue, Roberts argues that Titan was not entitled to void the insurance policy and therefore deny Roberts benefits on the basis of Irwin's alleged misrepresentations. Titan argues that Irwin fraudulently obtained insurance coverage by misrepresenting that she owned the Escort and, therefore, the insurance contract was void *ab initio*.

Irwin's insurance policy excludes coverage when the policy is obtained by fraud. Specifically, the policy states as follows:

> We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in obtaining or maintaining this policy or concerning any **accident** or **loss** for which coverage is sought under this policy.

Further, it is a well-established rule that "[w]here a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the

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[54] *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 601; 648 NW2d 591 (2002).

[55] *Id*. at 599.

[56] See *id*.

application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void *ab initio*."[57]

Here, there is no dispute that Irwin lied to Titan when she said that she owned the Escort, which was actually owned and used by her son Vernon. And Irwin's misrepresentation was material to the risk insured because Titan would have increased the premium had it known the truth about the vehicle's ownership and usage. Karen Gines, an employee in Titan's underwriting department, attested that

> [t]he risk Titan assumed by issuing the policy to Lillian Irwin for the 1995 Ford Escort was substantially less than the actual risk assumed due to the car being owned by, in the possession of, and driven by Ms. Irwin's 19-year-old son, Vernon Austin, III. The risk of insuring a 19-year-old male is significantly greater than the risk of insuring a 36-year-old female.

Therefore, the Titan policy was procured through Irwin's intentional misrepresentation of a material fact in the application for insurance.

However, an insurer may not void a policy of insurance *ab initio* where an innocent third party is affected.[58] Therefore, " 'only the claim of an insured who has committed the fraud' will be barred, leaving unaffected 'the claim of any insured under the policy who is innocent of fraud.' "[59] Titan argues that this innocent

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[57] *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985).

[58] *Id*. at 10; see also *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997).

[59] *Darnell*, *supra* at 10, quoting *Morgan v Cincinnati Ins Co*, 411 Mich 267, 277; 307 NW2d 53 (1981).

third party doctrine does not apply in this case because, given that Roberts is a minor, it is Irwin who is actually responsible for paying his medical expenses and therefore she is the person actually seeking to collect any insurance benefits.

However, caselaw demonstrates that the innocent third party doctrine ensures coverage for any person who is innocent of participation in the alleged fraud. For example in *Darnell v Auto-Owners Ins Co*, this Court held that the plaintiff was entitled to recover benefits where his wife, not the plaintiff, made the alleged misrepresentations.[60] In contrast, in *Hammoud v Metro Prop & Cas Ins Co*, this Court held that the plaintiff was not entitled to recover benefits because he was actively involved in defrauding the insurer by allowing his older brother to obtain the insurance policy by misrepresenting the plaintiff's status as a driver of the vehicle.[61] Therefore, the relevant inquiry is whether the injured third party was innocent with respect to the misrepresentation made to the insurance company or was actively involved in defrauding the insurer.

Here, it was Irwin, not Roberts, who is alleged to have misrepresented facts on the application for insurance. Consequently, while we certainly do not condone Irwin's actions, the fact remains that Roberts made no misrepresentation and coverage may not be denied to him on the basis of his mother's improper actions.

3. INSURABLE INTEREST

Titan also argues that Irwin did not have an insurable interest in the Escort; thus, the policy should be void. However, "there is no requirement that an insured

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[60] *Darnell, supra* at 10.

[61] *Hammoud*, *supra* at 488-489.

actually own or be the registrant of a vehicle in order to have an insurable interest adequate to support PIP coverage."[62]

> [T]here is no requirement that there be an insurable interest in a specific automobile since an insurer is liable for personal protection benefits to its insured regardless of whether or not the vehicle named in the policy is involved in the accident. A person obviously has an insurable interest in his own health and well-being. This is the insurable interest which entitles persons to personal protection benefits regardless of whether a covered vehicle is involved.[63]

Therefore, the fact that Irwin may not have had an insurable interest in the Escort does not preclude recovery of PIP benefits.

III. CONCLUSION

Despite our disagreement with *Butterworth*'s adoption of the *Priesman* lead opinion's reasoning regarding a family joyriding exception, it is controlling, and we must follow it as binding precedent.[64] We therefore reverse the trial court's grant of summary disposition in favor of Titan. In the absence of *Butterworth*, we would follow Justice GRIFFIN's dissent in *Priesman*, and we therefore declare a conflict between the present case and *Butterworth*.[65]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[62] *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 725; 635 NW2d 52 (2001).

[63] *Madar v League Gen Ins Co*, 152 Mich App 734, 739; 394 NW2d 90 (1986).

[64] MCR 7.215(J)(1).

[65] MCR 7.215(J)(2).

HOEKSTRA, P.J. *(concurring)*. I concur in the result only.

TKACHIK v MANDEVILLE

Docket No. 280879. Submitted January 6, 2009, at Detroit. Decided February 5, 2009, at 9:05 a.m. Leave to appeal sought.

Janet E. Mandeville executed a trust and a will that expressly indicated her intent not to give any property to her husband, Frank Mandeville, Jr., who had been absent and with whom she had had little contact for the 18 months before her death. The will appointed her sister, Susan Tkachik, as personal representative. Following Janet Mandeville's death, Frank Mandeville petitioned the Macomb County Probate Court for probate and sought to set aside the will and trust. The court, Pamela G. O'Sullivan, J., granted Tkachik's motion for summary disposition on the ground that Mandeville had been absent for more than a year and under MCL 700.2801(2)(e)(*i*) was not considered a surviving spouse. Tkachik subsequently filed a complaint in the probate court, seeking a determination that the court's ruling that Mandeville was not a surviving spouse terminated the Mandevilles' tenancies by the entirety in two properties. The court concluded, however, that its ruling on the surviving-spouse issue had not terminated those tenancies. Tkachik amended her complaint to seek contribution for various property-related expenses that the decedent had paid during her spouse's absences. The court granted Mandeville summary disposition. Tkachik sought leave to appeal, which the Court of Appeals denied. The Supreme Court, on reconsideration of Tkachik's application for leave to appeal in that court, remanded the case to the Court of Appeals for consideration as on leave granted. 480 Mich 898 (2007).

The Court of Appeals *held*:

If a married couple owns property as tenants by the entirety, upon the death of one spouse, the decedent's estate cannot claim contribution from the surviving spouse with respect to the property under a theory of unjust enrichment. The surviving spouse only receives that which he or she is given by operation of law: ownership of the whole property. This includes all previously incurred property-related expenses paid by either spouse. A divorce ends a tenancy by the entirety and creates a tenancy in common, which permits each spouse to obtain an equal share of

the property that the spouse may then devise or alienate as he or she wishes. The Mandevilles remained legally married, however. While Tkachik argued that Mandeville's absence in the 18 months preceding his wife's death and their lack of communication created a de facto divorce that terminated the tenancies by the entirety, this would be tantamount to a posthumous divorce. Courts do not have jurisdiction to render a divorce judgment and distribute jointly held property after the death of one of the parties. The probate court properly granted Mandeville summary disposition.

Affirmed.

1. TENANTS BY THE ENTIRETY — CONTRIBUTION — DECEDENTS' ESTATES — UNJUST ENRICHMENT.

The estate of a deceased spouse cannot, under an unjust enrichment theory, claim contribution from the surviving spouse with respect to property held as tenants by the entirety.

2. TENANTS BY THE ENTIRETY — DIVORCE.

A divorce ends a tenancy by the entirety and creates a tenancy in common (MCL 552.102).

Penzien Hirzel, PLLC (by *Charles M. Penzien*), for the plaintiff.

Cashen & Strehl (by *William K. Cashen*) for the defendant.

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

K. F. KELLY, J. This matter comes before us on remand from our Supreme Court. Initially, plaintiff filed an application for leave to appeal in this Court, seeking reversal of the probate court's judgment granting summary disposition for defendant on plaintiff's claim for contribution. This Court denied leave to appeal.[1] Subsequently, our Supreme Court, on reconsideration of plaintiff's application for leave to appeal in

[1] *Tkachik v Mandeville*, unpublished order of the Court of Appeals, entered November 16, 2006 (Docket No. 270253).

that Court, directed us to consider "whether a contribution claim against the defendant, based on an unjust enrichment theory, is appropriate under the facts of the case." *Tkachik v Mandeville*, 480 Mich 898, 899 (2007). Because we hold that a contribution claim predicated on a theory of unjust enrichment for expenses incurred in connection with property held as tenants by the entirety is not appropriate when brought by the decedent's estate against the surviving spouse, we affirm the probate court's grant of summary disposition for defendant.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant and decedent Janet Mandeville married in 1975 and remained married until decedent's death. In 1984, defendant and decedent purchased a single-family residence in Macomb County, Michigan. The property was titled in the name of "Frank Mandeville, Jr.[2] and Janet Elaine Mandeville, his wife." Later, in 1987, defendant and decedent purchased another parcel of property located in Ogemaw County, Michigan. This property was titled in the name of "Frank Mandeville, Jr. and Janet E. Mandeville, husband and wife." Defendant and decedent held both properties free and clear of any lien or encumbrance until 1999, when defendant and decedent jointly mortgaged the Macomb property, obtaining a loan in both their names for $200,000.

Decedent died on July 13, 2002, of breast cancer. Defendant had been absent and had had infrequent contact with decedent for the 18 months before decedent's death.[3] Despite defendant's absence, decedent

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[2] There is a notation on the deed that defendant was "a/k/a Frank Mandeville."

[3] Although it is unclear from the record, plaintiff alleges that defendant was absent from the marriage and the properties for extended periods,

and defendant never sought a divorce or separation, nor did decedent file an action for family support based on spousal abandonment. According to an affidavit of decedent's close friend, neither decedent nor defendant considered their marriage to be terminated.

Several weeks before her death, decedent executed a trust and a will, both of which contain the following language: "It is my specific intent to give nothing to my husband . . . . If I am survived by my husband, . . . he will be deemed to have predeceased me." Decedent's will appointed her sister, Susan Tkachik, who had cared for decedent during her illness, as personal representative of her estate.

About five months after decedent's death, defendant filed a petition for probate and also a complaint seeking to set aside decedent's will and trust. Plaintiff Susan Tkachik moved for summary disposition, arguing that defendant should not be considered a surviving spouse pursuant to MCL 700.2801(2)(e)(*i*) because defendant had been absent from decedent for more than a year. In October 2003, the probate court granted plaintiff's motion, thereby dismissing defendant's complaint.

On November 10, 2003, plaintiff filed a complaint seeking a determination that the probate court's previous ruling that defendant was not a surviving spouse operated to destroy the tenancies by the entirety, meaning that the two properties were held by defendant and the estate as tenants in common. Specifically, plaintiff alleged:

> That when [the probate court] determined that [defendant] is not a surviving spouse, the tenancy by the entireties for the [Macomb and Ogemaw] real estate was destroyed, as the theoretic unity of the spouses was

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including a six-year absence. Defendant concedes in his brief on appeal that he was out of the country for extended periods beginning in the late 1990s.

> destroyed, the marital relation terminated, and the estate by the entireties may not continue as such.

Defendant countered in his motion for summary disposition that the tenancies by the entirety remained intact, despite the probate court's previous ruling, and, therefore, sole ownership of the properties vested in him.

In a written opinion, the probate court agreed with defendant, reasoning that MCL 700.2801(2)(e)(*i*) did not terminate the tenancies in the entirety, stating:

> After a review of all the pleadings submitted by each party, it is the opinion of this Court that the determination that Defendant is not the surviving spouse of Mrs. Mandeville pursuant to MCL 700.2801(2)(e)(i) does not terminate the tenancy by the entirety. Consequently, Defendant became the sole owner of the Real Property upon the death of Mrs. Mandeville. Pursuant to the terms of the Order, the determination that Defendant is not the surviving spouse of Mrs. Mandeville is limited to MCL 700.2801. MCL 700.2801(2) states that the application of subsection (2) is limited to intestate succession, spousal entitlements, and priority among persons seeking appointment as personal representative.

Subsequently, plaintiff filed an amended complaint, seeking contribution for decedent's maintenance of the properties during defendant's absence, including maintenance, tax, and mortgage costs.[4] Plaintiff alleged that decedent paid for all property-related expenses during defendant's extended absences, while defendant made no contribution whatsoever. Defendant again moved for summary disposition, arguing that plaintiff had failed to state a claim on which relief could be granted. The probate court granted the motion, ruling that a tenancy by the entirety "is held without regard to who provided a greater contribution . . . ."

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[4] Around the time of decedent's death, defendant and decedent owed approximately $167,000 on the Macomb property's mortgage.

Plaintiff sought leave to appeal in this Court, which we denied "for lack of merit in the grounds presented." As previously noted, our Supreme Court, on reconsideration of plaintiff's application for leave to appeal in that court, directed us to consider "whether a contribution claim against the defendant, based on an unjust enrichment theory, is appropriate under the facts of the case." *Tkachik,* 480 Mich at 899.

II. STANDARDS OF REVIEW

The probate court granted defendant's motion for summary disposition under MCR 2.116(C)(8) on the basis that plaintiff had failed to state a claim upon which relief may be granted. We review de novo the decision to grant or deny summary disposition under MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings. 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 a right of recovery." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001) (citation omitted). Our Supreme Court directed us to address "the legal question whether a contribution claim against the defendant, based on an unjust enrichment theory, is appropriate under the facts of the case." *Tkachik,* 480 Mich at 899. We review questions of law de novo. *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998).

III. APPLICABLE LAW

For purposes of putting our analysis into context, we first address the rights a spouse enjoys in a property held as tenants by the entirety, as well as the doctrine of contribution.

A. TENANCY BY THE ENTIRETY

A tenancy by the entirety is a type of concurrent ownership in real property that is unique to married persons. *Field v Steiner*, 250 Mich 469, 477; 231 NW 109 (1930). This type of concurrent ownership, which was adopted into our legal system from the English common law, is intended to protect the marital estate. See *United States v Craft*, 535 US 274, 279-282; 122 S Ct 1414; 152 L Ed 2d 437 (2002). "It is well settled under [Michigan] law . . . that one tenant by the entirety has no interest separable from that of the other . . . . Each is vested with an entire title . . . ." *Long v Earle*, 277 Mich 505, 517; 269 NW 577 (1936). In other words, the spouses are considered one person at law. Consequently, one spouse cannot alienate the property without the other spouse's consent, and each has the power to use the property and exclude others from it, as well as to profit from the property. MCL 557.71. In addition, and most significantly for the matter at issue, both spouses have the right of survivorship, meaning that in the event that one spouse dies, the remaining spouse automatically owns the entire property. MCL 700.2901(g); *Rogers v Rogers*, 136 Mich App 125, 134; 356 NW2d 288 (1984). Thus, entireties properties are not part of the decedent spouse's estate, and the law of descent and distribution does not apply to property passing to the survivor. *Rogers*, 136 Mich App at 134-135. Under Michigan law, a divorce will end a tenancy by the entirety, thereby creating a tenancy in common, which permits each spouse to obtain an equal share of the property that is devisable and alienable as each spouse wishes. MCL 552.102; *Budwit v Herr*, 339 Mich 265, 273; 63 NW2d 841 (1954).

B. THE DOCTRINE OF CONTRIBUTION

Turning to the doctrine of contribution, our Supreme Court has noted that contribution is an equitable remedy based on principles of natural justice. *Lorimer v Julius Knack Coal Co*, 246 Mich 214, 217; 224 NW 362 (1929). "It is premised upon the simple proposition that equality is equity." *Strohm v Koepke*, 352 Mich 659, 662; 90 NW2d 495 (1958). Thus, "one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable . . . , is entitled to contribution against the others to obtain from them payment of their respective shares." *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975). Accordingly, "one who has paid more than his share of the joint obligation may recover contribution from his cocontractors." *Comstock v Potter*, 191 Mich 629, 637; 158 NW 102 (1916). In *Strohm*, 352 Mich at 662-663, the Court recognized the application of this doctrine to cotenants. Notably, there is no indication in *Strohm* that the property at issue was ever held as tenants by the entirety.

In the absence of an express agreement, a claim for contribution may be predicated on a theory of unjust enrichment, as plaintiff attempts to claim in the instant case. Unjust enrichment is defined as the unjust retention of "money or benefits which in justice and equity belong to another." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (quotation marks and citation omitted). In *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950), our Supreme Court stated, "No person is unjustly enriched unless the retention of the benefit would be unjust." The Court further provided: "One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity

give him absolutely without any obligation on his part to make restitution." *Id.* (quotation marks and citation omitted). Further, "[e]nrichment of [a person or entity] is not unjust if pursuant to the express agreement of the parties, fairly and honestly arrived at before hand." *Michigan Med Service v Sharpe*, 339 Mich 574, 577; 64 NW2d 713 (1954).

IV. SURVIVING SPOUSE'S LIABILITY TO DECEDENT'S ESTATE

Turning to the issue we must address on appeal, and in light of the legal doctrines explained above, it is plain that the recipient of an entireties property, the surviving spouse, is not unjustly enriched and is not subject to liability based on a contribution theory. Rather, defendant has only received that which was given to him by operation of law, without any obligation—ownership of the *whole* of both entireties properties. *Id*.; MCL 700.2901(g). By definition, this would include all previously incurred property-related expenses that either he or his decedent spouse paid. It follows, and we hold accordingly, that upon the death of one spouse, if the married couple owns property as tenants by the entirety, the decedent's estate cannot claim contribution from the surviving spouse as it relates to the property under a theory of unjust enrichment. Simply put, there is no inequity, nor any law, with which to force restitution from a surviving spouse who owns property as a tenant by the entirety.

A. MICHIGAN DIVORCE LAW

Plaintiff's application of Michigan divorce law, which requires equitable division of property upon divorce taking into consideration each spouse's contributions, is inapplicable to the facts of this case and is unavailing. Here, the parties were never divorced; in fact no divorce

or legal separation action was ever filed. Plaintiff urges us to conclude that given the apparent lack of communication between decedent and defendant, as well as defendant's absence in the 18 months preceding decedent's death, a "de facto" divorce was created and by operation of MCL 552.102[5] destroyed the tenancies by the entirety and triggered the opportunity to claim contribution. We decline to do so. We continue to adhere to the principle that a court is without jurisdiction to render a judgment of divorce, and thereafter distribute jointly held property, after the death of one of the parties. There must be living parties, or there can be no relationship to be divorced. *Tokar v Albery*, 258 Mich App 350, 355; 671 NW2d 139 (2003). In reality, plaintiff is seeking to create a new cause of action that would permit post-death property distributions in accordance with domestic relations law. This request for a new cause of action is merely based on the perceived inequities of this case. As such, it proffers purely a policy argument with no firm support from any legal authority. "[O]ur judicial role precludes imposing different policy choices than those selected by the Legislature . . . ." *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001) (citation and quotation marks omitted).

B. NON-MICHIGAN CASE LAW

Plaintiff argues and we note that our sister courts have come to different conclusions with respect to contribution for property-related expenses for entireties properties, but based on different reasoning.

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[5] MCL 552.102 provides: "Every husband and wife owning real estate as joint tenants or as tenants by entireties shall, upon being divorced, become tenants in common of such real estate, unless the ownership thereof is otherwise determined by the decree of divorce."

Namely, when a husband and wife own property as tenants by the entirety, improvements or contributions made by one spouse to maintain or improve the property are presumed to be a gift to the other spouse. *Crawford v Crawford*, 293 Md 307, 311; 443 A2d 599 (1982); *Kratzer v Kratzer*, 130 Ill App 2d 762, 766-768; 266 NE2d 419 (1971). The recipient of a gift has neither incurred an obligation nor proffered any consideration as a result of accepting the gift. Under such circumstances, the spouse making the expenditure is not entitled to contribution from the other spouse because the expenditure is intended as a gift to the other spouse and, thus, no unjust enrichment has occurred. See *Crawford*, 293 Md at 311-313. A spouse can prove otherwise by clear and convincing evidence. *Klavans v Klavans*, 275 Md 423, 431-432; 341 A2d 411 (1975); *Kratzer*, 130 Ill App 2d at 767-768. This framework of analysis has led numerous courts to hold, however, that the presumption of a gift does not arise once a husband and wife have separated or are no longer living together, and consequently one spouse may be liable for contribution to the other for expenses made to maintain an entireties property. *Crawford*, 293 Md at 313; *Kratzer*, 130 Ill App 2d at 768-769; *Cagan v Cagan*, 56 Misc 2d 1045, 1047-1050; 291 NYS2d 211 (1968); *Heinemann v Heinemann*, 314 So 2d 220, 221-222 (Fla App, 1975).

In *Crawford*, the wife sought contribution for property-related expenses she incurred in connection with the entireties property after the parties had separated, but had not yet divorced. *Crawford,* 293 Md at 308-309. The lower court found that a presumption of a gift arose and, because the wife had failed to rebut it, the wife was not entitled to contribution. *Id.* at 309. The Maryland Court of Appeals ruled that the presumption of gift doctrine was not applicable to the facts of the case. *Id*. The court held that, "absent a showing of an

intention to make a gift, . . . a tenant by the entireties is entitled to contribution when he or she makes a payment, after the parties discontinue living together as husband and wife, which preserves the property and, therefore, accrues to the benefit of the co-tenant." *Id.* at 313.

Similarly, in *Cagan*, a New York supreme court upheld a wife's contribution claim for maintenance of the marital home, permitting her to collect from her husband payment for certain costs related to the property, even though the husband and wife held the property as tenants by the entirety. *Cagan,* 56 Misc 2d at 1047, 1049-1050. As in *Crawford*, the wife in *Cagan* sought contribution for expenditures she made after the parties separated. *Id.* at 1046-1048. The court reasoned that the presumption of a gift did not apply to the expenditures the wife made to maintain the property and, accordingly, equity entitled the wife to contribution. *Id.* at 1048-1050.

In *Kratzer*, the Illinois Appellate Court concluded that the husband was entitled to contribution from his wife for expenditures he made for the maintenance of property held as joint tenants after he and his wife began living separately, but had not yet divorced. *Kratzer,* 130 Ill App 2d at 763, 768-769. The court held that the presumption of a gift did not apply. *Id.* at 768-769. Florida's court of appeals came to the same conclusion in *Heinemann*, 314 So 2d at 221-222, in which a husband and wife acquired the marital property jointly. That court deemed the wife liable for contribution for payments the husband made on the property after their separation because the presumption of a gift did not apply. *Id.*

We stress, however, that the common thread in all these cases is that the husband and wife had separated,

whether legally or only in fact, and that both spouses remained alive. As a result of the marriage's de facto or apparent dissolution, these courts appear to have considered the property at issue, whether a divorce had been finalized or not, to be held as a de facto tenancy in common on the basis of the common conclusion that the presumption of gift doctrine did not apply. See *Crawford*, 293 Md at 308-313; *Kratzer*, 130 Ill App 2d at 763, 768-769; *Cagan*, 56 Misc 2d at 1048-1049; *Heinemann*, 314 So 2d at 221-222.

Although these authorities present an alternative framework of analysis, they are not binding on this Court and we will not adopt that framework here. See *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). In our view, this analysis is not applicable in the context of considering whether a decedent's estate is entitled to contribution from the surviving spouse for expenses the decedent spouse incurred in connection with an entireties property. The instant matter is factually distinct: The parties were never divorced, and although they lived their lives separately, there is no indication that they believed their marriage to be dissolved. And, as noted, the cases cited earlier were determined in the context of partitioning marital property between living spouses, not in the context of distributing a decedent spouse's estate after that spouse's death. Further, if we were to follow this line of cases, as plaintiff prompts us to, we would subvert the protective purpose of the tenancy by the entirety, as it would permit the state to pierce the marital relationship and divide property contrary to how the parties chose to hold the property. See *Craft*, *supra*; MCL 700.2901(g). Moreover, and just as importantly, we will not disturb the parties' right to contract to hold property during their lifetimes in such a way as they see fit.

As our Supreme Court stated in *Lober v Dorgan*, 215 Mich 62, 64; 183 NW 942 (1921):

> The parties themselves have provided for survivorship by agreement. The parties having so contracted, is there any valid reason why we should refuse to enforce their agreement? . . . There is nothing in the agreement which is immoral or against the public good.

As such, we decline to impute a tenancy in common to the parties in the instant case simply because defendant and decedent rarely had contact with one another and did not live together for the last 18 months of decedent's life. We will not interfere in the way spouses choose to conduct their marriage, and the manner in which they choose to hold property, absent a compelling state interest. No compelling state interest is presented here, particularly in light of the fact that neither chose to alter their marital status or to revise the manner in which they held their real property.

Plaintiff, citing *In re Keil Estate*, 51 Del 351; 145 A2d 563 (1958), further argues that the present matter is analogous to situations in which courts have compelled a decedent's estate to make restitution to a surviving spouse for jointly held obligations, such as a lien on an entireties property, on a theory of equitable contribution. While this situation is essentially the inverse of the present matter, i.e., the surviving spouse is entitled to contribution as opposed to the decedent's estate being entitled to contribution, we find this argument to be without merit for the reasons explained earlier. Moreover, we are not bound by precedent from foreign jurisdictions. *Hiner*, 271 Mich App at 612.

V. CONCLUSION

In the present matter, defendant and decedent, while married, acquired two parcels of property, thereby cre-

ating tenancies by the entirety. Decedent contributed to the maintenance of the properties by paying the mortgage, taxes, insurance, and other property-related expenses while defendant was absent from the country for extended periods and allegedly made no contributions himself. However, because defendant and decedent remained legally married during their lifetimes, and did not consider themselves separated, defendant was not unjustly enriched when he received ownership of the entireties properties upon his wife's death. See *Buell*, 327 Mich at 56.

In light of the facts of this case, and the purposes of the tenancy by the entirety and the equitable doctrine of contribution, it is our view that it would be imprudent not to perpetuate the indivisible estate created by spouses when they jointly obtain property in their capacity as husband and wife. What plaintiff has tried to do in this case—divide the entireties properties—is tantamount to a posthumous divorce. Michigan law does not recognize such an action. Accordingly, we reject the invitation to invent a claim by which a decedent spouse's estate can sue the surviving spouse for contribution for expenses related to an entireties property under a theory of unjust enrichment. The trial court's grant of summary disposition for defendant was proper.

Affirmed.

PEOPLE v ACEVAL

Docket No. 279017. Submitted January 7, 2009, at Detroit. Decided February 5, 2009, at 9:10 a.m. Leave to appeal sought.

The Wayne Circuit Court, Vera Massey-Jones, J., accepted Alexander Aceval's plea of guilty to a charge of possession with intent to deliver 1,000 or more grams of cocaine. The defendant filed a delayed application for leave to appeal. The Court of Appeals, HOEKSTRA, P.J., and SAWYER and MARKEY, JJ., denied the application in an unpublished order, entered October 5, 2007 (Docket No. 279017). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration, as on leave granted, of whether the defendant was denied the right to counsel of his choice under *United States v Gonzalez-Lopez*, 548 US 140 (2006), and whether the prosecution's acquiescence in the presentation of perjured testimony, during the defendant's first trial before Mary Waterstone, J., that resulted in a mistrial when the jury was unable to reach a verdict, amounts to misconduct that deprived the defendant of due process to such an extent that a retrial should be barred. 480 Mich 1108 (2008).

The Court of Appeals *held*:

1. The defendant was not denied his right to choice of counsel under the circumstances of this case. Although the trial court disallowed the limited appearance of an attorney who sought to participate in the case solely with respect to certain pretrial motions by the defendant, the defendant was represented by a second counsel of his choice who was fully involved in the litigation. The trial court did not prevent the excluded attorney from filing a full appearance and acting as cocounsel, and its decision was based on concerns regarding retrying the defendant in a timely manner. The defendant failed to show plain error affecting his substantial rights with regard to this unpreserved issue.

2. A retrial was not barred under the circumstances of this case. The remedy when a defendant receives an unfair trial because of prosecutorial misconduct is a new and, presumably, fair trial. The remedy flows from the type of harm that the defendant has suffered. It does not follow that a due process violation should

bar a retrial because such a remedy would be unduly broad and would fail to address the specific harm that the defendant has suffered. The complained-of misconduct that occurred in the first trial did not prejudice the defendant because he received a new trial, the remedy that was appropriate.

3. The disgraceful conduct by the trial judge in the first trial and by the prosecutor in that first trial of knowingly allowing perjured testimony denied the defendant due process. The misconduct, however, does not itself warrant a bar to a retrial because the first trial ended in a mistrial because of a hung jury and the misconduct did not prejudice the defendant, who received the appropriate remedy of a new trial.

Affirmed.

MURPHY, P.J., concurring, wrote separately to set forth analysis and reasoning with respect to footnote 5 of the majority opinion and to state his view regarding why it is critical to include the footnote. He additionally wrote to note that, to the extent that the majority opinion builds a wall separating due process analysis from double jeopardy analysis or compartmentalizes the two concepts so that the two never meet, he disagreed because the right to due process includes, in part, immunity from double jeopardy. Without the footnote, the opinion would shut the door on a double jeopardy remedy that would bar retrial on any and all due process challenges, no matter how egregious the violation arising from prosecutorial misconduct. Considering that a retrial is barred under the Double Jeopardy Clause when it is determined that there was insufficient evidence to sustain a conviction, there is logic to permitting that same remedy when a prosecutor is faced with proper evidence that the prosecutor deems is insufficient to secure a conviction, but nonetheless proceeds with the trial, intentionally relying on perjured testimony in order to avoid what is believed to be a likely acquittal. In such circumstances, had legally sound evidence alone been presented that was insufficient to sustain a conviction, a retrial would not be allowed. There is no indication in this case that the prosecutor committed the misconduct for the purpose of avoiding or preventing an acquittal, nor can it be said that an acquittal was likely to occur if the prosecutor refrained from this misconduct or that the prosecutor believed that that was the case.

1. CRIMINAL LAW — ASSISTANCE OF COUNSEL — COUNSEL OF CHOICE.

Trial courts are given wide latitude in balancing a defendant's right to counsel of choice against the needs of fairness and the demands of the court's calendar; a balancing of the defendant's right to

counsel of his or her choice and the public's interest in the prompt and efficient administration of justice is performed to determine whether the defendant's right has been violated.

2. CRIMINAL LAW — DUE PROCESS — PROSECUTORIAL MISCONDUCT.

A new trial is the appropriate remedy when a defendant receives an unfair trial because of prosecutorial misconduct; barring a retrial should not be a remedy for such a due process violation because that remedy would be unduly broad and fail to address the specific harm that the defendant has suffered.

3. ATTORNEY AND CLIENT — JUDGES — RULES OF PROFESSIONAL CONDUCT — CODE OF JUDICIAL CONDUCT — VIOLATIONS OF PROFESSIONAL AND JUDICIAL CONDUCT RULES.

Neither the Michigan Rules of Professional Conduct nor the Code of Judicial Conduct confers upon a criminal defendant a constitutional right or remedy for an attorney's or a judge's violation of either set of rules.

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 *Jeffrey Caminsky*, Principal Attorney, Appeals, for the people.

Law Offices of David L. Moffitt & Associates (by *David L. Moffitt*) for the defendant.

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

K. F. KELLY, J. Defendant pleaded guilty of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and was sentenced to 10 to 15 years' imprisonment. Defendant then filed a delayed application for leave to appeal, which this Court denied[1] and, subsequently, he sought leave to appeal in our

[1] *People v Aceval*, unpublished order of the Court of Appeals, entered October 5, 2007 (Docket No. 279017).

Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court

> for consideration . . . of whether the defendant was denied the right to counsel of his choice under *United States v Gonzalez-Lopez*, 548 US 140 [126 S Ct 2557; 165 L Ed 2d 409] (2006), and for consideration of whether the prosecution's acquiescence in the presentation of perjured testimony amounts to misconduct that deprived the defendant of due process such that retrial should be barred. [*People v Aceval*, 480 Mich 1108 (2008).]

We now consider these issues on remand[2] and affirm.

I. FACTS AND PROCEDURAL HISTORY

This matter arises out of an illegal drug transaction. On March 11, 2005, police officers Robert McArthur, Scott Rechtzigel, and others, acting on information obtained from Chad William Povish, a confidential informant (CI), were on surveillance at J Dubs bar in Riverview, Michigan. Povish previously told police officers that defendant had offered him $5,000 to transport narcotics from Detroit to Chicago. That day, the officers observed defendant, Povish, and Bryan Hill enter the bar. Defendant arrived in his own vehicle, while Povish and Hill arrived in another. Eventually the three individuals left the bar and loaded two black duffel bags into the trunk of Povish's car. Povish and Hill then drove away, while defendant drove away in his own vehicle. Subsequently, the officers stopped both vehicles and found packages of cocaine in the duffel bags located

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[2] In his brief on appeal, defendant asserts issues not articulated in the Supreme Court's remand order. Because these issues are unpreserved and because the Supreme Court specifically denied leave to appeal in all other respects, *People v Aceval*, 480 Mich 1108 (2008), these additional issues are not properly before this Court and we do not consider them. See *People v Frazier*, 478 Mich 231, 241; 733 NW2d 713 (2007) (noting review of unpreserved issues is not favored).

in the trunk of Povish's car. Defendant was subsequently arrested and charged with possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and conspiracy to commit that offense, MCL 750.157a.

Before trial, defendant moved for the production of the identity of the CI. During an evidentiary hearing on June 17, 2005, defendant requested that the trial court, Judge Mary Waterstone, conduct an in camera interview of McArthur, the officer in charge of the investigation. The judge agreed, and in the conference it was revealed that McArthur and Rechtzigel knew that Povish was the CI. Further, the officer told the trial court that Povish was paid $100 for his services, plus "he was going to get ten percent, whatever we got." The conference was sealed and the trial court denied defendant's motion.

Subsequently, defendant filed a motion to suppress certain evidence. During a hearing on September 6, 2005, Rechtzigel lied when he testified, in response to defense counsel's questioning, that he had never had any contact with Povish before March 11, 2005. The prosecutor did not object. On September 8, 2005, in another sealed in camera conference between the judge and the prosecutor, the prosecutor admitted that she knew that Rechtzigel had knowingly committed perjury but stated that she "let the perjury happen" because "I thought an objection would telegraph who the CI is." In response, the judge stated that she thought "it was appropriate for [the witness] to do that." Further, the court added, "I think the CI is in grave danger . . . . I'm very concerned about his identity being found out."

The matter went to trial on September 12, 2005. At trial, the prosecutor and the judge continued their

efforts to protect the CI's identity. Povish testified that he had never met Rechtzigel or McArthur before they stopped his vehicle on the day that he received the duffel bags and that neither had offered him a deal of any kind. He further testified that did not know what was in the duffel bags and that, until trial, he believed that he could be charged with a crime for his role in the incident. The prosecutor made no objection to this testimony. The prosecutor and the judge again indicated, in another sealed ex parte bench conference on September 19, 2005, that they knew Povish had perjured himself in order to conceal his identity. At the close of the trial, the jury was unable to reach a verdict and, thus, the trial court declared a mistrial.

On December 7, 2005, attorney Warren E. Harris filed an appearance to represent defendant in his retrial, again in Judge Waterstone's court. On March 6, 2006, attorney David L. Moffitt petitioned for leave to file a limited appearance solely for purposes of filing certain motions by defendant, which the trial court granted on March 17, 2006. Subsequently, at a hearing on March 28, 2006, defendant indicated that he had become aware that the CI was Povish and argued that the case should be dismissed because of the trial court's and the prosecutor's complicit misconduct in permitting perjured testimony. Defendant also requested that both the prosecuting attorney and Judge Waterstone disqualify themselves from the case. Judge Waterstone disqualified herself on the record. The following day, Judge Vera Massey-Jones, the successor judge, entered an order unsealing the three in camera interviews.

Twelve days before defendant's second trial, Harris moved to withdraw because of a breakdown in the attorney-client relationship that he attributed to Moffitt's increased involvement. After finding that Moffitt's

appearance was only a limited appearance, the trial court, noting that it "can't deal with lawyers who aren't in the case all the way[,]" disallowed Moffitt from participating in the case and did not permit Harris to withdraw. The trial court stated, "And there's no way in the world I'm going to let you have a new trial lawyer come in here and mess up." Further, the trial court indicated that the matter was set for trial on a "particular date, and it's going to go to trial that date[,]" and that there was "no way I'm going to let" you "ruin my trial docket."

Defendant's retrial began on June 1, 2006, with Harris acting as counsel. Before trial, defendant allegedly contacted a prosecution witnesses and directed him to provide false testimony in support of the defense. After the prosecution discovered this information, it informed the trial court and defense counsel. Subsequently, the witness testified that defendant had asked him to lie and he purged his testimony. Thereafter, defendant pleaded guilty to the charge of possession with intent to distribute more than 1,000 grams of cocaine.

II. RIGHT TO COUNSEL

We first address whether defendant was denied the right to counsel of his choice under *Gonzalez-Lopez*, *supra*. Defendant did not preserve this argument by asserting it in the trial court. Because this issue is, at a minimum, unpreserved,[3] our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[3] By pleading guilty, defendant waived appellate review of this issue. "[A] plea of guilty waives all nonjurisdictional defects in the proceedings." *People v New*, 427 Mich 482, 488; 398 NW2d 358 (1986) (quotation marks and citation omitted). Nevertheless, we will address this issue pursuant to our Supreme Court's order.

Both the United States and Michigan constitutions provide that the accused shall have the right to counsel for his defense. US Const, Am VI; Const 1963, art 1, § 20. A defendant's right under the Michigan Constitution is the same as that guaranteed by the Sixth Amendment. *People v Reichenbach*, 459 Mich 109, 118; 587 NW2d 1 (1998). This guaranteed right encompasses a defendant's right to effective assistance of counsel, *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the right to self-representation, *Faretta v California*, 422 US 806, 818; 95 S Ct 2525; 45 L Ed 2d 562 (1975), the right of indigent defendants to have appointed counsel in felony prosecutions, *Gideon v Wainwright*, 372 US 335, 344; 83 S Ct 792; 9 L Ed 2d 799 (1963), and the right to choice of counsel, *Powell v Alabama*, 287 US 45, 53; 53 S Ct 55; 77 L Ed 158 (1932), which is at issue in this case.

The United States Supreme Court recently expounded upon a defendant's right to choice of counsel in *Gonzalez-Lopez*, *supra*. The Court stated, "[The Sixth Amendment] commands . . . that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez, supra* at 146. The Court continued, "Deprivation of the right is 'complete' when the defendant is *erroneously* prevented from being represented by the lawyer he wants . . . ." *Id.* at 148 (emphasis added). It is not necessary that a defendant show prejudice; it is enough that a defendant merely show that a deprivation occurred. *Id*. at 150. However, this right to choice of counsel is limited and may not extend to a defendant under certain circumstances. *Id*. at 151; *Wheat v United States*, 486 US 153, 164; 108 S Ct 1692; 100 L Ed 2d 140 (1988). As the *Gonzalez-Lopez* Court stated:

> [T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them. See *Wheat*, 486 U.S., at 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140; *Caplin & Drysdale [v United States]*, 491 U.S. [617], at

> 624, 626, 109 S. Ct. 2646, 109 S. Ct. 2667, 105 L. Ed. 2d 528 [1989]. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. See *Wheat*, 486 U.S., at 159-160, 108 S. Ct. 1692, 100 L. Ed. 2d 140. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, *id*., at 163-164, 108 S. Ct. 1692, 100 L. Ed. 2d 140, and against the demands of its calendar, *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). [*Gonzalez-Lopez, supra* at 151-152.]

Similarly, this Court has opined that "[a] balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).

In the present matter, defendant was represented by not one, but *two*, attorneys of his choice. Before the case was transferred to Judge Massey-Jones, Judge Waterstone permitted Moffitt to file a limited appearance and participate in the case solely with respect to certain pretrial motions, while Harris, who was already part of the case, handled matters pertaining to defendant's retrial. Just 12 days before trial, Harris moved to withdraw because of a disagreement between the two counsel regarding proper trial strategy and a resulting breakdown in the attorney-client relationship between Harris and defendant. At the hearing on Harris's motion, Judge Massey-Jones disallowed Moffitt's limited appearance and denied Harris's motion to withdraw. Defendant did not object to proceeding to trial with Harris.

Given these facts, it is our view that defendant was not denied his right to choice of counsel. While Judge

Massey-Jones denied defendant a second "limited-attorney" of defendant's choosing, defendant was not denied counsel of his choice, Harris, who was fully involved in the litigation. Moreover, the trial court did not indicate that defendant could not have a cocounsel. Rather, the trial court's statement that it would not "deal with lawyers who aren't in the case all the way" would have permitted Moffitt to file a full appearance and to act as cocounsel had defendant wished Moffitt to do so. Moffitt, however, did not file an appearance and was unwilling or unable to undertake the complete defense of defendant's case. Significantly, defendant did not object to the continued representation by Harris. In short, defendant exercised his right to counsel of choice by proceeding to trial with Harris, who was willing and able to do so.

In addition, our review of the record indicates that Judge Massey-Jones's decision to deny Harris's motion to withdraw 12 days before trial was based primarily on retrying defendant in a timely manner. At one point, Judge Massey-Jones stated, "[T]here's no way in the world I'm going to let you have a new trial lawyer come in here and mess up[,]" and, further, indicated that substituting a new attorney would "ruin [the court's] trial docket." Here, the demands of the trial court's calendar clearly outweighed defendant's right to choice of counsel when defendant maintained the first and primary attorney of his choosing, despite the fact that limited counsel was ejected from the case just 12 days before trial. *Morris*, *supra* at 11-12; *Krysztopaniec*, *supra* at 598. Under these circumstances, we cannot conclude that defendant was denied his Sixth Amendment right to counsel when the trial court did not permit Moffitt's limited appearance. Defendant has failed to show plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

III. DUE PROCESS

We next address whether the prosecutor's acquiescence in the presentation of perjured testimony at defendant's first trial constituted misconduct that deprived defendant of due process to the extent that retrial should have been barred. This issue presents a question of constitutional law that we review de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001).[4]

It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935); *Pyle v Kansas*, 317 US 213, 216; 63 S Ct 177; 87 L Ed 214 (1942); *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). If a conviction is obtained through the knowing use of perjured testimony, it "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976); see also *Giglio v United States*, 405 US 150, 154-155; 92 S Ct 763; 31 L Ed 2d 104 (1972); *Napue*, *supra* at 269-272. Stated differently, a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment. *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982); *Giglio, supra* at 154-155; *People v Cassell*, 63

[4] We note that defendant's guilty plea did not waive appellate review of this issue. Our Supreme Court in *New*, *supra*, recognized that a guilty plea does not waive defenses based on the Due Process Clause. The Court stated, "Wherever it is found that the result of the right asserted would be to prevent the trial from taking place, we follow the lead of the United States Supreme Court and hold a guilty plea does not waive that right." *New*, *supra* at 489 (quotation marks and citation omitted).

Mich App 226, 227-229; 234 NW2d 460 (1975). Thus, it is the "misconduct's effect on the trial, not the blameworthiness of the prosecutor, [which] is the crucial inquiry for due process purposes." *Phillips*, *supra* at 220 n 10. The entire focus of our analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. *Id.* at 219.

While it is plain that a new trial is the remedy for a conviction obtained through misconduct that materially affected the trial's outcome, our Supreme Court has asked us to consider whether, under the circumstances of this case, a different remedy—a bar to retrial—is warranted. We conclude that it is not.

The purpose behind the Double Jeopardy Clause informs the reason for our answer, because our decision is based on the particular type of harm that a bar to retrial is intended to address. In instances where retrial is barred, that remedy stems from a violation of the Double Jeopardy Clause. US Const, Am V; Const 1963, art 1, § 15. The constitutional prohibition against double jeopardy bars retrial, or a second prosecution, after acquittal or conviction and protects against multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). The purpose of the Double Jeopardy Clause is to "protect a person from being twice placed in jeopardy for the 'same offense' [and] . . . to prevent the state from making repeated attempts at convicting an individual for an alleged crime." *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996) (citations omitted). Thus, the remedy arising from a double jeopardy violation—a bar to retrial—is specifically tailored to the nature of the harm that the Double Jeopardy Clause is intended to prevent —the "embarrassment, expense and ordeal . . . [of living] in a continuing state of anxiety and insecurity"

that arises from being twice placed in jeopardy. *Id.* at 64 (quotation marks and citation omitted).

Having understood the proper purpose of a remedy barring retrial, the unsuitability of that remedy in the context of a due process violation becomes evident. In contrast to the prohibition against double jeopardy, a criminal defendant's right to a fair trial derives from the Due Process Clause of the Fourteenth Amendment. US Const, Am XIV; Const 1963, art 1, § 17. It goes without saying that it is not necessary to conduct a double jeopardy inquiry to establish a due process violation. As noted, the crux of the due process analysis in cases of alleged prosecutorial misconduct is whether the defendant received a fair trial. *Phillips*, *supra* at 220 n 10. The remedy when a defendant receives an unfair trial because of prosecutorial misconduct is a new and, presumably, fair trial. *Cassell*, *supra* at 227-229; *Agurs*, *supra* at 103; *Napue*, *supra* at 269-272. This remedy naturally flows from the type of harm that the defendant has suffered. It does not follow that a due process violation should bar retrial, because such a remedy would be unduly broad and would fail to address the specific harm the defendant has suffered. Specifically, barring retrial on the basis of due process grounds would amount to "punishment of society for [the] misdeeds of a prosecutor" because it would permit the accused to go free. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Further, our Supreme Court has noted, "[T]he protections of substantive due process [do not] require recognition of a remedy for the harm incident to one or more mistrials [unless it also places a defendant in double jeopardy]." *People v Sierb*, 456 Mich 519, 525; 581 NW2d 219 (1998).[5]

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[5] This is not to suggest however, that prosecutorial misconduct can never invoke the constitutional protection against double jeopardy. On

Nor do we find, as defendant urges, that the court's and the prosecutor's disgraceful conduct itself should warrant a bar to retrial. Assuming that the acts of the trial judge and the prosecutor in this case violated Michigan's Rules of Professional Conduct, MRPC 3.4, and Code of Judicial Conduct, Canon 3, and were clearly opprobrious, the remedy for their wrongs is accomplished in other forums, such as the Attorney Discipline Board and the Judicial Tenure Commission. *People v Green*, 405 Mich 273, 292-295; 274 NW2d 448 (1979). These codes, however, do not confer upon a defendant any type of constitutional right or remedy. *Id*. at 293. Rather, the particular constitutional right determines the constitutional remedy and these codes play no part in such decisions. *Id*. at 293-294. For these reasons, we do not take the opportunity here to create a new remedy for a due process violation arising out of prosecutorial and judicial misconduct.

Turning to the present matter, we find that defendant was denied due process because of the trial court's and the prosecutor's misconduct. However, here we stress that defendant was *not* convicted following his first trial; rather, the trial court declared a mistrial because of a hung jury.[6] This was clearly the appropriate remedy. Although both the trial court's and the prosecutor's conduct was plainly reprehensible, the blameworthiness of either is not the critical factor, because

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that issue, we offer no opinion because, as Judge MURPHY notes in his concurrence, "there is no indication whatsoever that the prosecutor committed the misconduct for the purpose of avoiding or preventing an acquittal, nor can it be said that an acquittal was likely to occur if the prosecutor refrained from the misconduct or that the prosecutor believed such was the case." *Post* at 409.

[6] Here, the prohibition against double jeopardy did not prevent defendant's retrial. Retrial after a mistrial is not barred if the mistrial was the result of "manifest necessity," such as a hung jury, as was the case here. *People v Lett*, 466 Mich 206, 217-218; 644 NW2d 743 (2002).

the primary inquiry is the misconduct's effect on the trial. *Phillips*, *supra* at 220 n 10; *Cassell*, *supra* at 227-229. In this case, the complained-of misconduct did not prejudice defendant because he received the remedy that was due him: a new trial. For these reasons, defendant's constitutional due process claim must fail.

Affirmed.

DONOFRIO, J., concurred.

MURPHY, P.J. (*concurring*). I concur in the majority opinion affirming defendant's conviction. I write separately to set forth some analysis and reasoning with respect to footnote 5 of the majority opinion and to voice my view regarding why it is critical to include the footnote in the opinion. I additionally write to note that, to the extent that the majority opinion builds a wall separating due process analysis from double jeopardy analysis or compartmentalizes the two concepts so that the two never meet, I disagree because the right to due process includes, in part, immunity from double jeopardy.

Footnote 5 of the majority opinion is found in the discussion regarding the issue, as framed by our Supreme Court, "of whether the prosecution's acquiescence in the presentation of perjured testimony amounts to misconduct that deprived the defendant of due process such that retrial should be barred." *People v Aceval*, 480 Mich 1108 (2008). Without the footnote, the opinion would effectively shut the door on a double jeopardy remedy that would bar retrial on any and all due process challenges, no matter how egregious the violation, arising from prosecutorial misconduct. The majority concludes that the granting of a new trial in this case would have been the proper remedy for the due process violation predicated on prosecutorial mis-

conduct; therefore, because the first trial resulted in a mistrial, given the hung jury, and because a new trial was scheduled, defendant already effectively received the remedy available to him for prosecutorial misconduct. Limited to the facts of this case, I can agree with that ruling. I can, however, conceive of situations, the present case excepted, in which a due process violation involving prosecutorial misconduct is so egregious and prejudicial that retrial should be barred. Indeed, in the context of some mistrials not involving a deadlocked jury, retrial is barred under existing Michigan and federal precedent.

The Fourteenth Amendment of the United States Constitution provides that no state in our union can "deprive any person of life, liberty, or property, without due process of law . . . ."[1] The Fifth Amendment affords individuals protection against double jeopardy with respect to criminal prosecutions pursued by the federal government. US Const, Am V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). The Double Jeopardy Clause of the Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Albright v Oliver*, 510 US 266, 273; 114 S Ct 807; 127 L Ed 2d 114 (1994); *Benton v Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969) ("we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment"); *People v Wilson*, 454 Mich 421, 427; 563 NW2d 44 (1997); *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). "A citizen's right to due process in state court, guaranteed by the

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[1] At its core, "[d]ue process requires fundamental fairness . . . ." *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

Fourteenth Amendment to the United States Constitution, includes the immunity from double jeopardy guaranteed by the Fifth Amendment." *Ex parte Thomas*, 828 So 2d 952, 954 (Ala, 2001). In *People v Sierb*, 456 Mich 519, 525 n 13; 581 NW2d 219 (1998), our Supreme Court noted that ordering the retrial of a defendant "is not a violation of due process unless it also places the defendant in double jeopardy." Thus, it can be stated that, with respect to state prosecutions, an attribute of the right to due process under the United States Constitution includes the protection against double jeopardy.

Further, prosecutorial misconduct consisting of the knowing use of false evidence or perjured testimony violates a defendant's due process rights guaranteed by the Fourteenth Amendment. *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959); *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935). Our Supreme Court has even stated that "[i]t is inconsistent with due process when the prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears, even when the false testimony goes only to the credibility of the witness." *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986). The United States Supreme Court in *Mooney, supra* at 112-113, observed:

> [The due process] requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such

> a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers. [Citation and quotation marks omitted.]

In *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976), the Supreme Court stated that it had "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." The principle that the perjured testimony must affect the jury verdict, i.e., prejudice, was further explored in *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982), wherein the Court reasoned:

> Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. In *Brady v. Maryland*, 373 U.S. 83 [83 S Ct 1194; 10 L Ed 2d 215] (1963), for example, the prosecutor failed to disclose an admission by a participant in the murder which corroborated the defendant's version of the crime. The Court held that a prosecutor's suppression of requested evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Applying this standard, the Court found the undisclosed admission to be relevant to punishment and thus ordered that the defendant be resentenced. Since the admission was not material to guilt, however, the Court concluded that the trial itself complied with the require-

> ments of due process despite the prosecutor's wrongful suppression. The Court thus recognized that the aim of due process "is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." [Citations omitted.]

On the strength of the authorities recited above, it is evident that prosecutorial misconduct in the form of knowing use of perjured testimony can violate due process, demand the setting aside of a verdict, and require a new trial to be conducted when prejudice was incurred. This leaves the issue whether there exist situations where the granting of a new trial is not a sufficient remedy for the constitutional deprivation, and where double jeopardy protections should be invoked. Generally speaking, the constitutional protection against double jeopardy does not preclude the retrial of a defendant who successfully had a conviction reversed on appeal. *United States v Ball*, 163 US 662, 671-672; 16 S Ct 1192; 41 L Ed 300 (1896); *People v Watson*, 245 Mich App 572, 599; 629 NW2d 411 (2001). In *People v Langley*, 187 Mich App 147, 150; 466 NW2d 724 (1991), this Court stated that "[i]t is well established that the Double Jeopardy Clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceedings leading to conviction other than the insufficiency of the evidence to support the verdict." This principle begs the question whether retrial should be permitted if a prosecutor knowingly used perjured testimony, without which there would have been insufficient evidence to secure a conviction, with the intent to avoid a likely acquittal. I shall return to that thought later in this concurrence.

In the context of a mistrial, double jeopardy is not a bar to a second trial or retrial if there was a "manifest necessity" for declaring the mistrial, and the classic example of a situation in which there exists a manifest

necessity is a mistrial declared after a jury has indicated that it was unable to reach a verdict. *Oregon v Kennedy*, 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Lett*, 466 Mich 206, 215-217; 644 NW2d 743 (2002) (mistrial premised on a hung jury is the classic basis for a proper mistrial and is occasioned by manifest necessity, and a retrial following a jury deadlock does not violate double jeopardy protections under the state and federal constitutions). In the case of a mistrial declared at the behest of a defendant, the " 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause." *Kennedy, supra* at 672; see also *Lett, supra* at 215. There is a narrow exception to this rule that arises when the prosecutor acts in a manner intended to goad a defendant into moving for a mistrial, in which case the defendant may raise the bar of double jeopardy to preclude a second prosecution after having proceeded in aborting the first trial on his or her own motion in response to the prosecutor's conduct. *Kennedy, supra* at 673-679; *Lett, supra* at 215. This is an example of prosecutorial misconduct that mandates the double jeopardy remedy of barring retrial.

Here, we are addressing a classic example of a mistrial declared because of manifest necessity, i.e., a deadlocked or hung jury, and the prosecution did not attempt to goad defendant into moving for a mistrial during the proceedings. But the part of the equation that exists here and which is not generally found with mistrials declared because the jury was unable to reach a verdict is the presence of the prosecutor's knowingly presenting perjured testimony.[2] And it would be improper to hold that in all instances under such circum-

[2] I would also note that the admission of the perjured testimony was with the full knowledge of the trial court. This is not an instance in which the prosecutor alone can be accused of misconduct.

stances the most a defendant can obtain as a remedy is a new trial. This returns me to the question I posed earlier, which is whether retrial should be permitted if a prosecutor knowingly used perjured testimony, without which there would have been insufficient evidence to secure a conviction, with the intent to avoid a likely acquittal. I tend to believe that the language in the Supreme Court remand order suggests that there might be occasions on which retrial would be barred.[3] Some courts across the country have grappled with the issue.

In *United States v Wallach*, 979 F2d 912, 915-916 (CA 2, 1992), the United States Court of Appeals for the Second Circuit engaged in the following extensive and insightful discussion regarding the issue whether double jeopardy protection bars retrial because of prosecutorial misconduct arising out of the use of perjured testimony:[4]

> Both sides recognize that a defendant who secures a reversal of his conviction because of a defect in the proceedings leading to conviction normally obtains from the Double Jeopardy Clause no insulation against retrial. The principal exception is a reversal for insufficiency of the evidence. Both sides also recognize that a further exception

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[3] As indicated above, our Supreme Court directed us to answer the question "whether the prosecution's acquiescence in the presentation of perjured testimony amount[ed] to misconduct that deprived the defendant of due process such that retrial should be barred." *Aceval*, *supra* at 1108.

[4] In *Wallach*, the defendant had been convicted of various offenses, and after the trial it was discovered that one of the witnesses had given perjured testimony. The witness was later indicted and convicted of perjury, and the Second Circuit reversed the defendant's conviction on the basis that the federal prosecutor should have known that the witness was providing perjured testimony. On remand for a new trial, the defendant moved to dismiss the case, arguing that double jeopardy barred retrial, and the district court denied the motion. The case then proceeded, once again, to the Second Circuit for resolution of the double jeopardy issue. *Wallach*, *supra* at 913-914.

arises in some circumstances involving misconduct by a prosecutor, but they differ sharply on the scope of that further exception. Their differences arise from disagreement as to the teaching of [*Kennedy, supra*].

Kennedy concerned a state court criminal trial that ended when a defendant's motion for a mistrial was granted. The defendant sought the mistrial after the prosecutor had asked a witness a prejudicially improper question. The trial court then denied a motion to preclude retrial on double jeopardy grounds, after finding that the prosecutor had not intended to precipitate the mistrial. The state appellate court reversed, concluding that retrial was barred, regardless of the prosecutor's intent, simply because the prosecutor's misconduct constituted "overreaching."

Reviewing this ruling, the Supreme Court acknowledged that its prior decisions had created some ambiguity as to the standard to be applied in assessing a prosecutor's misconduct for purposes of determining whether, under the Double Jeopardy Clause, a mistrial precipitated by such misconduct precluded a retrial. Resolving the ambiguity, the Court rejected the idea that misconduct alone barred a retrial and ruled instead that the circumstances in which the Clause would bar a retrial "are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."

The Government reads *Kennedy* as limited to its context of a criminal trial that ends with the granting of a defendant's motion for a mistrial. In the Government's view, *Kennedy* affords Wallach no benefit because he did not even move for a mistrial, much less obtain one; indeed, the trial ended, not with a mistrial, but with a conviction. On the other hand, Wallach reads *Kennedy* without the limitation of the mistrial context and extracts from it a rule of more general application: "The Supreme Court's rationale is that the Double Jeopardy Clause bars a second prosecution when the prosecutor engages in serious misconduct with the intention of preventing an acquittal."

We have some doubt that the Supreme Court expected its carefully worded statement of the rule in *Kennedy* to be extended beyond the context of a trial that ends with the granting of a defendant's motion for a mistrial. . . . The decision proceeds from the premise that "the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.' " Obviously a defendant, like Wallach, whose trial ends with a conviction has suffered no impairment of that valued right.

Yet there is force to Wallach's argument for some sort of extension. Since *Kennedy* bars a retrial on jeopardy grounds where the prosecutor engages in misconduct for the purpose of goading the defendant into making a successful mistrial motion that denies the defendant the opportunity to win an acquittal, the Supreme Court might think that the Double Jeopardy Clause protects a defendant from retrial in some other circumstances where prosecutorial misconduct is undertaken with the intention of denying the defendant an opportunity to win an acquittal.

But an extension of *Kennedy* beyond the mistrial context cannot be as broad as the rule for which Wallach contends. Every action of a prosecutor in the course of a trial is taken "with the intention of preventing an acquittal." . . . If the rationale of *Kennedy* were as broad as claimed by Wallach, the Double Jeopardy Clause would bar retrial of every defendant whose conviction is reversed because of intentional misconduct on the part of a prosecutor. For example, knowing use of perjured testimony that "could have affected the judgment of the jury" would result not only in reversal of a conviction, but also in a bar to retrial on jeopardy grounds. The Supreme Court could not possibly have mandated that result in *Kennedy.* Such a result would obliterate the precise distinction drawn in *Kennedy* between misconduct that merely results in a mistrial and misconduct undertaken for the specific purpose of provoking a mistrial. Only the latter circumstance creates a bar to retrial.

If any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the

> misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct. If jeopardy bars a retrial where a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion by the defendant, there is a plausible argument that the same result should obtain where he does so with the intent to avoid an acquittal he then believes is likely. The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction. [Citations omitted.]

The *Wallach* court concluded that the defendant could not avail himself under the principles stated in the quoted passage where the record reflected that the prosecution did not apprehend an acquittal, that the evidence of guilt was quite strong, and that the "prosecution had every reason to anticipate a conviction." *Wallach, supra* at 916.

In *United States v Catton*, 130 F3d 805 (CA 7, 1997), the United States Court of Appeals for the Seventh Circuit had previously reversed the defendant's conviction because of various trial errors and had remanded the case for a new trial. Following remand, the defendant moved to dismiss, claiming that a retrial would violate the Double Jeopardy Clause of the Fifth Amendment. The defendant argued that the prosecutor sub-

orned perjury and concealed exculpatory evidence, all in an effort to stave off a certain acquittal. *Id.* at 806. The *Catton* court stated:

> There is an argument for a further extension of *Kennedy* that would bring Catton's case within the range of the double jeopardy clause. Confined to cases in which the defendant is goaded into moving for a mistrial, whether the motion is granted or denied, *Kennedy* would leave a prosecutor with an unimpaired incentive to commit an error that would not be discovered until after the trial and hence could not provide the basis for a motion for a mistrial, yet would as effectively stave off an acquittal and thus preserve the possibility of a retrial. Suborning perjury would be a good example. It can be argued that if the prosecutor commits a covert error for the same purpose that he might have committed an open error calculated to evoke a motion for a mistrial (before *Kennedy* made this tactic unprofitable)—namely, to prevent an acquittal and so preserve the possibility of retrying the defendant even if the error is sure to be discovered and result in a reversal of the conviction either on direct appeal or on collateral attack—the double jeopardy clause should protect the defendant against being retried. *Wallach* does not hold that the argument is sound, but in a considered dictum concludes that it may well be sound. See also *United States v. Pavloyianis*, 996 F.2d 1467, 1473-75 (2d Cir. 1993); *United States v. Gary*, 74 F.3d 304, 314-15 (1st Cir. 1996); *State v. Colton*, 234 Conn. 683, 663 A.2d 339, 346-48 (1995); contra, *State v. Swartz*, 541 N.W.2d 533, 538-40 (Iowa App. 1995).
>
> So at argument we asked the prosecutor whether there was a principled distinction between the open error, which might lead to a mistrial, and the covert error not discovered till after trial. He could not think of any. He could have pointed to language in *Kennedy* and other cases to the effect that, as we put it in *United States v. Oseni*, 996 F.2d 186 (7th Cir. 1993), the only prosecutorial intent that is relevant to double jeopardy is "intent to terminate the trial, not intent to prevail at this trial by impermissible means." *Id.* at 188. "It doesn't even matter that he knows

he is acting improperly, provided that his aim is to get a conviction." *Id*. But this language . . . does not have reference to the case in which the prosecutor does not expect to prevail at *this* trial—the case in which he knows that his misconduct is likely to be discovered and that if it is discovered the verdict will be set aside either on direct appeal or, later, in a collateral attack on the conviction—and what he is seeking to obtain by committing a reversible error is the opportunity to retry a defendant who but for the error would be acquitted. In such a case, the prosecutor's ultimate aim is not to obtain a conviction at this trial but to obtain a conviction at a subsequent trial, and that was not a consideration in the cases that we have just been citing.

Yet it would be a great burden on the courts if every reversal traceable to a prosecution-induced error at trial gave rise to a *Kennedy*-style inquest on the prosecutor's motives; and it is possible to read *Kennedy* as merely carving a narrow exception to the rule that by moving for a mistrial a defendant waives his defense of double jeopardy to a retrial. And so we have left open the question whether to adopt *Wallach's* dictum as the law of this circuit, *United States v. Doyle*, 121 F.3d 1078, 1085 (7th Cir. 1997), as has the Eighth Circuit. *Jacob v. Clarke*, 52 F.3d 178, 182 (8th Cir. 1995). We need not bite the bullet in this case either. For it is clear that a defendant who wants the district court (or this court on appeal from an adverse ruling by the district court) to block a retrial on the basis of prosecutorial error must show that the prosecutor committed the error *because* he thought that otherwise the jury would acquit and he would therefore be barred from retrying the defendant. It is not enough that there was an error; it is not enough that it was committed or procured by the prosecutor; it is not enough that it was deliberate prosecutorial misconduct; it must in addition have been committed for the purpose of preventing an acquittal that, even if there was enough evidence to convict, was likely if the prosecutor refrained from misconduct. Any greater extension of *Kennedy* must be left to the Supreme Court, in view of the danger of adding a double jeopardy tail to every

> appellate-reversal dog. [*Catton, supra* at 807-808 (citations omitted; emphasis in original).]

The *Catton* court rejected the defendant's double jeopardy argument because he had failed to request an evidentiary hearing to probe the motives of the prosecutor, and "without such a hearing all the defense had was suspicion, and suspicion isn't enough to satisfy *Kennedy* or *Wallach*." *Catton, supra* at 808.

In *State v Colton*, 234 Conn 683; 663 A2d 339 (1995), the Connecticut Supreme Court addressed the issue whether "the double jeopardy clause will bar the retrial not only of a criminal defendant whose conviction was reversed for evidentiary insufficiency, but also of a defendant whose conviction in the first trial was secured by prosecutorial misconduct." *Id.* at 687. Citing and quoting *Wallach*, *supra* at 916, the court ruled that "we agree with the Second Circuit Court of Appeals that *Kennedy* logically should be extended to bar a new trial, even in the absence of a mistrial or reversal because of prosecutorial misconduct, if the prosecutor in the first trial engaged in misconduct with the intent 'to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.' " *Colton, supra* at 696.

In *State v Lettice*, 221 Wis 2d 69, 75; 585 NW2d 171 (Wis App, 1998), the Wisconsin Court of Appeals, also relying on *Wallach*, held that "double jeopardy bar[red] retrial because the prosecutor's action was undertaken with the intent to prevent an acquittal or to prejudice the possibility of an acquittal that the prosecutor believed would occur in the absence of his misconduct."

In *People v Batts*, 30 Cal 4th 660, 692; 134 Cal Rptr 2d 67; 68 P3d 357 (2003), the California Supreme Court, analyzing the state constitution's double jeopardy provision, noted the need to carefully contemplate

the standard for a remedy with respect to prosecutorial misconduct that went beyond the sanction of a new trial:

> [T]he standard that we adopt should not be so broad as to lead to the imposition of the double jeopardy bar—with its drastic sanction prohibiting retrial—in circumstances in which such a sanction is unwarranted. What is needed is a standard that sufficiently protects double jeopardy interests, but also retains and enforces a distinction between "normal" prejudicial prosecutorial misconduct that violates a defendant's due process right to a fair trial and warrants reversal and retrial, and the form of prosecutorial misconduct that not only constitutes a due process violation but also a double jeopardy violation, and hence warrants not only reversal but dismissal and a bar to reprosecution.

After consideration of various factors and concerns, the California court crafted the following standard:

> [Double jeopardy] bars retrial following the grant of a defendant's mistrial motion (1) when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and also (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal—and a court, reviewing the circumstances as of the time of the misconduct, determines that from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal. [*Id.* at 695.]

In *Commonwealth v Smith*, 532 Pa 177, 186; 615 A2d 321 (1992), the Pennsylvania Supreme Court went further than the cases cited above, holding:

> We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, *but also when the conduct of the prosecutor is intentionally under-*

> *taken to prejudice the defendant to the point of the denial of a fair trial*. Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial. [Emphasis added.]

I tend to believe that this holding goes much too far, given that prejudicial prosecutorial misconduct that denies a defendant his due process right to a fair trial typically calls only for a new trial. See *Phillips, supra* at 219.

In *State v Barton*, 240 SW3d 693, 702 (Mo, 2007), the Missouri Supreme Court examined an argument made pursuant to *Wallach* and *Catton*, and it ruled that even if the United States Supreme Court were to adopt an extension of *Kennedy*, the defendant would not meet "the required showing that the prosecutor intended to subvert double jeopardy protection."

Here, the purpose of this concurrence, in light of the persuasive authority cited above, is to simply provide some reasoning why I believe it would be legally unsound to render a holding that suggests or indicates that prosecutorial misconduct can never mandate the double jeopardy remedy of barring retrial, leaving a defendant, no matter how egregious the misconduct, to the sole remedy of a new trial.[5] Considering that retrial is barred under the Double Jeopardy Clause when it is

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[5] I recognize that the caselaw that I have cited chiefly addressed situations in which a defendant was actually convicted, as opposed to the situation here where a mistrial was declared on the basis of a deadlocked jury. I see no reason why this distinction calls for a different analysis. Indeed, where a jury is unable to convict or acquit, there would appear to be more compelling reasons to bar retrial if a prosecutor intentionally engaged in misconduct for the purpose of avoiding or preventing an acquittal that the prosecutor believed was likely absent the misconduct; the jury was in fact partly in favor of acquittal.

determined that there was insufficient evidence to sustain a conviction, there is logic to permitting that same remedy when a prosecutor is faced with proper evidence that he or she deems insufficient to secure a conviction, but nonetheless proceeds with the trial, intentionally relying on perjured testimony in order to avoid what is believed to be a likely acquittal. In such circumstances, had legally sound evidence alone been presented that was insufficient to sustain a conviction, retrial would not be allowed.[6]

Moreover, it is not necessary, at this time, to consider adopting an extension of *Kennedy*, as discussed in *Wallach, Catton*, and the other cases, because, assuming an extension was recognized, double jeopardy did not

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[6] I note that my analysis does not conflict with our Supreme Court's analysis in *Sierb, supra*. In *Sierb*, the defendant endured two trials that culminated in mistrials because the jurors were unable to agree on a verdict, and the trial court precluded the prosecution from commencing a third trial on the basis of an inferred remedy arising from the substantive Due Process Clause of the constitution. *Id.* at 520-522. No prosecutorial misconduct was at issue; the trial court simply believed that it would be fundamentally unfair to put the defendant through a third trial. *Id.* at 521-522. The Court held that due process guarantees under the state and federal constitutions "do not create a right to preclude retrial *of this defendant in these circumstances*." *Id.* at 521 (emphasis added). The defendant in *Sierb* could not resort to any arguments under the Double Jeopardy Clause, considering that it gave him no protection from retrial in light of the existence of manifest necessity for the mistrials and the absence of misconduct. The defendant thus attempted to extract a double jeopardy type remedy from the Due Process Clause, solely in and of itself, relying on the concept of substantive due process. The Court noted that "[t]he United States Supreme Court has declined to expand substantive due process as an *independent* source of limitation on government." *Id.* at 526 (emphasis added). Rather, as indicated earlier, "the number of trials is not a violation of due process unless it also places the defendant in double jeopardy." *Id.* at 525 n 13. Here, I am merely envisioning circumstances in which retrial might be improper on the basis of prosecutorial misconduct that gives rise to a due process violation that is so egregious that double jeopardy protection must be invoked as implemented under the Double Jeopardy Clause or through the Due Process Clause.

bar retrying defendant under the facts of this case. At most, had defendant known the truth regarding the informant's identity and the circumstances regarding the deal the informant had with the police, defendant could have impeached his credibility. Given that the informant testified that he was unaware that the bags at issue contained cocaine, impeaching his credibility would have had limited value. On the existing record, there was evidence of error, i.e., use of perjured testimony, and there was evidence that the prosecutor deliberately and intentionally suborned perjury, but there is no indication whatsoever that the prosecutor committed the misconduct for the purpose of avoiding or preventing an acquittal, nor can it be said that an acquittal was likely to occur if the prosecutor refrained from the misconduct or that the prosecutor believed such was the case.

I respectfully concur in affirming defendant's conviction.

GREATER BETHESDA HEALING SPRINGS MINISTRY v
EVANGEL BUILDERS & CONSTRUCTION MANAGERS, LLC

Docket No. 280185. Submitted December 10, 2008, at Detroit. Decided February 10, 2009, at 9:00 a.m.

Greater Bethesda Healing Springs Ministry brought a breach of contract action in the Wayne Circuit Court against Evangel Builders & Construction Managers, LLC, Vincent Colbert, HMC Mechanical Corp., and Leslie Upfall. Various counterclaims and cross-claims were filed, and KEK Enterprises, Inc., which was not a party to the action, brought its own action against HMC, Upfall, Evangel Builders and Greater Bethesda. The actions were consolidated and all parties agreed to submit their disputes for binding arbitration. The arbitrator issued an award that provided, in part, that Upfall and HMC were jointly liable to Evangel Builders and Colbert for $75,000. KEK filed the arbitration award with the circuit court clerk, and the court, John H. Gillis, Jr., J., entered a judgment confirming the arbitration award. Upfall appealed.

The Court of Appeals *held*:

1. KEK's filing of the arbitration award with the circuit court clerk satisfied the requirements of MCR 3.602(I), which governs the confirmation of arbitration awards. The two cases were consolidated and treated as one for purposes of arbitration, and nothing in MCR 3.602(I) requires that all parties seeking to enforce an arbitration award must each file the arbitration award separately.

2. MCR 3.602(I) requires that an arbitration award be filed within one year after the award was rendered, not that the award must be confirmed within one year after it was rendered. The arbitration award in this case was timely filed.

3. The judgment is consistent with the arbitration award with respect to the finding that Upfall had tortiously, intentionally, and improperly interfered with the contract between Evangel Builders and Greater Bethesda.

Affirmed.

Urso & Raeges, P.C. (by *John R. Urso*), for Evangel Builders & Construction Managers, LLC, and Vincent Colbert.

Michael C. Hechtman, P.C. (by *Michael C. Hechtman*), for Leslie Upfall.

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

PER CURIAM. Defendant Leslie Upfall appeals as of right the trial court's order of judgment affirming an arbitration award in favor of Evangel Builders & Construction Managers, LLC, and Vincent Colbert[1] and against Upfall. Because the judgment was properly entered and is consistent with the arbitrator's award, we affirm.

Plaintiff initiated this action in relation to a church Evangel was to build for plaintiff. Evangel hired defendants HMC Mechanical Corp (HMC) and its owner, Leslie Upfall, as subcontractors on the project, and HMC subsequently hired other subcontractors to perform some of the services for which it had contracted. In its complaint, plaintiff alleged, among other things, that the work performed by defendants was defective, that it paid defendants for services not completed, and that defendants breached the contract and certain warranties with respect to their work. Various cross-claims and counterclaims followed, and one of the subcontractors hired by HMC, KEK Enterprises, Inc., filed a separate complaint against HMC, Upfall, Evangel Builders, plaintiff, and others for damages arising out of the church construction project. The actions were consolidated and, upon the parties' agreement, their disputes were submitted for binding arbitration under the Michigan arbitration act, MCL 600.5001 *et seq*.

The arbitrator issued an award on September 14, 2005, that provided, in part, that Upfall was liable

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[1] Colbert is the owner of Evangel Builders and Construction Managers, LLC, and these defendants shall singularly be referred to as "Evangel Builders."

(jointly with HMC) to Evangel Builders and Colbert in the amount of $75,000. KEK Enterprises filed the arbitration award with the clerk of the court on September 19, 2005, and, shortly thereafter, Upfall filed for bankruptcy. The trial court entered a judgment on the award on June 27, 2006. After the entry of an order by the United States Bankruptcy Court, the trial court set aside the judgment and thereafter entered a new (but substantially same) judgment on July 13, 2007, against Upfall and in favor of Evangel Builders. Upfall moved for reconsideration, which the trial court denied. This appeal followed.

On appeal, Upfall first argues that the July 13, 2007, judgment was improperly entered, as the arbitration award was not filed with the trial court in the instant case, as required by MCR 3.602(I). The interpretation and application of a court rule involves a question of law that this Court reviews de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005). The rules governing the construction of statutes apply with equal force to the interpretation of court rules. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). Clear and unambiguous language in a court rule must be given its plain meaning and enforced as written. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007).

MCR 3.602(I) provides:

> Award; Confirmation by Court. An arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.

It is undisputed that the arbitration award resolved all the claims of *all* the parties in the two lawsuits and that KEK filed the award with the clerk of the court mere days after the award was issued. While Upfall contends that KEK filed the award only with respect to the KEK case, the date-stamped cover sheet under which the award was filed contains the case number of the instant matter. Moreover, the cases were consolidated and treated as one for purposes of arbitration and the award, and there is nothing in the language of MCR 3.602(I) that requires that all parties seeking to enforce an arbitration award separately file the award with the court clerk. Upfall has provided no authority suggesting or supporting such an interpretation; thus, this argument fails.

Upfall next contends that MCR 3.602 requires that any judgment on an arbitration award be entered within one year of the issuance of the award. According to Upfall, the entry of the July 13, 2007, judgment was in error because it was entered more than one year after the September 14, 2005, arbitration award. We disagree.

Notably, Upfall provides no authority to support his position and gives this issue only cursory treatment. An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position. *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 499; 668 NW2d 402 (2003). Insufficiently briefed issues are deemed abandoned on appeal. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004).

Nevertheless, in addressing the merits of Upfall's argument, we note, as we did previously, that the rules governing the construction of statutes apply with equal force to the interpretation of court rules. *Rafferty*,

supra. The drafters of statutes are presumed to know the rules of grammar, and statutory language must be read within its grammatical context unless a contrary intent is clearly expressed. *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 315; 683 NW2d 148 (2004).

The "last antecedent" rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation. *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002). Applying this rule to MCR 3.602(I), the clause "within one year after the award was rendered" applies to the filing of the award with the court clerk, not to the confirmation of the award by the court. Nothing in the court rule requires a different interpretation.

Additionally, at the time the arbitration award at issue was rendered, MCR 3.602(J)(2) required a party to file an application to vacate an arbitration award within 21 days after the party received a copy of the award, unless the award was "predicated on corruption, fraud, or other undue means," in which event the application had to be filed within 21 days after "the grounds are known or should have been known." MCR 3.602(K)(1) required a party to apply for modification or correction of an award within 21 days after the date of the award.[2] In the present case, appellant has never filed an application to vacate, modify, or correct the arbitration award. Given that the court "*shall* render judgment giving effect to the award as corrected, confirmed, or modified," MCR 3.602(L) (emphasis added), and the award having been confirmed, entry of the judgment was proper.

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[2] In 2007, the court rule was amended to extend the time for filing a motion to vacate, modify, or correct an arbitration award to 91 days. See MCR 3.602(J), (K).

Finally, Upfall contends that the judgment, as entered, is inconsistent with the arbitration award. Generally, issues regarding an order enforcing an arbitration award are reviewed de novo. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

The judgment provides:

> A Judgment in favor of . . . Evangel Builders and Vincent Colbert shall be entered against . . . H.M.C. Mechanical Corporation and Leslie Upfall for their tortuous [sic], intentional and improper interference with the contract between Evangel and Plaintiff Greater Bethesda Healing Springs Ministry which resulted [in] Plaintiff Greater Bethesda's decision to terminate the contract between Greater Bethesda and Evangel and Vincent Colbert resulting in the loss of anticipated fees totaling Seventy-Five Thousand ($75,000) Dollars for Evangel Builders and Vincent Colbert. A Judgment in the amount of Seventy-Five Thousand ($75,000) Dollars shall be entered against . . . HMC Contracting and Leslie Upfall jointly and severally, inclusive of costs and attorney fees.

The text on page 11 of the arbitration award bears the heading, "Arbitration Award" and states, in relevant part, as follows:

> Hills Mechanical Contracting Corporation, a/k/a HMC, a Michigan Corporation and Leslie Upfall are jointly and severally liable, and shall pay Evangel Builders & Construction Managers, a Michigan Limited Liability Company, and Vincent Colbert the total sum of Seventy-Five Thousand and 00/100 ($75,000) Dollars.

Upfall asserts that the language in the judgment concerning Upfall's "tortuous [sic], intentional and improper interference" is not included on page 11 of the arbitration award and, as such, should not have appeared in the judgment. Again, Upfall has failed to adequately brief this issue or cite any authority sup-

porting his position, rendering this issue effectively abandoned on appeal. See *Wiley v Henry Ford Cottage Hosp* and *Blackburne & Brown Mortgage Co v Ziomek*, *supra.* In any event, after briefly considering Upfall's argument, we find no error in the judgment.

MCR 3.602(L) states that "[t]he court shall render judgment giving effect to the award as corrected, confirmed, or modified." Page 9 of the arbitrator's decision includes the following passage:

> 5. Evangel and Colbert have filed a Counter/Cross Complaint against Defendant and Cross Plaintiffs HMC and Leslie Upfall alleging a Breach of Contract, Tortious Interference with Contractual Relations and Defamation. Credible evidence supports the complaint. Upfall's efforts in February and March 2002, including submitting a new contract between his company, HMC, and Greater Bethesda, are sufficient evidence of Upfall's *intentional and improper interference* with the contract between Evangel and Greater Bethesda, which more likely than not, precipitated Rev. Knowlton's decision to terminate the Greater Bethesda contract with Evangel. This termination resulted in a loss of anticipated fees for Evangel. The evidence warrants an award and judgment of Seventy-Five Thousand and 00/100 ($75,000) Dollars to Evangel and against Les Upfall and HMC jointly and severally, inclusive of costs and attorney fees.

As seen above, the arbitrator explicitly found that Upfall intentionally and improperly interfered with the contract between Evangel and plaintiff. The statement in the judgment that Upfall tortiously, intentionally, and improperly interfered with the contract between Evangel and plaintiff is thus consistent with the arbitrator's decision.

Affirmed.

AMERISURE INSURANCE COMPANY v PLUMB

Docket No. 276384. Submitted June 3, 2008, at Detroit. Decided February 10, 2009, at 9:05 a.m. Leave to appeal sought.

Amerisure Insurance Company brought an action in the Tuscola Circuit Court against Rae L. Plumb and State Farm Mutual Automobile Insurance Company, seeking a declaration that, under MCL 500.3113(a), Plumb was not entitled to personal protection insurance (PIP) benefits because she had taken an automobile unlawfully and did not have a reasonable belief that she was entitled to take and use it. David Shelton had entered into an agreement to purchase the automobile, but he was not the titled owner and maintained no insurance on it. State Farm was the titled owner's insurer. Shelton had left the automobile in the parking lot of a bar and later discovered that it was missing. Plumb was subsequently found severely injured some distance from the automobile in a nearby field. Neither Shelton nor the titled owner had given Plumb the keys to the car or permission to drive it. Plumb, who was uninsured and had a suspended driver's license, remembered no details about the accident, but claimed that an unidentified man had given her the keys and asked her to drive because he was on probation. Seeking PIP benefits, Plumb had applied to the Michigan Assigned Claims Facility, which assigned the claim to Amerisure. The court, Patrick R. Joslyn, J., granted Amerisure summary disposition. Plumb appealed.

The Court of Appeals *held*:

1. MCL 500.3113(a) precludes PIP benefits if a motor vehicle was taken unlawfully and the person who took it lacked a reasonable basis for believing that he or she could take and use it. If the taking was lawful, MCL 500.3113(a) does not apply.

2. There is no genuine issue of material fact that Plumb unlawfully took the automobile. While prior caselaw has established a joyriding exception to MCL 500.3113(a) for family members who take a motor vehicle without permission but lack an actual intent to steal it, the exception has not been extended to persons who are not family members.

3. In the case of a motor vehicle taken unlawfully, the injured party may receive PIP benefits only if it can be shown (1) that the

injured party reasonably believed that he or she was entitled to take the vehicle and (2) that the injured party reasonably believed that he or she was entitled to use it.

4. Plumb consistently provided one explanation regarding how she came to drive the automobile: an unidentified man gave her the keys and asked her to drive. Under the circumstances, there was no reason for her to doubt that he owned the automobile and that she was entitled to take it. The trial court erred by weighing credibility and making impermissible findings regarding this issue.

5. Plumb's blood alcohol level was well above the legal limit established by MCL 257.625(1)(b). She also admitted that, when she got in the automobile, she knew that she could not legally drive because of her suspended license. Therefore, she was not able to legally use the automobile. Even given the question of fact regarding whether she reasonably believed that she was entitled to take the automobile, she could not have reasonably believed that she was entitled to use it when she knew that she was unable to legally operate it. The trial court properly granted Amerisure summary disposition.

Affirmed.

O'CONNELL, J., concurring in part and dissenting in part, agreed that MCL 500.3113(a) applied to the facts of the case, that no genuine issue of material fact existed regarding Plumb's unlawful taking, and that a genuine issue of material fact existed regarding Plumb's reasonable belief that she was entitled to take the automobile. He disagreed, however, with the majority's conclusion that the use of the motor vehicle must be legal in order for a person to be eligible for PIP benefits. The statute does not require that a person must legally operate the vehicle in order to reasonably believe that he or she is entitled to use it. A question of fact existed concerning whether Plumb reasonably believed that she was entitled to take and use the vehicle. The case should be reversed and remanded for further proceedings.

INSURANCE — NO FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — MOTOR VEHICLES — UNLAWFUL TAKING OF A MOTOR VEHICLE — BELIEF OF ENTITLEMENT TO TAKE AND USE A MOTOR VEHICLE.

A person is not entitled to personal protection insurance benefits for accidental bodily injury if the person was using a motor vehicle that he or she had taken unlawfully unless it can be shown (1) that the person reasonably believed that he or she was entitled to take the vehicle and (2) that the person reasonably believed that he or she was entitled to use it; a person cannot reasonably believe that

> he or she is entitled to use a motor vehicle when the person knows that he or she is unable to legally operate it (MCL 500.3113[a]).

Siemion, Huckabay, Bodary, Padilla, Morganti & Bowerman, P.C. (by *Raymond W. Morganti*), for Amerisure Insurance Company.

Skupin & Lucas, P.C. (by *Joseph F. Lucas*), for Rae L. Plumb.

Bensinger, Cotant & Menkes, P.C. (by *Dale L. Arndt*), for State Farm Mutual Automobile Insurance Company.

Before: WHITBECK, P.J., and O'CONNELL and K. F. KELLY, JJ.

K. F. KELLY, J. In this no-fault insurance case, defendant/cross-defendant/counterplaintiff/cross-plaintiff Rae Louise Plumb appeals[1] the trial court's order granting summary disposition in favor of plaintiff/counterdefendant Amerisure Insurance Company, and the order denying Plumb's motion for reconsideration,

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[1] State Farm Mutual Automobile Insurance Company challenges this Court's jurisdiction of this appeal pursuant to MCR 7.203(A). State Farm claims that the January 17, 2007, order granting Amerisure Insurance Company summary disposition and the February 5, 2007, order denying Plumb reconsideration are not final orders within the meaning of MCR 7.202(6). State Farm further asserts that, because Plumb has not claimed an appeal of the March 5, 2007, order of judgment, which it contends is the final order, this Court is without jurisdiction and the time for filing a claim has expired. Although the trial court never specifically addressed State Farm's cross-claim against Plumb or Amerisure's claim against State Farm, it is clear that these claims were resolved when the trial court concluded that Plumb was not entitled to personal protection insurance benefits pursuant to MCL 500.3113(a). To the extent that these orders are not final orders pursuant to MCR 7.202(6) and there may be remaining, unresolved issues, we exercise our discretion to treat Plumb's appeal as an application for leave to appeal and grant such an appeal, assuming jurisdiction pursuant to MCR 7.203(B)(1). See *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998).

which ultimately denied Plumb personal protection insurance (PIP)[2] benefits. The issue raised on appeal requires us to determine the requisite showing a claimant must make under MCL 500.3113(a) in order to obtain PIP benefits. We affirm and hold that § 3113(a) precludes PIP benefits when a motor vehicle is (1) taken unlawfully and the claimant has failed to show (2) that the claimant reasonably believed that he or she was entitled to "take" the vehicle and (3) that the claimant reasonably believed that he or she was entitled to "use" the vehicle.

I. BASIC FACTS AND PROCEEDINGS

Plumb arrived at a bar near Caro, Michigan, about 11:30 p.m. one evening, socializing and consuming alcohol with several men. A couple of hours later, David Shelton drove a Jeep Cherokee to the same bar and parked it in the parking lot. Shelton did not maintain insurance on the Jeep, and although he had entered into an agreement to purchase the Jeep several months earlier, he was not the titled owner. Shelton left his keys in the Jeep, and he did not usually lock his car doors. Plumb and Shelton did not know one another, and during the time they were both in the bar, they never spoke to one another. Shelton did not give Plumb the keys or permission to drive the Jeep, and she did not receive the keys or permission from the titled owner. Plumb left the bar with two men, one of whom she described as Caucasian and wearing a baseball cap and a goatee. Plumb claimed that the unidentified man with the baseball cap and goatee handed her the keys to the

[2] While MCL 500.3101 *et seq*. uses the phrase "personal protection insurance benefits," these benefits are commonly known as "PIP" benefits. See *Allen v State Farm Mut Automobile Ins Co*, 268 Mich App 342, 343 n 1; 708 NW2d 131 (2005) (BANDSTRA, J.).

Jeep and asked her to drive because he was on probation. Plumb, who did not maintain automobile insurance and did not reside with a relative who carried automobile insurance, was intoxicated, and her driver's license had been suspended. Shelton left the bar shortly after Plumb and discovered that the Jeep was missing.

Later that morning, Plumb was found lying in a field near the bar, having sustained severe burn injuries. In a deep drainage ditch about 250 yards away from Plumb, the police found Shelton's Jeep, which had been totally consumed by fire. Plumb suffers from a closed-head injury and posttraumatic stress disorder and does not recall all the events leading up to the accident or the accident itself. The police determined that the Jeep had been driven away from the bar across a mowed field and an unmowed hayfield, struck an electric transformer, and ultimately crashed into the drainage ditch. In the mowed field near the parking lot, there were several other sets of tire tracks. The police concluded that Plumb had been driving the Jeep and was its sole occupant.

Defendant/cross-plaintiff/cross-defendant State Farm Mutual Automobile Insurance Company insured the titled owner of the Jeep on the date of the accident. Plumb submitted an application to the Michigan Assigned Claims Facility (MACF), seeking PIP benefits under the no-fault act, MCL 500.3101 *et seq*. Pursuant to MCL 500.3172, the MACF assigned Plumb's PIP claim to Amerisure. Amerisure filed a complaint against Plumb and State Farm, seeking a declaratory judgment that Plumb was not entitled to PIP benefits pursuant to MCL 500.3113(a) when the Jeep was taken unlawfully and when Plumb did not have a reasonable belief that "she was entitled to take and use the vehicle." It further asserted that State Farm was a higher priority insurer than Amerisure pursuant to

MCL 500.3114(4)(a). State Farm filed a cross-claim against Plumb, also seeking a declaration that Plumb was not entitled to PIP benefits pursuant to § 3113(a). Plumb filed a counterclaim against Amerisure and a cross-claim against State Farm, claiming that they had both wrongfully denied her PIP benefits.

Amerisure moved for summary disposition of its claim against Plumb pursuant to MCR 2.116(C)(10), claiming that she was not entitled to PIP benefits. Amerisure argued that § 3113(a) precluded benefits because there was no genuine issue of material fact that Plumb had unlawfully taken the Jeep without a reasonable belief that she was entitled to take and use it. In reply, Plumb requested summary disposition, arguing that she had not taken the Jeep unlawfully and that she had reasonably believed that she was entitled to take the Jeep. Amerisure and State Farm both requested summary disposition of Amerisure's claim against State Farm, raising arguments regarding whether State Farm's insured, the titled owner, had an ownership interest in the Jeep at the time of the accident and whether State Farm was a higher priority insurer than Amerisure. State Farm also adopted Amerisure's arguments with respect to § 3113(a) and requested summary disposition of Plumb's cross-claim against State Farm. The trial court granted Amerisure summary disposition, concluding that MCL 500.3113(a) applied and that Plumb was not entitled to PIP benefits because she had unlawfully taken the vehicle. The trial court also ruled that Plumb had presented mere conjecture and speculation with respect to how she received permission to drive the Jeep and that Plumb had not had a reasonable belief that she was entitled to take and use the Jeep.

Plumb moved for reconsideration, asserting that the trial court had engaged in improper fact-finding regard-

ing whether she had been given the keys to the Jeep. On reconsideration, the trial court held that, even assuming Plumb had permission to drive the Jeep, she was not entitled to drive it because she did not have a driver's license and was intoxicated. Accordingly, the trial court held that Plumb was not entitled to PIP benefits. The trial court subsequently entered a judgment dismissing Plumb's cross-claim against State Farm and her counterclaim against Amerisure.

On appeal, Plumb argues that the trial court erred in granting summary disposition because it engaged in impermissible fact-finding and erroneously construed MCL 500.3113(a). We agree that the trial court engaged in impermissible fact-finding and that there was a genuine issue of material fact regarding whether Plumb reasonably believed that she was entitled to take the Jeep. However, we affirm the trial court's order granting summary disposition because there is no genuine issue of material fact that Plumb did not have a reasonable belief that she was entitled to "use" the Jeep, within the meaning of § 3113(a).

II. STANDARDS OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. We also view all legitimate inferences in the light most favorable to the nonmoving party. *Houdek v Centerville Twp*, 276 Mich App 568, 572-573; 741 NW2d 587 (2007). Summary disposition under MCR 2.116(C)(10) is properly granted when "[e]xcept as to the amount of damages, there is no

genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue on which reasonable minds could differ." *Houdek*, *supra* at 573. We review for an abuse of discretion the trial court's decision on a motion for reconsideration. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

Further, we review de novo questions of statutory interpretation. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). When construing a statute, "our purpose is to discern and give effect to the Legislature's intent." *Id*. We must first examine the plain language of the statute, and if it is unambiguous, "we presume that the Legislature intended the meaning clearly expressed . . . ." *Id.* (quotation marks and citation omitted). If the statutory language is unambiguous, we must enforce the statute as written, and no further construction is permitted. *Id.* In construing the no-fault act in particular, we are mindful that it "is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995).

We review for an abuse of discretion a trial court's ruling on a motion for reconsideration. *Woods, supra* at 629. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

III. STATUTORY SCHEME

MCL 500.3113 precludes PIP benefits under certain circumstances, and it provides, in pertinent part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had *taken unlawfully*, unless the person *reasonably believed that he or she was entitled to take* ***and*** *use the vehicle*. [Emphasis added.]

Thus, PIP benefits will be denied if the taking of the vehicle was unlawful and the person who took the vehicle lacked "a reasonable basis for believing that he [or she] could take and use the vehicle." *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 626; 499 NW2d 423 (1993). When applying § 3113(a), the first level of inquiry will always be whether the taking of the vehicle was unlawful. If the taking was lawful, the inquiry ends because § 3113(a) does not apply.

A. UNLAWFUL TAKING

As this Court has previously observed, the phrase "taken unlawfully" is not defined in the no-fault act. *Landon v Titan Ins Co*, 251 Mich App 633, 638; 651 NW2d 93 (2002). In *Priesman v Meridian Mut Ins Co*, 441 Mich 60, 62, 68; 490 NW2d 314 (1992) (LEVIN, J.), our Supreme Court considered the phrase "taken unlawfully" without defining it and determined that a vehicle had not been unlawfully taken when a 14-year-old boy took his mother's vehicle without her permission. While the lead opinion in *Priesman* was not binding because only three justices signed it, this Court adopted its reasoning in *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 245-249; 570 NW2d 304 (1997), and extended this judicially created " 'family member' joyriding exception" to an adult family member who lived in a separate residence from his

parents.[3] The Court held that PIP benefits should only be denied if the family member had an actual intent to steal the vehicle. *Id.* at 249. The *Butterworth* Court rejected an argument that the driver had taken the vehicle unlawfully because he was physically incapable of safely operating a vehicle and was not eligible to obtain a driver's license. *Id.* The Court stated, "[I]t is the unlawful nature of the taking, not the unlawful nature of the use, that is the basis of the exclusion under § 3113(a)." *Id.* at 250. The Court held that no unlawful taking had occurred within the meaning of § 3113(a). *Id.* at 249. However, this Court has declined to extend the joyriding exception to nonfamily members. *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 88; 596 NW2d 205 (1999); *Allen v State Farm Mut Automobile Ins Co*, 268 Mich App 342, 346; 708 NW2d 131 (2005) (BANDSTRA, J.).

In this case, given that Shelton had possession of the Jeep, had been using it for more than 30 days, and had entered into an arrangement to make payments on the Jeep, he is considered an "owner" of the vehicle for purposes of the no-fault act. MCL 500.3101(2)(g)(*i*) and (*iii*). Shelton never gave the keys or permission to drive the Jeep to anyone that night. Although Plumb asserted that she received the keys from the unidentified man, there is no evidence that she received them from Shelton or the titled owner or otherwise had permission to take the Jeep and, accordingly, there is no material

[3] An exemption for joyriding family members does not appear in § 3113(a) or anywhere else in the no-fault act and is inconsistent with the plain language of the statute. This Court recently declared a conflict with *Butterworth* in *Roberts v Titan Ins Co*, 281 Mich App 551, 574; 2008 WL 5105160 (2008). However, this Court declined to convene a conflict panel, 281 Mich App 801 (2008), and, accordingly, *Butterworth* remains precedentially binding. We believe that this so-called joyriding exception is worthy of reexamination by our Supreme Court.

question of fact that Plumb lacked Shelton's consent or implied consent to take the Jeep. Nor is there any evidence to suggest that Plumb had an intent to permanently deprive Shelton of the Jeep, and thus her conduct could be considered joyriding. *Mester, supra* at 88. However, given that Plumb and Shelton are not family members, the joyriding exception is unavailable. *Id.*; *Allen*, *supra* at 346 (BANDSTRA, J.). Therefore, there is no genuine issue of material fact that Plumb unlawfully took the Jeep, and § 3113(a) applies.

B. REASONABLE BELIEF OF ENTITLEMENT TO "TAKE AND USE"

Having concluded that Plumb unlawfully took the Jeep, the next step in our analysis is to determine whether Plumb "reasonably believed that . . . she was entitled to *take and use* the vehicle." MCL 500.3113(a) (emphasis added). We note at the outset that no case has specifically construed the meaning of this particular clause of the statute because the circumstances presented in the cases applying § 3113(a) did not require this Court to address it.[4] Because the unlawful taking in

[4] A review of relevant caselaw shows that once a court has found an unlawful taking, it treats the unlawful taking, without any analysis, as subsuming any legitimate claim that the claimant reasonably believed that he or she was entitled to take and use the vehicle. It appears that the facts of these cases, unlike those of the case at bar, have compelled such a conclusion, i.e., under those circumstances an unlawful taking also equated with a lack of reasonable belief that one is entitled to take and use a vehicle, and this appears to be the reason why courts have not separately construed the meaning of the "take and use" clause in § 3113(a). For example, in *Mester*, *supra* at 88, the claimant and two other girls, all under the age of 15, found a parked truck with keys in it and decided to take it. The Court denied the claimant PIP benefits because she "participated in the unlawful taking of the truck, without permission and without any reason to believe that she was entitled to take or use the truck." *Id.* at 89; see also *Allen*, *supra* at 344-347 (concluding, when a non-family-member driver took another's vehicle without permission, that the taking was unlawful, thereby precluding PIP benefits, without

this case does not also defeat any legitimate claim that Plumb "reasonably believed that . . . she was entitled to take and use the vehicle," MCL 500.3113(a), we now find it necessary to address the meaning of the "take and use" clause in § 3113(a). In doing so, we are required to give the words of the statute their plain and ordinary meaning, which may be determined through dictionary definitions. *Echelon Homes*, *supra* at 196.

Random House Webster's College Dictionary (1997) defines the word "take" as "to get into one's hands or possession by voluntary action" and the word "use" as "to employ for some purpose; put into service[.]" Clearly, the terms "take" and "use" are not interchangeable or even synonymous; obtaining possession of an object is very different from employing that object or putting it into service. The term "and" is defined as a conjunction, and it means "with; as well as; in addition to[.]" *Id*. When given its plain and ordinary meaning, the word "and" between two phrases requires that both conditions be met. See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 33; 732 NW2d 56 (2007). We note that the " 'popular use of "or" and "and" is so loose and so frequently inaccurate that it has infected statutory enactments.' " *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995) (citation omitted). However, "because the words are not

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considering whether the claimant reasonably believed that he was entitled to take and use the vehicle). Notably, in *Bronson, supra* at 625-627, this Court, in dicta, reached the issue whether the claimant, who had *lawfully taken* the vehicle, reasonably believed that he was entitled to take and use the vehicle. While § 3113(a) did not apply, the Court concluded that had the claimant unlawfully taken the vehicle, he would have had a reasonable belief of his entitlement to take and use the vehicle because the only other driver was uncomfortable with a manual transmission. *Id*. The *Bronson* Court, in coming to this conclusion, did not conduct any statutory analysis and conflated the terms "take" and "use" in applying the law to the facts. *Id*.

interchangeable, we should give them their strict meaning when their accurate reading does not give the text a dubious meaning, and there is no clear contrary legislative intent." *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 319; 683 NW2d 148 (2004). Construing the word "and" as a conjunction does not give the text of § 3113(a) a dubious meaning. On the contrary, it is clear that it requires a driver who obtains a vehicle unlawfully to have (1) a reasonable belief that he or she was entitled to *take* the vehicle and (2) a reasonable belief that he or she was entitled to *use* the vehicle. The statute does not contain any clear legislative intent that the term "and" was meant to be applied as providing a choice or alternative between taking the vehicle and using the vehicle. See *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997) ("The word 'or' generally refers to a choice or alternative between two or more things."). Therefore, in circumstances in which the vehicle was unlawfully taken, the injured party may obtain PIP benefits only if it can be shown (1) that the injured party reasonably believed that he or she was entitled to take the vehicle *and* (2) that the injured party reasonably believed that he or she was entitled to use the vehicle.

IV. APPLICATION OF MCL 500.3113(a)

Having already determined that Plumb unlawfully took the vehicle, we now consider whether Plumb has made the requisite showing.

A. REASONABLE BELIEF OF ENTITLEMENT TO TAKE

Shelton asserted that he did not give Plumb or anyone else the keys or permission to drive the Jeep that night. In her answers and pleadings, Plumb initially indicated that she did not remember how she

ended up driving the Jeep. Later, in her deposition, she asserted that she remembered the incident after viewing the surveillance videotapes from the bar and participating in therapy. When asked at her deposition if it was true that Plumb did not recall the unidentified man giving her a set of keys, she replied that she did not recall. However, immediately after that, Plumb testified that she recalled the unidentified man helping her into the Jeep, giving her the keys, and asking her to drive because he was on probation. Amerisure claims that Plumb is attempting to create a question of fact by contradicting herself. Although it is well settled that "a party may not create issues of fact through contradiction of that party's prior sworn statements," *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 411; 622 NW2d 533 (2000), we do not find a contradiction of sworn statements here. Plumb consistently provided one explanation regarding how she came to drive Shelton's Jeep: an unidentified man handed her the keys and asked her to drive. It appears that Plumb's memory was refreshed through therapy and viewing the videotape, akin to refreshed memory under MRE 612. Amerisure also focuses on the fact that Plumb's description of the unidentified man might match Shelton or one of Shelton's friends. However, Plumb never gave any sworn statements identifying Shelton or his friend as the one who gave her the keys. Therefore, these arguments are unavailing.

Given that Plumb left the bar with the unidentified man and claimed that he produced the keys to the Jeep, which was in a parking lot containing very few vehicles, she would have had no reason to doubt that he owned the Jeep. If Plumb received the keys from someone who appeared to own the Jeep, it would have been reasonable for her to believe that she was entitled to take the Jeep within the meaning of § 3113(a). Accordingly,

there was a genuine issue of material fact regarding whether Plumb reasonably believed that she was entitled to take the Jeep. Although Plumb's assertion that an unidentified man gave her the keys to the Jeep may not turn out to be true, it is not for the trial court to make factual findings or weigh credibility when deciding a summary disposition motion. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998) (WEAVER, J.). Rather, all reasonable inferences must be drawn in favor of Plumb, the nonmovant. *Houdek*, *supra* at 572-573. The trial court erred when it weighed credibility and made impermissible factual findings.

B. REASONABLE BELIEF OF ENTITLEMENT TO USE

When Plumb's blood and urine were tested at the hospital after the accident, her blood alcohol content was 0.12 grams per hundred milliliters, and her urine tested positive for cocaine and opiates. A toxicology expert opined that, at 2:15 a.m., when the accident was believed to have occurred, Plumb's blood alcohol content was between 0.208 and 0.223 grams per hundred milliliters, which is well above the legal limit of 0.08 grams per hundred milliliters pursuant to MCL 257.625(1)(b). Plumb also admitted that, when she got into the Jeep, she knew that she could not legally drive because her driver's license had been suspended. Therefore, Plumb was not able to legally use the Jeep at the time of the accident. Even given a question of fact regarding whether Plumb reasonably believed that she was entitled to take the Jeep, she could not have reasonably believed that she was entitled to use it.

For the purposes of MCL 500.3113(a), we hold that, as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the

vehicle. Therefore, there was no genuine issue of material fact that Plumb lacked a reasonable belief that she was entitled to use the Jeep, and the trial court properly granted Amerisure summary disposition. For the same reason, the trial court did not abuse its discretion in denying Plumb's motion for reconsideration.

Affirmed.

WHITBECK, P.J., concurred.

O'CONNELL, J. (*concurring in part and dissenting in part*). I concur with the majority's holdings that no genuine issue of material fact exists regarding whether defendant Rae Louise Plumb unlawfully took the Jeep, that MCL 500.3113(a) applies to the facts of this case, and that there exists a genuine issue of material fact regarding whether Plumb reasonably believed that she was entitled to take the Jeep. I disagree with the majority's conclusion that MCL 500.3113(a) requires that use of a motor vehicle must be "legal" in order for an individual to be eligible for personal protection insurance (PIP) benefits. I am unable to find such a requirement in the statute. Consequently, I reluctantly conclude that there exists a genuine issue of material fact regarding whether Plumb reasonably believed that she was entitled to take and use the Jeep.

MCL 500.3113 precludes eligibility for PIP benefits under certain circumstances. The statute provides, in pertinent part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had *taken unlawfully*, unless the person

> *reasonably believed that he or she was entitled to take* ***and*** *use the vehicle*. [Emphasis added.]

The majority concludes that MCL 500.3113(a) precludes eligibility for PIP benefits when a motor vehicle is taken unlawfully and the claimant has failed to show (1) that the claimant reasonably believed that he or she was entitled to "take" the vehicle and (2) that the claimant reasonably believed that he or she was entitled to "use" the vehicle. Although I concur with the majority's analysis of MCL 500.3113(a), I disagree with the majority's statement that "[f]or the purposes of MCL 500.3113(a), we hold that, as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle." *Ante* at 431-432. In my opinion, the majority opinion adds a requirement to the statute that does not exist. MCL 500.3113(a) requires that the person using a vehicle must "reasonably believe[] that he or she was entitled to take and use the vehicle." The majority engrafts onto the statute the concept that one must "legally operate the vehicle" in order to have the reasonable belief that he or she was entitled to use the vehicle. I find no such requirement in the statute.

I conclude that there is a question of fact whether Plumb reasonably believed that she was entitled to take and use the vehicle.[1] It is not for the trial court to make factual findings or weigh credibility when deciding a motion for summary disposition. *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 176; 579 NW2d 906 (1998) (WEAVER, J.). Rather, the trial court must draw all

[1] That Plumb may have stolen the vehicle, that she was an unlicensed driver, and that she may have been intoxicated are all factors that a jury may consider when determining whether Plumb had a reasonable belief that she was entitled to take and use the vehicle.

reasonable inferences in favor of Plumb, the nonmovant. *Houdek v Centerville Twp*, 276 Mich App 568, 572-573; 741 NW2d 587 (2007). The trial court erred when it weighed Plumb's credibility and made impermissible factual findings.[2]

I would reverse and remand for further proceedings consistent with this opinion.

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[2] Although I note that it is not the role of this Court to add or subtract words from the statute, the ordinary reader of MCL 500.3113 may wonder how one can unlawfully take a motor vehicle and still have a reasonable belief that he or she is entitled to use the vehicle. As a reader of this statute, I share this concern. However, this Court's job is merely to interpret the statute as it is written. The Legislature may wish to revise the statute to provide for a "reasonable belief" that one is entitled "to take the vehicle and legally use the vehicle."

ONEIDA CHARTER TOWNSHIP v CITY OF GRAND LEDGE

Docket No. 277093. Submitted October 7, 2008, at Grand Rapids. Decided February 12, 2009, at 9:00 a.m.

Oneida Charter Township and four of its residents brought an action in the Eaton Circuit Court against the city of Grand Ledge, seeking a declaratory judgment regarding the continued validity of a 1980 agreement between the township and the city whereby the city directly supplies water to township residents and bills them. Pursuant to the agreement, the township residents pay a rate twice that which city residents pay for the same service. The plaintiffs alleged that MCL 123.141, which authorizes municipalities to contract for the sale of water outside their territorial limits, mandates that the rate charged be equal to the actual cost of service. The court, Thomas S. Eveland, J., determined that the provisions of MCL 123.141(2) did not apply to the city and that the provisions of MCL 123.141(3) were not binding on the city. The court concluded that the 1980 agreement remains valid and enforceable. The individual plaintiffs appealed.

The Court of Appeals *held*:

1. The general authority governing the rates that can be charged is set forth in MCL 123.141(2), which forbids the price to exceed the actual cost of service as determined under the utility basis of ratemaking. However, the city qualifies under the exception to that requirement stated in MCL 123.141(2) because it is not a contractual customer of another water department and it serves less than one percent of the population of the state. Therefore, subsection 2, standing alone, would permit the city to charge the township residents more than the actual cost of service.

2. Although subsection 2 is the general charging scheme, a more specific scheme is set forth in MCL 123.141(3), which requires that the retail rate charged to the inhabitants of a township that is a contractual customer as provided in subsection 2 shall not exceed the actual cost of providing the service. In this case, the township is a contractual customer of the city and the city sells the water to the ultimate consumers at retail. Where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls. A municipality selling

water extraterritorially directly to individual inhabitants of a contractual customer must charge actual cost pursuant to MCL 123.141(3), regardless of whether the municipality is exempt from the provisions of MCL 123.141(2). The judgment of the circuit court must be reversed and the case must be remanded to the circuit court for further proceedings.

Reversed and remanded.

PUBLIC UTILITIES — MUNICIPAL CORPORATIONS — WATER RATES.

A municipality that, pursuant to MCL 123.141(1), is selling water extraterritorially directly to individual inhabitants of another municipality pursuant to a contract with that municipality must, pursuant to MCL 123.141(3), charge the individual inhabitants the actual cost of providing the service.

James L. Shonkwiler for David M. Lee, Robert E. Ludlum, Lawrence J. Emery, and James Brandt.

J. Richard Robinson, P.C. (by *J. Richard Robinson* and *Shane Bolley*), for the city of Grand Ledge.

Before: MARKEY, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM. This case requires us to decide whether MCL 123.141, which authorizes municipalities to contract for the sale of water outside their territorial limits, mandates that rates charged for the sale of water directly to extraterritorial individual inhabitants of a "contractual customer" be equal to the actual cost of service. The court below determined that it does not, and plaintiffs now appeal as of right. We disagree and hold that a municipality selling water extraterritorially directly to individual inhabitants of a "contractual customer" must charge actual costs pursuant to MCL 123.141(3).

I. BASIC FACTS

This case arises out of a dispute over the water rates that the city of Grand Ledge charges residents of

Oneida Charter Township (Oneida) who reside outside the territorial limits of Grand Ledge. In 1980, Oneida sought to expand residential development by contracting with Grand Ledge for the purchase of sanitary sewer and potable water services. To that end, on October 27, 1980, Grand Ledge and Oneida entered into a water agreement (1980 agreement) under which Grand Ledge supplies potable water and sanitary sewer services to Oneida residents within a designated area. Pursuant to this agreement, Grand Ledge delivers water directly to each individual Oneida resident approved for water service and directly bills each individual on the basis of his or her water consumption.[1] Moreover, it mandated that each new resident in the designated area be required to connect to the water system.[2] While Oneida is the contracting party under the 1980 agreement, Oneida does not receive, nor is it billed for any water services under this arrangement; only its residents receive and are billed for water services. Although Oneida owns the water facilities

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[1] Stated more specifically, Grand Ledge provides each township resident approved for water service with a water meter. Then, on a monthly basis, city employees read each township resident's water meter, compute the amount of water consumed, calculate the rate to be charged, and mail a billing to each individual township customer for his or her usage.

[2] Section 6 provides:

> TOWNSHIP shall adopt such Ordinances to take such other legal action as may be necessary to require each new user within the Designated Service Area to connect to both the sanitary sewer system and the water system, as required by the terms of this Agreement.

Section 14 provides, in relevant part:

> All potential TOWNSHIP users shall receive written notification from TOWNSHIP at such time as sanitary sewers and water mains are available for their use, and shall be required to hook up to the sewer system and begin service within thirty (30) days after such notification.

used to deliver the water to township users, Grand Ledge assumes all maintenance and operation of these facilities. With respect to the rates charged for water services, § 13 of the 1980 agreement states:

> TOWNSHIP users shall be required to pay a Sewer Tap Fee in the same amount as that currently being charged CITY users at the time of issuance of said permit. TOWNSHIP users shall be required to pay for water service, including tapping the main and/or furnishing a water meter, in amounts as may be established by CITY Ordinances pertaining to users outside CITY limits as the same may then exist or from time to time be amended, *which charges shall be at least twice the amount currently being charged CITY users for the same service.* Rates for sewer and water service, permit fee, any other charges, rates and manner of collection and billing thereof shall be in accordance with the then effective Ordinances of CITY as they pertain to users outside the corporate limits of CITY. [Emphasis added.]

Since the inception of the agreement, Oneida residents have paid for Grand Ledge's water service at a rate twice that paid by Grand Ledge residents for the same service. This rate is based exclusively on the 1980 agreement, not on the actual cost of the service.

At the time when the parties drafted the 1980 agreement, it complied with MCL 123.141, which then stated:

> Municipal corporations having authority by law to sell water outside their territorial limits, hereinafter referred to as corporations, may contract for such sale with cities, villages or townships having authority to provide a water supply for their inhabitants*, but the price charged shall not be less than nor more than double that paid by customers within their own territory*. The price charged may be more than double that paid by consumers within their own territory if the water is delivered to a city, village or township lying outside the county within which the corpo-

> rations are situated, and lying more than 10 miles beyond the territorial limits of the corporations. Any price charged that is more than double shall bear a reasonable relationship to the service rendered. [1917 PA 34, as amended by 1957 PA 53 (emphasis added).]

But, in 1981, just eight months after Grand Ledge and Oneida entered into the 1980 agreement, the Legislature amended the statute, removing the language permitting municipal corporations to charge water consumers outside their territories double that charged to their own inhabitants. MCL 123.141 now reads, in pertinent part:

> (1) A municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants.
>
> (2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of ratemaking. This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract. This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state. This subsection shall take effect with the first change in wholesale or retail rate by the city or its contractual customers following the effective date of this subsection. Any city that has not adjusted rates in conformity with this subsection by April 1, 1982 shall include in the next ensuing rate period an adjustment to increase or decrease rates to wholesale or retail customers, so that each class of customer pays rates which will yield the same estimated amount of revenue as if the rate adjustment had been retroactive to April 1, 1982. . . .
>
> (3) The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual

customer as provided by subsection (2) shall not exceed the actual cost of providing the service.

In December 2005, plaintiffs[3] filed suit against Grand Ledge, seeking declaratory relief regarding water service rates under the 1980 agreement. Specifically, plaintiffs contended that the rates must be equal to "actual cost" as a matter of law under MCL 123.141.[4] Plaintiffs moved for partial summary disposition without success, and the matter was tried before the trial court without a jury.

At trial, plaintiffs argued that the statute envisions two different methods of supplying water. The first method, controlled by subsection 2, is a "wholesale" method whereby a municipality sells water to another municipality, which, in turn, sells the water to its inhabitants. The second is a "retail" method controlled by subsection 3, whereby the selling municipality sells directly to the other municipalities' inhabitants. According to plaintiffs, the present situation is a retail method and, therefore, MCL 123.141(2) is inapplicable and Grand Ledge must bill at actual cost pursuant to MCL 123.141(3). Conversely, Grand Ledge argued that the exemption in subsection 2 applies because it is not a contractual customer of another water department

[3] Plaintiffs-appellants David M. Lee, Robert E. Ludlum, Lawrence J. Emery, and James Brandt (hereafter plaintiffs) are individual residents of Oneida who reside in the designated service area created under the 1980 agreement. Plaintiff Oneida Charter Township did not join in this appeal.

[4] With respect to the rate-setting clause of the 1980 agreement, plaintiffs' complaint also alleged that the rates are contrary to the 1980 agreement's plain language, that the 1980 agreement is void because it lacks mutuality, and that the rate-setting clause violates the Equal Protection Clause of both the United States Constitution and the Michigan Constitution because it is discriminatory in nature. In addition, plaintiffs raised two other counts seeking declaratory relief in regard to the connection fees and exclusive provider clauses of the agreement. Plaintiffs do not raise any of these issues on appeal.

and it serves less than one percent of the state's population. It follows, according to Grand Ledge, that subsection 3 also does not apply because application of that subsection would render the exemption language in subsection 2 nugatory.

The trial court found in favor of Grand Ledge. The court characterized the statute as "at best, confusing" and noted that the Legislature intended that the 1981 amendment address Detroit's "dilemma of having to charge communities to which it was providing water double the city's rates even though the cost was substantially less; and by the same token having to charge far-reaching communities less than its actual costs." On the basis of this reasoning, the trial court concluded that subsection 2 of the statute does not apply to Grand Ledge because Grand Ledge is not a "contractual customer of another water department and only provides water outside its boundaries to a portion of Oneida Township." The trial court, again, relying on the legislative history, also found that subsection 3 is not binding on Grand Ledge because that subsection applies to "contractual customers" referenced in subsection 2 and was intended to assure that townships that purchase water from another system cannot charge their own inhabitants a rate above actual costs. Under this reasoning, the trial court concluded that the 1980 agreement remains valid and enforceable.

This appeal followed, limited to the issue whether MCL 123.141 mandates that Grand Ledge charge Oneida residents the actual cost of the water service it provides. For the purpose of this appeal and in lieu of providing a transcript to this Court of the lower court proceedings,[5] the parties stipulated a statement of facts, including:

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[5] MCR 7.210(B)(1)(e).

> [Grand Ledge] is a municipal corporation authorized to sell water outside of its territorial limits.
>
> [Grand Ledge] is not a contractual customer of another water department. [Grand Ledge's] water system serves less than 1% of the population of the state. [Oneida] is a contractual customer of [Grand Ledge] by virtue of the Agreement of 1980. [Oneida's] water system serves less than 1% of the population of the state.
>
> [Grand Ledge] water consumed by [Oneida] inhabitants is measured by a meter provided by [Grand Ledge]. [Grand Ledge] bills [Oneida] water users who make payment directly to [Grand Ledge]. [Grand Ledge] does not sell water to [Oneida] for resale by [Oneida] to individual [Oneida] users.

II. STANDARD OF REVIEW

We review matters of statutory construction de novo. *Casco Twp v Secretary of State*, 261 Mich App 386, 390; 682 NW2d 546 (2004).

III. PRINCIPLES OF STATUTORY CONSTRUCTION

When interpreting the meaning of a statute, our main objective is to ascertain and give effect to the Legislature's intent. *Id.* The first step is to determine whether the language of the statute is plain and unambiguous. *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). If the language is unambiguous, we must assume that the Legislature intended its plain meaning and, accordingly, we must apply the statute's language as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). In such instances, we must assume that every word has some meaning and we must give effect to every provision, if possible. *Danse Corp v Madison Hts*, 466 Mich 175; 644 NW2d 721 (2002). In doing so, we are to give words their plain and

ordinary meaning, unless otherwise defined by the Legislature. MCL 8.3a; *Ford Motor Co v Woodhaven*, 475 Mich 425, 438-439; 716 NW2d 247 (2006); *Village of Holly v Holly Twp*, 267 Mich App 461, 470; 705 NW2d 532 (2005). We may not speculate regarding the Legislature's probable intent, nor may we "inquire into the knowledge, motives, or methods of the Legislature." *Fowler v Doan*, 261 Mich App 595, 599; 683 NW2d 682 (2004). It is only when the statute's language is ambiguous that this Court is permitted to look beyond the statute's language to determine the Legislature's intent. *Casco Twp*, *supra* at 391.

We must not consider the statute's language in isolation; rather, we must consider each word and phrase in light of its placement and purpose within the statutory scheme. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008). Subsections of a statute are not to be read discretely, but as part of a whole. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 167-168; 680 NW2d 840 (2004). "[T]he entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922); see also *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001) (provisions must be read in the context of the entire statute).

Finally, we are mindful that "it 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." *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006), citing *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).

IV. ANALYSIS

Before the instant case, neither this Court nor our Supreme Court has had the opportunity to determine the circumstances under which MCL 123.141 requires a municipal corporation selling water extraterritorially to sell that water at actual cost. Accordingly, this issue of first impression requires us to interpret the meaning of the language in MCL 123.141(2) that exempts certain water systems from the actual cost provision of that subsection and its relationship to the language of MCL 123.141(3).

A. THE STATUTORY SCHEME

In enacting the current version of MCL 123.141, "the Legislature intended that municipal water rates more accurately reflect the actual cost of service when it eliminated the artificial limits imposed by the previous version of MCL 123.141." *City of Novi v Detroit*, 433 Mich 414, 430-431; 446 NW2d 118 (1989). As set forth earlier in this opinion, the relevant portions of MCL 123.141 provide:

> (1) A municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants.
>
> (2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of ratemaking. *This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract. This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state.* This subsection shall take effect with the first change in wholesale or retail rate by the city or its contractual customers following the effective date of this subsection. Any city that

> has not adjusted rates in conformity with this subsection by April 1, 1982 shall include in the next ensuing rate period an adjustment to increase or decrease rates to wholesale or retail customers, so that each class of customer pays rates which will yield the same estimated amount of revenue as if the rate adjustment had been retroactive to April 1, 1982. . . .
>
> (3) The *retail rate* charged to the inhabitants of a city, village, township, or authority *which is a contractual customer as provided by subsection (2)* shall not exceed the actual cost of providing the service. [Emphasis added.]

We are of the view that the language of MCL 123.141 is plain and unambiguous despite the fact that it may be difficult to apply to the specific factual situation presented here.[6] While "[w]hat is 'plain and unambiguous' often depends on one's frame of reference," *Shiffer v Gibraltar School Dist Bd of Ed*, 393 Mich 190, 194; 224 NW2d 255 (1974), if the language is unambiguous, it must be applied as written despite any difficulties presented.[7] Thus, we must determine what the statute means as written and apply the statutory scheme to the facts in this case.

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[6] In *Henderson v State Farm Fire & Cas Co*, 460 Mich 348; 596 NW2d 190 (1999), our Supreme Court noted that the application of a particular phrase to a given set of facts will not always be easy. *Id.* at 357 n 10, quoting *Horace Mann Ins v Stark*, 987 F Supp 562, 567 (WD Mich, 1997) (" '[A] term is not rendered ambiguous merely because its meaning may vary according to the circumstances.' "); *Gredig v Tennessee Farmers Mut Ins Co*, 891 SW2d 909, 914 (Tenn App, 1994) ("[T]he fact that the words may be difficult to apply to a given factual situation does not make those words ambiguous.").

[7] The trial court, as well as Grand Ledge, relied heavily on the statute's legislative history in interpreting MCL 123.141. But, if the meaning of the statute is plain and unambiguous, there is no reason to inquire into the Legislature's purpose or motives beyond the statute's plain language. *Fowler*, *supra* at 599. Legislative history cannot alter the meaning of clear statutory language. *In re Certified Question (Kenneth Henes Special Projects v Continental Biomass Industries)*, 468 Mich 109, 116; 659 NW2d 597 (2003).

1. MCL 123.141(1)

Const 1963, art 7, § 24, empowers cities and villages to own and operate water supply systems for the benefit of residents and nonresidents:

> Subject to this constitution, any city or village may acquire, own or operate, within or without its corporate limits, public service facilities for supplying water, light, heat, power, sewage disposal and transportation to the municipality and the inhabitants thereof.
>
> * * *
>
> Any city or village may sell and deliver heat, power or light without its corporate limits in an amount not exceeding 25 percent of that furnished by it within the corporate limits, except as greater amounts may be permitted by law; may sell and deliver water and provide sewage disposal services outside of its corporate limits in such amount as may be determined by the legislative body of the city or village; and may operate transportation lines outside the municipality within such limits as may be prescribed by law.

Consistent with this constitutional authority, subsection 1 plainly authorizes municipal corporations to contract with any city, township, village, or authority to sell water extraterritorially. Grand Ledge is such a municipal corporation and is authorized to contract with Oneida in order to sell water services to Oneida residents. To that end, Grand Ledge and Oneida entered into the 1980 agreement.

2. MCL 123.141(2)

The general authority governing the rates that can be charged is set forth in subsection 2. It requires the price of any water sold to be based upon, and forbids the price to exceed, "the actual cost of service as determined

under the utility basis of ratemaking." MCL 123.141(2). However, subsection 2 provides an exemption to this requirement: the actual cost of service must be charged *unless* the water system "is not a contractual customer of another water department and that serves less than 1% of the population of the state." MCL 123.141(2). Clearly, Grand Ledge has a water system but the system is not a contractual customer; it is not under contract to buy water from another department. And, Grand Ledge services less than one percent of the state—it services only its own residents and those extraterritorial users authorized for service. Because Grand Ledge qualifies under the exemption, if viewed in isolation, the general actual cost provision of subsection 2 would not apply to the rates charged to Oneida residents. Accordingly, subsection 2, standing alone, would permit Grand Ledge to charge Oneida residents more than the actual cost of service.

3. MCL 123.141(3)

Nonetheless, a more specific rate-charging scheme is set forth in subsection 3. This subsection provides that the "retail" rate charged to residents of a township that "is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service." According to *Random House Webster's Unabridged Dictionary* (2001), "retail" is defined as "the sale of goods to ultimate consumers, usually in small quantities."[8] Here, Oneida is a contractual customer of Grand Ledge by virtue of the 1980 agreement and as stipulated by the parties. The Oneida residents are the

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[8] Undefined words in a statute should be accorded their plain and ordinary meanings, and dictionary definitions may be consulted in such situations. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

ultimate consumers of the water supplied by Grand Ledge. Accordingly, under subsection 3 Grand Ledge is required to charge the "actual cost of providing" water services.

B. APPLICATION OF MCL 123.141

Grand Ledge argues that requiring it to charge actual costs under subsection 3 would render nugatory the exemption language under subsection 2, and therefore, it should also be exempt under subsection 3. According to Grand Ledge, the doctrine of *noscitur a sociis* requires that subsections 2 and 3 be read together, and that when read in such a manner, the exemption language of subsection 2 necessarily applies in the context of subsection 3. We disagree. Simply put, Grand Ledge's interpretation would require us to graft onto subsection 3 an additional requirement that does not exist.

Subsection 3, referring back to the term "contractual customer" used in subsection 2, provides:

> The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer *as provided by subsection (2)* shall not exceed the actual cost of providing the service. [MCL 123.141(3) (emphasis added).]

Subsection 2, while not precisely setting forth a definition of "contractual customer," determines that the relationship between the contracting parties will provide the definition of who is a "contractual customer":

> The price charged by the *city to its customers* shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making. This subsection shall not remove any minimum or maximum limits imposed *contractually between the city and its whole-*

> *sale customers* during the remaining life of the contract. [MCL 123.141(2) (emphasis added).]

Thus, a "contractual customer" is one that contracts with a city for water services in general and one that contracts for wholesale water services in particular. Here, Grand Ledge contracted with Oneida to provide water services to Oneida residents; accordingly, Oneida is a contractual customer by virtue of the 1980 agreement and its stipulation of that relationship. And, according to subsection 2, a contractual customer is prohibited from being charged more than the actual cost of service. The Legislature did provide an exemption to this flat prohibition: the exemption language of subsection 2 specifically provides that "*[t]his subsection* shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state." (Emphasis added.) Importantly, however, the exemption in subsection 2 only applies to the pricing scheme of that particular subsection; it does not exempt water departments selling water services from the pricing requirements of the entire statute. Grand Ledge continues to be bound by the other requirements of the statute. A careful reading of subsection 3 in conjunction with subsection 2 makes clear that nothing in subsection 3 invokes the exemption language of MCL 123.141(2); rather, it only invokes the contractual relationship between the contracting parties in defining who is a contractual customer.

While subsection 2 is the general charging scheme for water departments selling water services, subsection 3 specifically applies to entities selling water services to retail customers. "[W]here a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." *In re Haley*, *supra*

at 198, citing *Gebhardt*, *supra* at 542-543. Clearly, the Legislature intended to ensure that retail customers would only be charged the actual cost of providing the service regardless of how they received it.[9] By choosing to sell water services to Oneida residents at retail through its contractual arrangement with Oneida as provided for in the 1980 agreement, Grand Ledge is bound by the specific retail provisions of subsection 3. Grand Ledge argues that the exemption language in subsection 2 is rendered meaningless under this interpretation. To the contrary, utilizing the interpretation set forth by Grand Ledge, subsection 3 would be rendered nugatory in spite of the Legislature's express intent that the retail rate charged to "inhabitants" of a township that is a "contractual customer" shall not exceed the cost of the seller's actual cost.

In the present circumstances, Grand Ledge directly charges its contractual customer's inhabitants more than the actual cost of service under the 1980 agreement. This arrangement violates the requirements of subsection 3. Accordingly, the 1980 agreement, which requires that township residents pay Grand Ledge for water services at a rate double that which Grand Ledge residents pay for the same services, is in violation of MCL 123.141(3).

Because the language of subsection 3 does not explicitly or implicitly incorporate the exemption language of subsection 2, but rather only incorporates the contractual relationship between the contracting parties, we conclude that subsection 3 requires that the rate

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[9] Likewise, if Grand Ledge were selling water to Oneida for subsequent resale to Oneida's residents, Grand Ledge would not be bound by the limitations in subsection 2 and could charge Oneida more than actual costs. But Oneida would thereafter be limited by the actual cost of service provisions in subsection 3 when selling the water at retail to its residents.

charged by a water department directly to "inhabitants" of a municipal corporation that is a contractual customer of that water department not exceed actual costs. Accordingly, we hold that a municipality selling water extraterritorially directly to individual inhabitants of a contractual customer must charge those inhabitants for actual costs pursuant to MCL 123.141(3), regardless of whether that municipality is exempt from the provisions of MCL 123.141(2).

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

4041-49 W MAPLE CONDOMINIUM ASSOCIATION
v COUNTRYWIDE HOME LOANS, INC

Docket No. 282585. Submitted February 3, 2009, at Detroit. Decided February 12, 2009, at 9:05 a.m.

The 4041-49 W. Maple Condominium Association recorded a lien against a condominium for unpaid condominium assessments. Countrywide Home Loans, Inc., foreclosed on its mortgage on the condominium and purchased it at the public sale. The association brought an action in the Oakland Circuit Court against Countrywide, alleging that Countrywide had violated MCL 559.208(9) by failing to give the association proper notice of the foreclosure. The court, Fred M. Mester, J., granted the association summary disposition with respect to liability. The court subsequently rendered a verdict in the association's favor, concluding that because MCL 559.208(9) provided for "legal recourse," the statute was intended to provide a legal remedy for the failure of notice. Countrywide appealed.

The Court of Appeals *held*:

1. The trial court properly granted the association summary disposition with respect to liability because there was no genuine issue of material fact that Countrywide violated MCL 559.208(9).

2. MCL 559.208(9) provides for a private right of action for its violation. The failure to abide by the notice requirements of the statute constitutes a tort.

3. The association had the burden of proving its actual damage with reasonable certainty. While a party cannot recover remote, contingent, or speculative damages in a tort action, nominal damages are generally sufficient to sustain a cause of action. Actual monetary damage is not an element of a cause of action for a breach of the duties under MCL 559.208(9).

4. While the possibility of a legal remedy exists for a violation of the statute, a plaintiff must still prove entitlement to the specific remedy requested, in this case money damages in the amount secured by the association's assessment lien against the condominium and associated interest, costs, and attorney fees. The association argued that with notice of the foreclosure, it could have made efforts to preserve its lien. Whether those efforts would

have succeeded, however, is unknown. If they had been unsuccessful, the association would have had to either purchase the property at the foreclosure sale or redeem it. The association had the opportunity to do both but did neither. Its lien was extinguished the same as it would have been had it received proper notice and failed in its efforts to avert foreclosure. Whether the amount secured by the association's lien was recoverable would depend on many variables, and in light of the facts of this case, an award in the amount of the association's assessment lien constituted an impermissible award of remote, contingent, or speculative damages.

5. Because Countrywide had a statutory duty to timely notify the association of the foreclosure and breached its duty, the plaintiff was entitled to an award of nominal damages.

Judgment vacated and case remanded for entry of a judgment of nominal damages only.

CONDOMINIUMS — NOTICE OF FORECLOSURE — STATUTORY DUTIES — ACTIONS FOR VIOLATIONS OF STATUTORY DUTIES — PRIVATE RIGHTS OF ACTION — WORDS AND PHRASES — LEGAL RECOURSE.

The Condominium Act requires a mortgagee to give notice of foreclosure to a condominium association; a breach of this duty to notify is a tort for which the statute provides "legal recourse," that is, a private right of action for the association's actual damage (MCL 559.208[9]).

Meisner & Associates, P.C. (by *Jennifer Cordon Thor* and *Robert M. Meisner*), for the plaintiff.

Trott & Trott, P.C. (by *Charles L. Hahn* and *Michelle K. Clark*), for the defendant.

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

PER CURIAM. Defendant appeals as of right a judgment in plaintiff's favor that includes the amount secured by plaintiff's lien, as well as interest, costs, and attorney fees, in this case arising from defendant's violation of the foreclosure notice provision of MCL 559.208(9). We vacate the judgment and remand for entry of a judgment in plaintiff's favor for nominal damages only.

Defendant held a mortgage by assignment on a condominium purchased by Roselene Carter. On January 19, 2006, pursuant to MCL 559.208, plaintiff recorded a lien against the unit for nonpayment of condominium assessments in the amount of $2,370, exclusive of interest, late charges, attorney fees, and costs. On May 16, 2006, defendant foreclosed on its mortgage by public sale. Defendant was the highest bidder, and the property was transferred to it by a sheriff's deed. On February 2, 2007, plaintiff filed this action against defendant, alleging that defendant had failed to give it proper notice of foreclosure, in violation of MCL 559.208(9). In particular, plaintiff was notified of the foreclosure sale on May 16, 2006, the same day as the foreclosure sale, which was insufficient notice and deprived plaintiff of valuable rights.

Subsequently, plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that plaintiff did not receive proper notice of the foreclosure sale in violation of MCL 559.208(9), which required that plaintiff receive notice of the sale within 10 days after the first publication of notice. As a consequence, plaintiff argued, it was precluded from preserving its lien interest, causing it to suffer damages in the amount of $5,237.63, plus interest, attorney fees, and costs.

In opposition, defendant argued that plaintiff's claim that the lack of notice deprived it of the ability to preserve its lien was without merit. To preserve its lien, plaintiff had to either purchase the property at the foreclosure sale or redeem the property. After the sale, defendant presented plaintiff with the opportunity to purchase the sheriff's deed, which plaintiff refused. Plaintiff also failed to redeem the property, and its lien was extinguished on November 15, 2006. Plaintiff's

statutory legal claim against Carter for all unpaid assessments and recoverable fees and costs had not been impaired. Accordingly, defendant argued, it was entitled to summary disposition rather than plaintiff because plaintiff failed to state a cause of action under MCL 559.208(9). There simply were no legal damages. Even if plaintiff had received timely notice of the foreclosure, the result would have been the same.

In its reply brief, plaintiff argued that the only issue in this case was whether defendant failed to give plaintiff the notice required by statute and that there was no genuine issue of material fact that defendant failed to give such notice. Thus, plaintiff was entitled to summary disposition with respect to liability, and the issue of damages remained to be litigated. Plaintiff argued that defendant's failure to give the statutory notice deprived plaintiff of various options regarding the protection of its lien. The purported options denied included "holding meetings, raising money, levying assessments, securing the necessary funds to redeem, negotiating with the co-owner to reinstate the mortgage, tendering mortgage payments on behalf of the co-owner, etc." Accordingly, plaintiff argued, because defendant clearly violated MCL 559.208(9) by failing to provide plaintiff the requisite notice, plaintiff was entitled to summary disposition on the issue of liability.

On June 20, 2007, the trial court heard oral arguments. Plaintiff argued that the reason for the notice provision in the statute was to provide condominium associations the opportunity to take action with regard to the potential loss of their secured interests in condominium units. As defendant admitted, defendant had failed to provide that notice. The extent of plaintiff's damages was irrelevant to the issue of defendant's liability under the statute; therefore, plaintiff was en-

titled to summary disposition with respect to the matter of liability, and the issue of damages could be determined at an evidentiary or other hearing.

In response, defendant argued that, under MCL 559.158, condominium liens are extinguished by the foreclosure and title vests, under MCL 600.3236, at the expiration of the redemption period. Thus, defendant claimed, plaintiff's arguments lacked merit. Defense counsel admitted that defendant had not complied with the notice provision of the statute. However, counsel argued, the only legal recourse plaintiff had was redemption. The court then questioned defense counsel, asking, "And you acknowledge you did not give notice within ten days?" Defense counsel responded, "That's correct." Then the trial court ruled as follows:

> The issue before the Court is whether the Defendant failed to give the Plaintiff proper notice of foreclosure as required under the statute. Plaintiff has brought this motion under [MCR 2.116(C)(10)], which states that:
>
> "Except as to the amount of damages, where there's no genuine issue as to any material fact, the moving party is entitled to judgment or partial judgment as a matter of law."
>
> * * *
>
> In this matter, Defendant does not dispute and has provided no evidence to dispute the fact that they did not give Plaintiff notice ten days before [sic] the first published notice of foreclosure. Therefore, Plaintiff's Motion for Summary Disposition is granted as to liability only. The Court will hold a hearing to determine damages.

On July 10, 2007, the court entered an order granting plaintiff's motion for summary disposition.

On November 7, 2007, following a partial evidentiary hearing, the trial court rendered a verdict in plaintiff's

favor. The court noted that MCL 559.208(9) provides for "legal recourse" for failure to give the requisite notice, but does not further define "legal recourse." The court held that the statute was clearly intended to provide a legal remedy to the condominium association for the failure of notice and that "it would, thus, be illogical to allow the Defendant to foreclose out the association's lien." Further, the court held

> that when Defendant foreclosed Plaintiff's lien without proper notice, Plaintiff suffered damages in the amount secured by the lien. In addition, because the condominium bylaws provide that the association can recoup interest, costs and attorney fees incurred in the collection of unpaid assessments, those costs are also included in the Plaintiff's damages.
>
> Thus, the Court is satisfied that Defendant took title to the condominium subject to the lien.

On November 28, 2007, the court entered an order to that effect. This appeal followed.

First, defendant argues that the trial court erred when it granted plaintiff's motion for summary disposition on the issue of liability because plaintiff failed to establish that defendant's acts were the proximate cause of plaintiff's damages. After review de novo of the evidence to determine whether a material factual dispute exists, we disagree. See MCR 2.116(C)(10); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002).

Defendant claims that plaintiff asserted "a negligence cause of action based on a violation of civil statute, MCL 559.208(9)." But plaintiff did not assert a negligence cause of action. Plaintiff merely alleged in its complaint that defendant had pursued a course of conduct in violation of its statutory duties under MCL

559.208(9): namely, defendant failed to give the required notice of foreclosure. See, e.g., *Lash v Traverse City*, 479 Mich 180, 191; 735 NW2d 628 (2007). Defendant, through its counsel, admitted that it had violated MCL 559.208(9). Accordingly, the trial court held that there was no genuine issue of material fact that defendant violated the statute and granted plaintiff's motion for summary disposition, limited to the issue of liability. See MCR 2.116(C)(10). We agree with that decision. Thus, defendant's claim is without merit; this was not a negligence action.

Next, defendant argues that the trial court erroneously interpreted the term "legal recourse," as that term is used in MCL 559.208(9), because the court imposed "absolute liability in the amount of the Association's lien." We agree.

The relevant part of MCL 559.208(9) provides: "Failure of the mortgagee to provide notice as required by this section shall only provide the association with legal recourse and will not, in any event, invalidate any foreclosure proceeding between a mortgagee and mortgagor." With regard to its interpretation of this provision, the trial court held as follows:

> It is clear that the legislature stated that the foreclosure sale between the mortgagor and the mortgagee would not be invalidated. However, it is also clear that it intended to provide a legal remedy to the association, and it would, thus, be illogical to allow the Defendant to foreclosure out the Association's lien.
>
> When Defendant sought to foreclose Plaintiff's lien without proper notice, Plaintiff suffered damages in the amount secured by the lien. Because the condominium bylaws provide that the association can recoup interest, costs and attorney fees incurred in the collection of unpaid assessments, those costs, including the costs of the within litigation, are also included in Plaintiff's damages and secured by Plaintiff's lien.

Defendant took title to the condominium unit subject to Plaintiff's lien.

After review de novo of this issue of statutory interpretation, we disagree with the trial court's reasoning. See *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). Our primary goal with regard to statutory interpretation 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).

Defendant does not dispute that MCL 559.208(9) provides for a private right of action for its violation. The statute states: "Failure of the mortgagee to provide notice as required by this section shall only provide the association with legal recourse . . . ." That is, the failure to abide by the notice requirements of this civil statute constitutes a civil wrong—a tort—for which a civil action may be instituted in an effort to pursue a legal remedy. See, e.g., Prosser & Keeton, Torts (5th ed), § 1, pp 1-7; *Tate v Grand Rapids*, 256 Mich App 656, 660; 671 NW2d 84 (2003). The statute does not, however, prescribe the remedy for its violation. The remedy requested by plaintiff in this case was money damages in the amount secured by its assessment lien against the condominium, plus associated interest, costs, and attorney fees.

In accordance with tort law principles, then, plaintiff had the burden of proving its actual damage with

reasonable certainty. See *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). Remote, contingent, or speculative damages cannot be recovered in Michigan in a tort action. *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966). However, nominal damages are generally sufficient to sustain a cause of action. See, e.g., *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 107; 706 NW2d 843 (2005). "Nominal damages are those damages recoverable where plaintiff's rights have been violated by breach of contract or tortious injury, but no actual damages have been sustained or none can be proved." 7 Michigan Civil Jurisprudence, Damages, § 9, p 313. For example, the law infers some damage—at least nominal damage—from the breach of a contract, *Vandenberg v Slagh*, 150 Mich 225, 229; 114 NW 72 (1907), and from the infringement of a legal right, such as by trespass to land, *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999).

Defendant admitted that it did not provide plaintiff with the notice required under MCL 559.208(9); thus, it breached its statutory duty to do so. A cause of action exists regardless of whether a plaintiff proves that it suffered actual monetary damage as a result of the violation, i.e., actual monetary damage is not an element of this cause of action. The plaintiff could have merely suffered the loss of an opportunity to purchase the property at the public sale. The real dispute in this case is whether plaintiff was entitled to recover as damages the amount secured by its assessment lien. The trial court held that plaintiff was so entitled because the statute clearly intended to provide such a plaintiff with a legal remedy. Although the possibility of a legal remedy exists by this statutory authority, a plaintiff must still prove entitlement to the specific remedy requested.

Defendant argues that, because plaintiff's lien was subordinate to defendant's lien, the foreclosure of defendant's mortgage—with or without notice—extinguishes that lien by operation of MCL 559.158. Thus, defendant argues, the legal remedy plaintiff sought, and the trial court provided, was not a proper remedy. Plaintiff argues, however, that if it had been notified about the foreclosure, it could have instituted efforts to preserve its lien. These proposed efforts included "holding meetings, raising money, levying assessments, securing the necessary funds to redeem, negotiating with the co-owner to reinstate the mortgage, tendering mortgage payments on behalf of the co-owner, etc." But clearly, whether these proposed efforts would have been undertaken or even fruitful is unknown. Plaintiff does not appear to have had a formal procedure in place to deal with such situations.

If plaintiff's efforts to avert the foreclosure had been unsuccessful, it is undisputed that to preserve its lien rights, plaintiff would have had to either purchase the property at the foreclosure sale or redeem the property. Accordingly, in the situation in which a defendant foreclosed on its mortgage without the requisite statutory notice to a plaintiff, the remedy sought through "legal recourse" could be related to the availability of these lost opportunities. But, in this case, plaintiff had the opportunity to do both and did neither. Thus, plaintiff's lien was extinguished the same as it would have been if plaintiff had received proper notice of the foreclosure and failed in its efforts to avert the foreclosure. In other words, the amount secured by plaintiff's lien may or may not have been recoverable—it would depend on plaintiff's actions between the time it received the requisite notice and the time of foreclosure, as well as several other variables. Therefore, we conclude that an award in the amount of plaintiff's assess-

ment lien constituted an impermissible award of remote, contingent, or speculative damages. See *Sutter*, *supra* at 86; *Hofmann*, *supra* at 108. Thus, we reverse the trial court's award of such damages and the associated award of "interest, costs and attorney fees incurred in the collection of unpaid assessments . . . ."

However, because defendant had a statutory duty to timely notify plaintiff of the foreclosure and breached its duty, we conclude that plaintiff was entitled to an award of nominal damages. In so holding, we do not rule out the possibility of a factual scenario existing whereby a plaintiff in this situation could establish that it suffered actual damage because of the lack of notice. It just has not been established in this case. Further, plaintiff is not without a legal remedy with regard to the unpaid assessments. As set forth in the Condominium Act, including MCL 559.208(5), plaintiff can file a legal action against the co-owner of the unit, Carter, who failed to pay the assessments, to secure a money judgment in the amount of the unpaid assessments, as well as other amounts deemed owing under the applicable contract and law.

In summary, MCL 559.208(9) permits "legal recourse" for its violation. "Legal recourse" can include the filing of a civil action that seeks an award of monetary damages. To recover such damages, the plaintiff must prove its actual damage with reasonable certainty. Remote, contingent, or speculative damages cannot be recovered. If actual damage is not sufficiently proved, an award of nominal damages in the plaintiff's favor is proper. In this case, plaintiff sought, and the trial court awarded, damages in the amount secured by plaintiff's assessment lien, plus associated interest, costs, and attorney fees. Plaintiff failed to establish that it was entitled to those damages. An award of nominal

damages, however, is appropriate in this case. In light of our resolution of this matter, we need not consider defendant's other issues on appeal.

We vacate the trial court's judgment and remand for entry of a judgment in plaintiff's favor for nominal damages only. We do not retain jurisdiction.

MANSKE v DEPARTMENT OF TREASURY

Docket No. 281988. Submitted February 4, 2009, at Lansing. Decided February 17, 2009, at 9:00 a.m. Leave to appeal sought.

Craig Manske, Wolverine V LP, and others brought actions in the Court of Claims against the Department of Treasury disputing the department's treatment for single business tax purposes of the gain that resulted from executing a deed in lieu of foreclosure on a loan. Wolverine sought a refund of taxes and interest paid under protest after the department assessed a single business tax deficiency because Wolverine did not include the gain in its single business tax base. The Court of Claims, William E. Collette, J., granted the department summary disposition. Wolverine appealed, alleging, in part, that the execution of the deed was a casual transaction and the resulting gain should not have been included in its single business tax base. The Court of Appeals, HOEKSTRA, P.J., and NEFF and SCHUETTE, JJ., agreed and reversed and remanded for further proceedings consistent with its opinion. The Court also declined to address two other issues raised by Wolverine on appeal. 265 Mich App 455 (2005). On remand, the Court of Claims disagreed with the department's assertion that it could offset a refund for the tax improperly collected by the amount of the unused capital acquisition deduction (CAD) granted for the same property and held that it was bound by the law of the case doctrine to order a full refund without an offset to recapture any unused CAD as a matter of law. The department appealed.

The Court of Appeals *held*:

1. The prior panel of the Court of Appeals did not directly or by implication hold that the defendant could not offset the refund by the amount of the unused CAD. The Court of Claims erred in concluding otherwise.

2. The Single Business Tax Act does not provide that adjustment for CAD recapture does not apply to a transfer that qualifies as a casual transaction. The CAD recapture provisions apply to the transfer at issue in this case. Wolverine did receive some benefit from giving the deed in lieu of foreclosure, a CAD triggering event.

Reversed and remanded for further proceedings.

TAXATION — SINGLE BUSINESS TAX — DEDUCTIONS — CAPITAL ACQUISITION DEDUCTIONS — CASUAL TRANSACTIONS.

The Single Business Tax Act allows a taxpayer a full deduction for the cost of an asset in the year of acquisition, and the taxpayer must make an adjustment to its tax base in subsequent years to reflect the depreciation for that year; if the asset is transferred before it is fully depreciated, the unused portion of the capital acquisition deduction must be recaptured; adjustments for recapture of capital acquisition deductions apply to a transfer that qualifies as a casual transaction (MCL 208.4[1], 208.9[4], 208.23[a], 208.23b[a]).

Honigman Miller Schwartz and Cohn, LLP (by *Patrick R. Van Tiflin, Daniel L. Stanley*, and *Brian T. Quinn*), for Wolverine V LP.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for the Department of Treasury.

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

PER CURIAM. In this dispute over the proper application of the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*,[1] defendant Department of Treasury (the Department) appeals as of right the Court of Claims decision and order compelling the Department to refund plaintiff Wolverine V LP $146,220 in taxes plus interest. On appeal, we must determine whether the Court of Claims correctly concluded that it was bound by this Court's prior decision in the same case under the law of the case doctrine. Specifically, we must determine whether the previous panel of this Court impliedly determined that the Department could not offset a refund for tax improperly collected on the gain from a casual property transfer by the amount of the unused capital acquisi-

[1] The Legislature repealed the SBTA for tax years beginning after December 31, 2007. See 2006 PA 325; see also MCL 208.151(a).

tion deduction (CAD) granted for the same property. Because the prior panel of this Court did not impliedly make such a determination, the Court of Claims erred when it concluded that it had to deny the Department's request for an offset under the law of the case doctrine. Further, we conclude that the Department was entitled to recapture the unused CAD as a matter of law. For these reasons, we reverse the Court of Claims order and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In a prior appeal in this Court, Wolverine argued that the Department wrongfully assessed a tax deficiency against it when it included the gain on real property transferred in lieu of foreclosure. *Manske v Dep't of Treasury*, 265 Mich App 455, 456-457; 695 NW2d 92 (2005). Wolverine argued that the transfer constituted a "casual" transaction under the SBTA, see MCL 208.4(1), and, as a result, the gain from that transaction could not be included in Wolverine's single business tax (SBT) base. *Manske*, 265 Mich App at 457. This Court concluded that the transfer at issue clearly qualified as a casual transaction under MCL 208.4(1) and that the "resulting gain should not have been included in [Wolverine's] SBT base for 1992." *Manske,* 265 Mich App at 462. For this reason, the Court reversed the Court of Claims grant of summary disposition in favor of the Department and remanded the case for further proceedings.

On remand, the Department refused to agree to a final judgment. As a result, Wolverine moved for summary disposition and asked the Court of Claims to order the Department to pay a refund. The Department acknowledged that this Court had determined that the

real estate transfer was a casual transaction that should not have been included in Wolverine's SBT base, but noted that this Court did not directly address whether the Department was entitled to recapture the unused CAD granted for the same property. The Department argued that it should be permitted to offset this amount against the total refund.

The Court of Claims disagreed. The Court of Claims reasoned that this Court could have addressed the question regarding CAD and setoff, but chose not to. The Court of Claims noted that this Court typically will rule on only one issue when it feels that that issue will resolve all questions. For this reason, the Court of Claims concluded that it was bound by the law of the case doctrine to order a full refund without an offset for the recapture of any unused CAD.

II. LAW OF THE CASE

We review de novo a determination whether the law of the case doctrine applies. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine generally provides that a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000).

In the previous appeal, this Court determined that, under the facts of the case, Wolverine's transfer of the property at issue was a casual transaction. For this reason, the Court concluded that the gain on the property should not have been included in Wolverine's SBT base. This Court did not directly address whether Wolverine was improperly assessed $8,251,603 for the unused CAD associated with the property. Instead, the Court noted that the Court of Claims erred when it

granted summary disposition in favor of the Department and remanded the case for further proceedings. This Court's decision to remand the case without addressing the CAD issue does not suggest that this Court concluded that the CAD recapture provisions of the SBT did not apply to casual transactions. Indeed, had the Court determined that the CAD recapture provisions did not apply to casual transactions, the Court could have stated as much and reversed and remanded for entry of a judgment in favor of Wolverine. Instead, the Court apparently chose to let the Court of Claims determine whether the CAD recapture provisions apply to casual transactions. Thus, under the law of the case doctrine, the Court of Claims had to treat the transfer as a casual transaction, but it could still appropriately consider the proper treatment of the CAD recapture provisions. Therefore, the Court of Claims was not bound to hold that the CAD recapture provisions of the SBT did not apply to a property that is ultimately transferred under a casual transaction.

III. UNUSED CAD RECAPTURE

The Department next argues that Wolverine was still obligated to repay any unused CAD for the property at issue even though the ultimate transfer qualified as a casual transaction. We review de novo both a trial court's decision on a motion for summary disposition and the proper interpretation of a statute. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003); *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

The dispute in this case is whether Wolverine had to make an adjustment to its SBT adjusted taxable base to include depreciation recapture under MCL 208.9(4).

Under MCL 208.23(a), a taxpayer was allowed a full deduction for the cost of an asset in the year of acquisition:

> After allocation as provided in section 40 or apportionment as provided in section 41, the tax base shall be adjusted by the following:
>
> (a) For a tax year ending before March 31, 1991 for which subdivision (c) is not in effect, deduct the cost, including fabrication and installation, paid or accrued in the taxable year of tangible assets of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes excluding costs of assets that are defined in section 1250 of the internal revenue code.

After taking this deduction in the first year, the taxpayer was expected to make an adjustment to its tax base in subsequent years to reflect the depreciation for that year. See MCL 208.9(4)(c). If the property was transferred before it was fully depreciated, the unused portion of the CAD must be "recaptured":

> After allocation as provided in section 40 or apportionment as provided in section 41, the tax base shall be adjusted by the following:
>
> (a) If the cost of an asset was paid or accrued in a tax year ending before March 31, 1991 . . . add the gross proceeds or benefit derived from the sale or other disposition of the tangible assets described in section 23(a) minus the gain and plus the loss from the sale reflected in federal taxable income and minus the gain from the sale or other disposition added to the tax base in [MCL 208.9(6)]. This addition shall be multiplied by a fraction, the numerator of which is the payroll factor plus the property factor and the denominator of which is 2. [MCL 208.23b(a).]

Nothing in the provisions of MCL 208.23b(a) suggests that the adjustments for CAD recapture do not apply to

transfers that qualify as a casual transaction. And this Court will not read such an exception into the statute. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Therefore, the CAD recapture provisions apply to the transfer at issue here.

Nevertheless, Wolverine argues that it did not experience a CAD triggering event, because it did not receive proceeds from the disposition of the property and did not receive a benefit from giving the deed in lieu of foreclosure. Although Wolverine did not receive cash, it clearly received a benefit. Wolverine was liable for a debt of $12,964,083 on a property with an adjusted basis of $8,251,603. By avoiding foreclosure, Wolverine reduced its overall liability and saved the expenses associated with foreclosure. Thus, despite the fact that Wolverine lost its sole asset and went out of business, it still received some benefit from the transfer.

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

MCINTOSH v MCINTOSH

Docket No. 285528. Submitted October 7, 2008, at Grand Rapids. Decided February 17, 2009, at 9:05 a.m.

Steven D. McIntosh obtained a divorce from Kristin R. McIntosh in the Kalamazoo Circuit Court, Family Division, Patricia N. Conlon, J. The defendant was awarded sole legal and physical custody of the parties' minor child. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court properly considered the friend of the court's psychological evaluation, which recommended joint legal and physical custody, in light of all the other evidence presented and did not err by determining that the recommendation was not appropriate. The trial court did not err by refusing to implement the recommendation.

2. The trial court did not err in its evaluation of the best-interest factors provided in MCL 722.23. The trial court did not abuse its discretion by finding clear and convincing evidence to award the defendant sole legal and physical custody of the child.

3. The Court of Appeals lacks jurisdiction to consider whether the trial court erred by entering a postjudgment order awarding the defendant appellate attorney fees because the plaintiff failed to file a claim of appeal from that order.

Affirmed.

PARENT AND CHILD — CHILD CUSTODY — EVIDENCE — PSYCHOLOGICAL EVALUATIONS.

Trial courts may consider psychological evaluations in making child-custody determinations but are not required to adopt any recommendations contained in them; the Child Custody Act requires a court to independently determine what custodial placement is in the best interest of a child (MCL 722.21 *et seq.*).

James D. Wines for the plaintiff.

James C. Boerigter for the defendant.

Before: MARKEY, P.J., and SAWYER and K. F. KELLY, JJ.

K. F. KELLY, J. In this child custody dispute, we must determine the proper role of, and the proper weight a trial court is to give, psychological evaluations in determining custody in the child's best interests. Plaintiff appeals as of right the judgment of divorce awarding defendant sole legal and physical custody of the parties' minor child. On appeal, plaintiff argues that the trial court erred by failing to implement, and essentially adopt without question, the friend of the court's (FOC) psychological evaluation recommending joint legal and physical custody. Because we conclude that such evaluations are but one piece of evidence amongst many, and are not by themselves dispositive in determining custody, we conclude in light of all the other evidence submitted in this matter that the trial court did not err by refusing to implement the FOC's recommendation. Because plaintiff's additional arguments also fail, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties met in the early 1990s when defendant was plaintiff's boss at a Hot 'n Now business. At the time, defendant had a son, Keegan, from a previous relationship. The parties lived together before getting married on October 2, 2004. Their son, Jordan, was born on May 5, 2006.

On July 5, 2007, plaintiff filed his verified complaint for divorce and moved for an ex parte order awarding him sole legal and physical custody of Jordan. He alleged that the parties separated on May 31, 2007, and that because of Keegan's presence in the home, he feared for his and Jordan's safety. On July 5, 2007, the trial court entered an ex parte order awarding the

parties joint custody of Jordan, with Jordan's residence to be with plaintiff and for defendant to have reasonable parenting time. Defendant was precluded from overnight parenting time when Keegan was present.

On July 11, 2007, defendant filed an answer to the complaint and objections to the ex parte custody order. Defendant alleged that plaintiff failed to establish any conduct between Jordan and Keegan to support his alleged fear for Jordan's safety. Defendant also alleged that plaintiff had lied regarding their separation because plaintiff did not leave the marital residence until after the trial court entered the ex parte order, and that after plaintiff moved to his parents' home with Jordan he arbitrarily set terms for defendant's parenting time not set forth in the order. The trial court ultimately entered a consent order modifying the ex parte order to provide for an equal division of physical custody.

Numerous difficulties arose with respect to the parenting time schedule, resulting in several show cause hearings and in parenting time exchanges occurring at the local police station. The trial court referred the case to the Kalamazoo County FOC for a child custody and parenting time evaluation and recommendation. Laura Kracker, a limited license psychologist at Kalamazoo Psychology, L.L.C., performed psychological evaluations of the parties. In the final report, Kracker recommended that the parties continue to share joint legal and physical custody of Jordan.

After the custody and parenting time evaluation was completed, plaintiff moved to modify the consent order to grant him sole physical custody of Jordan. At the bench trial regarding the custody dispute,[1] the parties agreed that Kracker's written evaluation and recom-

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[1] Before trial, the parties reached a property settlement. The property division is not at issue in this appeal.

mendation would be admitted as a trial exhibit. Defendant testified that she wanted sole custody of Jordan, with parenting time for plaintiff, but would not be opposed to joint custody. She also requested that plaintiff pay her attorney fees. Plaintiff indicated that he wanted sole physical custody and joint legal custody of Jordan, but would try to facilitate Jordan's relationship with defendant.

On April 8, 2008, in a written opinion, the trial court awarded defendant sole legal and physical custody of Jordan. The trial court also granted defendant's request for attorney fees on the basis of the disparity in income between the parties. On April 28, 2008, the trial court entered a judgment of divorce incorporating the custody determination. The trial court then granted defendant's request for an additional $2,000 in attorney fees in anticipation of an appeal and entered a postjudgment order to this effect on May 15, 2008.

II. STANDARDS OF REVIEW

We apply three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994) *(Fletcher I)*. The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). This Court defers to the trial court's determinations of credibility. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); *Fletcher v Fletcher*, 229 Mich App 19,

25; 581 NW2d 11 (1998) *(Fletcher II)*. Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. *Fletcher I, supra* at 881. Third, discretionary rulings are reviewed for an abuse of discretion. *Id.* at 879; *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006).

A trial court's findings regarding each best interests factor are reviewed under the great weight of the evidence standard. *Berger*, *supra* at 705. The trial court's ultimate custody decision is reviewed for an abuse of discretion. *Id.* The overriding concern is the child's best interests. *Fletcher II*, *supra* at 29. When a party seeks joint custody, the trial court must also consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b).

III. PSYCHOLOGICAL EVALUATION

Plaintiff argues that the trial court erred by "ignoring" and refusing to implement the recommendation from the psychological evaluation, which recommended continuing the shared 50/50 custodial arrangement. We disagree. Plaintiff mistakes the proper use and role of a psychological evaluation. While trial courts may consider psychological evaluations, and, at their discretion, afford them the weight they deem appropriate in accord with the Michigan Rules of Evidence, psychological evaluations are not conclusive on any one issue or child custody factor. The ultimate resolution of any child custody dispute rests with the trial court. See *Harvey v Harvey*, 470 Mich 186, 187; 680 NW2d 835 (2004) ("[T]he Child Custody Act [MCL 722.21 *et seq.*] requires the circuit court to determine independently what custodial placement is in the best interests of the children.") (Footnote omitted.)

In declining to adopt the recommendation of the FOC report and psychological report, the trial court stated:

> This case had a lot of contact with the Court since the summer of 2007. And as cases go, documents were filed by both sides and there were conferences by both sides. What was very evident throughout this entire case from the very beginning of the filing of the complaint of—for divorce, up until the closing argument of counsel was that the father, Plaintiff in this case, was on a very focused mission to remain in control of the case and at all costs the child of the parties to the extent that he denied the child seeing the mother in the beginning of the case and for periods of time until an order was entered saying that the mother was to be allowed to see the child.
>
> I will confess that none of that quite hit home to this judge until the actual trial, until I heard the parties testify. I was greatly impacted by the testimony in this case in my decision and the evidence. As far as I understand, the law in Michigan, there is nothing that says that a judge making a custody decision has to rubberstamp what the Friend of the Court evaluation does and, in fact, sadly what I am learning by my number of years on the bench is that many times these evaluators that we trust to give us an open-minded opinion, what they end up doing is rubberstamping temporary orders that are issued by Courts on very limited information or temporary orders that are entered because the parties agree on something in the beginning of the case.
>
> * * *
>
> I was not expecting the testimony or the evidence that I got at trial. At the most, I think at the most, [plaintiff's counsel] would have to be—acknowledge this, at the most, I said probably will follow the recommendation of joint. Probably, because that's very often what I do, and if they had a 50/50 situation, that's probably the way the evidence would be. That's probably the most that I said because that's how I saw it at the time before trial, and I fully expected that the end result, that we would have wasted our time at trial, I fully expected that the end result would be that I would say, okay,

> I've heard all this testimony. Now the father's gonna have 50-percent of the time and mother's gonna have 50-percent of the time, which was recommended.
>
> Instead, when I reflected on the testimony and the evidence, and went back to the pleadings in this case, I was shocked. Totally shocked to see that it was not meritorious at all to agree with the Friend of the Court evaluation, and there's nothing under the law that says I have to agree . . . .

We commend the learned trial court's reasoning in this matter. Although the parties' agreement to admit Kracker's report allowed the trial court to *consider* the psychological evaluation, the trial court, as it recognized, was not in any way compelled to adopt its recommendation. Rather, a trial court may consider all the competent evidence presented at the hearing in arriving at its own custody decision and give each the weight as it deems appropriate. See *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989) (a trial court has a duty to arrive at its own custody decision on the basis of competent evidence presented at trial). Here, the trial court properly considered the psychological evaluation in light of all the other evidence presented and determined that the FOC's recommendation was not appropriate. The trial court did not err by refusing to implement the FOC's recommendation.

IV. AWARD OF SOLE LEGAL AND PHYSICAL CUSTODY

Plaintiff next contends that the trial court erred in awarding defendant sole legal and physical custody because there was insufficient clear and convincing evidence presented to alter the existing joint custody arrangement.[2]

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[2] When resolving a custody dispute between parents, a trial court must first determine if there is an established custodial environment. MCL 722.27(1)(c) provides that "[t]he custodial environment of a child is established if over an appreciable time the child naturally looks to the

He also asserts that the trial court erred in its evaluation of the best interests of the child factors in reaching its custody determinations. We find no error and affirm the award of sole legal and physical custody to defendant.

MCL 722.28 governs child custody disputes on appeal:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

Accordingly, absent error in the lower court proceedings, we may not substitute our judgment for that of the trial court.

In order to resolve a child custody dispute, a trial court must evaluate the best interests of the child in light of the factors in MCL 722.23:

> "[B]est interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (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.

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custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." An established custodial environment cannot be changed unless the court is presented with clear and convincing evidence that a change of custody is in the child's best interests. MCL 722.27(1)(c); *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). Here, the trial court determined that an established custodial environment existed with both parties in light of the original ex parte order that was amended by consent to allow each party 50/50 parenting time and the trial court applied the clear and convincing evidence standard of proof.

(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.

Plaintiff has not challenged the trial court's finding that the parties were equal with respect to a number of best interests factors in MCL 722.23. Specifically, plaintiff only challenges the trial court's findings with respect to best interests factors f, j, k, and *l*, primarily on the basis of the trial court's finding that plaintiff is an alcoholic. Plaintiff asserts that there is not a scintilla of competent evidence to establish his alcoholism. We disagree.

Plaintiff has a long history of alcohol use. Defendant testified that plaintiff's alcohol use was a problem even before the marriage. She testified that he became violent and angry when he drank. She found out when they were seeing a marriage counselor that plaintiff was hiding liquor at the marital residence. In the beginning of 2007, plaintiff admitted that he was an alcoholic and he had a relapse in May 2007. On one occasion, defendant found plaintiff passed out in bed with a bottle of vodka next to him. On the date of the "first exchange" for defendant to have overnight parenting time with Jordan, she could tell that plaintiff had been drinking from the way that he tossed Jordan in the air and because she could "smell it" and saw that his eyes were glassy. Plaintiff also testified that he abused alcohol for a while, but only classified a four- to six-month period as a "problem." He conceded hiding alcohol and attending Alcoholics Anonymous (AA) meetings for seven or eight months beginning in January 2007. He also planned to attend additional AA meetings.

The trial court properly considered this evidence in evaluating factor f, "[t]he moral fitness of the parties involved." MCL 722.23(f). Our Supreme Court has indicated that having a drinking problem is a type of conduct that bears on how one functions as a parent, which can be considered under the moral fitness factor. *Fletcher I*, *supra* at 887 n 6. Giving deference to the trial court's assessment of the credibility of witnesses, its finding that this factor should favor defendant on the basis of plaintiff's unresolved alcohol problem is not against the great weight of the evidence.

Plaintiff's challenge to the trial court's finding on factor j, "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," MCL 722.23(j), is without merit. The trial court mentioned plaintiff's "controlling behavior and alcoholic behavior, at this point" in finding that plaintiff "would do everything in his power to interfere with and upset the parent/child relationship of the mother." Moreover, the trial court considered the entire case history in concluding that this factor favored defendant. Plaintiff was found to have withheld Jordan from defendant without cause, to have reported defendant to the police and protective services, and, "overall, [to have] behaved in a manner designed to cause upset, and influence the mother/child relationship in this case." The trial court made other findings with respect to the proceedings, which included its entry of an ex parte order in November 2007 for plaintiff to return Jordan to defendant. Considering the evidence as a whole, the trial court's decision to weigh factor j in favor of defendant is not against the great weight of the evidence. There was record evidence to support the trial court's finding that plaintiff was unwilling or unable to facilitate and encourage a close relationship between defendant and Jordan.

With respect to factor k, "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child," MCL 722.23(k), the trial court found:

> There was evidence that there was at least one incident of domestic violence in the home perpetrated by the father against the mother. This is not surprising given his testimony regarding his relationship with alcohol. There was at least one conviction[3] for domestic violence in the history of their relationship. Although the father tried to show that the mother had violent behavior, the only testimony was

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[3] This was actually an adjudication from the juvenile court, resulting from a physical altercation between Keegan and plaintiff.

> that she threw a glass at the father on one occasion. There was no other testimony of domestic violence perpetrated by the mother against the father.
>
> The mother testified that the father had been abusive throughout the marriage, which would explain in part the apparent traumatized behavior of the older boy in the home.

Considering defendant's testimony that she was physically assaulted by plaintiff, as well as plaintiff's own testimony admitting that he was "probably" physically assaultive toward defendant on two occasions, we find no basis for disturbing the trial court's finding that the domestic violence factor favored defendant.

Factor *l* is "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23(*l*). Factor *l* is a "catch-all" provision. *Ireland v Smith*, 451 Mich 457, 464 n 7; 547 NW2d 686 (1996). Contrary to plaintiff's argument on appeal, the trial court did not expressly weigh this factor in favor of defendant. Rather, the court used factor *l* to comment on various matters, including the parties' love for their son and plaintiff's conduct during this case, which were already considered under other factors or affected its decision to change the joint custody arrangement. The trial court also used factor *l* to comment on arguments raised at trial regarding defendant's parenting skills with respect to her teenaged son, finding that plaintiff also had substantial involvement in the teenaged son's life before and after plaintiff became his stepfather, but did not weigh any "parenting skills" factor in favor of either party. It also addressed relevant circumstances when assessing the "[a]ny other factor" in MCL 722.23(*l*). It found that plaintiff, "failed, to this date, to understand or admit how inappropriate his behavior was at the time of the initial filing of this case, and how it resulted in an act of cruelty perpetrated on the minor

child." Overall, the trial court's findings with respect to factor *l* are consistent with its decision to weigh the parties the same with respect to the love and affection factor in MCL 722.23(a) and the "guidance" factor in MCL 722.23(b), but to weigh factor j in favor of defendant. We are not persuaded that the trial court's findings with respect to factor *l* are against the great weight of the evidence.

Considering the circumstances and evidence presented, the court did not abuse its discretion by finding clear and convincing evidence to award defendant sole legal and physical custody. *Berger*, *supra* at 705.

V. APPELLATE ATTORNEY FEES

Plaintiff also argues that the trial court erred in awarding defendant appellate attorney fees. MCR 3.206(C)(2) allows a trial court to award appellate attorney fees. *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003). The party requesting attorney fees must show that the attorney fees were incurred and that they were reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005). A trial court's grant of attorney fees is reviewed for an abuse of discretion. *Id.* at 164. However, because plaintiff failed to file a claim of appeal from the postjudgment order awarding appellate attorney fees, we conclude that the Court lacks jurisdiction over this issue.

"The question of jurisdiction is always within the scope of this Court's review . . . ." *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004). This Court has jurisdiction of an appeal as of right filed by an aggrieved party from a "final judgment or final order . . . ." MCR 7.203(A)(1). MCR 7.202(6)(a)(i) and (iv) defines "final judgment" or "final order" in a civil case as "the first judgment or order that disposes of all the

claims and adjudicates the rights and liabilities of all the parties," or "a postjudgment order awarding or denying attorney fees and costs . . . ." An appeal as of right must be filed within "21 days after entry of the judgment or order appealed from[.]" MCR 7.204(A)(1)(a). The filing of the claim of appeal and the entry fee vests this Court with jurisdiction in an appeal as of right. MCR 7.204(B)(1) and (2).

Here, the trial court's May 15, 2008, postjudgment order required plaintiff to pay defendant attorney fees of $2,000 in anticipation of appeal. Plaintiff never appealed this postjudgment order. Instead, plaintiff merely argued in his claim of appeal from the judgment of divorce that the trial court erred in awarding attorney fees. Because plaintiff was required to file a separate claim of appeal from the postjudgment order and he did not, we lack jurisdiction to consider this issue.

VI. EX PARTE ORDER

With respect to plaintiff's general challenge to the trial court's remarks concerning the ex parte custody order entered on July 5, 2007, we conclude that plaintiff has failed to sufficiently brief this issue for purposes of appellate consideration. *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Therefore, we consider this argument abandoned on appeal. *Id.*

VII. TRIAL COURT'S ADMONISHMENT OF PLAINTIFF'S RELATIVES

Finally, plaintiff's argument that the trial court abused its discretion by "dressing down" two women for interfering with the parties' parenting time is not properly before us because plaintiff has not identified the legal or factual basis for his argument as MCR

7.212(C)(7) requires. This Court will not search the record for factual support for a party's claim. *Derderian v Genesys Health Care System*s, 263 Mich App 364, 388; 689 NW2d 145 (2004). Further, this Court has "held repeatedly that appellants may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims; nor may they give issues cursory treatment with little or no citation of supporting authority." *VanderWerp*, *supra* at 633.

Affirmed.

COOPER v JENKINS

Docket No. 283506. Submitted February 10, 2009, at Lansing. Decided February 24, 2009, at 9:00 a.m.

Phillip D. Cooper brought an action in the Wayne Circuit Court against Ravis Jenkins, Mary L. Woodson, and Farm Bureau Insurance Company after he was injured when an uninsured vehicle owned by Woodson and driven by Jenkins struck an uninsured vehicle owned by Dalana Norman that Cooper was driving. Farm Bureau, which had been assigned to Cooper's claim for no-fault personal protection insurance benefits, agreed to an award of damages for attendant care provided to Cooper by Norman, his girlfriend, if Farm Bureau's liability for such attendant care benefits can be established. Farm Bureau thereafter moved to strike the award of those damages, and the court, Robert L. Ziolkowski, J., denied the motion. Farm Bureau appealed.

The Court of Appeals *held*:

Norman's unlawful act of owning and permitting the operation of an uninsured motor vehicle, MCL 500.3102(2), does not absolve Farm Bureau of its obligation under the no-fault act to pay no-fault personal protection insurance benefits to Cooper for the attendant care services provided by Norman to Cooper following Cooper's injury in the automobile accident. The no-fault act uses mandatory language when describing an insurer's duty to pay benefits, but uses permissive language in describing an insurer's ability to seek reimbursement from an owner or registrant of an uninsured motor vehicle. Thus, Farm Bureau must pay the disputed benefits to Cooper but may seek reimbursement or indemnification by Norman pursuant to MCL 500.3177(1).

Affirmed.

The Thurswell Law Firm, PLLC (by *Cary M. Makrouer* and *Christina D. Davis*), for Phillip D. Cooper.

Anselmi & Mierzejewski, P.C. (by *Joseph S. Mierzejewski*), for Farm Bureau Insurance Company.

Amicus Curiae:

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

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

PER CURIAM. Defendant Farm Bureau Insurance Company appeals as of right from the trial court's order denying its motion to strike damages for attendant care. Because Farm Bureau's obligation to pay is a mandated fixed benefit to plaintiff alone, Farm Bureau may not bypass the legal process to enforce its right to reimbursement. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, Phillip Dean Cooper, was driving an uninsured vehicle owned by his girlfriend, Dalana Norman, when he was struck by defendant Ravis Jenkins, who was driving an uninsured vehicle owned by defendant Mary Louise Woodson. Plaintiff was badly injured, and his doctor prescribed attendant care. Because there was no applicable no-fault insurance policy, plaintiff's claim was assigned to Farm Bureau. After plaintiff sued for benefits, Farm Bureau moved to strike damages awarded for the attendant care provided by Norman, which the parties stipulated was $60,000. Farm Bureau argued that under the no-fault statutory scheme, an insurer assigned to pay benefits arising from an accident involving an uninsured motor vehicle has the right to seek reimbursement from the owner of that vehicle, MCL 500.3177(1), and that because an uninsured owner in this case was the very person to whom the attendant care benefits would be paid, it was illogical to require Farm Bureau to pay the benefits to Norman only to then sue her for reimbursement.

Plaintiff argued that Norman was not a party to the suit, that any dispute between Farm Bureau and Norman did not take away Farm Bureau's obligation to pay him benefits, and that the risk of nonrecovery should be placed on the insurance company. The trial court agreed, ruling that the statutory scheme dictates that the insurer is obligated to pay benefits but then can seek reimbursement from the uninsured owner. Accordingly, the trial court ordered Farm Bureau to pay $20,000 to plaintiff's attorney and place the remainder in escrow until Farm Bureau obtains a judgment against Norman.

Farm Bureau argued in this Court that under the statutes and caselaw, the owner of an uninsured vehicle is not entitled to no-fault benefits. MCL 500.3113(b); MCL 500.3173; *Belcher v Aetna Casualty & Surety Co*, 409 Mich 231, 261; 293 NW2d 594 (1980). Had Norman been an injured occupant of her uninsured vehicle, there would be no question that she would not be eligible for benefits. She would not have had a reasonable expectation of being paid by plaintiff; otherwise, she would be seeking recovery despite her illegal act of failing to maintain insurance coverage. Farm Bureau raises as further support the theory that the wrongful conduct rule precludes Norman from benefiting from her own wrongdoing, and adds the arguments that plaintiff has a duty to mitigate his damages by obtaining services from an individual who cannot gain by obtaining no-fault benefits from an assigned claims servicing insurer, and that Norman has a duty to mitigate her debt owed to Farm Bureau. Finally, Farm Bureau argues that it should not have to pay plaintiff's attorney $20,000 until it has exhausted its appellate rights. It has already posted a $75,000 bond; should plaintiff prevail on appeal, plaintiff's attorney will get his fee.

The trial court's decision involves statutory construction, which we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). Where the statute unambiguously conveys the Legislature's intent, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Industries)*, 468 Mich 109, 113; 659 NW2d 597 (2003).

Farm Bureau relies on several statutes in support of its argument. MCL 500.3113 provides, in part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

Under this statute, the injured owner of an uninsured vehicle is not eligible to be paid personal protection insurance benefits.[1] Furthermore, MCL 500.3175 provides, in relevant part:

> (1) . . . An insurer to whom claims have been assigned shall make prompt payment of loss in accordance with this act and is thereupon entitled to reimbursement by the assigned claims facility for the payments and the established loss adjustment cost . . . .
>
> * * *

[1] While this statute applies to no-fault policies, under MCL 500.3173, a person who is disqualified from receiving personal protection insurance benefits is also disqualified from receiving benefits under the assigned claims plan.

> (2) The insurer to whom claims have been assigned shall preserve and enforce rights to indemnity or reimbursement against third parties and account to the assigned claims facility therefor and shall assign such rights to the assigned claims facility upon reimbursement by the assigned claims facility.

Finally, MCL 500.3177(1) allows an insurer paying benefits in a case involving an uninsured vehicle to seek reimbursement from the owner of that vehicle:

> An insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the owner or registrant of the uninsured motor vehicle or from his or her estate.

These statutes do not support Farm Bureau's argument that it may unilaterally withhold benefits from a claimant on the basis of its perception that the service provider eventually would be required to reimburse or indemnify it. The statutes clearly use mandatory language when describing the insurer's duty to pay benefits, but use permissive language in describing the ability of an insurer to seek reimbursement. Nothing in the comprehensive statutory scheme allows for the insurer to withhold payment on the basis of the eligibility of any service provider; only the injured person's status is considered. The ability to "recover such benefits paid . . . from the owner or registrant of the uninsured motor vehicle," MCL 500.3177(1), does not by itself equate to having a *legal right* to indemnification.

While it may seem "illogical" for Farm Bureau to pay for a benefit provided by a person from whom it may then seek reimbursement, it is a matter of public policy best left to the Legislature's determination. The argument that the economy is causing more and more

people to forgo compulsory insurance clearly implicates public policy. It is up to the Legislature to decide if the assigned claims plan is better suited to payment of such benefits, or if the taxpayers in general should pay, or if the benefits should not be paid at all. Encouraging accident victims who would receive benefits if they sought professional attendant care to instead receive the care from family members is in accord with the public policy of this state. See *Van Marter v American Fidelity Fire Ins Co of America*, 114 Mich App 171, 180-181; 318 NW2d 679 (1982); *Reed v Citizens Ins Co*, 198 Mich App 443, 452; 499 NW2d 22 (1993), overruled on other grounds by *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 540 (2005). Balancing any conflict between these principles is not the proper role for this Court.[2]

Farm Bureau's "wrongful conduct" argument, raised for the first time on appeal, likewise does not change our analysis. It analogizes to the situation where treatment provided by an unlicensed physician is not a paid benefit under MCL 500.3157 (allowing charges by those "lawfully rendering treatment"). Yet, there is nothing unlawful about a friend or family member providing attendant care or replacement services. Norman's unlawful act was owning and permitting the operation of an uninsured vehicle, a misdemeanor under MCL 500.3102(2). It is the responsibility of the legal system, not the insurance industry, to enforce this statute.

Affirmed.

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[2] Nothing in this opinion should be interpreted as precluding Farm Bureau from employing appropriate legal measures to enforce any rights of reimbursement or collection it deems suitable against Norman. That being said, Farm Bureau must engage in the proper legal process, including but not limited to obtaining a judgment against Norman and then proceeding to collection.

AUTOALLIANCE INTERNATIONAL, INC v
DEPARTMENT OF TREASURY

Docket No. 282096. Submitted February 3, 2009, at Lansing. Decided February 24, 2009, at 9:05 a.m.

AutoAlliance International, Inc., a joint venture between the Ford Motor Company and Mazda Motor Corporation, brought an action against the Department of Treasury in the Court of Claims, William E. Collette, J., after the department denied the plaintiff's claims for a refund of taxes paid on motor fuel that the plaintiff claimed was exempt from the motor fuel tax because the plaintiff was an end user that used the fuel for nonhighway purposes. The Court of Claims granted summary disposition in favor of the department, ruling that the plaintiff failed to present evidence concerning the actual amount of fuel that it used for a nontaxable purpose. The plaintiff appealed, claiming a tax exemption for the entire 3.2 gallons of fuel that it placed in each vehicle to power the vehicle for final testing and quality control and to ensure that the vehicle did not run out of fuel during those procedures. The plaintiff's claim relates solely to the fuel placed in vehicles that were destined for out-of-state delivery.

The Court of Appeals *held*:

1. As interpreted in *DaimlerChrysler Corp v Dep't of Treasury*, 268 Mich App 528 (2005), whether a person qualifies as an "end user" under MCL 207.1033 and MCL 207.1039 does not depend on whether the person puts the fuel to his or her own use or sells it to a third party. Rather, the person must use the fuel in a manner that is consistent with the way in which one would typically use the fuel in the machine at issue. Thus, where the motor fuel is put into a motor vehicle, in order for the person to qualify as an end user, the person must use the fuel to power the motor vehicle.

2. The plaintiff qualified as an "end user" of the fuel it placed in the vehicles because it used the fuel to power the vehicles during the testing process.

3. The verb "use," in the context of a commodity such as motor fuel, means to employ for some purpose, to apply to one's own purposes, or to consume, expend, or exhaust. The plaintiff clearly "used" the full 3.2 gallons for purposes of MCL 207.1033 and MCL

207.1039 because it actually consumed part of it and used the rest for its own purposes to ensure that the vehicles could complete the testing procedures without running out of fuel.

4. The undisputed evidence indicates that the plaintiff used the fuel for a nonhighway purpose because it used the fuel for purposes other than to operate the vehicles on Michigan's public roads or highways. There is no possibility that the incidental amounts of fuel remaining in the vehicles that are shipped out of state will be used to power the vehicles on Michigan's public roads or highways. The plaintiff met its burden and established that is was entitled to a refund of the tax on the entire 3.2 gallons without regard to the actual amount consumed during the testing and quality control procedures.

Reversed and remanded for entry of an order of summary disposition in favor of the plaintiff.

TAXATION — MOTOR FUEL TAX — REFUNDS OF TAX — WORDS AND PHRASES — END USER OF MOTOR FUEL — USE OF MOTOR FUEL — NONHIGHWAY PURPOSES.

A taxpayer seeking a refund of the tax paid on motor fuel must establish that the taxpayer is an end user of the fuel and used the fuel for nonhighway purposes; the taxpayer must use the fuel to power the motor vehicle at issue to qualify as an end user; the taxpayer must employ the fuel for some purpose, apply it to its own purposes, or consume, expend, or exhaust it in order to use the fuel; use for nonhighway purposes means use for purposes other than to operate a vehicle on public roads or highways (MCL 207.1033, 207.1039).

Varnum, Riddering, Schmidt & Howlett LLP (by *Thomas J. Kenny*, *Marla S. Carew*, and *Paul V. McCord*) for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heidi L. Johnson-Mehney*, Assistant Attorney General, for the defendant.

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

M. J. KELLY, J. In this suit for a refund of taxes paid on motor fuel, plaintiff, AutoAlliance International, Inc., appeals as of right the Court of Claims grant of summary disposition in favor of defendant, Depart-

ment of Treasury (the Department). On appeal, we conclude that the Court of Claims erred when it required AutoAlliance to present evidence of the amount of fuel actually consumed during the operation of the vehicles at issue before it could claim a refund. Because AutoAlliance presented undisputed evidence that it was an end user and that it used the motor fuel at issue for nonhighway purposes, it was entitled to a refund of the taxes paid on the motor fuel. For this reason, we reverse and remand for entry of judgment in favor of AutoAlliance.

I. BASIC FACTS AND PROCEDURAL HISTORY

The facts in this case are not in dispute.[1] AutoAlliance is a joint venture between Ford Motor Company and Mazda Motor Corporation. During the 2002-2003 tax period, AutoAlliance assembled Ford and Mazda automobiles at its plant in Flat Rock, Michigan. During this period, AutoAlliance purchased gasoline and diesel fuel in bulk quantities and paid the Michigan motor fuel tax on the fuel purchases. After AutoAlliance purchased the fuel, the vendor would deliver it to the Flat Rock facility and place it in underground storage tanks. AutoAlliance then placed a predetermined amount of motor fuel in the fuel tank of each newly assembled vehicle during the period in issue.

AutoAlliance previously requested and obtained from the Department a refund on the amount of taxes paid on the fuel placed in the tank of each newly assembled vehicle destined for out-of-state automobile dealers. The Department approved AutoAlliance's claims for refunds until April 2001.

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[1] On May 10, 2007, the parties submitted a stipulation of facts to the Court of Claims.

AutoAlliance filed claims with the Department seeking a refund of the motor fuel taxes paid on some of its fuel purchases during the 2002 to 2003 tax period. As the basis for its claims, AutoAlliance selected "Non-Taxable Use of Gasoline—Industrial/Commercial." AutoAlliance claimed that it was owed refunds totaling more than $90,000 for this period. In May 2005, the Department denied each claim on the ground that AutoAlliance was not an exporter. AutoAlliance only claimed refunds related to motor fuel placed in vehicles destined for out-of-state dealers; it did not seek a refund on motor fuel placed in new vehicles sold to Michigan dealers.

After its requests for refunds were denied, AutoAlliance asked for a final decision from the Department. The Department issued its final decision denying the requested refunds in October 2005. In December 2005, AutoAlliance sued the Department for a refund in the Court of Claims.

In July 2007, the Court of Claims held an evidentiary hearing on the matter. At the hearing, Jeffrey Donnelly testified that he was employed by Ford and worked at AutoAlliance's plant in Flat Rock. Donnelly stated that he was the manufacturing engineering manager. Donnelly testified that he was familiar with AutoAlliance's use of fuel in newly assembled vehicles because it was his responsibility to ensure that the vehicles each had the correct amount of fuel.

In outlining AutoAlliance's fuel use, Donnelly explained that AutoAlliance would contact a supplier for delivery of fuel. When delivered, the supplier would pump the fuel into one of two underground storage tanks at the plant. Each storage tank held 20,000 gallons. The underground tanks were connected to a fuel pump that was located at the last station on the

assembly line. The fuel would then be placed into the assembled vehicles at this station. AutoAlliance placed 3.2 gallons of fuel in the vehicles it manufactured during the relevant period in order to power the vehicles during the final testing and quality control procedures that occurred after assembly. The 3.2 gallon amount was selected to ensure that the vehicles did not run out of fuel during the testing.

After the fuel was put in the vehicle, a worker would drive it to various testing and quality control stations. Donnelly stated that the vehicle would be turned off at some stations and would run throughout the testing at other stations. A typical process lasted 70 minutes from fuel fill to the last station.

After performing these tests, a worker would drive the vehicle approximately 1/2 mile to the rough road area to check it for wind noise and drivability issues. The vehicle was then taken to the code check, which is where an electronic device is plugged into the vehicle to look for internal vehicle imperfections resulting from the assembly process. Finally, the vehicle was driven to a storage area.

Donnelly also testified that approximately 15 to 20 percent of the vehicles were driven 6 1/4 miles to the Mazda North America Operations site for installation of aftermarket items such as burglar systems, remote starters, and any other feature the customer may have ordered. These vehicles went through another inspection to make sure that there were no additional faults generated in the installation of the aftermarket features. The final step in the process was to take the vehicle to the shipping lane and load it for shipping.

Donnelly testified that he did not know the exact amount of fuel that each vehicle used during the testing process. Donnelly also stated that the new vehicles

assembled at Flat Rock were not driven on Michigan's public roads or highways before shipment.

Dan Pampuch also testified at the evidentiary hearing. Pampuch stated that he was AutoAlliance's controller for the last two years and that he worked for AutoAlliance for a little over 20 years. Before becoming the controller, Pampuch was AutoAlliance's treasurer and assistant treasurer. Pampuch testified that he was responsible for filing the motor fuel tax returns, and that he was familiar with the procedure for purchasing fuel from 1989 to 2001. Pampuch said that, from 1989 to 2001, the Department had refunded the taxes paid on fuel placed in new vehicles that were shipped out of state. He explained:

> What we would do is we would determine how much gasoline was placed in each vehicle and then we would determine what destination the vehicle was intended to go to. And we would file a refund for those gallons that were to be placed in vehicles destined for outside of Michigan.

Pampuch said that the refund request submitted to the Department provided that the motor fuel tax refund was for fuel placed in vehicles that would be shipped out of state and not used or consumed on Michigan highways.

Pampuch admitted that he did not know how much fuel was actually used during the testing and quality control procedures or how much remained in the tank after each station.

In August 2007, the Department moved for summary disposition under MCR 2.116(C)(10). In its brief in support of its motion for summary disposition, the Department noted that AutoAlliance had not presented any evidence concerning the exact amount of fuel used during the testing process for the vehicles at issue. The Department argued that, absent evidence of the exact

amount of fuel used for a nontaxable purpose, AutoAlliance was not entitled to a refund. In contrast, AutoAlliance argued that, because the 3.2 gallons of fuel selected for placement in each vehicle was calculated to be the minimum amount needed to ensure that the vehicles could proceed through testing without running out of fuel, it "used" that amount. For that reason, AutoAlliance argued that it was entitled to a refund of the taxes paid on the full 3.2 gallons put into each vehicle shipped out of state.

In November 2007, the Court of Claims issued its opinion and order granting summary disposition in favor of the Department with regard to AutoAlliance's request for a tax refund. The court determined that AutoAlliance failed to present evidence concerning the actual amount of fuel used for a nontaxable purpose:

> [I]n this case, the primary issue is one of fact; not of terminology. Although [AutoAlliance] was certainly an "end user" as defined by the Act, [AutoAlliance] was an "end user" of an *unknown* amount of motor fuel. [AutoAlliance] used that same unknown amount of motor fuel for the claimed exempt purpose (i.e., for a non-highway purpose). The Act does not contain any provision permitting the use of estimates in requesting a refund of motor fuel tax paid. . . . Since [AutoAlliance] has admitted that it has no idea how much of the fuel was actually consumed for the exempt purpose—or how much of it remained in the gas tanks following the exempt use—[AutoAlliance's] refund claim should be denied. [Emphasis in original.]

This appeal followed.

II. TAX REFUND FOR MOTOR FUEL

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Hamade v Sunoco, Inc*

(R&M), 271 Mich App 145, 153; 721 NW2d 233 (2006). This Court also reviews de novo the proper interpretation of statutes, such as the Motor Fuel Tax Act. *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

B. THE MOTOR FUEL TAX ACT

The Motor Fuel Tax Act, see MCL 207.1001 *et seq*., imposes a tax on motor fuel that is "imported into or sold, delivered, or used" in Michigan. See MCL 207.1008(1). For gasoline, the tax is equal to 19 cents a gallon. MCL 207.1008(1)(a). The purpose of the tax act is to "require persons who operate a motor vehicle on the public roads or highways of this state to pay for the privilege of using those roads or highways." MCL 207.1008(5)(a). However, the tax act also provides that "persons who pay the tax imposed by this act and who use the fuel for a nontaxable purpose" may "seek a refund or claim a deduction as provided in this act." MCL 207.1008(5)(c). MCL 207.1032 permits a taxpayer to seek a refund of the taxes paid on motor fuel used for the nontaxable purposes described under MCL 207.1033 to MCL 207.1047. In order to obtain a refund, the taxpayer must comply with the requirements of MCL 207.1048.

C. END USER

AutoAlliance argues that it is entitled to a refund of the motor fuel taxes paid on the 3.2 gallons of fuel placed in each vehicle that it tested at its facility and that it later shipped out of this state. AutoAlliance relies on MCL 207.1033 and MCL 207.1039. MCL 207.1033 provides that an "end user may seek a refund for tax paid under this act on motor fuel used by the person for nonhighway purposes." Similarly, under

MCL 207.1039, an "end user may seek a refund for tax paid under this act on motor fuel or leaded racing fuel used in an implement of husbandry or otherwise used for a nonhighway purpose not otherwise expressly exempted under this act." Thus, in order to be entitled to a refund under either MCL 207.1033 or MCL 207.1039, the person seeking the refund must be an "end user" and must have used the motor fuel "for nonhighway purposes." Although the parties do not appear to dispute that AutoAlliance was an "end user" in some regard, because the parties' arguments do not clearly distinguish between AutoAlliance's status as an "end user," the nature of the "use" at issue, and whether the "use" was for a "nonhighway purpose," for the sake of clarity, we shall first address whether and to what extent AutoAlliance was an "end user" within the meaning of MCL 207.1033 and MCL 207.1039.

Because "end user" is not defined in the Motor Fuel Tax Act, we would normally give this term its ordinary meaning. See *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325; 725 NW2d 80 (2006). The ordinary meaning of "end user" is someone who purchases a product and puts it to use for his or her own purposes—as opposed to selling the product to a third party. In the context of the Motor Fuel Tax Act generally, and MCL 207.1033 and MCL 207.1039 specifically, the term "end user" plainly applies to an end user of motor fuel. Hence, an end user of motor fuel would be any person who purchases motor fuel for his or her own use—that is, an end user is someone other than a jobber or retailer who purchases the motor fuel in order to resell it to a third party. See *Random House Webster's College Dictionary* (1997) (defining "jobber" as "a wholesale merchant" or "one selling to retailers" and defining "retail" as "the sale of goods to ultimate consumers"); MCL 207.1005(1)(e) and (f) (defining re-

tail diesel dealers and retail marine diesel dealers as persons who sell or distribute fuel to an "end user"). Thus, were we able to construe this term according to its plain and ordinary meaning, we would conclude that AutoAlliance clearly constitutes an end user: AutoAlliance does not purchase and place fuel in the newly manufactured vehicles in order to sell the fuel to third parties. Rather, AutoAlliance places the fuel into newly manufactured vehicles in order to facilitate its final testing and quality control measures. The fact that an incidental amount of fuel remains in the vehicles after the conclusion of testing and quality control does not alter AutoAlliance's status as an end user. Nevertheless, because a prior panel of this Court has already construed the term "end user," we are no longer at liberty to give this term its plain and ordinary meaning. See MCR 7.215(J)(1).

In *DaimlerChrysler Corp v Dep't of Treasury*, 268 Mich App 528, 530-533; 708 NW2d 461 (2005), this Court had to determine whether DaimlerChrysler was entitled to a tax refund for the amount of unused fuel placed into newly manufactured vehicles that were to be shipped out of state. In order to resolve the issue on appeal, the Court had to construe the term "end user" as used in MCL 207.1033. The Court first turned to the dictionary and noted that "end user" is defined as " 'the ultimate user for whom a machine, [such] as a computer, or product, [such] as a computer program, is designed.' " *DaimlerChrysler,* 268 Mich App at 536, quoting *The Random House Dictionary of the English Language: Second Edition Unabridged*.[2] The Court also

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[2] We note that this definition is consistent with our conclusion that an "end user" is a person who puts the motor fuel to his or her own use as opposed to purchasing the motor fuel in order to sell it to a retailer or to the general public.

noted that MCL 207.1026 equated "used" or "consumed" with " 'producing or generating power for propelling the motor vehicle.' " *DaimlerChrysler*, 268 Mich App at 536, quoting MCL 207.1026. From this, the Court concluded that "an end user of motor fuel is the ultimate user of the motor fuel, i.e., the party who uses the fuel to power the motor vehicle into which the fuel was placed." *Daimler-Chrysler,* 268 Mich App at 536. After construing "end user" in this manner, the Court concluded that Daimler-Chrysler was not an end user because it "never used the fuel at issue to power the vehicles. Rather, [Daimler-Chrysler] passed the fuel on to the dealership, which may have used the fuel to power the vehicle or may have passed the fuel on to a purchaser who used the fuel to power the vehicle."[3] *Id.* at 536-537.

As interpreted by the Court in *DaimlerChrysler*, whether a person qualifies as an end user does not depend on whether that person puts the fuel to his or her own use or sells it to a third party. Rather, to qualify as an end user under *DaimlerChrysler*, a person must apparently use the fuel in a manner that is consistent with the way in which one would typically use the fuel in the machine at issue. Thus, where the motor fuel is put into a motor vehicle, in order for the person to qualify as an end user, that person must use "the fuel to power the motor vehicle . . . ." *Id.* at 536. We do not agree that whether one qualifies as an end user should depend on whether one uses the fuel in a manner that is consistent with the typical use of a particular machine.[4] Rather, whether a person qualifies as an end

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[3] Because DaimlerChrysler's claim was limited to unused fuel, the Court declined to consider whether DaimlerChrysler could qualify as an end user to the extent that it had used motor fuel to power vehicles within its facilities. *Id.* at 536 n 4.

[4] The interpretation in *DaimlerChrysler* appears to blur the distinction between an end user of motor fuel and an end user of a particular

user should depend on whether the person acts as a typical middleman (such as a jobber or retailer) and sells the fuel to third parties or acts as a typical consumer and puts the fuel to his or her own use. Nevertheless, because the decision in *DaimlerChrysler* is directly applicable to the facts of this case, we must apply it.

In the present case, it is undisputed that AutoAlliance placed 3.2 gallons of motor fuel into each vehicle that it manufactured during the period at issue at the last station along the assembly line. The plant's workers placed the fuel in the new vehicles in order to enable the workers to move the vehicles through the final testing and quality control procedures, to drive some vehicles to a facility for installation of aftermarket parts, and to drive the vehicles to the point at which the vehicles were loaded for final shipment. Testimony also established that, although not every vehicle might need the full 3.2 gallons in order to move throughout the final testing and quality control procedures, that amount was selected to ensure that production would not be disrupted by vehicles running out of fuel. Because it used the motor fuel to power the vehicles during the testing process, we conclude that AutoAlliance qualified as an end user of the motor fuel it placed in the vehicles at issue under the decision in *DaimlerChrysler*.

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machine—such as an automobile. Although an end user of an automobile may typically use motor fuel to power or propel the automobile, one can easily imagine situations where a manufacturer may need to place fuel into the automobile's fuel system even though the manufacturer never uses the fuel to power it. Examples include checking the fuel system for leaks and ensuring that the automobile will start and can be driven a sufficient distance for the initial purchaser to fill the fuel tank. Thus, a manufacturer's use of fuel might very well differ from that of the typical end user of the *automobile*, but that does not necessitate the conclusion that the manufacturer is not an end user of the *motor fuel*.

D. USE FOR NONHIGHWAY PURPOSES

However, having concluded that AutoAlliance is an end user does not resolve the present appeal. An end user is only entitled to a refund of the taxes paid on motor fuel to the extent that it "used" the motor fuel for "nonhighway purposes." See MCL 207.1033; MCL 207.1039. Hence, AutoAlliance would only be entitled to a refund of the taxes paid on motor fuel that it "used" and then only to the extent that it "used" that fuel for "nonhighway purposes."

On appeal, the Department apparently concedes that AutoAlliance was an end user of a portion of the 3.2 gallons placed in the vehicles at issue and that it used that portion for a nonhighway purpose. Nevertheless, the Department contends that AutoAlliance failed to present evidence concerning the specific amount of motor fuel used to power the vehicles at issue and, for that reason, argues that AutoAlliance is not entitled to a refund of the taxes paid on any portion of the 3.2 gallons. In making this argument, the Department implicitly assumes that, in order to use motor fuel for a nonhighway purpose, the taxpayer must actually use the fuel to power the vehicle.[5] That is, the Department

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[5] This understanding conflates the test stated in *DaimlerChrysler* for determining whether a particular person is an "end user" with the type of use that must be for a nonhighway purpose in order to obtain a refund. However, the nature of the actual use and whether it constitutes use for "nonhighway purposes" is a separate inquiry from whether the taxpayer is an "end user." Once AutoAlliance established that it used the fuel at issue—at least in part—to power vehicles, it met the test stated in *DaimlerChrysler* and qualified as an "end user." After AutoAlliance qualified as an "end user" of the fuel at issue, it became necessary to examine the nature of the specific uses to which the fuel was put and whether those uses were for "nonhighway purposes." At that point, the evidence that AutoAlliance might not have used the entire amount of fuel to power the vehicles was relevant but not dispositive.

equates "use" of fuel with "consumption" of fuel. However, we do not agree that the term "used" has such a limited meaning.

Because the Motor Fuel Tax Act does not define "used," we must give it its ordinary meaning. *Wolfe-Haddad Estate*, 272 Mich App at 325. The ordinary meaning of the verb "use," in the context of a commodity such as motor fuel, is "to employ for some purpose," to "apply to one's own purposes," or to "consume, expend, or exhaust." *Random House Webster's College Dictionary* (1997). Understood in this light, AutoAlliance clearly "used" the full 3.2 gallons placed into the vehicles at issue. The evidence established that AutoAlliance actually consumed a portion of the 3.2 gallons of motor fuel placed into each vehicle during the quality control and testing procedures that it performed after the vehicles left the assembly line. Further, the evidence demonstrated that AutoAlliance selected the 3.2-gallon amount in order to ensure that the vehicles would be able to complete these procedures without running out of fuel.[6] Hence, to the extent that fuel remained in the vehicles after all the tests were performed, that fuel was nevertheless "employed" for AutoAlliance's "own purposes." As such, even though AutoAlliance might not have consumed the entire 3.2 gallons during these procedures, it still "used" the full 3.2 gallons within the meaning of MCL 207.1033 and MCL 207.1039.

[6] There was no evidence that AutoAlliance selected the amount of fuel to place in the vehicles for any reason other than to ensure that the vehicles had the minimum amount of fuel necessary to complete the testing and quality control procedures while minimizing the risk of disruptions caused by vehicles running out of fuel. Hence, this is not a case where the manufacturer might be deliberately attempting to transfer fuel to a third party for the third party's use. In such a case, the Department might be justified in treating the manufacturer as a middleman (such as a jobber or retailer) rather than an end user.

Moreover, the undisputed evidence indicates that AutoAlliance used the motor fuel for a nonhighway purpose. The phrases "for nonhighway purposes" and "for a nonhighway purpose" must be understood in light of the purpose behind the tax act. See MCL 207.1033 and MCL 207.1039. The tax act requires "persons who operate a motor vehicle on the public roads or highways of this state to pay for the privilege of using those roads or highways." MCL 207.1008(5)(a). Further, the tax act defines "[p]ublic roads or highways" to be "a road, street, or place maintained by this state or a political subdivision of this state and generally open to use by the public as a matter of right for the purpose of vehicular travel . . . ." MCL 207.1004(k). Because the intent behind the tax act is to impose a tax on gasoline so that a motor vehicle operator pays for the privilege of using public roads or highways, the phrase "for nonhighway purposes" must mean for purposes other than to operate a vehicle on public roads or highways. Because we have already determined that AutoAlliance was an "end user" and "used" the full 3.2 gallons of motor fuel placed in each of the vehicles at issue, AutoAlliance would be entitled to a refund of the motor fuel taxes paid on the full 3.2 gallons if it "used" the whole amount for purposes other than to operate the vehicles at issue on Michigan's public roads or highways.

It is undisputed that AutoAlliance never drove any of the vehicles at issue on Michigan's public roads or highways; rather, AutoAlliance operated the vehicles in and around its own facilities before loading them on transports for shipment to dealers. Thus, the fuel actually consumed during the testing and quality control procedures was clearly not used to operate the vehicles on public roads or highways. Nevertheless, because the fuel remaining in the vehicles after testing

and quality control could ultimately be used as an additional use to operate the vehicles on Michigan's roads or highways, in order to qualify for a refund on the remaining amounts of fuel, AutoAlliance had to present evidence that the fuel would not ultimately be used to operate the vehicles on Michigan's roads or highways.

The parties do not dispute that AutoAlliance shipped some of the new vehicles to dealers in Michigan and others to dealers outside Michigan. However, AutoAlliance has not claimed a refund with regard to any vehicles that were shipped to destinations in Michigan. Instead, AutoAlliance only claimed a refund with regard to those vehicles that it shipped out of this state. Because those vehicles were shipped out of state, there is no possibility that the incidental amounts of motor fuel remaining in the vehicles were used to power the vehicles on Michigan's public roads or highways. Therefore, AutoAlliance met its burden and established that it was entitled to a refund on the tax on the entire 3.2 gallons of fuel placed into each of the vehicles at issue without regard to the actual amount of fuel consumed during the testing and quality control procedures.[7]

E. CONCLUSION

In order to establish the right to a refund of the taxes paid on motor fuel under MCL 207.1033 or MCL

[7] Because AutoAlliance used the full 3.2 gallons of fuel at issue for a nonhighway purpose, the Department's reliance on authorities involving mixed-use situations—that is, situations where the taxpayer cannot accurately identify the amount of fuel used for a nonhighway purposes—is misplaced. See, e.g., *Charles E Austin, Inc v Secretary of State*, 321 Mich 426; 32 NW2d 694 (1948). Likewise, for the same reason, we do not need to determine the quantum of proof necessary to establish an entitlement to a refund where the uses on public roads or highways are commingled with uses for nonhighway purposes.

207.1039, the taxpayer must establish that he or she is an "end user" of motor fuel and that he or she "used" the motor fuel at issue for "nonhighway purposes." In this case, the undisputed facts show that AutoAlliance used the motor fuel at issue to power vehicles. Hence, it was an end user of the motor fuel. Further, with regard to the motor fuel at issue, the undisputed facts show that AutoAlliance employed the full 3.2 gallons placed in each vehicle for its own purposes. Thus, it used the full 3.2 gallons within the meaning of MCL 207.1033 and MCL 207.1039. Finally, because the evidence demonstrates that no amount of the 3.2 gallons placed in the vehicles shipped out of state was used or could be used to operate the vehicles on Michigan's public roads or highways, AutoAlliance established that its use was "for nonhighway purposes." Consequently, the Court of Claims erred when it concluded that AutoAlliance could not claim a refund for the full amount of the 3.2 gallons of fuel placed in each of the vehicles it shipped out of state. For this reason, we reverse the Court of Claims grant of summary disposition in favor of the Department and remand the case for entry of summary disposition in favor of AutoAlliance.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because this appeal involved important issues of public policy, AutoAlliance may not tax its appellate costs as a prevailing party. MCR 7.219(A).

BANDEEN v PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

Docket No. 279363. Submitted December 2, 2008, at Lansing. Decided February 24, 2009, at 9:10 a.m.

Nancy Bandeen worked as a substitute teacher in a Boston, Massachusetts, public school for a few days in the 1973 school year and discontinued that work on December 21, 1973, choosing to stay home while she was pregnant. She started teaching full-time in 1985 and retired in 2005. Bandeen filed an application with the Office of Retirement Services to purchase 3.1 years of service credit for part of the period between when she stopped being a substitute teacher and when she started teaching full-time. She claimed that she was on maternity leave and rearing children during that period. The Public School Employees' Retirement Board denied the application. The Calhoun Circuit Court, Allen L. Garbrecht, J., affirmed on appeal. Bandeen appealed by leave granted.

The Court of Appeals *held*:

The circuit court did not err by affirming the board's decision to deny Bandeen's application to purchase maternity/child rearing service credit.

1. MCL 38.1375 of the Public School Employees Retirement Act allows a member of the public school employees' retirement system who left service as a public-school employee in or outside Michigan for purposes of maternity, paternity, or child rearing and returned to service as a public-school employee to purchase service credit for the period during which the member was separated from service as a public-school employee.

2. As a teacher who had no contract of hire and could refuse an offer of hire for a day as a substitute for a regular teacher, Bandeen did not begin a leave of absence as a public-school employee for purposes of MCL 38.1375 at the time she decided to no longer accept substitute-teaching assignments.

3. The length of time between when Bandeen stopped accepting substitute-teaching assignments and the birth of her child together with the lack of documentation that she was unable to

teach because of a medical condition were adequate reasons for the board's determination that Bandeen did not take a leave for maternity reasons.

Affirmed.

PENSIONS — PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM — TEACHERS — SUBSTITUTE TEACHERS — SERVICE CREDITS FOR PENSION PURPOSES.

A member of the public school employees' retirement system does not leave service as a public-school employee in or outside Michigan for maternity, paternity, or child-rearing, within the meaning of a provision of the Public School Employees Retirement Act that allows the purchase of service credit for pension purposes for maternity, paternity, or child-rearing leaves of absence, if the member merely stops accepting day-to-day offers of hire as a substitute teacher (MCL 38.1375).

Humbarger, Zebell & Parks, P.C. (by *Robert L. Humbarger*), for the petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Stephen M. Rideout*, Assistant Attorney General, for the respondent.

Before: SAAD, C.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM. Petitioner, Nancy Bandeen, appeals by leave granted the circuit court order affirming the administrative decision of respondent, Public School Employees' Retirement Board, to deny petitioner's application to purchase maternity/child-rearing service credit for purposes of calculating petitioner's retirement pay. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. Petitioner obtained a Bachelor's Degree in Education in 1971. She relocated from Michigan to Boston and registered there as a substitute teacher. Petitioner taught approximately 8 to 12 days for the Lincoln Public School District in Boston

during the first half of the 1973 school year. Petitioner discontinued her service as a substitute teacher on December 21, 1973. She did not resume teaching after the holiday break because "I was pregnant. I wanted to stay home with my children, so I stayed home."[1] Petitioner's first baby was born in May 1974, and she had another baby 18 months later. Petitioner returned to full-time teaching in 1985. She worked as a full-time teacher until her retirement in August 2005.

Before her retirement, petitioner filed two applications with the Michigan Office of Retirement Services (ORS). The first application requested to purchase out-of-system public education service credit for the time petitioner spent working as a substitute teacher in Boston. The Boston school administrator certified that petitioner worked as a day-to-day substitute teacher during the fiscal year of 1973-1974 and earned total wages of $144. ORS granted petitioner's request to purchase out-of-system public education service credits for 0.0235 years.[2] The second application requested to purchase 3.1 years of maternity/child rearing service credit for part of the period between when she stopped substitute teaching in 1973 and when she began teaching full-time again in 1985.[3] By letter of January 27, 2005, ORS denied that request on the basis of the following reasoning:

> Our statute allows members to purchase Maternity/Child Rearing service when regular employment is interrupted by an official maternity or child rearing leave of absence. Your application stated that you were a casual

[1] At that time, petitioner was five months pregnant.

[2] Petitioner purchased the service credits.

[3] When petitioner retired she had 26.9 years of service and needed the additional 3.1 years to reach 30 years of creditable service, which would then allow her to obtain a full retirement allowance.

> substitute teacher, which is not established employment, thus making you ineligible. If you were granted a leave of absence from Lincoln Public Schools for the purpose of Maternity/Child rearing we would need proof that you were granted this leave as your separation reason from Lincoln schools on their letterhead.

Petitioner's file was referred to ORS analyst Lois Musbach for review. Musbach noted that the Lincoln Schools had certified that petitioner last worked on December 21, 1973, and that her child was not born until May 17, 1974. Musbach concurred with the original determination of ineligibility but further clarified ORS's position:

> The first consideration is the length of time between her last employment and the birth of her child. MCL 38.1375 is clear that the member must leave employment "for purposes of maternity, paternity or child rearing". As an "at will" employee, Ms. Bandeen chose to stop working well before the birth of her child. Without further documentation that Ms. Bandeen was medically required to leave her employment that far in advance of the birth of her child, her reason for leaving employment could not be connected to her pregnancy.
>
> The second consideration is the position that Ms. Bandeen held. As an "at will" employee, she chooses to work or not, purely at her choice or the choice of the school. Our policy regarding substitute employment is clear in that a substitute is only considered employed on the day they are actively working. At the conclusion of each day, Ms. Bandeen is unemployed. Ms. Bandeen chose to no longer work after December 21, 1973, therefore, she had no employment from which she could claim a separation for maternity reasons. A substitute employee who is attempting to purchase service credit must make payment on a day that they are working. Being on a substitute call list is also not considered to be employment. The policy is based on the statutory definition of a member. Only a member can make a purchase. A member is defined as a public school employee.

Musbach further stated that the ability to purchase maternity/child rearing service credits was designed to mitigate the damage to an employee's career when she leaves work for maternity or parenting reasons, and that a day-to-day substitute teacher, "who has no promise of future employment, could not claim this harm."

Following a hearing on the matter, hearing referee Carol Smith issued a proposal for decision in which she adopted Musbach's reasoning. Smith stated that "MCL 38.1375 requires, in relevant part that in order to be eligible to purchase the service credit for maternity, paternity, or child rearing purposes, a person must be a public school employee or a person performing out of system public education service at the time they leave their employment to have or raise their child." Smith stated that petitioner's employment as a day-to-day substitute teacher ended at the end of the given day she worked. Furthermore, there was insufficient evidence that future dates of employment were guaranteed because there is no evidence of a contractual relationship between the school district and petitioner. There was no evidence that petitioner told the school district that she was leaving for pregnancy or child-rearing purposes, and there was no formal maternity leave given by the school district. Smith proposed that petitioner's application be denied because she failed to meet the requirements set forth in MCL 38.1375. The board adopted Smith's proposal for decision and denied petitioner's application.

Petitioner appealed to the circuit court, which reviewed petitioner's decision to determine if it was clearly erroneous. The circuit court concluded that the board's interpretation and application of the statute to the present facts was not clearly erroneous. The court denied the appeal on that ground.

I

Petitioner first argues that the circuit court erred by failing to review the board's final agency decision de novo when the facts were not in dispute and the only question presented to the court was whether the board correctly interpreted MCL 38.1375. The standard of review appropriate to a particular decision is a question of law that this Court reviews de novo. *Palo Group Foster Care, Inc v Dep't of Social Services,* 228 Mich App 140, 145; 577 NW2d 200 (1998).

Traditionally, a circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. *Dignan v Pub School Employees Retirement Bd,* 253 Mich App 571, 576; 659 NW2d 629 (2002). However, it is axiomatic that questions of statutory interpretation are reviewed by appellate courts de novo. *Shinholster v Annapolis Hosp,* 471 Mich 540, 548; 685 NW2d 275 (2004). See also *Ronan v Pub School Employees Retirement Sys,* 245 Mich App 645, 648; 629 NW2d 429 (2001).

Here, both parties agreed that the facts were not in dispute. The issue to be resolved was whether petitioner, as a day-to-day substitute teacher, was a "public school employee" at the relevant time, as that term is defined in MCL 38.1306(5), and was therefore entitled to purchase maternity/child rearing service credit pursuant to MCL 38.1375. The meaning of "public school employee," as defined in MCL 38.1306(5), is an issue of statutory interpretation that should have been reviewed de novo by the circuit court. *Shinholster, supra* at 548. Although the circuit court initially applied a

"clearly erroneous" standard of review, in ruling on petitioner's motion for reconsideration, the circuit court indicated that application of a de novo standard of review would not have changed its ruling.[4] Thus, it would be a waste of judicial resources for this Court to grant petitioner's requested relief in the form of a remand for the circuit court to consider the matter in light of the correct standard of review.

II

Petitioner argues that the circuit court erred by affirming the board's decision to deny her application to purchase maternity/child rearing service credit. "This Court reviews a lower court's review of an administrative decision 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). Therefore, a circuit court's factual determination is reversed only if this Court is "left with a definite and firm conviction that a mistake was made." *Id.* at 585. In addition, the proper construction and interpretation of a statute are questions of law, which are reviewed de novo by this Court. See *People v Sierb,* 456 Mich 519, 522; 581 NW2d 219 (1998).

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[4] The circuit court's order denying reconsideration stated in relevant part:

> After reviewing the record once again in this case, this Court is not convinced that a different disposition of the Motion for judicial review would result, even with a de novo review on appeal. Specifically, it is this Court's opinion that the manner in which the agency applied the essentially undisputed facts in this case to the applicable statute was not contrary to the legislature's intent or the language of the statute.

The Michigan public school employees' retirement system was created to provide retirement benefits for public school employees of this state. MCL 38.1321. For public school employees who do not meet the full eligibility requirement, the system allows employees in certain instances to purchase service credit at an actuarially determined cost. MCL 38.1361 through 38.1379(a). One situation is where a public school employee leaves employment for reasons of maternity, paternity, or child rearing. See MCL 38.1375,[5] which provides in pertinent part:

> A member who left or leaves service as a public school employee for purposes of maternity or paternity or child rearing, and returns to service as a public school employee, or a person performing out of system public education service who leaves that service for purposes of maternity, paternity, or child rearing and who subsequently becomes a member of this retirement system, . . . may purchase service credit for the time period or periods during which the person was separated from service as a public school employee or during which the person was separated from performing out of system public education service because of maternity or paternity or child rearing, upon request and payment to the retirement system of the actuarial cost. . . . A member requesting purchase of service credit under this section shall certify to the board the purpose for which the member took leave and was separated from service as a public school employee.

The Public School Employees Retirement Act, MCL 38.1301 *et seq.*, defines "out of system public education service" as "service performed in public education . . . ." MCL 38.1306(2). MCL 38.1308(1) defines "service" as "personal service performed as a public school em-

[5] MCL 38.1375 was amended by 2006 PA 617, effective January 1, 2009. Any reference in this opinion to MCL 38.1375 refers to the former version of MCL 38.1375.

ployee . . . ." And "public school employee" is defined as "an employee of a public local school district, intermediate school district, public school academy, tax supported community or junior college . . . ." MCL 38.1306(5). That provision lists various types of employers and employment situations that qualify an employee as a "public school employee." The term "public school employee" specifically includes someone who otherwise meets the test but is "on approved leave of absence." MCL 38.1306(5). The term "employee" is not defined in the statute. Where statutory terms are undefined, they should be given their ordinary and plain meanings, and, in defining such terms, consulting a dictionary is proper. *Rakowski v Sarb,* 269 Mich App 619, 626; 713 NW2d 787 (2006). In *Rakowski,* this Court noted that the "*Random House Webster's College Dictionary* (1992), defines 'employee' as 'a person who has been hired to work for another.' " *Id.* When petitioner was hired to work as a substitute teacher, she certainly could be considered an employee. However, she was not always "hired," or under a contract of hire, by the very nature of her employment. Thus, her status at the time she left service for her alleged maternity/child rearing is at issue.

Petitioner admittedly was a day-to-day substitute teacher. The dispositive factor in the board's decision in this case was the board's determination that petitioner's position as a substitute teacher was classified as a "day-to-day," temporary assignment, without expectation of future positions. The *Random House Webster's College Dictionary* (2001) defines "substitute" as "a person or thing acting in place of another." And the *American Heritage Dictionary* (1985), in its definition of "day-to-day," includes "subsisting one day at a time with little regard for the future." Another word for such a situation is "temporary." Black's Law Dictionary (8th

ed) defines "temporary" as "[l]asting for a time only; existing or continuing for a limited time; transitory." Therefore, a day-to-day substitute teacher can properly be defined as a person employed from day to day and taking the place of a regularly employed teacher on a temporary basis or a daily basis with little regard to the future; someone who has no written agreement to work for a school district, who reports for teaching only when contacted, and who may refuse any offer of employment.

Because petitioner was a substitute teacher at the relevant time and hired only on a day-to-day basis, we conclude that she was not a public school employee at the time she decided to no longer accept substitute teaching assignments after the 1973 holiday break. She was not "hired" to work at that time. Additionally, the statute includes as a "public school employee" one who is on an "approved" leave of absence. A leave of absence presumes a relationship of duration to which an employee would expect to return and denotes a continuing relationship between the employer and the employee. Black's Law Dictionary (8th ed) defines "leave of absence" as a "worker's temporary absence from employment or duty with the intention to return." Petitioner worked only 8 to 12 days during the first half of the 1973 school year and then discontinued her service. Because petitioner was not a public school employee as defined by MCL 38.1306(5), petitioner has failed to prove that the board's interpretation of MCL 38.1375 was contrary to law and conflicted with the Legislature's intent. As a day-to-day substitute teacher, petitioner could not be classified as having a temporary absence with the intent to return. She was not guaranteed to return, and had no approval for a temporary absence. Thus, the board's determination that petitioner was not a public school employee for the purpose

of qualifying to purchase maternity/child rearing service credit was not clearly wrong nor was it contrary to legislative intent.

Moreover, petitioner has not proven that the circuit court misapplied the substantial evidence test in concluding that the board properly found that petitioner did not decide to continue service as a day-to-day substitute teacher for maternity reasons. *VanZandt, supra* at 585. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n,* 218 Mich App 734, 736; 555 NW2d 267 (1996). Although some inconsistencies exist with regard to when petitioner discovered that she was pregnant, the evidence showed that petitioner last worked as a substitute teacher on December 21, 1973, and that her first baby was born in May 1974. Petitioner decided not to accept offers of teaching assignments after the 1973 holiday break only because she "was pregnant . . . and wanted to stay home." The board determined that petitioner's withdrawal from teaching assignments, five months before her baby was born, was premature in the absence of any documentation that she was medically unable to continue teaching and, therefore, that petitioner did not prove that she left substitute teaching for maternity reasons. The length of time between January 1974 and the birth of petitioner's baby, together with the lack of any documentation that petitioner was unable to teach because of a medical condition, are adequate reasons for the board's determination that petitioner did not leave for maternity reasons. Accordingly, the circuit court properly affirmed the board's decision.

Affirmed.

PEOPLE v ZUJKO

Docket No. 281234. Submitted October 14, 2008, at Lansing. Decided November 13, 2008. Approved for publication February 26, 2009, at 9:00 a.m.

The Macomb Circuit Court, John C. Foster, J., accepted a plea of guilty by Edward R. Zujko to one count of use of a computer to commit a crime, sentenced the defendant to five years' probation, and ordered him to register as a sex offender and relocate his residence from a student safety zone. The court thereafter granted the defendant's motion to modify the terms of his probation to allow the defendant to remain in his residence. The Court of Appeals granted the prosecution's delayed application for leave to appeal.

The Court of Appeals *held*:

The trial court properly determined that MCL 28.735(3)(c) provided an exemption from the requirement that registered sex offenders not reside in a student safety zone for individuals like the defendant who resided in a school safety zone as of January 1, 2006. The exemption does not apply only to those individuals who were registered sex offenders as of January 1, 2006, and who also resided in a school safety zone as of that date. An individual who falls under the exemption provided in MCL 28.735(3)(c) may not be compelled to comply with MCL 28.735(4), which gives an individual who resides in a student safety zone and who becomes a registered sex offender 90 days to relocate outside the zone, unless the individual initiates or maintains contact with a minor within that student safety zone.

Affirmed.

CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — SCHOOL SAFETY ZONES — RESIDENCES OF REGISTERED SEX OFFENDERS.

A provision of the Sex Offenders Registration Act that forbids an individual who is required to register as a sex offender under article II of the act from residing in a school safety zone does not apply to an individual who was residing within a school safety zone as of January 1, 2006; an individual who falls under the exemption is not required to comply with a provision of the act that gives a person who resides in a school safety zone and who becomes a

registered sex offender 90 days to relocate outside the zone unless the individual initiates or maintains contact with a minor within that student safety zone (MCL 28.735[1], [3][c], and [4]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Attorney, and *William Harding*, Assistant Prosecuting Attorney, for the people.

Maceroni & Maceroni, P.L.L.C. (by *Patricia A. Maceroni*), for the defendant.

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

PER CURIAM. Defendant was charged with three counts of possession of child sexually abusive material, MCL 750.145c(4), and three counts of using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(d). Defendant pleaded guilty to one count of use of a computer to commit a crime in return for dismissal of the other charges. The trial court sentenced defendant to five years' probation and ordered him to register as a sex offender and relocate his residence within 180 days pursuant to the Sex Offenders Registration Act. See MCL 28.735. Subsequently, the trial court granted defendant's motion to modify the terms of his probation and allowed defendant to remain in his residence. The prosecution appeals the trial court's decision by delayed leave granted. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case requires us to construe MCL 28.735, which prohibits registered sex offenders from residing in student safety zones. We review matters of statutory interpretation de novo. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007). We review the trial court's decision to set terms of probation for an abuse of discretion. *People v Miller*, 182 Mich App 711, 713; 452 NW2d 890 (1990).

The prosecution argues that the trial court abused its discretion by modifying the terms of defendant's probation, because the modification was contrary to the terms of MCL 28.735. The prosecution contends that because defendant allegedly resides in a student safety zone and is not covered by any exemption in MCL 28.735, defendant was required to relocate his residence. We disagree.

When interpreting a statute, we must discern and give effect to legislative intent. *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006). If the language of the statute is clear and unambiguous, we presume that the Legislature intended that meaning, and we must enforce the language as written. *Id*. at 115. Under such circumstances, judicial construction is neither required nor permitted. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

MCL 28.735 provides, in pertinent part:

> (1) Except as otherwise provided in this section . . . an individual required to be registered under article II [a registered sex offender] shall not reside within a student safety zone.
>
> * * *
>
> (3) This section does not apply to any of the following:
>
> * * *
>
> (c) An individual who was residing within that student safety zone on January 1, 2006. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

The trial court interpreted the language of MCL 28.735(3)(c) as providing an exemption for individuals who resided in a safety zone as of January 1, 2006. We

find no reason to reach a contrary conclusion. The language of MCL 28.735(3)(c) is plain and unambiguous. Stated another way, MCL 28.735(1) and MCL 28.735(3)(c), taken together, mean that a registered sex offender shall not reside in a student safety zone unless the offender resided in that zone as of January 1, 2006. Reasonable minds could not differ with regard to the provision's meaning. See *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000). The trial court's interpretation of the statute was not erroneous. See *id.*

We do not agree with the prosecution's contention that the exemption in MCL 28.735(3)(c) applies only to those individuals who were registered sex offenders as of January 1, 2006, and who also resided in a student safety zone as of that date. The relevant language does not set such requirements. The subsection simply uses the word "individual," which the Sex Offenders Registration Act does not define. See MCL 28.722. The plain and ordinary meaning of that term is "a single human being" or "person." *Random House Webster's College Dictionary* (1997). The prosecution's interpretation reads additional requirements into the statute, namely that such an individual be a registered sex offender. Such an interpretation is contrary to the well-settled rule of statutory construction that courts must not inject additional requirements into a statute that the Legislature has not included. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

The prosecution also argues that the trial court's interpretation renders MCL 28.735(4)[1] nugatory. Subsection 4 gives an individual who resides in a student

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[1] MCL 28.735(4) provides, in pertinent part:

> An individual who resides within a student safety zone and who is subsequently required to register under article II shall change his or her residence to a location outside the student safety zone

safety zone and who becomes a registered sex offender 90 days to relocate outside the zone. A reading of MCL 28.735(4) and MCL 28.735(3)(c) indicates that an individual who falls under the 3(c) exemption would not be compelled to comply with the requirement of subsection 4. However, an individual who did not meet the 3(c) requirement, i.e., he or she did not reside in a school safety zone before January 1, 2006, would be required to move his or her residence within 90 days pursuant to subsection 4. The prosecution's contention is erroneous.

Lastly, we find that the prosecution's argument that the trial court's interpretation of MCL 28.735 would give registered sex offenders carte blanche to violate criminal laws is disingenuous. The sentence immediately following the language granting the exemption states: "However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone." MCL 28.735(3)(c). In other words, if such an individual engages in any contact with a minor, the individual loses the benefit of the exemption and must move his or her residence within 90 days pursuant to subsection 4. This is not carte blanche to violate criminal laws.

In sum, we conclude that the trial court's interpretation was consistent with the plain meaning of MCL 28.735. Because defendant resided in a student safety zone before January 1, 2006, he was exempt from the prohibition against registered sex offenders residing in student safety zones. The trial court did not abuse its discretion when it modified defendant's probation.

Affirmed.

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not more than 90 days after he or she is sentenced for the conviction that gives rise to the obligation to register under article II.

MASON v CITY OF MENOMINEE

Docket No. 282714. Submitted September 9, 2008, at Marquette. Decided February 26, 2009, at 9:05 a.m. Leave to appeal sought.

Gerald and Karen Mason brought an action in the Menominee Circuit Court against the city of Menominee, seeking to quiet title to a city-owned 60-foot strip of property over which part of the plaintiffs' driveway extends. The court, Mary B. Barglind, J., determined that the defendant had abandoned a portion of the property and granted the plaintiffs title to that portion. The city appealed. The Court of Appeals, SAWYER, P.J., and K. F. KELLY, J. (DAVIS, J., dissenting), determined that the city was the owner in fee simple of the disputed strip, but declined to address additional theories that had been raised but not addressed in the trial court. The Court of Appeals reversed the judgment of the trial court and remanded the case to the trial court to resolve any remaining issues. Unpublished opinion per curiam of the Court of Appeals, issued September 12, 2006 (Docket No. 262743) (*Mason I*). On remand, the trial court determined that the plaintiffs acquired the disputed property under the doctrine of acquiescence. The defendant appealed, and the plaintiffs cross-appealed, in part, with regard to the taxation of costs.

The Court of Appeals *held*:

1. MCL 600.5821(2) does not preclude the plaintiffs' claim because it prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property. The plaintiffs, not the city, brought this action.

2. A preponderance of the evidence shows that the plaintiffs established acquiescence for the statutory 15-year period.

3. The trial court did not abuse its discretion on remand by denying the plaintiffs' request for $150 in costs under MCL 600.2441(2).

4. The remand proceedings in the trial court did not constitute an appeal. Therefore, the provisions in MCL 600.2445(4) regarding an award of costs to the party who ultimately prevails do not apply in this case because that section pertains to appeals.

5. The plaintiffs did not timely file a bill of costs regarding the trial that occurred before the defendant's appeal in *Mason I*. MCL 600.2405(2) does not render costs that could have been awarded in *Mason I* taxable on remand. MCL 600.2405(2) does not render costs that are taxable in the Court of Appeals pursuant to court rule also taxable in the trial court on remand. The trial court did not abuse its discretion by denying the plaintiffs' requested costs.

Affirmed.

BECKERING, J., concurring, wrote separately to express her belief that when the Legislature enacted MCL 600.5821(2) it may not have anticipated the potential inconsistent outcomes in actions involving disputes over municipal land that result when the municipality is the plaintiff and when the municipality is the defendant. However, the statute is unambiguous and must be applied as written.

MUNICIPAL CORPORATIONS — ACTIONS — PUBLIC LANDS — BOUNDARIES — ACQUIESCENCE IN BOUNDARIES.

Actions brought by municipal corporations for the recovery of the possession of public property are not subject to periods of limitations; where a municipality brings an action to recover the property, a private landowner may not be found to have acquired the subject property by acquiescence; a private landowner may bring an action against a municipality to show that it acquired the subject property from the city under the doctrine of acquiescence (MCL 600.5821[2]).

Gerald Mason for the plaintiffs.

Robert J. Jamo, City Attorney, for the defendant.

Amicus Curiae:

Secrest Wardle (by *Thomas R. Schultz* and *Stephanie Simon Morita*) for the Michigan Municipal League.

Before: SAAD, C.J., and SAWYER and BECKERING, JJ.

PER CURIAM. In this action to quite title, defendant appeals as of right from the order of the circuit court, on remand, quieting title to the disputed parcel of real property in favor of plaintiffs. We affirm.

This case is before this Court for the second time. In the prior appeal, we held that defendant was the owner in fee simple of the disputed strip of land, but declined to address additional theories raised but not addressed in the trial court. *Mason v City of Menominee*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2006 (Docket No. 262743) (*Mason I*). On remand, the trial court determined that plaintiffs acquired the disputed land under the doctrine of acquiescence.

In *Mason I*, this Court stated the pertinent facts as follows:

> Plaintiffs are the owners of residential real property in Menominee, Michigan. Defendant is the owner of real property surrounding plaintiffs' property on three sides, commonly know as the Water Tower Park. At issue is a 60 foot strip of property, running north and south through the Water Tower Park, which adjoins the eastern border of plaintiffs' property. This property was originally deeded to defendant for a proposed Twentieth Street. But Twentieth St. has never been improved and, according to the trial court's findings, had never been used as a roadway. Plaintiffs have used a portion of the parcel as their driveway extends onto it. Plaintiffs brought this action to quiet title over those portions of the "right-of-way" that their driveway extends onto. [*Id.* at 1.]

Defendant argues that MCL 600.5821(2) shields municipalities from claims for the possession of property based on the doctrine of acquiescence. We disagree. This Court reviews equitable actions, such as an action to quiet title, de novo. *Sackett v Atyeo,* 217 Mich App 676, 680; 552 NW2d 536 (1996). Likewise, this Court reviews de novo a trial court's conclusions of law following a bench trial. *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000) (*Walters II*). This issue also presents a question of statutory interpretation, which is a

question of law that this Court reviews de novo. *Griffith v State Farm Mut Automobile Ins Co,* 472 Mich 521, 525-526; 697 NW2d 895 (2005).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes,* 470 Mich 661, 665; 685 NW2d 648 (2004). The best source for determining legislative intent is the specific language of the statute. *Id.* When the Legislature has unambiguously conveyed its intent, the statute speaks for itself and judicial construction is neither necessary nor permitted. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute. *Id.* Undefined words should be accorded their plain and ordinary meanings, and dictionary definitions may be consulted in such situations. *Id.* Further, courts should "construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Co Prosecutor v Murphy,* 464 Mich 149, 159; 627 NW2d 247 (2001).

To fully interpret MCL 600.5821, both subsections 1 and 2 must be examined. They state:

> (1) Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.
>
> (2) Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations.

While subsection 1 applies to "[a]ctions for the recovery of any land where the state is a party," subsection 2

applies to "[a]ctions brought by any municipal corporations . . . ." It is evident from the language employed in subsection 1 that the Legislature could have made subsection 2 applicable in all cases brought by or against a municipality. The Legislature, however, chose not to do so. Further, interpreting subsection 2 to apply to any case in which a municipality is a party would render the words "brought by" in subsection 2 nugatory. Finally, an acquiescence claim involves a limitations period. *Kipka v Fountain,* 198 Mich App 435, 438-439; 499 NW2d 363 (1993). The term "periods of limitations" in MCL 600.5821(2) renders that provision applicable to claims asserting acquiescence for the statutory period. Thus, because the language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property, it does not preclude plaintiffs' claim.

"[A] claim of acquiescence to a boundary line based upon the statutory period of fifteen years, MCL 600.5801(4); MSA 27A.5801(4), requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary." *Walters v Snyder*, 225 Mich App 219, 224; 570 NW2d 301 (1997) (*Walters I*). This theory of acquiescence does not require that the possession be hostile or without permission as would an adverse possession claim. *Id.* Further, "[t]he acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). Although Michigan precedent "has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence," caselaw has held that acquiescence is established when a pre-

ponderance of the evidence "establishes that the parties *treated* a particular boundary line as the property line." *Walters II*, *supra* at 457-458 (emphasis in original).

In this case, the record shows that both parties treated the fence as the boundary line. Further, the plaintiffs satisfied the requisite 15-year statutory period because the acquiescence of their predecessors in title can be tacked onto plaintiffs' acquiescence of title. *Killips, supra* at 260. Thus, a preponderance of the evidence shows that plaintiffs established acquiescence for the statutory 15-year period.

Because of the resolution of the above issues, we need not address plaintiffs' issue on cross-appeal, with the exception of plaintiffs' argument regarding the taxation of costs. Plaintiffs argue that they were the ultimate prevailing party; thus, they should be allowed taxable costs in the amount of $1,887.65 against defendant. We disagree. This Court reviews for an abuse of discretion a trial court's decision on a motion for costs under MCR 2.625. *Klinke v Mitsubishi Motors Corp,* 219 Mich App 500, 518; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998). 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).

Generally, MCR 2.625(A)(1) allows a prevailing party to tax costs. "The taxation of costs is neither a reward granted to the prevailing party nor a punishment imposed on the losing party, but rather a component of the burden of litigation presumed to be known by the affected party." *North Pointe Ins Co v Steward (On Remand),* 265 Mich App 603, 611; 697 NW2d 173 (2005). Although the decision whether to tax costs is discretionary, the authority to do so is "wholly statutory" and "the prevailing party cannot recover costs

where there exists no statutory authority for awarding them." *Beach v State Farm Mut Automobile Ins Co,* 216 Mich App 612, 621; 550 NW2d 580 (1996).

Plaintiffs first rely on MCL 600.2441(2) to establish their statutory authority, which states, in pertinent part:

> In all civil actions or special proceedings in the circuit court, whether heard as an original proceeding or on appeal, the following amounts shall be allowed as costs in addition to other costs unless the court otherwise directs:
>
> * * *
>
> (c) For the trial of the action or proceeding, $150.00.[1]

Although plaintiffs requested this amount for the "remand proceeding," subsection c allows a trial court to award $150 in costs for "the trial of the action or proceeding . . . ." Here, the trial occurred before the appeal in *Mason I* and there was no "remand proceeding" as plaintiffs assert. Thus, the trial court did not abuse its discretion by failing to award the $150 in costs for the "remand proceeding."

Plaintiffs also argue that they were entitled to costs under MCL 600.2445(4) because they "ultimately prevailed" in this action. That section pertains to appeals and provides, "Costs in the court below may be awarded to the party who ultimately prevails in the case." MCL 600.2445(4). Because the remand proceedings in the trial court did not constitute an appeal, MCL 600.2445(4) does not apply to this case.

Plaintiffs further contend that costs were awardable under subsection 2 of MCL 600.2405, which provides:

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[1] It appears that plaintiffs are relying on subsection c because they requested $150 for the remand proceeding as one of their taxable costs.

> The following items may be taxed and awarded as costs unless otherwise directed:
>
> * * *
>
> (2) Matters specially made taxable elsewhere in the statutes or rules.

Plaintiffs claim that because costs for trial of the action were awardable under MCL 600.2441(2), they should have been awarded on remand pursuant to MCL 600.2405(2). The trial of the action occurred before defendant appealed the trial court's ruling in *Mason I*. Although plaintiffs could have filed a bill of costs following the trial court's initial order that was appealed in *Mason I*, the record does not indicate that they did so. MCR 2.625(F)(2) required plaintiffs to file a bill of costs within a 28-day period. Thus, plaintiffs did not timely file a bill of costs and plaintiffs cite no authority for the proposition that MCL 600.2405(2) rendered such costs taxable on remand.

Finally, MCL 600.2405(2) did not render costs taxable in this Court in *Mason I* properly taxable on remand. Plaintiffs contend that they should have been awarded the $1,576.65 taxed against them in *Mason I*. They also argue that MCR 7.219 (F)(1) entitled them to $61 in costs for their appellate brief in *Mason I* and that MCR 7.219(F)(5) allowed them to tax $100 for a motion fee in this Court in *Mason I*. MCL 600.2405(2) allows the taxing of costs authorized by court rule. *Giannetti Bros Constr Co, Inc v City of Pontiac*, 152 Mich App 648, 657; 394 NW2d 59 (1986). Although these items are made taxable "elsewhere in the statutes or rules," they are taxable in this Court and not in the trial court. Plaintiffs cite no authority for the proposition that MCL 600.2405(2) rendered costs taxable pursuant to court

rule in this Court also taxable in the trial court on remand. Thus, the trial court did not abuse its discretion by denying plaintiffs' requested costs.

Affirmed. Plaintiffs may tax costs on appeal, and defendant may tax costs on cross-appeal.

BECKERING, J. (*concurring*). I concur with my colleagues that in this dispute over a 60-foot strip of municipal land adjoining plaintiffs' property, plaintiffs are entitled to quiet title on the basis of the doctrine of acquiescence because the record shows by a preponderance of the evidence that both parties treated the fence installed by defendant as the property line for the requisite 15-year period. *Walters v Snyder*, 239 Mich App 453, 457-458; 608 NW2d 97 (2000) (*Walters II*); MCL 600.5801(4). I write separately, however, to express my concern that in actions involving a dispute over municipal land, the Legislature may not have anticipated the potential for inconsistent outcomes, depending on which party beats the other to the courthouse, given its chosen language in MCL 600.5821(2).

MCL 600.5821 addresses whether a period of limitations applies in actions for the recovery of land when the state or a municipal corporation is involved. As the majority points out, MCL 600.5821(1), pertaining to state land, and MCL 600.5821(2), pertaining to municipal land, are worded differently, and state as follows:

> (1) Actions for the recovery of any land *where the state is a party* are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.

> (2) Actions *brought by* any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations. [Emphasis added.]

Notably, subsection 1 states that periods of limitations do not apply in actions for the recovery of any land "where the state is a party . . . ." Given the statute's wording, regardless of whether the state is the plaintiff or the defendant, it does not lose its right to recover possession of its land after a certain period. Subsection 2, on the other hand, applies to actions "*brought by*" a municipal corporation. On its face, the plain language of the statute does not apply in situations where the municipal corporation did not bring the action, which is the present case. While I find that the statute, as worded, creates a rather illusory protection for municipalities, immunizing them from periods of limitations only if they file the action for recovery of their land, it is for the Legislature to fix a statute that is subject to only one, albeit anomalous, interpretation.

Differences in the language between subsections 1 and 2 of MCL 600.5821 have previously been addressed by this Court. In *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365; 711 NW2d 391 (2006), this Court summarized the history of adverse possession law in Michigan with respect to state and municipal land leading up to the creation of MCL 600.5821:

> "Under the common law, a party cannot claim ownership of state property by adverse possession. Michigan, however, long ago [statutorily] allowed adverse possession claims by imposing on the state a twenty-year limitations period for recovery of property. See 1897 CL 9724. Municipally owned roads were subject to adverse possession claims under this state's common law and were not exempted by statute.

> "In 1907, the Legislature enacted a provision stating that adverse possession did not apply against 'the public' regarding 'any public highway, street or alley, or of any public grounds, or any part or portion thereof, in any township, village or city in this State.' 1907 PA 46. This statute used language very similar to that found in the current MCL 600.5821(2), except it did not limit claims by only municipalities but rather 'the public' in general. Eight years later, the Legislature changed the law significantly. The exception still existed in essentially the same form, but was applicable only to municipalities, and a separate provision expressly stated that a fifteen-year limitations period applied to all state property, thus making it clearly susceptible to adverse possession claims. See 1915 PA 314. The same provisions continued to exist for many years, although they were occasionally moved to different statutes as the Legislature reorganized the laws. . . .
>
> "What is clear from the legislative history is that, from 1915 to 1988, the Legislature gave municipalities and the state different protection from claims of adverse possession. In 1988, the Legislature enacted the current provisions found in MCL 600.5821(1) and (2). The municipality exception was not altered, but 'any land' owned by the state was no longer subject to the limitations period, eliminating claims of adverse possession. The legislative analysis noted that the state had too much property to monitor and the public cost was too great when property was lost by adverse possession. The analysis did not address whether the Legislature intended to make state protection comparable to or greater than municipality protection." [*Adams*, *supra* at 372-373, quoting *Cascade Charter Twp v Adams Outdoor Advertising*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2004 (Docket No. 240625), at 3 (citations omitted).]

As the above history illustrates, although MCL 600.5821 subsections 1 and 2 were both enacted in 1988, subsection 1 was newly drafted and reflected a substantial change in the law at that time, whereas the language in subsection 2 remained very similar to its

precursor statute, enacted in 1907. This leaves one to wonder whether the Legislature intended the different protections afforded by each subsection, especially with respect to the consequence currently at issue. As stated in *Canton Twp*, *supra*, it is not clear whether, in enacting MCL 600.5821, the Legislature intended to give comparable or greater protection to the state than was already being provided to municipalities. *Canton Twp*, *supra* at 373. Nonetheless, judicial construction of an unambiguous statute is neither necessary nor permitted, and courts must give effect to every word, phrase, and clause in the statute and avoid an interpretation that renders any part of the statute nugatory or surplusage. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

At first blush, this Court's opinion in *Canton Twp*, *supra*, appears to conflict with the idea that MCL 600.5821(2) applies only to actions brought by a municipality. In *Canton Twp*, a billboard company sued a municipality, seeking quiet title to municipal land under a theory of adverse possession.[1] The municipality in *Canton Twp* did not bring the action; rather, it was the defendant. Without citation of authority, this Court stated, "It is . . . undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation." *Canton Twp, supra* at 370. The parties in *Canton Twp*, however, did not raise the issue that is before us. Rather, they were focused on the meaning of the words "public ground" and whether the statutory protection provided to municipalities in MCL 600.5821(2) applied to the subject

[1] *Canton Twp* involved a claim for quiet title on a theory of adverse possession, whereas the trial court in the present case awarded title on a theory of acquiescence. Any distinction between these two theories need not be addressed given our finding that MCL 600.5821(2) does not apply in this circumstance.

property. As such, we remain bound to interpret the plain language set forth by the Legislature in MCL 600.5821(2).[2]

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[2] It is worth noting that in *Cascade Twp*, *supra*, the unpublished opinion quoted in *Canton Twp*, a municipality brought the action to recover land being adversely possessed by the defendant, the same billboard company that was involved in the *Canton Twp* case.

PEOPLE v HILL

Docket No. 281375. Submitted February 10, 2009, at Detroit. Decided March 3, 2009, at 9:00 a.m. Leave to appeal sought.

A jury in the Wayne Circuit Court, Patricia Fresard, J., convicted Thomas Hill of armed robbery and carjacking and acquitted him on charges of possession of a firearm by a felon and possession of a firearm during the commission of a felony. The defendant was sentenced as a third-offense habitual offender. The defendant appealed.

The Court of Appeals *held*:

1. The trial court properly allowed the defendant to question the complainant regarding her use of drugs on the day of the crimes. Inquiry into the complainant's drugs of choice was properly precluded after she denied using drugs on the day of the crimes and the defendant did not proffer any evidence showing otherwise or attempt to show that she was using a drug that had some lingering effects on her perception or memory.

2. The trial court did not err in preventing the defendant from cross-examining a police detective regarding whether there are people who trade cars for drugs after the defendant failed to present any evidence to support his theory that the complainant gave the car to someone in exchange for drugs and was lying about the robbery and the carjacking.

3. There was probable cause supporting the issuance of the warrant for the defendant's arrest.

4. There is no validity to the defendant's assertions that there was misconduct by the police and the prosecutor that affected the validity of his arrest.

5. The district court properly found probable cause to bind the defendant over on the charges. Defense counsel was not ineffective in failing to bring futile motions and in consenting to the amendment of the complaint during the preliminary examination.

6. There was no violation of the defendant's right to confront the witnesses against him when the victim was permitted to view a medical report to refresh her recollection. Nothing in MRE 612,

which permits use of such evidence to refresh the memory of a witness, limits its application to documents authored by the witness.

7. It was not plain error to allow the prosecution to introduce into evidence a recording of 911 calls made on the night of the offenses.

8. Sufficient evidence established the elements of the offenses. The jury's verdict was not internally inconsistent because the defendant could be convicted of armed robbery if he only feigned the use of a weapon.

9. The trial court failed to comply with the requirements of *People v Anderson*, 398 Mich 361 (1976), and MCR 6.005(D) in denying the defendant's request to represent himself at trial. The request was made solely through defense counsel, and the record does not provide a basis for concluding that the request for self-representation was knowingly and intelligently made. The defendant did not effectively waive his right to the assistance of counsel.

Affirmed.

JANSEN, P.J., dissenting, stated that the trial court's failure to make any inquiry into the defendant's assertion of the right to self-representation was tantamount to a wrongful denial of the request. This structural error requires automatic reversal. The judgment of the trial court should be reversed.

WITNESSES — EVIDENCE — WRITING USED TO REFRESH MEMORY.

The rule of evidence that permits a witness to use a writing to refresh the memory of the witness does not limit its application to documents authored by the witness (MRE 612).

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

State Appellate Defender (by *Christine A. Pagac*) and Thomas Hill, *in propria persona*.

Before: JANSEN, P.J., and METER and FORT HOOD, JJ.

FORT HOOD, J. Defendant was convicted by a jury of armed robbery, MCL 750.529, and carjacking, MCL 750.529a(1), but acquitted of additional charges of possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of 20 to 40 years for each conviction. He appeals as of right. We affirm.

Defendant was convicted of stealing the victim's car and money while threatening her with a gun. The victim identified defendant, whom she had known for several months, as the perpetrator.

I. LIMITATIONS ON CROSS-EXAMINATION

Defendant argues that the trial court erroneously prevented him from thoroughly cross-examining the victim and police detective Edwardo Torres, and that these limitations on cross-examination violated his right of confrontation and his right to present a complete defense. Constitutional claims of due process violations are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

A. RIGHT OF CONFRONTATION

Defendant argues that the trial court violated his right of confrontation by precluding him from questioning the victim concerning her drug use. We disagree.

The Confrontation Clause, US Const, Am VI, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." " 'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' " *Davis v Alaska*, 415 US

308, 315-316; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (citation and emphasis omitted). "[T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness." *Id*. at 316. Exposing a witness's motivation, bias, and prejudices is a crucial part of the constitutionally protected right of cross-examination. *Id*. at 316-317. However, the Confrontation Clause does not confer a right to impeach the general credibility of a witness. *Boggs v Collins*, 226 F3d 728, 737-738 (CA 6, 2000).

In the present case, the victim's drug use was relevant to her ability to perceive and recall the events that transpired and, therefore, was relevant to her credibility. However, the victim admitted having a drug habit. She denied using drugs on the day of the crimes, and defendant did not proffer any evidence showing otherwise. Defendant has failed to explain how the victim's drug of choice, which he does not identify, has any further bearing on her credibility. In other words, defendant made no attempt to show that the victim was using a drug that had some lingering effects on the victim's perception and memory.

By allowing inquiry into the victim's drug use on the day of the crimes, the trial court sufficiently permitted defendant to cross-examine the victim concerning her perception and memory. *Davis*, *supra* at 316. While defendant was entitled to attempt to discredit the victim, he was not entitled to do so by way of a general attack on her character. *Boggs*, *supra* at 737-738. Inquiry into her drugs of choice was such a general character attack. Therefore, the trial court correctly refused to allow it, absent a particular showing of relevance.

B. RIGHT TO PRESENT A DEFENSE

Defendant also argues that the trial court violated his right to present a complete defense by preventing him from eliciting testimony that the victim may have traded the car for drugs.

Along with the right of confrontation, the United States Constitution guarantees a defendant " ' "a meaningful opportunity to present a complete defense." ' " *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (citations omitted). "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are ' "arbitrary" or "disproportionate to the purposes they are designed to serve." ' " *Id*. (citations omitted). However, a trial court may exclude evidence where the probative value is outweighed by certain other factors, such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Id*. at 326. This includes evidence that is repetitive, only marginally relevant, or that poses an undue risk of harassment, prejudice, or confusion of the issues. *Id*.

Applying this balancing test in the context of evidence proffered to show that someone else may have committed the crime charged, evidence may be introduced " 'when it is inconsistent with, and raises a reasonable doubt of, [the defendant's] own guilt,' " but not when the evidence is " 'remote' " and lacks a sufficient " 'connection with the crime.' " *Id*. at 327 (citations omitted). Accordingly, evidence tending to inculpate another may be introduced when it tends to prove that another person may have committed the crime, but it may be excluded " 'where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.' " *Id*. (citation omitted); see also *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987).

In questioning Detective Torres, defendant's goal was to raise the possibility that the victim gave the car to someone in exchange for drugs, and that she was lying about the robbery and carjacking. However, defendant did not proffer any evidence tending to support that theory. Defendant's general inquiry into whether there are people who trade cars for drugs was speculative and remote, and lacked sufficient connection with the crime. *Holmes*, *supra* at 327. At best, defendant sought to create only a mere suspicion that the victim fabricated the entire story. *Kent*, *supra* at 793. The trial court did not err in preventing defendant from cross-examining Detective Torres on this issue.

II. DEFENDANT'S PRO SE BRIEF

Defendant raises several issues in a pro se supplemental brief, none of which has merit.

A. THE ARREST WARRANT AND CONDUCT OF THE POLICE AND THE PROSECUTOR

Defendant argues that there was no probable cause to support issuing a warrant for his arrest and that misconduct by the police and the prosecutor affected the validity of his arrest. We disagree.

Chapter IV of the Code of Criminal Procedure, MCL 764.1 *et seq*., governs the issuance of arrest warrants. In particular, MCL 764.1a states, in relevant part:

> (1) A magistrate *shall issue a warrant upon presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense*. The complaint shall be sworn to before a magistrate or clerk.
>
> (2) The finding of reasonable cause by the magistrate may be based upon 1 or more of the following:

(a) *Factual allegations of the complainant contained in the complaint*.

(b) The complainant's sworn testimony.

(c) The complainant's affidavit.

(d) Any supplemental sworn testimony or affidavits of other individuals presented by the complainant or required by the magistrate.

(3) The magistrate may require sworn testimony of the complainant or other individuals. Supplemental affidavits may be sworn to before an individual authorized by law to administer oaths. *The factual allegations contained in the complaint*, testimony, or affidavits *may be based upon personal knowledge, information and belief, or both*. [Emphasis added.]

The prosecutor must authorize a felony complaint. MCL 764.1(1). "A complaint shall recite the substance of the accusation against the accused" and "may contain factual allegations establishing reasonable cause." MCL 764.1d.

In this case, defendant was charged with armed robbery, carjacking, possession of a firearm by a felon, and felony-firearm. The complaint contains factual allegations made by the victim to Detective Torres, on the officer's information and belief, supporting the elements of each of the offenses charged. Contrary to what defendant argues, the sworn complaint satisfied the requirements of MCL 764.1a and was sufficient to enable a magistrate to find that there was reasonable cause to believe that defendant committed the four offenses charged.

Defendant argues that there was no evidence to support Detective Torres's trial testimony that he knew defendant by the name "June." The propriety of this trial testimony has no bearing on whether an arrest warrant was properly issued. Regardless of whether Detective

Torres personally knew defendant as June, the victim identified defendant as her assailant from a photographic array.

Defendant argues that Detective Torres committed misconduct because he did not thoroughly investigate this case and, therefore, the arrest warrant was invalid. We again disagree. Defendant cites no authority for his argument that a reviewing court may second-guess the police investigation of a case in the context of determining whether a warrant was properly issued. The statutory warrant requirements address only whether there is probable cause to believe that the defendant committed the crimes charged. Other matters—including the weight and the credibility of the evidence, and the thoroughness of any police investigation—are for trial.

Defendant argues that the Detective Torres made a false arrest and that the prosecutor was guilty of malicious prosecution. Again, we disagree. False arrest and malicious prosecution are both civil claims, and are not at issue in this case. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 9; 672 NW2d 351 (2003).[1]

B. THE BINDOVER AND THE AMENDMENT OF THE INFORMATION

Defendant argues that the district court erred in binding him over for trial and that defense counsel was ineffective for failing to present a defense at the preliminary examination. Defendant also argues that the circuit court erred in allowing the prosecutor to amend the information to add the felon-in-possession charge and

[1] Furthermore, a police officer is not liable for false arrest if the arrest was based on probable cause, which existed here. *Id.* at 17-21. Similarly, a malicious prosecution claim depends on a showing that, unlike here, a criminal proceeding was terminated in the defendant's favor. See *id*. at 21-24.

that defense counsel was ineffective for consenting to the amendment and for waiving a formal reading of the charges.

A district court's decision to bind a defendant over for trial is reviewed for an abuse of discretion. *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006). At defendant's preliminary examination, the victim testified, as she did at trial, that defendant took the keys out of the ignition of the car, pointed a gun at her head, threatened to shoot her, and choked her while his companion hit her. The victim fainted and, when she regained consciousness, defendant (still holding the gun) told her to get out of the car, and then took her money and the car. In light of this testimony, the district court properly found that there was probable cause to believe that defendant committed armed robbery, carjacking, and felony-firearm. Further, defense counsel consented to the bindover, with no objection from defendant. Therefore, the circuit court properly acquired jurisdiction over this case.

Contrary to what defendant argues, the preliminary examination is not the time to create questions of fact or present a defense to the charges. *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998). Doing so would have been futile because the district court is not permitted to discharge a defendant on the basis of factual or credibility disputes. *Id*. Thus, defense counsel was not ineffective for failing to do so. See *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). In light of the evidence presented, defense counsel was not ineffective for consenting to the bindover on three of the four charges. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

We also reject defendant's arguments that the circuit court erred by allowing the prosecutor to amend the information to add the charge of possession of a firearm by

a felon, and that defense counsel was ineffective for consenting to the amendment and for waiving a formal reading of the charges. Defendant specifically consented to waiving a formal reading of the charges. Further, because defendant was acquitted of the charge of possession of a firearm by a felon, he was not prejudiced by the allegedly improper amendment.

C. EVIDENTIARY MATTERS AND THE JURY'S VERDICT

Defendant argues that the trial court erroneously allowed the prosecutor to introduce inadmissible hearsay, in violation of his right of confrontation. Defendant further complains that the responding police officers were not called to testify, that there was insufficient evidence to support the jury's verdict, and that the verdict was internally inconsistent. We disagree.

Contrary to what defendant argues, the prosecutor was not permitted to introduce a hearsay medical report of the victim's injuries in violation of defendant's right of confrontation. The medical report was only used to refresh the victim's recollection, as permitted by MRE 612; it was not admitted into evidence. Nothing in the language of MRE 612 limits its application exclusively to documents authored by the witness.

Under the Confrontation Clause, a testimonial statement of a witness absent from trial is not admissible for its truth unless the declarant is unavailable and there has been a prior opportunity for adequate cross-examination. *Crawford v Washington*, 541 US 36, 53-56, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In this case, however, the report was not admitted into evidence and was not used for its truth. Therefore, there was no violation of defendant's right of confrontation. Further, because any objection by defense counsel

would have been futile, defense counsel was not ineffective for failing to object. See *Kulpinski*, *supra* at 27.

Defendant also argues that the trial court erred in allowing the prosecutor to introduce into evidence a compact disk recording of 911 calls made on the night of the offenses. Because there was no objection to this evidence, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

From the available record, the 911 calls could qualify for admission under various theories, including as a present sense impression, an excited utterance, or a public record. See MRE 803(1), (2), and (8). Thus, the receipt of this evidence did not constitute plain error, and defense counsel was not ineffective for failing to object. See *Kulpinski*, *supra* at 27.

To the extent that the Confrontation Clause entitled defendant to cross-examine the callers, see *Crawford*, *supra* at 53-56, 59, defendant has failed to overcome the presumption that defense counsel reasonably decided not to object as a matter of trial strategy, to preclude potentially prejudicial testimony from these witnesses. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

The prosecutor did not have a duty to call the responding police officers to testify. *People v Burwick*, 450 Mich 281, 288-289, 297; 537 NW2d 813 (1995); see also MCL 767.40a(1) to (5).[2] Because defendant has advanced no theory showing that failure to call the officers deprived him of a substantial defense, defendant has failed to show that defense counsel was ineffective for not calling the officers. *People v Davis*,

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[2] Defendant does not claim that the prosecutor failed to identify the officers during discovery.

250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Finally, the victim's testimony that defendant physically assaulted her, threatened her with a gun, and then stole her car and money, viewed in a light most favorable to the prosecution, was sufficient to establish the elements of armed robbery and carjacking beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). Further, the jury's verdict was not internally inconsistent. Whereas the weapons offenses required proof of an actual firearm, defendant properly could be convicted of armed robbery even if he only feigned the use of a weapon. See *People v Taylor*, 245 Mich App 293, 297-303; 628 NW2d 55 (2001); compare *People v Peals*, 476 Mich 636, 640-656; 720 NW2d 196 (2006).

III. DEFENDANT'S SUPPLEMENTAL BRIEF

In a supplemental brief, defendant argues that a new trial is required because his constitutional right to self-representation was violated. We disagree.

A trial court's findings concerning whether a defendant's waiver of the right to counsel was knowing and intelligent is reviewed for clear error. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

A defendant has a constitutional right to self-representation under state and federal law. *Id.* at 641-642. Nonetheless, a waiver of the right to counsel must be knowing, intelligent, voluntary, and made with sufficient awareness of the relevant circumstances. *Id*. Courts should indulge in every presumption *against* finding a waiver of a fundamental constitutional right such as the right to counsel. *Id*. at 641; see also *People v Russell*, 471 Mich 182, 188; 684 NW2d 745 (2004).

In *Williams*, *supra* at 642, the Supreme Court, relying on *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), stated:

> [A] trial court must make three findings before granting a defendant's waiver request. First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business.

See also *Russell*, *supra* at 189-190. The trial court must also comply with pertinent portions of MCR 6.005(D), which provides, in relevant part:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

See *Williams*, *supra* at 642-643, and *Russell*, *supra* at 190-191. Substantial compliance with the requirements of *Anderson* and the court rule is sufficient. *Id.* at 191; see also *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996), overruled in part on other grounds in *Williams*, *supra* at 641 n 7. Thus, the trial court must discuss the substance of the foregoing requirements with the defendant and make sure that the defendant fully understands, recognizes, and agrees to all the various procedures entailed in waiving the right to counsel. *Id*.

"If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propia persona, noting the reasons for the denial on the record." *Adkins*, *supra* at 727. "[I]f the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel." *Russell*, *supra* at 191-192. "[T]he rule articulated in *Adkins* provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel." *Id*. at 192. On the other hand, when it appears that all the pertinent requirements have been met, yet the trial court denies the request for self-representation, the defendant is entitled to a new trial. See *Anderson*, *supra* at 369-371.

In the present case, the trial court denied defendant's request to represent himself without any pertinent inquiry. We agree that the trial court failed to comply with the requirements of *Anderson* and the court rule. But the request was made solely through counsel and the record does not provide a basis for concluding that defendant's request for self-representation was knowingly and intelligently made. Accordingly, defendant did not effectively waive his Sixth Amendment right to the assistance of counsel,[3] *Russell*, *supra* at 191-192, and reversal on this basis is not warranted.

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[3] This case is similar to *People v Rice*, 231 Mich App 126, 133-134; 585 NW2d 331 (1998), rev'd 459 Mich 899 (1998), mod 459 Mich 929 (1998), in which this Court found a violation of the defendant's right to self-representation where the trial court had not complied with the requirements of *Anderson* and MCR 6.005(D). The Supreme Court reversed, finding that there had been no effective waiver of the defendant's right to counsel because "[t]he record does not establish that

Affirmed.

METER, J., concurred.

JANSEN, P.J. (*dissenting*). When defendant asked to represent himself in this case, the trial court summarily denied his request without ever inquiring into his reasons or attempting to establish whether his expressed desire for self-representation was unequivocal, knowing, intelligent, and voluntary. Therefore, I must respectfully dissent.

A criminal defendant's right to represent himself is implicitly guaranteed by the Sixth Amendment of the United States Constitution, US Const, Am VI;[1] *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975), and explicitly guaranteed by the Michigan Constitution and Michigan statutory law, Const 1963, art 1, § 13; MCL 763.1. "The right to defend is personal," and it is therefore "the defendant . . . who must be free personally to decide whether in his particular case counsel is to his advantage. . . . [A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Faretta*, 422 US at 834 (citation omitted). The right to self-representation is "fundamental" in nature,[2] and the erroneous denial of the right is a structural error requiring automatic reversal. *United States v Gonzalez-Lopez*, 548 US 140, 150; 126 S Ct

defendant made an unequivocal request to represent himself that was knowing, intelligent, and voluntary . . . ." *Rice, supra*, 459 Mich at 899.

[1] The Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005); see also *Gideon v Wainwright*, 372 US 335, 341-342; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[2] *Id.* at 817.

2557; 165 L Ed 2d 409 (2006); see also *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

Before granting a criminal defendant's request to proceed pro se, the trial court must determine that the request is unequivocal and that the defendant's assertion of the right to self-representation is knowing, intelligent, and voluntary. *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004); *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). The trial court must also substantially comply with MCR 6.005 by advising the defendant of the charge against him, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation, and by offering the defendant the opportunity to consult with an attorney. *Russell*, 471 Mich at 190-191.

I fully acknowledge that the right to self-representation is not absolute and that the state may place reasonable conditions on a criminal defendant's right to represent himself. *Indiana v Edwards*, 554 US ___; 128 S Ct 2379, 2384; 171 L Ed 2d 345, 353 (2008). For instance, the state may appoint "standby counsel over [a] self-represented defendant's objection," may require a pro se defendant to "compl[y] with 'relevant rules of procedural and substantive law,' " and may insist, without violating the constitutional guarantee, that a pro se defendant refrain from " 'abus[ing] the dignity of the courtroom' " and " 'engag[ing] in serious and obstructionist misconduct.' " *Id.*, 554 US at ___; 128 S Ct at 2384; 171 L Ed 2d at 353 (citations omitted). Indeed, the Michigan Supreme Court has specifically observed that before allowing a criminal defendant to continue without an attorney, the trial court must ensure that "the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *Russell*, 471 Mich at 190.

Moreover, I acknowledge that pro se representation is generally not "wise, desirable or efficient," *Martinez v Court of Appeal of California*, 528 US 152, 161; 120 S Ct 684; 145 L Ed 2d 597 (2000), and that there is a strong presumption against waiver of the right to counsel, *Michigan v Jackson*, 475 US 625, 633; 106 S Ct 1404; 89 L Ed 2d 631 (1986); see also *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

Nonetheless, as noted previously, the trial court in this case made *no inquiry* into defendant's assertion of the right to self-representation. Without making any inquiry, it was *impossible* for the trial court to ascertain whether defendant was seeking to unequivocally, knowingly, intelligently, and voluntarily waive his right to an attorney. By summarily substituting its own decision for that of defendant—whether for the sake of expediency or for some other reason—the trial court effectively foreclosed any consideration of defendant's assertion of the right to proceed pro se, never reaching the merits of his request. If our trial courts are to be allowed to simply deny criminal defendants' requests to proceed pro se, without ever reaching the substance and merits of those requests, there will be little meaning left in the Sixth Amendment right to self-representation under *Faretta*, or in Michigan's constitutional guarantee that a litigant in the courts of this state may "defend his suit . . . in his own proper person . . . ." Const 1963, art 1, § 13.

I find persuasive the decision of the United States Court of Appeals for the Eleventh Circuit in *Dorman v Wainwright*, 798 F2d 1358, 1366 (CA 11, 1986). There, as in the case at bar, "the trial court never bothered to inquire whether [the defendant] was making a knowing and intelligent waiver of his right to counsel or was aware of the dangers and disadvantages of self-

representation." *Id*. The *Dorman* Court explained that "[t]o invoke his Sixth Amendment right under *Faretta* a defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request." *Id*. Instead, the *Dorman* Court concluded that a defendant must simply state his request to the trial court and that the court "must then conduct a hearing on the waiver of the right to counsel to determine whether the accused understands the risks of proceeding pro se." *Id*.; see also *United States v McDowell*, 814 F2d 245, 250 (CA 6, 1987) (identifying a "model inquiry" to be made on the record "[i]n the future, whenever a federal district judge in this circuit is faced with an accused who wishes to represent himself in criminal proceedings"). Similarly, I conclude that the trial court was required to conduct a hearing on defendant's requested waiver of the right to counsel in the present case.

I recognize that the trial court in this case may have believed that defendant was merely seeking to delay trial or to obstruct the judicial process by requesting to represent himself. However, I conclude that the trial court was still under an obligation to honestly and reasonably entertain defendant's request and inquire into his reasons. Although the trial court's concerns in this regard may not have been without foundation, as the Iowa Supreme Court has observed, " ' "even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." ' " *State v Martin*, 608 NW2d 445, 450 (Iowa, 2000), quoting *McMahon v Fulcomer*, 821 F2d 934, 943 (CA 3, 1987) (additional citation omitted).

Courts in several other jurisdictions have reached similar conclusions, holding that trial courts must at

least minimally consider a criminal defendant's request to proceed pro se, even if the request is untimely or appears to be made for the purposes of delay. See *Tennis v State*, 997 So 2d 375, 379 (Fla, 2008) (holding that when a criminal defendant asserts the right to self-representation, "the trial court's failure to hold a *Faretta* hearing . . . to determine whether [the defendant can] represent himself is per se reversible error"); *Gladden v State*, 110 P3d 1006, 1010 (Alas App, 2005) (holding that even when the defendant merely "impliedly elected to proceed *pro se* by refusing to . . . hire an attorney," "that circumstance did not relieve the trial court of its obligation to ensure that [the defendant's] decision to forego the assistance of counsel was knowing and intelligent"); *State v Brown*, 342 Md 404, 414; 676 A2d 513 (1996) (stating that when a request for self-representation is made, "the court must conduct a waiver inquiry to ensure that any decision to waive the right to counsel is 'made with eyes open' ") (citation omitted); *People v Windham*, 19 Cal 3d 121, 128; 560 P2d 1187; 137 Cal Rptr 8 (1977) (observing that even when a criminal defendant makes an untimely request for self-representation, "the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required"); *Rodriguez v State*, 982 So 2d 1272, 1274 (Fla App, 2008) (holding that "[w]here a defendant makes an unequivocal request to represent himself prior to the commencement of trial, a trial court is required to conduct a *Faretta* inquiry" and that "[t]he failure of the trial court to conduct such an inquiry constitutes reversible error"); *State v Weiss*, 92 Ohio App 3d 681, 685; 637 NE2d 47 (1993) (holding that "[e]ven when the waiver of counsel is implied by the defendant's purported delaying tactics, a pretrial in-

quiry as to the defendant's knowing and intelligent waiver of the right must be made").

I am compelled to conclude that the trial court's *failure* to consider defendant's request to represent himself in this case was tantamount to a *wrongful denial* of defendant's right to represent himself. Both the failure to consider a request to proceed pro se and the wrongful denial of a request to proceed pro se achieve the same result; both actions improperly foreclose a defendant's fundamental constitutional right to self-representation. See *Faretta*, 422 US at 817, 819-820. I see no meaningful difference between the two. Because the trial court's wholesale failure to consider defendant's request to proceed without counsel in this case was tantamount to a wrongful denial of the right, I conclude that structural error occurred and automatic reversal is required. *Gonzalez-Lopez*, 548 US at 150; *McKaskle v Wiggins*, 465 US 168, 177 n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984) (observing that the denial of the right to self-representation "is not amenable to 'harmless error' analysis" and that "[t]he right is either respected or denied; its deprivation cannot be harmless").

I would reverse.

LANIGAN v HURON VALLEY HOSPITAL, INC

Docket No. 279799. Submitted November 4, 2008, at Detroit. Decided March 3, 2009, at 9:05 a.m.

Jayne and Greg Lanigan brought a medical malpractice action in the Oakland Circuit Court against Huron Valley Hospital, Inc., and Steven D. Belen, D.O., alleging, in part, that as a result of the defendants' breach of the applicable standard of care Jayne Lanigan (hereafter plaintiff) was required to have a heart transplant in lieu of bypass surgery. The plaintiff advanced both a traditional medical malpractice claim and a claim that the malpractice resulted in a lost opportunity to achieve a better result. The court, Denise Langford Morris, J., granted the defendants' motion for summary disposition, which focused entirely on the lost-opportunity claim, without addressing the traditional medical malpractice claim, after determining that the plaintiff did not suffer a greater than 50 percent loss of an opportunity to achieve a better result, as required by MCL 600.2912a(2). The plaintiff appealed.

The Court of Appeals *held*:

1. The general statistical evidence that the trial court considered was not limited to persons similarly situated to the plaintiff. Without some connection to the plaintiff, the evidence was, in the context offered and standing alone, only marginally relevant and was an improper basis upon which to grant summary disposition.

2. MCL 600.2912a(2) provides that a plaintiff cannot recover for the loss of an opportunity to survive or achieve a better result unless the opportunity was greater than 50 percent. The difference between the opportunity before the malpractice and the opportunity after the malpractice must be greater than 50 percent, that is, the alleged malpractice must have reduced the opportunity by more than 50 percent in order for the plaintiff to recover.

3. Because of the conflicting interpretations of the statistics in this case, a genuine issue of material fact exists with regard to the meaning of the statistics. Summary disposition was improperly granted and the order granting summary disposition must be reversed.

4. The plaintiff sufficiently pleaded both an ordinary medical malpractice claim and a lost-opportunity claim in her complaint. It was error to dismiss the case solely on the basis of the lost-opportunity claim without considering the ordinary medical malpractice claim. The case must be remanded to the trial court for further proceedings regarding the traditional medical malpractice claim.

Reversed and remanded.

GLEICHER, P.J., concurring, wrote separately to note that had the complaint articulated solely a lost-opportunity claim, this panel would have invoked the conflict provisions of MCR 7.215(J). The analysis of the language of MCL 600.2912a(2) that was set forth in *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), that this panel was required to follow pursuant to MCR 7.215(J)(1), was rejected by all the justices in the nonbinding plurality decision in *Stone v Williamson*, 482 Mich 144 (2008), and, therefore, the Court of Appeals should critically reexamine *Fulton* when presented with an appropriate case.

NEGLIGENCE — MEDICAL MALPRACTICE — LOSS OF OPPORTUNITY TO SURVIVE OR ACHIEVE A BETTER RESULT.

A medical malpractice plaintiff seeking recovery for loss of an opportunity to survive or achieve a better result must show that the alleged malpractice reduced the opportunity by more than 50 percent; the difference between the opportunity before the malpractice and the opportunity after the malpractice must be greater than 50 percent (MCL 600.2912a[2]).

Weiner & Cox, PLC (by *Cyril V. Weiner* and *Joel A. Sanfield*), and *Richard E. Shaw* for Jayne Lanigan.

Tanoury, Corbet, Shaw, Nauts & Essad, P.L.L.C. (by *Linda M. Garbarino* and *Cullen B. McKinney*), for Huron Valley Hospital, Inc.

Kerr, Russell and Weber, PLC (by *Stephen D. McGraw* and *Joanne Geha Swanson*), for Steven D. Belen, D.O.

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

K. F. KELLY, J. In this medical malpractice case, plaintiff Jayne Lanigan claims that defendants Huron Valley Hospital, Inc. (Huron Valley), and Steven D.

Belen, D.O. (Dr. Belen), breached the applicable standard of care and thus caused plaintiff to require a heart transplant in lieu of bypass surgery. Plaintiff appeals as of right the trial court's order granting summary disposition for defendants.[1] We reverse and remand.

I. FACTS

Around 9:00 a.m. on September 8, 2004, plaintiff experienced difficulty breathing while jogging and she collapsed. A bystander called 911 and an ambulance transported plaintiff to Huron Valley. When plaintiff arrived at Huron Valley at approximately 9:40 a.m., she complained of chest pains, shortness of breath, and nausea. An initial electrocardiogram (EKG) revealed a possible septal wall infarct, or heart attack. Given plaintiff's medical history and presentation—she was then 41 years old, athletic, and had no history of heart disease—the emergency room physician initially believed plaintiff had a pulmonary embolism. This diagnosis, however, was ruled out after a computerized axial tomography (CAT) scan of plaintiff's thorax at approximately 10:30 a.m. Plaintiff continued to suffer from severe respiratory distress and her condition worsened.

Given plaintiff's status, Dr. Belen, a cardiac specialist, was summoned, and he saw plaintiff at approximately 10:45 a.m. Pursuant to Dr. Belen's order, plaintiff had a 2-D echocardiogram,[2] which revealed decreased wall motion in the right ventricle of plaintiff's heart, suggesting that plaintiff had had a heart attack. Dr. Belen administered dopamine in order to stabilize plaintiff's condition and she was transferred to

[1] Throughout this opinion, "plaintiff" refers to Jayne Lanigan; the claims of her husband, Greg Lanigan, are derivative in nature.

[2] A 2-D echocardiogram is essentially an ultrasound of the patient's heart.

the intensive care unit. Although Huron Valley was not equipped to perform emergency invasive bypass surgery, no arrangements for a transfer to a different hospital were made at that time.

Before administering any thrombolytic therapy, or drugs used to break down blood clots, for the treatment of a heart attack, Dr. Belen ordered a CAT scan of plaintiff's head at 2:15 p.m. Dr. Belen was concerned that plaintiff may have suffered from an aneurysm because of her history of a closed head injury, which could contraindicate any thrombolytic therapy. If the CAT scan was negative, plaintiff was to be administered Retavase, a thrombolytic drug intended to improve ventricle functioning after a heart attack. The results of the CAT scan were negative and plaintiff was administered Retavase at 5:00 p.m. Dr. Belen believed that plaintiff might stabilize as a result of the Retavase and that a transfer would not be necessary. However, plaintiff's condition did not stabilize and Dr. Belen then decided to transfer plaintiff to a hospital equipped to perform emergency bypass surgery.

Plaintiff was transferred to Beaumont Hospital (Beaumont), arriving at approximately 10:30 p.m.[3] Upon her arrival, doctors discovered that bypass surgery was not possible because of irreparable damage to plaintiff's cardiac tissue. Plaintiff then underwent surgery for the placement of a ventricle assist device. Afterward, Beaumont transferred plaintiff to the University of Michigan hospital, where it was determined that plaintiff would need a heart transplant. Plaintiff received a heart transplant in December 2004. Since receiving her heart transplant, plaintiff has had to take

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[3] Plaintiff's family had requested that she be transferred approximately eight hours earlier.

immunosuppressant drugs every day, has had difficulty with daily tasks, and cannot return to work.

Plaintiff then filed this lawsuit. In her complaint, plaintiff alleged that defendants' actions breached the applicable standard of care, thus causing plaintiff to lose an opportunity for a better result, i.e., receiving a cardiac bypass and a longer life expectancy as opposed to a heart transplant and a shorter life expectancy, and, in addition, causing plaintiff direct harm. In contending that defendants failed to timely diagnose the heart attack, timely order thrombolytic therapy, and timely transfer her to a facility capable of emergency cardiac intervention, plaintiff alleged in her complaint:

> 25. That Plaintiff Jayne Lanigan sustained personal injuries as a direct and proximate result of Defendant's [sic] negligence and malpractice as herein alleged.
>
> * * *
>
> 27. That at all time material herein, due to the negligence of the Defendant [sic], their agents, servants and/or employees, either real or ostensible, Plaintiff lost an opportunity to survive and/or an opportunity to achieve a better result that was greater than 50%.

Defendant Dr. Belen moved for summary disposition, with which Huron Valley concurred, arguing that no material factual dispute exists that plaintiff did not suffer a lost opportunity to achieve a better result greater than 50 percent.[4] In defendants' view, plaintiff's opportunity to survive actually increased as a result of the heart transplant because patients receiving heart transplants have a 65 percent chance of surviving 10 years, whereas patients, like plaintiff, suffering from

[4] The motion for summary disposition did not address any allegations of the "traditional" medical malpractice claim, i.e., one that does not involve a claim of lost opportunity.

cardiogenic shock survive only 30 percent of the time. Notably, neither Dr. Belen nor Huron Valley moved for summary disposition regarding plaintiff's traditional medical malpractice claim. The trial court agreed with defendants and entered an order granting their motion. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews 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). A motion for summary disposition based on lack of a material factual dispute is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding a motion under MCR 2.116(C)(10), we must consider all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Rice*, *supra* at 30-31.

III. STATISTICAL EVIDENCE

Before reaching the substance of plaintiff's lost-opportunity claim, we first briefly consider plaintiff's argument that defendants presented misleading statistics to the trial court.[5] Dr. Belen argued in his brief in support of the motion for summary disposition that

[5] It is unclear from the trial court's opinion and order granting summary disposition whether it was swayed by defendants' interpreta-

plaintiff's opportunity to survive actually increased as a result of the heart transplant because patients receiving heart transplants have a 65 percent change of surviving 10 years, whereas patients suffering from cardiogenic shock have a fatality rate of 70 percent. However, the deposition testimony of plaintiff's expert, Dr. Daniel Wohlgelernter, indicates that the 70 percent mortality rate applies to "all-comers," which would include individuals in exceedingly poor health, unlike plaintiff. Just as a defendant must take a frail plaintiff as he finds him, so must a defendant take a strong and healthy plaintiff as he finds him. *Richman v City of Berkley*, 84 Mich App 258, 262; 269 NW2d 555 (1978); 2 Restatements Torts, 2d, § 461, p 502. In this case, the 70 percent mortality rate was not limited to those similarly situated to plaintiff. Thus, this general statistical evidence was without selective application to plaintiff. Without some connection to the plaintiff, the statistical evidence was, in the context offered and standing alone, only marginally relevant[6] and was an improper basis upon which to grant summary disposition.

IV. LOST-OPPORTUNITY CLAIM

Next, with respect to plaintiff's lost-opportunity claim, plaintiff argues that the trial court improperly

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tion of the statistics. The trial court simply stated that plaintiff failed to show that "[p]laintiff's chances of a better result decreased by at least 50%."

[6] Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. It must be material, that is, related to a fact of consequence to the action, and have probative force, that is, have a tendency to make the existence of a fact of consequence to the action more probable or less probable than it would be without the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000).

granted summary disposition because a genuine question of material fact exists. We agree. Regardless of whether a plaintiff alleges a traditional medical malpractice or a lost-opportunity claim, the plaintiff must establish: "(1) the standard of care, (2) breach of that standard of care, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006). Thus, a lost-opportunity claim is properly asserted where, either standing alone or together with a traditional medical malpractice claim, a plaintiff can demonstrate, by a preponderance of the evidence, that a defendant's negligence proximately caused the complained of injury. *Falcon v Mem Hosp*, 436 Mich 443, 461-462; 462 NW2d 44 (1990) (LEVIN, J.) (injury resulting from medical malpractice is not only physical harm, but also includes the loss of opportunity of avoiding physical harm.) With respect to lost-opportunity claims, the second sentence of MCL 600.2912a(2) expounds on the "injury" that plaintiff must show. That provision 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%*. [Emphasis added.]

Much confusion exists regarding the meaning of the last sentence of this provision. In *Fulton v William Beaumont Hosp*, 253 Mich App 70, 77-78; 655 NW2d 569 (2002), this Court examined whether the second sentence requires a plaintiff "to show only that the initial opportunity . . . before the alleged malpractice was greater than fifty percent . . . or, instead, that the

opportunity . . . was reduced by greater than fifty percent because of the alleged malpractice[.]" The *Fulton* Court determined that the latter interpretation was more aligned with the Legislature's intent, and thus held that the difference between the opportunity pre-malpractice and the opportunity post-malpractice must be greater than 50 percent. *Id.* at 82. For example, in *Fulton*, the plaintiff had an 85 percent chance of survival pre-malpractice and a 65 percent chance of survival post-malpractice, and, therefore, the plaintiff's lost-opportunity claim failed because the plaintiff only suffered a 20 percent loss, which is less than the 50 percent loss required by the statute. *Id.*

More recently, our Supreme Court interpreted the meaning of MCL 600.2912a(2) in a plurality decision, *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), in which all the justices expressed a belief that *Fulton* was wrongly decided, albeit for different reasons. *Id*. at 164 (TAYLOR, C.J.). Chief Justice TAYLOR, joined by Justices CORRIGAN and YOUNG, concluded that lost-opportunity claims do not exist because the second sentence of MCL 600.2912a(2) is so incomprehensible that it is judicially unenforceable and, further, because the Legislature reinstated the traditional elements of medical malpractice when it amended the statute after the Supreme Court adopted the lost-opportunity doctrine in *Falcon*, *supra*. *Stone*, *supra* at 160-162 (TAYLOR, C.J.). Justice CAVANAGH, joined by Justices WEAVER and KELLY, concluded that the Legislature did not reject the lost-opportunity doctrine; rather, its post-*Falcon* amendment merely established a threshold for lost-opportunity claims. *Id*. at 169-170 (CAVANAGH, J.). Further, when read in light of the Court's decision in *Falcon*, Justice CAVANAGH opined that the "injury" referred to in the second sentence of the statute is the lost opportunity itself, and the opportunity to be measured

is the pre-malpractice opportunity to survive or achieve a better result by 50 percent. *Id.* at 169-172. Conversely, Justice MARKMAN, the only justice to believe that *Stone* involved a true lost-opportunity claim, found that the provision was enforceable but would apply Dr. Roy Waddell's calculation to determine whether the lost opportunity was greater than 50 percent. *Id*. at 186 (MARKMAN, J.); see also Waddell, *A doctor's view of "opportunity to survive":* Fulton's *assumptions and math are wrong*, 86 Mich B J 32, 33 (March, 2007). Because the majority of the justices determined that the plaintiff's claim in *Stone* was not a lost-opportunity claim, but an ordinary medical malpractice claim, the issue of the correctness of *Fulton* was not properly before the Court. *Stone*, *supra* at 164 n 14, (TAYLOR, C.J.). Accordingly, because the correctness of *Fulton* was not properly before the Court and because *Stone* is a plurality opinion, *Stone* is not binding on this Court and it does not establish a point of law. *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976); *Fogarty v Dep't of Transportation*, 200 Mich App 572, 574-575; 504 NW2d 710 (1993). Therefore, the prevailing analysis for lost-opportunity cases remains that set forth in *Fulton*, *Stone*, *supra* at 164 n 14 (TAYLOR, C.J.), and regardless of whether we think *Fulton* was properly decided we are bound to follow it. MCR 7.215(J)(1); *Harvey v Harvey*, 257 Mich App 278, 301 n 6; 668 NW2d 187 (2003).

In the present matter, Dr. Wohlgelernter testified in his deposition that patients in cardiogenic shock only have a 30 percent chance of survival. Plaintiff's other expert, Dr. Douglas Zusman, testified that plaintiff's 10-year survival rate after her heart transplant is 65 percent. Given these statistics, defendants assert that plaintiff's chances of survival actually increased rather

than decreased as a result of the heart transplant.[7] Conversely, plaintiff points to other statistics showing that her chances of survival decreased more than 50 percent as a result of the alleged malpractice. In an affidavit, Dr. Wohlgelernter further indicated that less than 10 percent of transplant patients survive 25 years after transplant surgery, whereas more than 60 percent of patients receiving bypass surgery will survive over 25 years. Pre-malpractice then, i.e., assuming plaintiff had timely received a bypass, plaintiff had more than a 60 percent chance of surviving 25 years or more, whereas post-malpractice, i.e., with the heart transplant, plaintiff's chances of surviving more than 25 years dropped to less than 10 percent. The difference is 50 percent or more, sufficient for a lost-opportunity claim under the statute as construed in *Fulton*.

Even were we to construe Dr. Wohlgelernter's testimony regarding the likelihood that plaintiff would have avoided a heart transplant under a loss of opportunity analysis, Dr. Wohlgelernter's nonquantitative statements convey a greater than 50 percent chance of a better result. In fact, the statement that plaintiff "would have suffered little or no functional deficit[]" had she received a bypass rather than a heart transplant, is tantamount to a nearly 100 percent better result, i.e., maintaining one's own heart and living an unaffected life pre-malpractice. As a result of defendants' alleged malpractice, plaintiff had no chance (zero

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[7] We note that a living plaintiff cannot recover for a loss of opportunity to survive under the statute. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 62; 631 NW2d 686 (2001). This is because, under the provision's plain language, a lost-opportunity claim must include those injuries actually suffered and cannot include the possibility of future injuries, such as death. *Id*. 60-61. However, this does not preclude courts from considering the plaintiff's risk of death as part of the calculation of the "opportunity to achieve a better result," as is the case here.

percent) to save her heart. Thus, a reasonable interpretation of these statements is that plaintiff's lost opportunity for a better result, keeping her own heart, is close to 100 percent.

Given the conflicting interpretation of the statistics in this case, we are of the view that a genuine issue of material fact exists because reasonable minds could differ with regard to the meaning of the statistics. *Gen Motors Corp*, *supra* at 183. Therefore, we conclude that the matter is most appropriate for the jury to decide. Accordingly, summary disposition for defendants was improper and we reverse the trial court's order.

V. TRADITIONAL MEDICAL MALPRACTICE CLAIM

Lastly, plaintiff argues that her claim is a traditional medical malpractice claim and that we should consider it as such. Indeed, in light of our Supreme Court's decision in *Stone,* before analyzing a case under the lost-opportunity doctrine, we must first determine whether the case, in fact, presents a lost-opportunity cause of action. Although plaintiff's complaint is no model of clarity, our review of the record indicates that plaintiff sufficiently pleaded an ordinary medical malpractice claim, as well as a lost-opportunity claim, in her complaint below.[8] Dr. Belen's summary disposition motion focused entirely on the lost-opportunity portion of plaintiff's claim. Thus, the parties did not address plaintiff's traditional negligence claim in the trial court. Subsequently, the trial court dismissed plaintiff's entire claim on the basis of MCL 600.2912a(2). The dismissal was erroneous given that plaintiff's ordinary medical malpractice claim remained to be decided. However,

[8] In our view, and given our Supreme Court's holding in *Stone*, *supra*, it would have been helpful had plaintiff pleaded her ordinary negligence and lost-opportunity claims as separate counts in the complaint.

because the issue was not considered by the trial court, it is not properly preserved and it is not now properly before this Court. *People v Herrick*, 277 Mich App 255, 259; 744 NW2d 370 (2007). Accordingly, we remand to the trial court for further proceedings regarding plaintiff's traditional medical malpractice claim.

Reversed and remanded. We do not retain jurisdiction.

MURRAY, J., concurred.

GLEICHER, P.J. (*concurring*). I fully concur with the reasoning and result announced by the majority in this case. I write separately to observe that had the complaint articulated solely a lost-opportunity claim, it would be incumbent on this Court to invoke the conflict provisions of MCR 7.215(J). As my colleagues today acknowledge, all seven justices who decided *Stone v Williamson*, 482 Mich 144, 164; 753 NW2d 106 (2008) (opinion by TAYLOR, C.J.), rejected the analysis set forth in *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002). Because *Fulton*'s central holding clearly lacks the support of a majority of our Supreme Court, this Court should not hesitate to critically reexamine *Fulton* when presented with an appropriate case.

PEOPLE v MURPHY (ON REMAND)

Docket No. 258397. Submitted December 2, 2008, at Detroit. Decided March 3, 2009, at 9:10 a.m. Leave to appeal sought.

Bernard C. Murphy was charged in the Wayne Circuit Court with two counts of armed robbery and one count of possessing a firearm during the commission of a felony. After jury selection, counsel addressed the proposed introduction of evidence obtained during the defendant's arrest for a carjacking offense that occurred the day after the offenses in this case. The court, Deborah A. Thomas, J., ruled that the prosecution could present testimony related to shotgun shells found in the pickup that the defendant had been driving but not the shotgun or testimony regarding its discovery. Following the prosecution's interlocutory appeal, the Court of Appeals peremptorily reversed Judge Thomas's exclusion of evidence of the shotgun in an unpublished order, entered April 23, 2004 (Docket No. 255101). The case proceeded to trial before Michael M. Hathaway, J., and the jury convicted the defendant of all charges. The Court of Appeals, SCHUETTE, P.J., and BANDSTRA, J. (COOPER, J., concurring), reversed his convictions in an unpublished opinion per curiam, issued October 12, 2006 (Docket No. 258397), and remanded the case for a new trial after concluding that the defendant had entirely lacked the assistance of counsel during the prosecution's interlocutory appeal. The Supreme Court reversed the Court of Appeals' grant of a new trial for the defendant and remanded the case to that court for a new appeal. 481 Mich 919 (2008).

On remand, the Court of Appeals *held*:

1. Judge Thomas abused her discretion by ruling that in the absence of direct evidence linking the defendant and the shotgun, the prosecution could not introduce evidence of the shotgun at trial. The prosecution lacked direct evidence demonstrating the defendant's possession and control of the shotgun. The appropriate test, however, is not whether sufficient evidence existed to convict the defendant of constructively possessing the gun, but whether the circumstances surrounding its discovery tended to establish the defendant's connection to it. Generally, evidence is admissible if it is helpful in throwing light on any material point at

issue. The central issue in this case was whether a witness had correctly identified the defendant as one of his assailants. Evidence that a day after the robbery the defendant drove a pickup like that used in the robbery and parked it near a discarded shotgun that used shells of a caliber consistent with those found in the pickup tended to prove the defendant's identity as one of the robbers.

2. Judge Hathaway did not abuse his discretion by ruling that MRE 403 did not prohibit the admission of the evidence related to the carjacking. Although the carjacking involved a serious and entirely separate crime, the risk of unfair prejudice did not substantially outweigh the probative force of the evidence connecting the defendant to the pickup and the shotgun.

3. Judge Thomas did not clearly err by admitting the identification of the defendant a witness made after the witness requested that the participants in a lineup speak a command given during the robbery. A court evaluates the fairness of an identification procedure in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. Evidence of a voice identification is competent if the identifying witness demonstrates certainty in the mind by testimony that is positive and unequivocal. Voice identification must be based on a peculiarity in the voice or on sufficient previous knowledge by the witness of the person's voice. The witness in this case had ample opportunity to hear and see the robber with the shotgun.

Affirmed.

EVIDENCE — CRIMINAL LAW — LINEUPS — IDENTIFICATION OF A DEFENDANT — VOICE IDENTIFICATION.

Evidence of the identification of a person by his or her voice is competent if the identifying witness demonstrates certainty in the mind by testimony that is positive and unequivocal; voice identification must be based on a peculiarity in the voice or on sufficient previous knowledge by the witness of the person's voice.

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 *Jeffrey Caminsky*, Assistant Prosecuting Attorney, for the people.

Robin M. Lerg for the defendant.

ON REMAND

Before: BORRELLO, P.J., and DAVIS and GLEICHER, JJ.

GLEICHER, J. A jury convicted defendant of two counts of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 15 to 30 years' imprisonment for the armed robbery convictions and a consecutive term of 2 years' imprisonment for the felony-firearm conviction. This Court reversed defendant's convictions and remanded for a new trial.[1] Our Supreme Court granted the prosecution's application for leave to appeal. *People v Murphy*, 477 Mich 1019 (2007). In an order dated June 25, 2008, the Supreme Court reversed this Court's decision to grant defendant a new trial and ordered this Court to instead afford defendant "a new appeal." *People v Murphy*, 481 Mich 919 (2008). We now affirm defendant's convictions.

I. UNDERLYING FACTS AND PROCEEDINGS

Defendant's convictions arise from the armed robbery of Christopher Holman and his fiancée, Tammy Isaac, on Thanksgiving morning in 2003. At defendant's preliminary examination, Holman described how, while

[1] On July 27, 2006, this Court issued a published opinion reversing defendant's convictions on the ground that he was denied the assistance of appellate counsel because his counsel had failed to file a brief opposing the prosecution's interlocutory appeal; this Court remanded for a new trial. The prosecution then filed a motion for reconsideration, arguing that defendant's ineffective assistance claim should fail because he did not establish prejudice. This Court vacated the July 2006 opinion and on reconsideration issued an unpublished opinion that again reversed defendant's convictions and remanded for a new trial. *People v Murphy (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2006 (Docket No. 258397).

en route to Detroit's Thanksgiving Day parade in a Dodge Neon, the victims stopped at a traffic light. According to Holman, a black Dodge Ram pickup truck "bumped" the Neon from behind. Holman got out and walked to the rear of the car to inspect it for damage. As Holman returned to the Neon, he heard the pickup's driver inquire whether the truck had hit Holman's vehicle. Holman advised the driver that a collision had occurred but caused no discernible damage.

As Holman attempted to get into the car, he heard someone yell, "Get down on the ground now." Holman looked toward the truck and saw defendant standing behind its passenger door, pointing "[s]ome type of shotgun" at him. Holman got down on his hands and knees and produced his wallet in response to the pickup driver's demand for money. As he handed the driver money from the wallet, Holman heard defendant knock on the Neon's passenger window and yell: "Get out of the car now. Get out of the car now." Holman could not see exactly what happened, but believed that Isaac "was thrown onto the ground." When Holman turned, he observed defendant inside the Neon "going through our stuff." Holman testified that defendant stole two cell phones and Isaac's purse. After the Dodge Ram departed, Holman and Isaac drove to a state police post and reported the incident. On the basis of Holman's testimony, the district court bound defendant over for trial on the charged counts of armed robbery and felony-firearm.

Defendant's trial commenced on April 22, 2004, before Judge Deborah Thomas. After the parties selected a jury, the prosecutor and defense counsel addressed with Judge Thomas several "housekeeping matters," including "the People versus Hall issue."[2] This evidentiary matter concerned a separate case filed

[2] *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989).

against defendant that arose from a carjacking committed on the day after Thanksgiving 2003. The prosecutor sought to introduce in defendant's armed robbery prosecution evidence obtained at the time of defendant's arrest in the carjacking case. Coincidentally, Judge Thomas had been assigned to preside over the carjacking case. By the time of defendant's armed robbery trial, Judge Thomas had dismissed the carjacking charges filed against defendant and a codefendant on the basis that inadequate evidence linked defendant to the carjacking.

This Court ultimately reversed Judge Thomas's decision to quash the carjacking charges against defendant.[3] In an unpublished opinion, this Court summarized the facts surrounding the alleged carjacking as follows:

> [T]he victim was delivering newspapers in Detroit at approximately 4:30 [a.m.] when a black pickup truck approached, someone from the truck pointed a sawed-off long gun at him and demanded that he not look in that direction, and told him to lie face down on the ground. Multiple assailants then threatened to shoot him, demanded money, searched him, and took his glasses and keys. The victim saw both the truck and his own car driving away. He called the police with his description of the truck and firearm, but he could not identify any of the assailants.[4]

During the preliminary examination conducted in the carjacking case, Detroit police sergeant Ramon Childs explained that shortly after hearing a report regarding the carjacking, he located a black Dodge Ram pickup and followed it to a gas station. As Childs watched from

[3] *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 2005 (Docket Nos. 254939 and 254964).

[4] *Id.* at 1.

across the street, one of the pickup's passengers left the truck and entered the gas station. Another passenger walked to the rear of the gas station, while the other two occupants remained outside the truck, near the gas pumps. The four men got back in the pickup and began to drive away. The police stopped the pickup shortly thereafter and arrested its occupants, including defendant. The police found a live shotgun shell inside the pickup. A search at the gas station yielded a sawed-off shotgun in a dumpster behind the building and additional live shotgun shells in trash receptacles near the gas pumps. All the live shells were "caliber consistent" with the shotgun.

The prosecutor argued that Childs's testimony summarizing his observations after the carjacking was admissible against defendant at his armed robbery trial pursuant to *Hall*. Specifically, the prosecutor urged the trial court to admit "the testimony of the officer that made the observations before the gas station and at the gas station and the officers that were involved in the detention of the Black Dodge Ram Pickup and the officers that were involved in securing the evidence that I've made reference to." The prosecutor stated that he would "sanitize out" the carjacking circumstances prompting Childs's pursuit of the pickup. Defense counsel countered that Childs's testimony failed to establish that any of the men at the gas station "had a shotgun in his hand or even an object of any sort." Judge Thomas ruled that the prosecutor could present testimony related to the shotgun shells found in the pickup and the trash cans near the gas pumps, but not the shotgun or testimony regarding its discovery "because nobody gave any testimony they saw anybody taking anything behind the gas station." In her bench ruling, Judge Thomas elaborated that Childs "didn't say he saw

anybody going around the store carrying anything. If I had that, I would allow it. I don't have any of that."

On April 23, 2004, the prosecutor filed an emergency application for leave to appeal in this Court. Late that afternoon, this Court entered an order peremptorily reversing Judge Thomas's exclusion of evidence of the shotgun and remanding for further proceedings. *People v Murphy*, unpublished order of the Court of Appeals, entered April 23, 2004 (Docket No. 255101). On April 26, 2004, defense counsel informed Judge Thomas that she had not received notice of the prosecutor's appeal and planned to file a motion for reconsideration. Judge Thomas granted a stay of the proceedings, but defense counsel failed to pursue appellate relief.

In September 2004, the armed robbery case proceeded to trial before Judge Michael Hathaway, and a jury convicted defendant of all charges. Defendant filed an appeal of right, and this Court reversed his convictions because he entirely lacked the assistance of counsel during the prosecutor's interlocutory appeal. *People v Murphy (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2006 (Docket No. 258397). Our Supreme Court thereafter reversed this Court's order granting defendant a new trial and instead held that defendant is entitled to a new appeal. The Supreme Court advised that this Court "is not bound by the law of the case doctrine" and further directed this Court to consider whether voice identification evidence was properly admitted during defendant's trial. *Murphy*, 481 Mich at 919.

II. THE SHOTGUN EVIDENCE

Defendant contends that because no testimony directly linked him and the shotgun, Judge Thomas properly ruled the shotgun evidence and Childs's testi-

mony inadmissible. According to defendant, the prosecutor established only defendant's proximity to the shotgun and the shells, not his knowing possession and control over these items. Defendant additionally asserts that even if he had possessed the shotgun, MRE 403 would bar its admission because of the substantial danger that this evidence would confuse the issues and mislead the jury. We review for an abuse of discretion a trial court's decision whether to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo whether a court rule or statute precludes the admission of evidence. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

In *People v Hall*, 433 Mich 573, 575; 447 NW2d 580 (1989), our Supreme Court considered whether MRE 404(b) precluded the admission of evidence regarding other crimes, wrongs, or acts that otherwise qualified as relevant and material to a defendant's guilt. The defendant in *Hall* was charged with having committed an armed robbery at a videotape rental store. The victims of the robbery testified that their assailant had been armed with a sawed-off shotgun and escaped in a rust-colored, mid-size vehicle. *Id*. at 575-577. Approximately seven months later, a witness observed the defendant standing near a dry cleaning establishment holding a large brown bag. The witness believed that the bag contained a gun and reported his suspicion to the dry cleaning store's manager. When the witness left the store, he noticed the defendant sitting in a tan or rust-colored car. *Id*. at 577. The store manager saw the defendant place the bag into the car through an open window and walk away. *Id*. at 577-578. Store personnel

summoned the police, and an officer testified that he looked into the car and observed a black plastic bag lying on the floor. Inside the bag, the officer found a large brown grocery bag containing a sawed-off shotgun. On the car's front seat, the officer found a business card for the videotape store. The trial court allowed the prosecutor to introduce evidence surrounding the defendant's arrest, including his possession of the shotgun. On appeal, the defendant contended that the introduction of the evidence violated MRE 404(b). *Id*. at 578.

The Supreme Court affirmed the defendant's conviction, holding that the trial court properly admitted the shotgun and the testimony of the witnesses who participated in supplying information used by the police to arrest the defendant:

> We hold that, as direct physical evidence of the commission of the armed robbery, the shotgun was properly admitted notwithstanding the fact that mere possession of it was a distinct criminal offense. We also hold that the testimony of the various witnesses to the circumstances surrounding the defendant's arrest was admissible to establish the defendant's possession and control of both the shotgun and a vehicle similar to the one used in the charged robbery. In both instances, admissibility is governed by MRE 401 and not, as defendant claims, by MRE 404(b). [*Id*. at 575.]

The Supreme Court reasoned that evidence of the defendant's "possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *Id*. at 580-581. In *Hall*, the Supreme Court determined that "both the gun and the testimonial evidence of defendant's possession of it and the car . . . were clearly relevant to make the defendant's identity as the gunman in the charged robbery

'more probable . . . than it would be without the evidence.' " *Id*. at 582-583, quoting MRE 401.

Here, unlike in *Hall*, the prosecutor lacked direct evidence demonstrating defendant's possession and control of the weapon. However, the appropriate test is not whether sufficient evidence existed to convict defendant of constructively possessing the shotgun, but whether the circumstances surrounding the gun's discovery tended to establish defendant's connection to it. "This demand is one of simple, logical relevancy, measured by logic, common experience, and common sense, apart from legal technicalities." *People v McKinney*, 410 Mich 413, 418 n 3; 301 NW2d 824 (1981). Alternatively stated, "the general rule is that evidence 'is admissible if helpful in throwing light upon any material point in issue'." *Id*. at 419 (citation omitted). "A material fact is one that is ' "in issue" in the sense that it is within the range of litigated matters in controversy.' " *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000) (citations omitted). The central issue in controversy during defendant's armed robbery trial was whether Holman correctly identified him as one of the Thanksgiving Day assailants. Evidence that defendant drove a black Dodge Ram pickup the next day and parked it in proximity to a discarded sawed-off shotgun and with consistent caliber shells tended to prove defendant's identity as one of the assailants who had robbed Holman and Isaac on Thanksgiving Day. See *Hall*, 433 Mich at 582-583.

In this Court's previous opinion regarding precisely the same issue, we observed that

> there was evidence that Murphy was driving the truck when the police stopped it. That Murphy was driving then is circumstantial evidence that he assumed the role of driver in general. The obvious inference from stopping the

> truck both for the assault, and then to jettison contraband, is that the driver was fully involved in those actions. . . . Murphy's role as driver circumstantially links him to the crime beyond his mere presence in the truck . . . . [*People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 2005 (Docket Nos. 254939 and 254964), at 2.]

Despite Childs's failure to report seeing one of the pickup's passengers carry an object to the dumpster, the surrounding circumstances supported a reasonable inference that the black Dodge Ram containing defendant stopped at the gas station so that its occupants could dispose of evidence of their crimes, including both the shotgun and shells compatible with it. This evidence, which tended to show that defendant and his fellow passengers participated in a joint enterprise designed to dispose of the contraband, logically linked defendant to a sawed-off shotgun. Holman testified that his assailants traveled in a black Dodge Ram and possessed a sawed-off shotgun. " 'The acid test is logical relevance, and a logically relevant act is admissible even when the finding of logical relevance requires a long chain of intervening inferences.' " *People v VanderVliet*, 444 Mich 52, 61; 508 NW2d 114 (1993), quoting Imwinkelried, Uncharged Misconduct Evidence, § 2:17, pp 45-46.

Evidence that (1) defendant drove a black pickup truck involved in a recent alleged carjacking, (2) the occupants of the truck possessed live cartridges, (3) the truck stopped at a gas station where police found live cartridges in the trash cans, and (4) the police found a shotgun compatible with the cartridges behind the gas station tended to prove that defendant participated in the carjacking and knew that the shotgun was being discarded along with the shells. And both the shotgun and the black pickup truck linked defendant to the robbery of Holman and Isaac. Although circumstantial,

this evidence had a tendency to corroborate defendant's identity as a participant in the armed robbery, apart from also constituting evidence of his involvement in a carjacking. Judge Thomas's apparent ruling that direct rather than circumstantial evidence must connect defendant and the shotgun lacks legal support. " '[C]ircumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.' " *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748 (1992) (citation omitted). Reasonable inferences derived from circumstantial evidence are reviewed in the same manner as those arising from direct evidence. *Id*. Accordingly, Judge Thomas abused her discretion by ruling that in the absence of direct evidence linking defendant and the shotgun, the prosecutor could not introduce the shotgun at defendant's trial.

Defendant next maintains that even if the challenged evidence satisfied the relevancy criteria set forth in *Hall*, it qualified as substantially more prejudicial than probative and should have been excluded under MRE 403. Defendant unsuccessfully raised this objection at his trial.[5] MRE 403 proscribes the admission of relevant evidence "if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.) All relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). The fact that evidence is prejudicial does not make its admission

[5] Defendant contends that Judge Thomas excluded the shotgun evidence on the grounds of unfair prejudice under MRE 403 as well as relevancy. Our review of the record reveals no support for that contention. Rather, Judge Thomas clearly ruled that if the prosecutor had "something else that might make it both relevant and material, then it's in."

unfair. Unfair prejudice exists only "where either 'a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect,' or 'it would be inequitable to allow the proponent of the evidence to use it.' " *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002), quoting *Mills*, 450 Mich at 75-76.

Although the carjacking-related evidence involved a serious and entirely separate crime, the risk of unfair prejudice did not substantially outweigh the probative force of the evidence, which connected defendant to the Dodge Ram and the shotgun. The record supports that the prosecutor never argued to the jury that an aspect of defendant's character, or his alleged participation in a different, uncharged crime, established his guilt in the armed robbery. Moreover, in the final instructions to the jury, Judge Hathaway provided a cautionary instruction, limiting the potential for undue prejudice. Consequently, Judge Hathaway did not abuse his discretion by ruling that the admission of evidence of the post-carjacking events on the day after Thanksgiving 2003 did not contravene MRE 403.

III. VOICE IDENTIFICATION EVIDENCE

Defendant lastly challenges Judge Thomas's decision to admit Holman's identification of defendant. Holman identified defendant in a lineup only after requesting that members of the lineup say, "Get down on the ground now." After hearing defendant utter those words, Holman selected him from the lineup participants and identified him as the passenger with the shotgun. Defendant contends that Holman's voice identification should have been excluded because it was not based on a peculiarity in defendant's voice or on suffi-

cient knowledge about defendant's vocal characteristics. We review for clear error a trial court's factual findings regarding a motion to suppress evidence. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999). However, this Court reviews de novo a trial court's conclusions of law and ultimate decision regarding a motion to suppress evidence. *People v Garvin*, 235 Mich App 90, 96-97; 597 NW2d 194 (1999).

"The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Vocal identification evidence is competent if the identifying witness demonstrates "certainty . . . in the mind . . . by testimony that is positive and unequivocal." *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983). Further, voice identification must be based on a peculiarity in the voice or on " 'sufficient previous knowledge by the witness of the person's voice.' " *People v Bozzi*, 36 Mich App 15, 19; 193 NW2d 373 (1971) (citation omitted). Holman had ample opportunity to hear and see the robber with the shotgun. We find that the totality of the circumstances, combined with Holman's certainty regarding his identification of defendant, supplied sufficient reliability of the voice identification.

Affirmed.

In re PETITION OF ATTORNEY GENERAL FOR INVESTIGATIVE SUBPOENAS

Docket No. 279570. Submitted December 3, 2008, at Detroit. Decided March 5, 2009, at 9:00 a.m.

The Attorney General, on behalf of the Department of Community Health, Bureau of Health Professions, filed a petition in the Ingham Circuit Court, seeking under the authority granted in MCL 333.16235 investigative subpoenas directing Gerard R. Williams, Ph.D., to produce the medical records of 10 of his patients for the purposes of determining the respondent's compliance with the regulatory requirements of the Public Health Code. The court, James R. Giddings, J., entered an order authorizing the petitioner's request for the subpoenas. The respondent moved to quash the subpoenas, arguing that the records are privileged information protected from disclosure under the psychologist-patient privilege granted in MCL 333.18237. The court granted the motion. The Attorney General appealed by leave granted.

The Court of Appeals *held*:

MCL 333.18237 clearly provides that a licensed psychologist cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity. None of the three statutory exceptions that would allow disclosure applies in this case. There is no doubt that the Legislature unequivocally intended, as an exemption to the petitioner's investigative authority granted in the Public Health Code, that a licensed psychologist cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity. The circuit court properly interpreted § 18237 as precluding the disclosure of the records sought under MCL 333.16235, given the circumstances of this case.

Affirmed.

HEALTH — MEDICAL RECORDS — SUBPOENAS — INVESTIGATIVE SUBPOENAS — PSYCHOLOGISTS.

A licensed psychologist cannot be compelled by an investigative subpoena issued by a circuit court upon application of the Attorney General or a party to a contested case to disclose confidential

information acquired from an individual consulting the psychologist in his or her professional capacity unless one of three exceptions allowing disclosure applies (MCL 333.16235, 333.18237).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Serene Katranji-Zeni* and *Amy L. Rosenberg*, Assistant Attorneys General, for the petitioner.

Plunkett Cooney (by *Ernest R. Bazzana*) for the respondent.

Before: BORRELLO, P.J., and DAVIS and GLEICHER, JJ.

GLEICHER, J. In this action arising from petitioner's investigation of respondent psychologist's billing practices, petitioner appeals by leave granted a circuit court order quashing investigative subpoenas petitioner had directed to respondent, which required him to produce patient records. We affirm.

I. UNDERLYING FACTS AND PROCEDURE

In the course of a wide-ranging investigation of many different state-licensed health care providers, petitioner, on behalf of the Department of Community Health (DCH), Bureau of Health Professions, filed a circuit court petition for subpoenas relating to respondent. The April 2007 petition set forth the following:

1. The Department of Community Health, Bureau of Health Professions, acting on behalf of a regulatory health board, and as authorized by the Public Health Code, has initiated an investigation of GERARD ROBERT WILLIAMS, PH.D., a licensee of the Department.

2. Section 16235 of the Public Health Code authorizes the circuit court to issue investigative subpoenas upon application by the Attorney General.

> 3. The Department is a health oversight agency and pursuant to 45 CFR 164.512(d) seeks protected health information for the purpose of determining compliance with the regulatory requirements within the Public Health Code.
>
> 4. The Department is conducting an investigation and certain records, including but not limited to ALL billing records, medical records, emergency room records, documentation, treatment records, pathology and laboratory reports and radiology reports, pertaining to patient SEE ATTACHED EXHIBIT A,[1] for all treatment dates. The protected health information shall be disclosed to the Department as a health oversight agency pursuant to 45 CFR 164.512(d).

On April 27, 2007, the circuit court entered an order authorizing petitioner's request for investigative subpoenas concerning respondent's 10 listed patients. The order authorized subpoenas "to compel the production of" records, including, "but not by way of limitation, ALL billing records, medical records, emergency room records, documentation, treatment records, pathology and laboratory reports and radiology reports, pertaining to" the 10 patients.

In late May 2007, respondent moved to quash the subpoenas. Respondent's motion maintained that "[t]he information that petitioner has requested and that this Court has ordered by investigative subpoena to be produced is privileged information under the psychologist-patient privilege, MCL 333.18237, and, therefore, is statutorily protected from production." Respondent argued that the language of MCL 333.16235 made the "production of patient health information by investigative subpoena permissive," but not mandatory, in recognition that broad statutory privileges like MCL 333.18237 could preclude production of patient records. Respondent noted that the plain

[1] Exhibit A listed the names of 10 patients.

language of § 18237 contemplated disclosure of a psychologist's records only if "the individual consulting the psychologist" consented to the disclosure. In an affidavit attached to the motion, respondent attested that none of the 10 patients specified in the investigative subpoena had consented to the disclosure of their records: "[M]y office has contacted each of the individuals whose files were subpoenaed and have advised that a request for records has been made to my office by way of a subpoena . . . . [E]ach patient contacted expressed a desire not to have the contents of their very personal psychological files produced . . . ."

Petitioner filed a response to the motion to quash, explaining that a Bureau of Health Professions investigator had begun looking into "allegations of possible substandard practice" by respondent, "including the failure to maintain adequate patient records, and possible billing fraud." According to petitioner, the records of the 10 patients enumerated in the investigative subpoena were "necessary . . . to accurately assess the merits of the[] allegations" against respondent. Petitioner conceded that it had not sought the consent of any of the 10 patients enumerated in the investigative subpoena. However, petitioner insisted that § 16235(1) unequivocally mandated respondent's compliance with an investigative subpoena. With respect to respondent's invocation of § 18237, petitioner acknowledged that the statute did not expressly reference psychologist record production in the face of an investigative subpoena. But petitioner theorized that §§ 16235(1) and 18237 should be interpreted together, especially given (1) their placement together in art 15 of the Public Health Code, (2) the Legislature's directive that the Public Health "[C]ode shall be liberally construed for the protection of the health, safety, and welfare of the people of this state," MCL 333.1111(2), and (3) that acceptance of

respondent's proffered interpretation of § 18237 would essentially render nugatory the subpoena power in § 16235. Petitioner added that patient records reviewed in a public health investigation remained confidential under MCL 333.16238(1) and MCL 15.243, the latter being a provision of the Freedom of Information Act.[2]

After the parties filed supplemental briefs, the circuit court held a hearing in late June 2007. The circuit court explained in a bench ruling that it would grant respondent's motion to quash:

> Well, I'm going to grant the motion to quash. I mean clearly the case law that I've got is clear to me and the Court of Appeals in a *per curiam* opinion which will be published . . . shortly . . . *In re Petition of the Attorney General for Investigative Subpoenas*, . . . Court of Appeals Number 263959, relies in a very straightforward way on the language of the section relating to the privilege accorded—or relating to the relationship between the dentist and the patient. And without going through the whole thing, it's pretty clear, it's definitive and they conclude the argument in this case that they were somehow, these records exempt from the Attorney General subpoena power quote: This argument is refuted by the clear language in this section.
>
> In other words, it's clear that they looked at the section. [Petitioner's counsel] is correct, they didn't look at the broader question, to use her words. But that section is clearly different. This section has not been amended. And the very first sentence of Section 18237 quote: A psychologist licensed or allowed to use that title under this part, or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting with a psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services.

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[2] Petitioner also cited numerous decisions of federal and state courts in support of the proposition that "patients' privacy rights are not absolute, and that the public interest in regulating licensed health professionals outweighs patients' privacy interests."

> And that's the long and short of it. There is no qualifying there. So, obviously, we can presume, really almost indisputably, that the Legislature had in mind a different situation for dentists as opposed to the relationship between the psychologist and the psychologist's patient. And it makes sense. I mean it doesn't take a rocket scientist to understand that the kinds of communications a dentist is going to hear, for the most part, overwhelmingly are going to be of an entirely different character than the communications to a psychologist.
>
> I mean it's the very private matters of the client that draws him to need the services of a psychologist. I mean some of these things are of the most sensitive nature. There has been no attempt in this case to get any releases. But the statute is clear. It's not up to me to amend the statute. It seems to me that the argument that the Attorney General really wants is in the Legislature and not here in this Court. And I found no case—particularly I might note that cases from other states are not very pertinent in this context because we are concerned with a Michigan statute that the attorneys and I have already indicated on the language of the statute itself. So I don't believe the statute permits it.

On July 6, 2007, the circuit court entered an order quashing "the investigative subpoena compelling the release of 10 patient records" "pursuant to MCL 333.18237 and for those other reasons stated on the record . . . ."[3]

II. ANALYSIS

This Court reviews de novo legal issues of statutory construction. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007).

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[3] Five days later the circuit court entered a second order also purporting to quash the subpoenas, but differently and inaccurately titled, "Order to Quash 10 Investigative Subpoenas."

> Well-established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue.
>
> "When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." [*Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (citation and some quotation marks omitted).]

The competing statutes at the heart of the parties' conflict both became part of art 15 of Michigan's Public Health Code in 1978. 1978 PA 368. The statute authorizing the issuance of investigative subpoenas, on which petitioner relies, currently contains the following relevant language:

> Upon application by the attorney general or a party to a contested case, the circuit court may issue a subpoena requiring a person to appear before a hearings examiner in a contested case or before the department in an investigation and be examined with reference to a matter within the scope of that contested case or investigation and to produce books, papers, or documents pertaining to that contested case or investigation. A subpoena issued under this subsection may require a person to produce all books, papers, and documents pertaining to all of a licensee's or registrant's patients in a health facility on a particular day if the allegation that gave rise to the disciplinary proceeding was made by or pertains to 1 or more of those patients. [MCL 333.16235(1).]

Respondent's position rests on MCL 333.18237, which provides:

> A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services. Information may be disclosed with the consent of the individual consulting the psychologist, or if the individual consulting the psychologist is a minor, with the consent of the minor's guardian, pursuant to section 16222 if the psychologist reasonably believes it is necessary to disclose the information to comply with section 16222, or under section 16281. In a contest on the admission of a deceased individual's will to probate, an heir at law of the decedent, whether a proponent or contestant of the will, and the personal representative of the decedent may waive the privilege created by this section.

The psychologist-patient privilege statute clearly and unambiguously envisions that a state-licensed psychologist "*cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity* if the information is necessary to enable the psychologist to render services."[4] (Emphasis added.) The Legislature incorporated in the remainder of § 18237 three instances when a disclosure of confidential patient information may occur: (1) on obtaining consent from the patient, a minor patient's guardian, or a personal representative or heir involved in a will contest; (2) "if the psychologist reasonably believes it is necessary to disclose the information to comply with [MCL 333.16222]," which generally requires that "[a] licensee

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[4] Petitioner does not contest that the information sought in this case "is necessary to enable the psychologist to render services."

or registrant having knowledge that another licensee or registrant has committed a violation under section 16221 or article 7 or a rule promulgated under article 7 shall report the conduct and the name of the subject of the report to the department," § 16222(1); or (3) under MCL 333.16281, which obligates a "licensee or registrant" to supply a child's medical records to a child protective service caseworker who demonstrates "a compelling need for records or information to determine whether child abuse or child neglect has occurred or to take action to protect a child where there may be a substantial risk of harm," § 16281(1).[5]

In this case, the parties agree that none of the three exceptions contemplated in the second and third sentences of § 18237 applies. Consequently, giving the first sentence of the statutory language in § 18237 its plain and ordinary meaning, a licensed psychologist, like respondent, "*cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity* . . . ." (Emphasis added.) *Pohutski*, *supra* at 683. Because the first sentence of § 18237 contains no hint of ambiguity, " 'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.' " *Pohutski, supra* at 683 (citation omitted).

Petitioner argues that we must interpret § 18237 together with MCL 333.16235 because the Legislature enacted them together, and within the same article of

[5] Subsection 16281(2)(d) further clarifies that various "privileges do not apply to medical records or information released or made available under subsection (1)," including "[t]he psychologist-patient privilege created in section 18237."

the Public Health Code.[6] In *In re Petition of Attorney General for Investigative Subpoenas*, *supra*, the recent decision of this Court invoked in the circuit court's bench ruling, the Court examined the petitioner's power to compel, by investigative subpoena, a dentist to produce the dental records of patients. *Id*. at 697-698. The relevant portion of this Court's analysis, devoted to the respondent's position that "Michigan's dentist-patient privilege statute precludes disclosure of the subpoenaed information," recognized the expressly granted authority of "the Attorney General to pursue investigative subpoenas on behalf of the MDCH and to compel disclosure of patient records." *Id*. at 702-703. Without specifically noting the *in pari materia* doctrine,

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[6] The precise question whether to interpret together statutes in art 15 of the Public Health Code, specifically the investigative subpoena authority in § 16235 and the licensee privileges appearing later in art 15, has not been squarely addressed in a binding Michigan appellate opinion. In *Attorney General v Bruce*, 422 Mich 157, 162-164; 369 NW2d 826 (1985), the Supreme Court considered the petitioner's authority to issue an investigative subpoena under § 16235, seeking production of a hospital's peer review records. In the course of rejecting the petitioner's position on the basis that the peer review records were shielded by privilege, MCL 333.21515, the Supreme Court addressed the petitioner's suggestion that the code provisions bestowing broad investigative authority on the former Department of Licensing and Regulation should be considered together with the peer review statutes:

> Noting that the pertinent code provisions were enacted within a thirty-day period, and referring to the general rule that statutes *in pari materia* must be construed together, the Attorney General urges that the section providing confidentiality to peer review committee records must be read in light of the board's authority to investigate.
>
> *The problem with this argument is that department investigations are conducted pursuant to article 15 of the code*. *Internal peer review activities are required by article 17*. MCL 333.21513 . . . . MCL 333.21515 . . . expressly provides that the records, data, and knowledge collected by the peer review committee "shall be used only for the purposes provided in this article." This language is unambiguous. . . . [*Bruce, supra* at 165 (emphasis added).]

the Court, *id*. at 703, rejected the respondent's contention, in relevant part, as follows:

> Part 166 of Article 15 of the Public Health Code, . . . provides for the licensing and regulation of dentistry. Incident to this regulation, MCL 333.16648(1) provides as follows:
>
> "Information relative to the care and treatment of a dental patient acquired as a result of providing professional dental services is confidential and privileged. Except as otherwise permitted or required under the health insurance portability and accountability act of 1996, Public Law 104-191, and regulations promulgated under that act, . . . a dentist or a person employed by the dentist shall not disclose or be required to disclose that information."
>
> Respondent argues that this provision expressly excepts dentist-patient records from the Attorney General's subpoena power under MCL 333.16235(1) because it directs that dentists "shall not disclose or be required to disclose" that information. This argument is refuted by the clear language of this section.

We will assume that we should consider or construe §§ 16235 and 18237 together, given that the Legislature incorporated both sections in art 15 of the Public Health Code and both sections similarly relate to the certification and regulation of various public health licensees or registrants. We recognize the important function and broad authority the Legislature gave to the DCH to protect the public by investigating, regulating, and disciplining licensed health care providers, see MCL 333.1111(2), MCL 333.16221, MCL 333.16233; *Attorney General v Bruce*, 422 Mich 157, 170; 369 NW2d 826 (1985), including through the investigative subpoena power granted in MCL 333.16235. But in our view, the DCH's broad investigative authority and, specifically, its investigative subpoena authority under MCL 333.16235(1), does not imbue with ambiguity the

plain language of § 18237, which applies to this case. Notwithstanding that the DCH, through petitioner, generally may apply for a subpoena requiring the production of "books, papers, or documents pertaining to [a] contested case or investigation," § 16235(1), we still have no doubt that the Legislature unequivocally intended, as an exemption to petitioner's investigative authority, that a licensed psychologist "cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity . . . ." Section 18237.

In summary, considering the statutory language of §§ 16235(1) and 18237 together, as petitioner urges, we detect no ambiguity tending to suggest that the Legislature envisioned mandatory psychologist disclosure in the absence of patient consent, the only potential exception applicable here. *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008) ("If statutes lend themselves to a construction that avoids conflict, that construction should control."). To the contrary, the Legislature plainly intended to exempt from the investigative subpoena power granted in § 16235(1) a licensed psychologist's disclosure of patient records, where none of the qualifying language in § 18237 otherwise applies. Because no irreconcilable conflict exists between §§ 16235(1) and 18237, our consideration of these two provisions together gives rise to no ambiguity. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007).

The various scenarios potentially arising from our affirmance of respondent's motion to quash envisioned by petitioner as leading to unfair treatment or absurd or illogical results do not undermine our conclusion. Whatever the current status of the "absurd result" component of statutory interpretation, we do not regard

the psychologist-patient privilege in § 18237 as sanctioning any illogical or unfair results, especially in light of (1) the legislative purpose in enacting § 18237 "to protect the confidential nature of the psychologist-patient relationship," *People v Lobaito*, 133 Mich App 547, 562; 351 NW2d 233 (1984), a setting widely recognized as particularly sensitive and in which "confidentiality [is] an essential ingredient of successful" treatment[7]; and (2) petitioner's undisputed failure in this case to make any effort to obtain patient consent for the requested records. As Michigan courts have long recognized and often stated, a party having complaints about the wisdom of plain statutory language should direct his arguments to the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752; 641 NW2d 567 (2002) (" '[O]ur judicial role precludes imposing different policy choices than those selected by the Legislature . . . .' ") (citation omitted); *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003) ("The fact that a statute appears to be impolitic, unwise, or unfair is not sufficient to permit judicial construction. The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written.").[8]

We conclude that the circuit court astutely interpreted § 18237 as precluding disclosure of psychologist-

[7] 81 Am Jur 2d, Witnesses, § 427, p 420.

[8] Furthermore, *Doe v Dr F, MD*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 1995 (Docket No. 157669), apart from having no precedential value, MCR 7.215(C)(1), has no applicability to our analysis. In *Doe*, this Court did not consider the terms of any statutory privilege in art 15 of the Public Health Code, but instead analyzed the plaintiffs' claim that their constitutional rights of privacy outweighed "the state's interest in pursuing an investigation of" the plaintiffs' psychiatrist. *Doe, supra* at 3. We also reject any assertion that petitioner's comprehensive survey of privilege and right to privacy cases from other jurisdictions has a bearing on this case, which involves Michigan's plain statutory scheme.

patient records under the circumstances of this case, as sought by petitioner's investigative subpoenas under § 16235. The circuit court thus properly granted respondent's motion to quash the investigative subpoenas.

Affirmed.

CORPORAN v HENTON

Docket No. 285778. Submitted December 10, 2008, at Detroit. Decided March 5, 2009, at 9:05 a.m.

The Oakland Circuit Court, Family Division, Elizabeth Pezzetti, J., entered a judgment for child support and custody that awarded the plaintiff, Paula M. Corporan, and the defendant, Mark E. Henton, joint legal custody of their minor son and awarded the plaintiff sole physical custody. The court thereafter granted the plaintiff's motion to change her domicile from Michigan to St. Petersburg, Florida, and also ordered that the child spend the summers and Christmas breaks with the defendant. The defendant moved for a change of custody, but the court denied the motion. The defendant brought a second motion for a change of custody, alleging that there had been a change of circumstances warranting a change of custody. The court held a preliminary hearing, during which the court ruled that the plaintiff's alleged financial problems were not a sufficient change of circumstances that warranted a change of custody. The court refused to consider the motion any further because the defendant had failed to meet the threshold requirement of showing a change of circumstances. The defendant moved for reconsideration, but the court denied the motion. The defendant appealed.

The Court of Appeals *held*:

1. A trial court may modify a custody award only if the moving party first establishes proper cause or a change of circumstances. A trial court may not hold a custody hearing if the moving party fails to first demonstrate either proper cause or a change of circumstances. The trial court need not necessarily conduct an evidentiary hearing to determine whether the moving party has met his or her burden of proof.

2. The trial court properly determined that the defendant had failed to establish by a preponderance of the evidence either proper cause or a change of circumstances sufficient to warrant reconsideration of the previous custody order. The trial court did not abuse its discretion by denying the defendant's motion and declining to conduct an evidentiary hearing.

3. Changes of economic circumstances, standing alone, are

insufficient to warrant revisiting a custody order. The trial court correctly noted that such changes are more appropriately addressed through motions for modification of child support.

4. The trial court's determinations, that the defendant failed to demonstrate a change of circumstances with evidence that the plaintiff was experiencing financial problems and that the child's academic performance had declined, were not against the great weight of the evidence.

Affirmed.

PARENT AND CHILD — CHILD CUSTODY — CHANGES IN PARENT'S FINANCIAL CIRCUMSTANCES.

Changes in a parent's financial circumstances, standing alone, are insufficient to warrant a hearing to determine whether a previously entered child custody order should be modified; such changes, standing alone, do not establish proper cause or a change of circumstances that would warrant conducting an evidentiary hearing following a motion for a change of custody; changes of financial circumstances may be addressed through motions for modification of child support.

Greene Law Group, P.L.C. (by *Anthony Greene*), for the defendant.

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

K. F. KELLY, J. Defendant appeals as of right the trial court's order denying defendant's motion for change of custody. Defendant argues that, contrary to the trial court's conclusion, he presented sufficient evidence of a change of circumstances to warrant an evidentiary hearing on the issue whether a change of custody would be in the best interests of the parties' minor son. We hold that the trial court employed the proper procedure by first determining whether proper cause or a change of circumstances had been established by a preponderance of the evidence. We also affirm the trial court's ruling that negative financial changes, if any, are more appropriately addressed in a child support context rather than in a change of custody motion. Finally, we

affirm its decision that defendant failed to show proper cause or a change of circumstances warranting an evidentiary hearing.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

Pursuant to the original consent judgment of support entered on January 6, 2004, plaintiff was awarded sole physical custody of the parties' minor son, with joint legal custody to plaintiff and defendant. On August 23, 2006, the trial court granted plaintiff's motion to change her domicile from Michigan to St. Petersburg, Florida. The order provided that the child would remain with defendant "until the end of the first marking period" in the St. Petersburg school district, and then the child would move to Florida and reside with plaintiff. The order further provided that the child was "to spend summers with his dad from one week after school is out in [Florida] until one week before school starts in [Florida] and Christmas break with dad and any other time by mutual agreement of the parents." On January 5, 2007, defendant moved for a change of custody. On January 26, 2007, the trial court entered an order denying defendant's motion but slightly modifying the parenting schedule to include specific dates and to require plaintiff to pay for all transportation costs.

On March 28, 2008, defendant moved again for a change of custody. In his motion, defendant argued that after the trial court entered the January 26, 2007, order there had been a change of circumstances warranting a change of sole physical custody to defendant. Specifically, defendant alleged that plaintiff had difficulty maintaining steady employment, failed to provide an airplane ticket for the Christmas parenting time, received numerous eviction notices,

and, for a period of approximately six weeks, was without a telephone. Moreover, according to defendant, the minor child did less well in school when living with plaintiff and his activity level had declined.[1] Defendant claimed that it would be in the child's best interests for defendant to have sole physical custody because he was better able to provide financial support, as well as "a stable, satisfactory environment." Plaintiff did not file a written response to defendant's motion for change of custody.

On April 23, 2008, the trial court held a preliminary hearing on defendant's motion for change of custody. Plaintiff appeared at the hearing by telephone. In response to defendant's allegation that plaintiff withheld parenting time in violation of the trial court's order, plaintiff argued that she could not afford to purchase an airline ticket for the minor child to visit defendant during the winter holiday season. However, plaintiff stated that she had already purchased an airline ticket for him to travel to Michigan for his next scheduled visit during the summer. She further argued that she was still living in the same apartment and had not been evicted and that her problems with the landlord were a result of late fees added to the rent. Defendant argued that this constituted a change of economic circumstances and that it would be in the minor child's best interests for defendant to have sole physical custody.

The trial court ruled that plaintiff's alleged financial problems do not constitute a change of circumstances sufficient to warrant a change of custody. It further

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[1] Defendant also alleged that plaintiff's housemate continued to have contact with a physically abusive ex-boyfriend and that the housemate's 23-year-old son, who also lived with them, allegedly indicated that he "might harm" the minor child. This allegation was not made in the trial court, nor is it raised on appeal.

determined that the financial issues could be addressed by an increase in the amount of child support payments pursuant to a properly filed motion to modify child support. Because defendant failed to meet the threshold requirement of showing a change of circumstances, the trial court refused to consider defendant's motion any further. Defendant moved for reconsideration, which the trial court denied, reiterating its previous reasoning, as follows:

> As indicated on [sic] at the April 23rd hearing, I do not find that Defendant has shown a sufficient change of circumstance to warrant a hearing on change of custody. The parties were reminded that if they have a child support issue, one of them needs to file a motion with respect to child support, and Plaintiff was instructed to comply with the parenting Order in place.

This appeal followed.

II. APPLICABLE LAW

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). And, a trial court may modify a custody award only if the moving party first establishes proper cause or a change of 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 the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change of circumstances. *Killingbeck v Killingbeck*, 269 Mich App 132, 145; 711 NW2d 759 (2005); see also *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). If a party fails to do so, the trial court may not hold a child

custody hearing.[2] 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.
>
> * * *
>
> [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 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

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[2] 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 with 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).

> 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, the court need not necessarily conduct an evidentiary hearing on the topic. *Id*. at 512.

III. STANDARDS OF REVIEW

This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard. *Id*. at 507-508. Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings "clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (citation and quotation marks omitted). In reviewing child custody decisions, we apply three standards of review:

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted).]

We review a trial court's ruling on a motion for reconsideration for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of

principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

IV. ANALYSIS

We agree with the trial court that defendant failed to establish by a preponderance of the evidence either proper cause or a change of circumstances sufficient to warrant reconsideration of the previous January 26, 2007, custody and parenting time order. After making this threshold determination, the trial court did not abuse its discretion by denying defendant's motion for change of custody and declining to conduct an evidentiary hearing.

A. FINANCIAL DIFFICULTIES

Defendant contends that the evidence shows that plaintiff had incurred financial problems, specifically, difficulties with paying her rent in a timely manner. This argument addresses the "best interests of the child" factor c, which permits the trial court to consider "[t]he 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." MCL 722.23(c). These problems, in defendant's view, could have resulted in the eviction of plaintiff and the child, and demonstrated that there was a sufficient change of economic circumstances to warrant a change of custody. According to defendant, the change of economic circumstances was also shown by plaintiff's failure to provide airline transportation for the child to visit defendant during the previous holiday season. The trial court rejected defendant's contention that this change of economic circumstances warranted a change of custody because, according to the trial

court, plaintiff's shortage of income could be remedied by an increase in child support. This Court arrived at a similar conclusion in *Dempsey v Dempsey*, 96 Mich App 276, 289-290; 292 NW2d 549 (1980), mod 409 Mich 495 (1980). In *Dempsey*, this Court reasoned that a parent with "more modest economic resources" is nonetheless entitled to equal consideration in the child custody context, because "[i]f the parties are substantially different as to economic circumstances, the [trial] court has ample power through its orders, if it be in the best interests of the child or children, to equalize those circumstances." *Id*. at 290. We agree with the trial court that changes of financial circumstances are more appropriately addressed through a properly filed motion to review and/or change child support. Changes of economic circumstances, standing alone, are insufficient to warrant revisiting a previously entered child custody order.

Further, we are not persuaded that the trial court erred by concluding that defendant failed to show "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." *Vodvarka*, *supra* at 513 (emphasis in original). Although defendant presented evidence that plaintiff had difficulty paying her rent, and had, in fact, been threatened with eviction at one point, the record does not show that plaintiff and the child were ever compelled to vacate their residence, or that the living arrangement of plaintiff and the child actually changed in any way from January 26, 2007, through the date of the hearing on April 23, 2008. Further, although plaintiff admitted at the hearing that she did not comply with the trial court order with respect to providing defendant with parenting time, plaintiff articulated her intent and ability to follow the order in the

future, having already purchased the airline ticket for the child's next scheduled visit with defendant during the upcoming summer months. Thus, defendant's assertion, that plaintiff "blatant[ly] refus[ed] to make the minor child available" for parenting time, is unsupported by the record. We conclude that the trial court's finding, that defendant failed to demonstrate a change of circumstances with the evidence that plaintiff was experiencing financial problems, was not against the great weight of the evidence.

B. THE MINOR CHILD'S GRADES

Defendant next argues that "based upon a review of the minor child's grades since the entry of the last custody order, there appears to be significant decline in the minor child's academic performance." The trial court's finding that this evidence did not demonstrate a change of circumstances was not against the great weight of the evidence. Defendant addresses "best interests of the child" factor h, "[t]he home, school, and community record of the child." MCL 722.23(h). Although a comparison of the grade reports from Adler Elementary School (Southfield, Michigan) and Maximo Elementary School (St. Petersburg, Florida) shows that the child's grades have declined to a minor extent in certain subjects, the child's grades do not show anything "more than the normal life changes (both good and bad) that occur during the life of a child . . . ." *Vodvarka*, *supra* at 513. The child apparently excelled in five of twelve factors of language arts in Michigan, but achieved an overall grade of "C" in reading and writing in Florida. However, although the child achieved average grades in art in Michigan, he received an excellent grade for art in Florida.

According to the Florida progress reports, the child is not in danger of failing in any subject. Furthermore, although defendant attempts to attribute the decline in the child's academic performance to the child's current custodial environment, the changes in the child's grades could also have been caused by the difficulty of the educational material, differences in instructional methods, or many other reasons. In other words, defendant has failed to present evidence to demonstrate that the minor decline in the child's grades represents a "material change[ ] [that has] had or will almost certainly have an effect on the child." *Id*. at 513-514. The trial court's conclusion, that defendant failed to demonstrate a change of circumstances with the evidence that the child's academic performance has declined, was not against the great weight of the evidence.

Because defendant failed to make the required threshold showing of a change of circumstances, the trial court properly declined to conduct an evidentiary hearing on defendant's motion for change of custody. *Id*. at 508, 516. For the same reasons, we also affirm the trial court's order denying reconsideration.

Affirmed.

ROBINSON v CITY OF LANSING

Docket No. 282267. Submitted February 3, 2009, at Lansing. Decided March 5, 2009, at 9:10 a.m. Leave to appeal sought.

Barbara A. Robinson brought an action in the Ingham Circuit Court against the city of Lansing, seeking damages for injuries sustained when she tripped and fell on a sidewalk adjacent to Michigan Avenue, a state trunk line highway, in Lansing. The plaintiff alleged that the city breached its duty under MCL 691.1402(1) to maintain the sidewalk in reasonable repair and in a condition reasonably safe for public travel. The city answered and moved for summary disposition, asserting the defense of governmental immunity and relying on the "two-inch" rule set forth in MCL 691.1402a(2), which provides a rebuttable inference of reasonable repair by a municipal corporation where a discontinuity defect of a sidewalk is less than two inches. The plaintiff moved to strike the defense to the extent that it relied on the two-inch rule, asserting that the rule only applied to sidewalks adjacent to county highways. The court, Thomas L. Brown, J., granted the motion to strike and the defendant's subsequent motion for summary disposition. The defendant appealed.

The Court of Appeals *held*:

Although MCL 691.1402a(1) clearly refers and applies to sidewalks adjacent to county highways, MCL 691.1402a(2) does not contain language that would limit its application to only sidewalks adjacent to county highways. MCL 691.1402a(2) applies to this case and, therefore, there is a rebuttable inference that the city maintained in reasonable repair the sidewalk on which the plaintiff fell. The unpublished opinion per curiam of the Court of Appeals on which the trial court relied did not specifically address the language of subsection 2 and should not have been relied on in denying the defendant's motion. The city should have been allowed to raise the two-inch rule as a defense. The order denying the city's motion for summary disposition must be reversed and the case must be remanded to the trial court so that it may address the remaining issues.

Reversed and remanded.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — MUNICIPAL CORPORATIONS — SIDEWALKS — DISCONTINUITY DEFECTS — REASONABLE REPAIR — REBUTTABLE INFERENCES OF REASONABLE REPAIR.

MCL 691.1402a(2), which provides a rebuttable inference of reasonable repair by a municipal corporation where a discontinuity defect of a sidewalk is less than two inches, is not limited in its application to sidewalks adjacent to county highways and it applies to sidewalks adjacent to any public highway, road, or street that is open for public travel (MCL 691.1401[e]).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *Michael E. Larkin* and *Steven A. Hicks*), for the plaintiff.

Plunkett Cooney (by *Christine D. Oldani* and *David K. Otis*) for the defendant.

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

PER CURIAM. Defendant, city of Lansing, appeals as of right from the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity).[1] We decide this appeal without oral argument pursuant to MCR 7.214(E). We reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff, Barbara Robinson, tripped on a sidewalk adjacent to Michigan Avenue, a state trunk line highway, in Lansing and filed suit. Robinson alleged that the city breached its duty under MCL 691.1402(1) to maintain the sidewalk in reasonable repair and in a condition reasonably safe for public travel.

The city answered and moved for summary disposition under MCR 2.116(C)(7) (the defense of governmen-

[1] An order denying summary disposition based on governmental immunity is a final order from which a party may appeal as of right. MCR 7.202(6)(a)(v); *Costa v Community Emergency Med Services, Inc*, 475 Mich 403, 413; 716 NW2d 236 (2006).

tal immunity), arguing that Robinson had not shown that the sidewalk was not in reasonable repair, and relying on the "two-inch" rule set forth in MCL 691.1402a(2). MCL 691.1402a(2) provides a rebuttable inference of reasonable repair by a municipal corporation where a discontinuity defect of a sidewalk is less than two inches. Robinson then brought a motion to strike the city's defense to the extent it relied on the two-inch rule, arguing that MCL 691.1402a only applied to sidewalks next to county highways, not state trunk line highways like Michigan Avenue. The city responded, arguing that legislative history and subsequent caselaw supported its claim that the statute provided a rebuttable inference of reasonable repair by municipal corporations for any discontinuity defects of less than two inches in sidewalks adjacent to any public roadway, including state trunk line highways, city streets, and county roads. The trial court granted the motion to strike.

Thereafter, the trial court heard the city's motion for summary disposition. Although in its brief in support of the motion the city argued that, regardless of the two-inch rule, Robinson had not sufficiently pleaded that the sidewalk was not in reasonable repair and not reasonably safe for public travel, the city at the motion hearing argued only that the two-inch rule should apply. The trial court denied the motion "in view of the court's granting [Robinson's motion regarding the two-inch rule]." The trial court made no other finding that the sidewalk was not in reasonable repair and was unsafe for public travel.

II. THE TWO-INCH RULE

A. STANDARD OF REVIEW

On appeal, the city does not dispute that it has jurisdiction over the sidewalk adjacent to Michigan

Avenue. Instead, it argues that the trial court erred in relying entirely on *Darity v Flat Rock*[2] to deny its motion for summary disposition because the two-inch rule was not at issue in that case and nothing in the plain language of MCL 691.1402a(2) limits its application to sidewalks adjacent to county roads.

MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. To survive a C(7) motion raised on this ground, the plaintiff must allege facts warranting the application of an exception to governmental immunity.[3] Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[4] 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.[5] We review de novo a trial court's denial of summary disposition.[6] Further, the proper interpretation of a statute and determination of the applicability of the highway exception to governmental immunity are questions of law that we also review de novo on appeal.[7]

B. PRINCIPLES OF STATUTORY CONSTRUCTION

When construing a statute, this Court must not read into a clear statute anything that is not within the

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[2] *Darity v Flat Rock*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2006 (Docket No. 256481).

[3] *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

[4] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[5] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Smith*, *supra* at 616.

[6] *Stevenson v Detroit*, 264 Mich App 37, 40; 689 NW2d 239 (2004).

[7] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997); *Stevenson*, *supra* at 40-41.

manifest intention of the Legislature as derived from the language of the statute itself.[8] If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted.[9]

C. THE HIGHWAY EXCEPTION

The governmental immunity act[10] provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]"[11] However, MCL 691.1402(1) provides that "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." And MCL 691.1401(e) defines "[h]ighway" as "a public highway, road, or street that is open for public travel and includes bridges, *sidewalks*, trailways, crosswalks, and culverts on the highway." (Emphasis added.) Therefore, as an exception to governmental immunity, "[a] person who sustains bodily injury . . . by reason of failure of a governmental agency to keep a highway [including a sidewalk] under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency."[12]

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[8] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002); *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007).

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

[10] MCL 691.1401 *et seq*.

[11] *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 595; 363 NW2d 641 (1984); see MCL 691.1407(1).

[12] MCL 691.1402(1).

As stated, there is no dispute that the city has jurisdiction over the sidewalk adjacent to Michigan Avenue and therefore must keep it "in reasonable repair so that it is reasonably safe and convenient for public travel."[13] The salient question, however, is whether the city is entitled to assert as a defense the two-inch rule set forth in MCL 691.1402a(2).

D. MCL 691.1402a

MCL 691.1402a provides:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, *a portion of a county highway*[14] outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
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> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
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> (2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installa-

[13] MCL 691.1402(1); see also *Listanski v Canton Twp*, 452 Mich 678, 681-682; 551 NW2d 98 (1996) (holding that MCL 691.1402 imposes liability on townships for failure to maintain sidewalks abutting county roads); *Jones v City of Ypsilanti*, 26 Mich App 574; 182 NW2d 795 (1970) (holding that MCL 691.1402 imposes liability on cities for failure to maintain sidewalks abutting state roads).

[14] Emphasis added.

> tion *outside of the improved portion of the highway designed for vehicular travel*[15] in reasonable repair.
>
> (3) A municipal corporation's liability under subsection (1) is limited by section 81131[16] of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.

E. INTERPRETING MCL 691.1402a

There can be no dispute that the plain language of MCL 691.1402a(1) applies to delineate a municipal corporation's liability with respect to sidewalks etc. abutting *county highways*. And MCL 691.1402a(3) clearly refers back to subsection 1 to further delineate the municipal corporation's liability regarding a person's use of an off-road vehicle (ORV). The present dispute, however, centers on determining whether the two-inch rebuttable inference provision of MCL 691.1402a(2), like the terms of subsection 1, is limited to county highways, or whether, absent such an express limitation, subsection 2 extends to sidewalks abutting *any* public roadway within a municipal corporation's jurisdiction.

There is no binding caselaw on whether MCL 691.1402a(2) applies *only* when the road at issue is a county highway. Caselaw, published and unpublished, has simply addressed or applied the rule to sidewalks

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[15] Emphasis added.

[16] MCL 324.81131(11) provides that

> a municipality is, immune from tort liability for injuries or damages sustained by any person arising in any way out of the operation or use of an ORV on maintained or unmaintained roads, streets, shoulders, and rights-of-way over which . . . the municipality has jurisdiction. The immunity provided by this subsection does not apply to actions that constitute gross negligence. As used in this subsection, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

without describing the nature of the adjacent road.[17] Thus, we cannot discern any prevailing rule from these cases that would mandate a decision in this case one way or the other. Regardless, there is no need to look beyond the statute to discern the intent of the Legislature.

Although MCL 691.1402a(1) clearly refers and applies to county highways, subsection 2 does not contain that language; it refers to a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of "the highway designed for vehicular travel," and there is no further language of limitation in subsection 2 relating to such a highway. Subsection 3, which refers to a statute that by its express terms encompasses all kinds of streets, roads, and highways, expressly refers back to the liability imposed in subsec-

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[17] *Gadigian v City of Taylor*, 282 Mich App 179; ___ NW2d ___ (2009); *Noe v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2008 (Docket No. 278727); *Jurstik v Owosso*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2008 (Docket No. 276701); *Semon v St Clair Shores*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2007 (Docket No. 274777); *Baine v Inkster*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 274261); *Gutierrez v City of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2007 (Docket No. 272619); *Ledbetter v City of Warren*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 2006 (Docket No. 269758); *Griffin v City of Pontiac*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2006 (Docket No. 269988); *Allgaier v City of Warren*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2006 (Docket No. 268102); *Smith v City of Warren*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2006 (Docket No. 255004); *Jones v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2005 (Docket No. 263036); *Bates v Village of Addison*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2005 (Docket No. 253374); *Crites v Owosso*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 245999).

tion 1. Again, subsection 2 lacks any such reference to subsection 1. We must therefore accept as intentional the Legislature's omission in subsection 2 of a reference to "county highways" or to "subsection (1)."[18] And we may not read any such references into the plain language of the statute.[19]

Accordingly, we conclude that MCL 691.1402a(2) is not limited in its application to county highways. Rather it applies to any "sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel," with the term "highway" therein meaning any "public highway, road, or street that is open for public travel . . . ."[20] Thus, MCL 691.1402a(2) applies here, and there is a rebuttable inference that the city maintained in reasonable repair the sidewalk on which Robinson tripped.

F. *DARITY*

Nevertheless, in support of her argument that MCL 691.1402a(2) only applies to county highways, Robinson relies on the unpublished opinion in *Darity v Flat Rock*. In *Darity*, the plaintiff's decedent was injured when he fell off his bicycle on a debris-covered sidewalk adjacent to a state trunk line highway.[21] In seeking to disclaim liability for the injury adjacent to the state trunk line highway, the city of Flatrock argued that, under MCL 691.1402a, cities are "liable only for sidewalks adjacent to *county* highways."[22] Interpreting the language of the statute, the *Darity* panel said, "Because the sidewalk at

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[18] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

[19] *Id*.

[20] MCL 691.1401(e).

[21] *Darity*, *supra* at 1.

[22] *Id*. at 4 (emphasis in original).

issue was adjacent to a state trunkline and not a county road, MCL 691.1402a does not govern this action."[23] The panel continued:

> MCL 691.1402a "creates no liability for municipalities that would not otherwise exist. . . . The obvious purpose of § 1402a is to limit the liability municipalities would otherwise face to maintain sidewalks . . . ." *Carr v City of Lansing*, 259 Mich App 376, 380; 674 NW2d 168 (2003). In enacting MCL 691.1402a, the Legislature implicitly recognized that by virtue of MCL 691.1402, municipal corporations faced liability for portions of county highways that were outside the improved portion designed for vehicular travel. MCL 691.1402 does not provide a basis for concluding that municipal corporations have a lesser degree of liability with respect to portions of state highways that are outside the improved portion designed for vehicular travel. Yet in enacting MCL 691.1402a, the Legislature decided to limit liability with respect to county roads only. The Legislature's failure to impose similar limits with respect to state roads does not suggest that the Legislature was unaware of that liability or did not intend that liability would exist. Rather, the absence of a provision concerning portions of state highways outside the improved portion means that a municipal corporation's liability for those areas pursuant to MCL 691.1402 remains unreduced.[24]

We first note that, as an unpublished decision, *Darity* has no precedential value.[25] And although this Court may rely on unpublished cases to the extent that they present persuasive reasoning on an issue,[26] we find *Darity* inapplicable and unpersuasive in the present action.

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[23] *Id*.

[24] *Id*. at 5.

[25] MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994).

[26] *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004).

Although the *Darity* panel mentioned MCL 691.1402a(2), it did not specifically address the language of that provision. Indeed, the only part of MCL 691.1402a at issue in *Darity* was subsection 1, which clearly and unambiguously deals only with sidewalks adjacent to *county* highways. Therefore, any interpretation of subsection 2—the subsection that statutorily creates the two-inch rule—that could arguably be discerned from *Darity* would be dictum. Moreover, the *Darity* panel's conclusion that MCL 691.1402a did not absolve the city of Flat Rock of liability was limited to the facts of that action and any broader rule intended by the *Darity* panel would be dictum.

In sum, we conclude that the trial court erred to the extent that it relied on *Darity* in denying the city's motion and that the trial court should have allowed the city to raise the two-inch rule as a defense.

Reversed and remanded for further proceedings so that the trial court may rule on the remaining issues in this case. The city may refile its motion for summary disposition. We do not retain jurisdiction.

SUPERIOR HOTELS, LLC v MACKINAW TOWNSHIP

Docket No. 276836. Submitted August 6, 2008, at Lansing. Decided March 10, 2009, at 9:00 a.m. Leave to appeal sought.

Mackinaw Township petitioned the State Tax Commission (STC) for a correction of the taxable value of commercial real estate owned by Superior Hotels, LLC, for the tax years 2001 through 2003. The township alleged that the valuation for that period was incorrect because its former assessor had originally established the taxable value when a motel was being built on the property and it was only half completed and the assessor had thereafter failed to change the value to reflect that the motel had been completed. The STC entered an order that increased the taxable value for the tax years involved to correct the assessor's error in calculating the taxable value. Superior Hotels sought relief from the STC's order in the Tax Tribunal, which ruled that the STC lacked jurisdiction to correct the error because the township had failed to show that the subject property was "incorrectly reported or omitted" within the meaning of MCL 211.154, which, according to the Tax Tribunal, permitted assessments to be corrected only if a property's status was misrepresented, such as when a taxpayer incorrectly claimed that the property was tax-exempt. The Tax Tribunal determined that § 154 does not confer jurisdiction on the STC to correct the assessor's error in mistakenly undervaluing the property because it does not apply to property conceded to be taxable but alleged to be improperly assessed. The Tax Tribunal further ruled that even if the assessor's error were to be considered a clerical error correctable under MCL 211.53b, the township's failure to appear before the board of review prevented such action and also deprived the Tax Tribunal of jurisdiction to correct the assessor's error. The township appealed the Tax Tribunal's judgment reinstating the original taxable values.

The Court of Appeals *held*:

The Tax Tribunal erred as a matter of law by ruling that the STC lacked jurisdiction under § 154 to issue an order correcting the taxable value for the subject property for the pertinent tax years. The Tax Tribunal also erred as a matter of law by reaching

a legal conclusion from the stipulated facts that this case did not implicate the omission of taxable property within the meaning of § 154.

1. The administrative jurisdiction of the STC available under § 154 to correct the incorrectly reported or omitted assessment value of property subject to taxation fits harmoniously with the appellate jurisdiction of the Tax Tribunal to review the STC's final agency determination or order under § 154.

2. Section 154 only applies when the incorrect assessment was based on incorrect reporting or an omission.

3. "Assessment value," as used in § 154, means either "taxable value" or 50 percent of the true cash value of property subject to taxation as those terms are defined in this state's constitution and statutes.

4. The township's assessor erred in calculating the taxable value of the subject property for the 1999 tax year (December 31, 1998, assessment date) by failing to include "new construction" that was an "addition" under MCL 211.27a(2)(a) and MCL 211.34d(1)(b)(*iii*). When the property was assessed for the 2000 tax year, what was "new construction" in 1999 came within the definition of "omitted real property" under § 34d(1)(b)(*i*). The "new construction" completed in 1998 but not included in the determination of the 1999 taxable value became "omitted real property" as of the 2000 assessment date and dates thereafter because it was "previously existing tangible real property not included in the assessment" under § 34d(1)(b)(*i*).

5. The stipulated facts establish that the assessor's error in calculating taxable value under MCL 211.27a(2) occurred because the assessor failed to add the new construction in the year it was finished. In the following years, this initial error resulted in the omission of taxable property from taxable value within the meaning of § 154.

6. The reasoning in *Detroit v Norman Allan & Co*, 107 Mich App 186 (1981), on which the Tax Tribunal and Superior Hotels relied for the proposition that the STC's jurisdiction under § 154 is limited to circumstances where the status of property as either taxable or exempt has been incorrectly reported or omitted, is not reliable precedent or authority for interpreting § 154 because the statutory language on which the *Norman Allan* Court based its reasoning was removed following the decision.

Tax Tribunal judgment reversed; State Tax Commission order reinstated.

1. TAXATION — WORDS AND PHRASES — ASSESSMENT VALUE FOR PROPERTY TAX PURPOSES.

The term "assessment value," as used in MCL 211.154, means either "taxable value" or 50 percent of the true cash value of property subject to taxation.

2. TAXATION — STATE TAX COMMISSION — ASSESSMENT VALUE FOR PROPERTY TAX PURPOSES — CORRECTION OF ASSESSMENT VALUES — APPEAL — TAX TRIBUNAL.

The State Tax Commission may place a corrected assessment value for the appropriate years on the appropriate assessment roll when the commission determines that property subject to taxation under certain statutes has been incorrectly reported or omitted for any previous year, but the correction is limited to the current assessment year and two years immediately preceding the date the incorrect reporting or omission was discovered and disclosed to the commission; a person against whom such an assessment is made may appeal the commission's order to the Tax Tribunal (MCL 211.154[1], [7]).

Foster, Swift, Collins & Smith, P.C. (by *Steven H. Lasher* and *Pamela C. Dausman*), for Superior Hotels, LLC.

MacArthur Law Firm (by *Timothy P. MacArthur*) for Mackinaw Township.

Amicus Curiae:

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Steven B. Flancher*, Assistant Attorney General, for the State Tax Commission.

Before: MARKEY, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM. Respondent appeals by right the Michigan Tax Tribunal's ruling that the State Tax Commission (STC) lacked jurisdiction under MCL 211.154 to correct the taxable value of petitioner's commercial real estate for the tax years 2001 through 2003. The error arose over a two-year period when petitioner was building a motel on the subject property. During that time

respondent's former assessor continued to calculate the property's taxable value on the basis of the taxable value of the motel established when it was only half completed, which was adjusted annually for inflation as permitted by MCL 211.27a. The STC entered an order in response to respondent's petition under § 154 to correct the taxable value of the property for tax year 2001 from $841,604 to $1,622,420, for tax year 2002 from $868,535 to $1,674,338, and for tax year 2003 from $881,563 to $1,699,453. Petitioner sought relief from the STC's order in the Tax Tribunal, which ruled that the STC lacked jurisdiction to correct an assessor's error in calculating taxable value because respondent had failed to show that the subject property was "incorrectly reported or omitted" within the meaning of § 154. We hold that because the Tax Tribunal erred as a matter of law, its judgment must be reversed.

I. SUMMARY OF FACTS AND PROCEEDINGS

The parties submitted this dispute to the Tax Tribunal on stipulated facts. The most pertinent are:

> 7. Superior Hotels began construction of a motel known as a "Baymont Inn" on the property in 1997 and completed construction of the hotel in 1998.
>
> 8. The Township assessed the subject property as 50% complete on December 31, 1997 and calculated the 1998 assessed value and taxable value accordingly.
>
> 9. For the 1999 tax year (December 31, 1998 assessment date), the Township assessed the subject property as 100% complete, but calculated the 1999 taxable value by applying the applicable inflation rate to the 1998 taxable value which 1998 taxable value was based on a 50% completion calculation.
>
> 10. The Township assessed the subject property as 100% complete for the 1999 tax year and such assessment was reflected on the assessment roll.

> 11. No portion of the subject property was "omitted" from assessment by the Township.
>
> * * *
>
> 15. The Township filed Michigan Department of Treasury Form L-4154, Assessor or Equalization Director's Notice of Property Incorrectly Reported or Omitted from Assessment Roll (copy attached as Exhibit A) with the State Tax Commission alleging an error made by the Township in calculating the 2001, 2002 and 2003 taxable values for the subject property.
>
> 16. On March 7, 2005, Superior Hotels appeared before the State Tax Commission.
>
> 17. The State Tax Commission accepted the Section 154 petition filed by the Township and increased the 2001, 2002 and 2003 taxable values of the subject property as requested by the Township.

At issue in this case is MCL 211.154, the critical first sentence of which provides:

> If the state tax commission determines that property subject to the collection of taxes under this act[1] . . . has been *incorrectly reported or omitted* for any previous year, but not to exceed the current assessment year and 2 years immediately preceding the date the incorrect reporting or omission was discovered and disclosed to the state tax commission, the state tax commission shall place *the corrected assessment value* for the appropriate years on the appropriate assessment roll. [Emphasis added.]

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[1] The act referred to is the General Property Tax Act, MCL 211.1 *et seq*. Section 154 also includes property subject to taxation under 1974 PA 198, MCL 207.551 to 207.572 (relating to industrial development districts), 1905 PA 282, MCL 207.1 to 207.21 (property of public utilities), 1953 PA 189, MCL 211.181 to 211.182 (lessees of tax-exempt property), and property taxed under the Commercial Redevelopment Act, 1978 PA 255, MCL 207.651 to 207.668.

The Tax Tribunal first noted that the Legislature did not define the statutory terms "incorrectly reported" or "omitted," so it was permitted to construe those terms to determine whether the STC had jurisdiction under § 154. To ascertain the meaning of the term "incorrectly report," the Tax Tribunal relied primarily on *Detroit v Norman Allan & Co*, 107 Mich App 186; 309 NW2d 198 (1981), and *Eagle Glen Golf Course v Surrey Twp*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2002 (Docket No. 224810), one of several unpublished cases of this Court that have followed *Norman Allan*. Quoting from *Eagle Glen*, *supra* at 2, the Tax Tribunal opined that § 154 "permitted 'assessments to be corrected only if a property's status is misrepresented, such as when a taxpayer incorrectly claimed that the property was tax-exempt.' " *Superior Hotels, LLC v Mackinaw Twp*, 16 MTTR 119 (Docket No. 313228, February 23, 2007), at 123. The Tax Tribunal then reasoned on the basis of the stipulated facts, ¶ 11 and ¶ 15 in particular, that "neither the status of the property [as exempt or taxable] nor a purported omission was at issue." *Id*. at 123. Specifically, the Tax Tribunal ruled that respondent had conceded in ¶ 11 of the stipulated facts that there was no issue concerning "omitted" property in the present case. *Id*. Thus, the Tax Tribunal concluded that "[r]espondent's own stipulations of fact dictate that MCL 211.154 is not applicable to this matter." *Superior Hotels, supra* at 123.

In reaching its conclusion that § 154 did not confer jurisdiction on the STC in this case, the Tax Tribunal also relied on dicta in *Centre Mgt v City of Ferndale*, unpublished opinion per curiam of the Court of Appeals, issued August 10, 2004 (Docket No. 248266). The Tax Tribunal, quoting *Centre Mgt, supra* at 2, opined, " 'MCL 211.154 did not confer jurisdiction on the STC

to correct an assessor's error in mistakenly undervaluing the property in previous years because MCL 211.154 does not apply to property conceded to be taxable but alleged to be improperly assessed.' "[2] *Superior Hotels, supra* at 123. In addition, the Tax Tribunal quoted its own prior decision in *Michigan Basic Prop Ins v State Tax Comm*, 15 MTTR 423 (Docket No. 296251, March 13, 2006), at 429, which in turn quoted *Eagle Glen*, *supra* at 3, stating " 'MCL 211.154 does not "confer jurisdiction on the state tax commission to correct an assessor's error in mistakenly undervaluing the property, because MCL 211.154 does not apply to property conceded to be taxable but alleged to be improperly assessed." ' " *Superior Hotels, supra* at 123-124. On the basis of this authority, the Tax Tribunal ruled that § 154 does not grant jurisdiction to the STC "to correct an assessor's undervaluing the property for previous years." *Id*. at 124.

The Tax Tribunal further ruled that respondent's error in calculating the subject property's taxable value might arguably have been considered "a clerical error or a mutual mistake of fact relative to the correct assessment figures, the rate of taxation, or the mathematical computation relating to the assessing of taxes," correctible under MCL 211.53b. But the Tax Tribunal opined that respondent's failure to appear before the board of review was fatal to correcting the assessor's error in calculating taxable value under that

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[2] *Centre Mgt*, *supra*, relied for this dictum on *Norman Allan*, *supra*, and *Gen Motors Corp v State Tax Comm*, 200 Mich App 117; 504 NW2d 10 (1993). The latter case held that the STC could employ the services of an accounting firm in a § 154 proceeding regarding alleged underreporting of taxable personal property. The Court cited *Norman Allan* for the proposition that "MCL 211.154 . . . applies where the issue is whether property thought to be taxable has been incorrectly reported or omitted." *Gen Motors Corp*, *supra* at 120.

section. *Superior Hotels, supra* at 124. This same defect, the Tax Tribunal ruled, also deprived it of jurisdiction to correct the assessor's error in calculating taxable value. *Id*., citing MCL 205.735.

Accordingly, the Tax Tribunal entered judgment for petitioner, reinstating the original taxable values for the subject property for the tax years 2001 to 2003. *Superior Hotels, supra* at 124-125. Respondent appeals by right.

II. STANDARD OF REVIEW

Our review of the Tax Tribunal's decision is limited. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28. Factual findings of the Tax Tribunal are final if they are supported by competent, material, and substantial evidence on the whole record. *Id*.; *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 482; 473 NW2d 636 (1991). Thus, as here, where the facts are not disputed and fraud is not alleged, our review is limited to whether the Tax Tribunal made an error of law or adopted the wrong legal principles. *Id*. at 482-483. The issue in this case presents a question of statutory interpretation, which this Court reviews de novo. *Wexford Med Group v Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006).

The primary goal of construing a statute is to determine and give effect to the intent of the Legislature. *Mt Pleasant*, *supra* at 53. The first step in doing this is to review the language of the statute. *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App

192, 202; 745 NW2d 125 (2007). "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." *Mt Pleasant*, *supra* at 53. A statutory provision "is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation omitted and emphasis in original).

In reading a statute, this Court must assign to every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical words or phrases that have acquired a peculiar and appropriate meaning in the law. MCL 8.3a; *Ford Motor Co v Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006). Also, we must not read statutory words or phrases in isolation; rather, we must read each word or phrase and its placement in the context of the whole act. *Lansing Mayor*, *supra* at 167-168. Thus, we must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted).

We also note that " '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 quoted in *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935) (citation and quotation marks omitted). In this regard, the Legislature has granted the STC general supervisory authority over the

assessment of property for taxation as provided in Const 1963, art 9, § 3, and legislation implementing that constitutional provision. See MCL 211.150. Clearly, the STC believes that § 154 grants it jurisdiction to correct the assessor's error in calculating taxable value in this case and supports this position in an amicus curiae brief. We accord respectful consideration to the STC's position. Nevertheless, "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

We begin our analysis of § 154 by reading it both as a whole and as part of the General Property Tax Act (GPTA), MCL 211.1 *et seq*., to determine the Legislature's overall purpose. We conclude that in § 154 the Legislature has conferred administrative jurisdiction on the STC to correct erroneous property tax assessments in specific limited circumstances. Specifically, the STC may correct an "assessment value" that results in an "assessment change." MCL 211.154(1). An "assessment change" under § 154 may result "in increased property taxes," MCL 211.154(2), or might "result[] in a decreased tax liability," MCL 211.154(6). That the STC's administrative jurisdiction under § 154 to correct erroneous property tax assessments is not precluded by the appellate jurisdiction of the Tax Tribunal is manifested by the Legislature's extension of jurisdiction to correct assessment values "for any previous year, but not to exceed the current assessment year and 2 years immediately preceding the date the incorrect reporting or omission was discovered and disclosed to the state tax commission." MCL 211.154(1). This time frame is well

beyond the limited time to appeal an assessment dispute to the Tax Tribunal, which, in general, must also be contemporaneously protested before the board of review. See MCL 205.735 and MCL 205.735a.[3] Moreover, subsection 7 of § 154 clearly provides that after a final decision by the STC in a § 154 proceeding, the appellate jurisdiction of the Tax Tribunal may be invoked, as in this case: "A person to whom property is assessed pursuant to this section may appeal the state tax commission order to the Michigan tax tribunal." MCL 211.154(7).

The Legislature originally added subsection 7 to § 154 when 1982 PA 539 added it as subsection 4, which provided: "A person to whom property is assessed pursuant to this section may appeal the state tax commission determinations to the Michigan tax tribunal." This amendment of § 154 was a clear legislative rejection of *Detroit v Jones & Laughlin Steel Corp*, 77 Mich App 465, 476; 258 NW2d 521 (1977), which held that proceedings under § 154 are appellate in nature and must be first brought in the Tax Tribunal. This Court in *Norman Allan*, *supra* at 191, followed *Jones & Laughlin Steel*. As discussed more fully later in this opinion, 1982 PA 539 also seriously undermined the *Norman Allan* decision in several other respects.

Our reading of § 154 is consistent with the legislative scheme regarding both the Tax Tribunal and the STC. The Tax Tribunal is a "quasi-judicial agency," MCL 205.721, that is granted "exclusive and original jurisdiction" of "proceeding[s] for direct review of a final

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[3] MCL 205.735a supersedes MCL 205.735 for appeals to the Tax Tribunal after December 31, 2006. In general, MCL 205.735a permits owners of property classified as commercial or other business use to bypass the board of review and appeal directly to the Tax Tribunal. See 2006 PA 174.

decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws," MCL 205.731(a). "A 'proceeding' is defined as an 'appeal' in MCL 205.703 . . . ." *Wikman v City of Novi*, 413 Mich 617, 631; 322 NW2d 103 (1982). Thus, pertinent to this case, the Tax Tribunal is a quasi-judicial agency having exclusive and original jurisdiction over *final* agency decisions "relating to assessment" and "valuation . . . under property tax laws." MCL 205.731(a). Having entered an order correcting the taxable value of petitioner's property, the STC is an "agency" as defined in MCL 205.703(a), i.e., "a board, official, or administrative agency who is empowered to make a decision, finding, ruling, assessment, determination, or order that is subject to review under the jurisdiction of the tribunal or who has collected a tax for which refund is claimed."[4] The Tax Tribunal is vested with "jurisdiction over matters previously heard by the State Tax Commission *as an appellate body*." *Jefferson Schools v Detroit Edison Co*, 154 Mich App 390, 398; 397 NW2d 320 (1986) (emphasis in original), citing MCL 205.741 and *Emmet Co v State Tax Comm*, 397 Mich 550, 555; 244 NW2d 909 (1976).

On the other hand, as already noted, the Legislature in MCL 211.150 has granted the STC general supervisory authority over the assessment of property for taxation. The Legislature has specifically conferred on the STC the authority "[t]o receive all complaints as to property liable to taxation that has not been assessed or that has been fraudulently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if any is

[4] 2008 PA 125 amended MCL 205.703(a) without changing its substance.

found to exist." MCL 211.150(3). This authority implicates the administrative, rather than the appellate, jurisdiction of the STC. See *Jefferson Schools, supra* at 398-399. Thus, the administrative jurisdiction of the STC available under § 154 to correct the "assessment value" of "property subject to the collection of taxes" that "has been incorrectly reported or omitted" dovetails harmoniously with the appellate jurisdiction of the Tax Tribunal to review the STC's final agency determination or order under § 154. MCL 211.154(7).

The first sentence of § 154 establishes the limited circumstances to which it applies. There must be an "assessment value" that needs to be corrected as a result of taxable property having been "incorrectly reported or omitted . . . ." We agree with the Tax Tribunal's observation in *SSAB Hardtech, Inc v State Tax Comm*, 13 MTTR 164 (Docket No. 288672, March 30, 2004), at 174: "It is reasonable to conclude that section 154 only applies when the assessment *was based upon* the incorrect reporting" or omission. (Emphasis in original.) We also conclude that "assessment value" as used in § 154 means either "taxable value" or 50 percent of the true cash value of property subject to taxation as those terms are defined in the Michigan Constitution and statutes.

When the Legislature does not provide definitions, courts may consult a dictionary. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004) ("Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions."). The *Random House Webster's College Dictionary* (1992) provides three definitions for the word "assessment." It may mean (1) "the act of assessing; appraisal; evaluation," (2) "an official valuation of property, used as a basis for levying a tax," or (3) "an

amount assessed as payable." Because the word "assessment" in § 154 is coupled with the word "value" in the context of property subject to taxation, the second definition is the most pertinent. "For the purpose of collecting *ad valorem* taxes, or taxes based on the value of property, the word 'assessment' means the determination of the value of property for tax purposes . . . ." *Wikman*, *supra* at 632. See also MCL 211.10(1): "An assessment of all the property in the state liable to taxation shall be made annually in all townships, villages, and cities by the applicable assessing officer as provided in section 3 of article IX of the state constitution of 1963 and section 27a." The cited constitutional and statutory provisions split Michigan property tax assessments into "taxable value" and 50 percent of true cash value, so "assessment value" must include both.

In 1994, Michigan voters approved Proposal A, "which amended article 9, § 3 of the Michigan Constitution." *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 11; 743 NW2d 902 (2008). As amended, Const 1963, art 9, § 3, provides, in part:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is trans-

> ferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value.

The purpose of Proposal A, as explained by our Supreme Court, was

> "to generally limit increases in property taxes on a parcel of property, as long as it remains owned by the same party, by capping the amount that the 'taxable value' of the property may increase each year, even if the 'true cash value,' that is, the actual market value, of the property rises at a greater rate. However, a qualification is made to allow adjustments for 'additions.' " [*Toll Northville*, *supra* at 12, quoting *WPW Acquisition Co v City of Troy*, 466 Mich 117, 121-122; 643 NW2d 564 (2002).]

The Legislature implemented Proposal A by amending relevant portions of the GPTA. See 1994 PA 415; *Moshier v Whitewater Twp*, 277 Mich App 403, 405; 745 NW2d 523 (2007). In doing so, the Legislature codified Proposal A's bifurcated assessment system in § 27a of the GPTA, subsections 1 and 2 of which provide:

> (1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.
>
> (2) Except as otherwise provided in subsection (3),[5] for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, *plus all additions*. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.
>
> (b) The property's current state equalized valuation. [MCL 211.27a(1) and (2) (emphasis added).]

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[5] Subsection 3 of § 27a relates to transfers of ownership, which is not pertinent here.

MCL 211.27a(11) provides that "additions" as used in § 27a has the same meaning "as defined in section 34d." MCL 211.34d(1)(b) defines "additions," in pertinent part:[6]

> For taxes levied after 1994, "additions" means, except as provided in subdivision (c), all of the following:
>
> (*i*) Omitted real property. As used in this subparagraph, "*omitted real property*" means *previously existing tangible real property not included in the assessment*. Omitted real property shall not increase taxable value as an addition unless the assessing jurisdiction has a property record card or other documentation showing that the omitted real property was not previously included in the assessment. The assessing jurisdiction has the burden of proof in establishing whether the omitted real property is included in the assessment. *Omitted real property for the current and the 2 immediately preceding years, discovered after the assessment roll has been completed, shall be added to the tax roll pursuant to the procedures established in section 154*. For purposes of determining the taxable value of real property under section 27a, the value of omitted real property is based on the value and the ratio of taxable value to true cash value the omitted real property would have had if the property had not been omitted.
>
> * * *
>
> (*iii*) New construction. As used in this subparagraph, "*new construction*" *means property not in existence on the immediately preceding tax day and not replacement construction*. New construction includes the physical addition of equipment or furnishings, subject to the provisions set forth in section 27(2)(a) to (o). *For purposes of determining the taxable value of property under section 27a, the value of*

[6] Section 34d has been amended twice since the periods pertinent to this case without change to the portions of § 34d discussed in this opinion. See 2005 PA 12 and 2007 PA 31.

> *new construction is the true cash value of the new construction multiplied by 0.50*. [Emphasis added.]

This Court in *Kok v Cascade Charter Twp*, 255 Mich App 535; 660 NW2d 389 (2003), addressed a situation similar to the case at bar. In *Kok* the construction of a residence took two tax years. The *Kok* Court was then faced with how to properly calculate its taxable value under the statutory scheme set forth above. In *Kok*, the petitioner's home was only 56 percent completed when it was first assessed. After the home was completed in the second tax year, the township assessed it " 'as complete new construction.' " *Id*. at 537. The home owner appealed to the Tax Tribunal, contending that the assessment after the home was completed violated Const 1963, art 9, § 3, as amended by Proposal A, and MCL 211.27a(2)(a) because it increased the home's taxable value in excess of the taxable value of the first year multiplied by the lesser of 1.05 or the inflation rate. *Kok*, *supra* at 537. The Tax Tribunal rejected the petitioner's claim, reasoning that the township had simply treated as new construction the difference between the home's value as completed in the second tax year and the value of the home as partially completed the prior tax year. *Id*. at 538. This Court, after reviewing § 27a and § 34d(1)(b), concluded that the Legislature had "provided a technical definition of the term 'addition,' " and no language in subsection 34d(1)(b)(*iii*) supported "finding that the taxable value of an addition, including new construction, can be determined by 'treat[ing] as new construction the difference between the value of the house as completed at December 31, 1999, and the value of the partially completed house at December 31, 1998.' " *Kok*, *supra* at 543. Rather, applying the plain language of pertinent statutes, the Court held:

> The portion of the house that was not completed at the time the property was assessed for the 1999 tax year and that was not included in the assessment of the taxable value of the property falls within the meaning of "addition" for purposes of determining the taxable value of the property for the 2000 tax year. Applying the plain language of the statute, the taxable value of the property for the 2000 tax year is the lesser of the 1999 taxable value multiplied by the lesser of 1.05 or the inflation rate, "plus the true cash value of the new construction multiplied [by] 0.50." MCL 211.27a(2)(a); MCL 211.34d(1)(b)[*iii*]. [*Kok*, *supra* at 543.]

Applying the plain language of MCL 211.27a(2)(a) and MCL 211.34d(1)(b)(*iii*) to the stipulated facts of this case leads to the inescapable conclusion that respondent's assessor erred in calculating the taxable value of petitioner's property for the 1999 tax year (December 31, 1998, assessment date) by failing to include "new construction" that was an "addition" within the meaning of § 27a(2)(a) and § 34d(1)(b)(*iii*). Although the assessor properly calculated the first part of the 1999 taxable value by multiplying the property's 1998 taxable value "by the lesser of 1.05 or the inflation rate," MCL 211.27a(2)(a), the assessor failed to add the "the true cash value of the new construction multiplied by 0.50," MCL 211.34d(1)(b)(*iii*). When petitioner's property was assessed for the tax year 2000, again by only applying the applicable multiplier to the prior year's taxable value, what was "new construction" in 1999 came within the definition of "omitted real property" under § 34d(1)(b)(*i*). This conclusion flows from our determination that the word "assessment" as used in the pertinent provisions of the GPTA includes both "taxable value" and 50 percent of true cash value. Thus, the "new construction" completed in 1998 but not included in the determination of the 1999 taxable value became "omitted real property" as of the 2000 assess-

ment date and assessment dates thereafter because it was "previously existing tangible real property not included in the assessment." MCL 211.34d(1)(b)(*i*). "Omitted real property for the current and the 2 immediately preceding years, discovered after the assessment roll has been completed, shall be added to the tax roll pursuant to the procedures established in section 154." *Id*. Consequently, the Tax Tribunal erred as a matter of law by ruling that the STC lacked jurisdiction under § 154 to issue an order correcting the taxable value for the subject property for the tax years 2001 to 2003.

Our conclusion is not altered by ¶ 11 of the parties' stipulation, which states, "No portion of the subject property was 'omitted' from assessment by the Township." This stipulation was for the benefit of the Tax Tribunal after the STC had already properly assumed jurisdiction under § 154 and issued its order correcting the taxable value of petitioner's property for the tax years 2001 to 2003. Parties cannot confer jurisdiction on a court by stipulation where it otherwise does not exist. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). We think the converse applies: the parties cannot by their stipulation deprive the STC of jurisdiction it had already properly exercised. Moreover, in its brief and at oral argument, respondent's counsel explained that the stipulation in ¶ 11 was not intended as a waiver of its legal argument that the assessor's error in this case resulted in "property subject to the collection of taxes" being "*incorrectly* . . . *omitted* for any previous year," thus conferring jurisdiction on the STC to "place *the corrected assessment value* for the appropriate years on the appropriate assessment roll." MCL 211.154(1) (emphasis added). Rather, respondent contends that it only intended to stipulate that petitioner's whole parcel of property was included on its assessment

roll. Further, respondent cites unpublished opinions of this Court that support the *legal conclusion* that taxable property was omitted from the "assessment value" within the meaning of § 154. See *Eyde Constr Co v City of Lansing*, unpublished opinion per curiam of the Court of Appeals, issued November 25, 2003 (Docket No. 239423), *Cohn v West Bloomfield Twp*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2002 (Docket No. 232917), and *Rockind v West Bloomfield Twp*, unpublished per curiam opinion of the Court of Appeals, issued March 2, 2001 (Docket No. 214620). Although not binding precedent, MCR 7.215(C)(1), we find these unpublished cases persuasive because they are consistent with our reading of the constitutional and statutory scheme.

Finally, ¶ 11 of the parties' stipulation must be read together with the rest of the parties' stipulation to determine whether the facts of this case come within the jurisdiction of the STC under § 154. When read together as a whole, the stipulated facts make plain that the assessor's error in calculating taxable value under § 27a(2) occurred in this case because the assessor failed to add the new construction in the year it was finished. In the following tax years, this initial error resulted in the omission of taxable property from taxable value. Thus, the Tax Tribunal erred as a matter of law by reaching the legal conclusion from the stipulated facts that this case did not implicate the omission of taxable property within the meaning of § 154.

Last, we address this Court's decision in *Norman Allan*, on which the Tax Tribunal and petitioner heavily rely for the proposition that the STC's jurisdiction under § 154 is limited to circumstances where the status of property as either taxable or exempt has been incorrectly reported or omitted. Although several un-

published opinions of this Court have followed *Norman Allan*, these opinions have precedential value only to the extent that they are persuasive. MCR 7.215(C)(1). Likewise, although *Norman Allan* has precedential value, it is not binding on this Court because it was decided before November 1, 1990. MCR 7.215(J)(1). We agree with respondent and the STC that the Legislature's adoption of 1982 PA 539 patently undermines this Court's reasoning in *Norman Allan*. *Norman Allan* was also decided more than a decade before the adoption of Proposal A, which dramatically altered Michigan's property tax system.

In *Norman Allan*, the city of Detroit filed petitions in the Tax Tribunal seeking to increase the personal property tax assessments of two respondent taxpayers, Norman Allan & Company and E. L. Rice & Company. With respect to Norman Allan, the city contended that the company incorrectly reported the value of its personal property subject to taxation. With respect to E. L. Rice, the city contended, among other things, that the company had omitted certain inventory from its report of personal property subject to taxation. *Norman Allan*, *supra* at 187-188. The Tax Tribunal granted an order favoring the city and increasing the assessed value of Norman Allan's personal property and adding the assessed value of the omitted inventory in the case of E. L. Rice. On appeal, this Court reviewed which of two statutory provisions, MCL 211.22 or MCL 211.154, might control the city's claims. *Norman Allan*, *supra* at 189-190.

At the time *Norman Allan* was decided, the first sentence of § 154 only referred to "incorrectly reported" property liable to taxation, and the second sentence provided, " '*If it appears to the commission that no reason in fact or in law exists which would justify an*

exemption of such property from taxation for those 2 years, it shall immediately place the total aggregate assessment value for the omitted years on the then current assessment roll in the column provided.' " *Norman Allan*, *supra* at 190 (emphasis added). The Court held that § 154 "applies when property has been incorrectly reported as exempt property but is thought to be (*i.e.*, is 'made to appear to be') taxable property." *Norman Allan*, *supra* at 191. Although the Court opined that the language of the statute that it emphasized "reinforced" its conclusion, the Court pointed to no other language in § 154 that supported its interpretation that § 154 does not apply when property is undervalued because something other than the status of the property has been "incorrectly reported." *Norman Allan*, *supra* at 191-193; cf. *Eagle Glen*, *supra* at 3 (acknowledging "that MCL 211.154 has been amended since the decision in *Norman Allan*," but opining that "it is apparent to us that the *Norman Allan* Court did not rely *solely* on this excerpted language in reaching its decision") (emphasis in original). 1982 PA 539 eliminated entirely the language emphasized and relied on by the *Norman Allan* Court and added "omitted" taxable property to § 154.

The only other basis for the decision in *Norman Allan* regarding § 154 is the Court's conclusion that MCL 211.22 was the more pertinent and controlling statute under the facts of that case. At the time of the decision, MCL 211.22 provided for correcting both "incorrectly" reported as well as "omitted" taxable property. Specifically, the statute provided, in part:

"*[Testimony Assessment.]* If the supervisor or assessing officer, a member of the state tax commission, or the director or deputy director of the county tax or equalization department as mandatorily established under section 34 of

> this act *shall be satisfied that any statement* so made is incorrect * * * [he] is hereby authorized to set down and assess to such person, firm or corporation so entitled to be assessed, such amount of real and personal property as he may deem reasonable and just.
>
> "Whenever examination and investigation reveal that the *written statement of personal property is incorrectly made*, that any data submitted is false, or that certain personal property has been omitted from the statement, the supervisor or assessing officer *may petition* the state tax commission to revise the personal property assessment of the person submitting such erroneous statement, *if the petition is filed on or before June 30 of each year*." [*Norman Allan*, *supra* at 189-190, quoting the version of MCL 211.22 then in effect (emphasis in original).]

The Court held that § 22 "applies when the assessor petitions the tribunal to increase the value on the tax roll of personal property inadequately and improperly reported by a taxpayer but which is conceded to be taxable." *Norman Allan*, *supra* at 191. But the Court held that the city's petition had not been timely filed. *Id*. at 193. In particular, the Court held that because the city was "challenging the *statements* submitted by respondents, it should have proceeded under MCL 211.22; MSA 7.22, and the failure to comply with its requirements necessitates a dismissal of both cases." *Norman Allan*, *supra* at 193 (emphasis in original).

The Legislature apparently was not pleased with the *Norman Allan* decision. 1982 PA 539 also eliminated the language in § 22 that the *Norman Allan* Court relied on in reaching its conclusions. The amended statute eliminated any need for taxing authorities to timely file a petition with any other authority, but permitted a supervisor or assessing officer, a member of the state tax commission, or the director or deputy director of the county tax or equalization department to make contemporaneous investigations regarding prop-

erty tax statements. The 1982 legislation also added "omitted" taxable property to § 154 and expanded the scope of that section to correct "assessment value" to "not to exceed the current assessment year and 2 years immediately preceding the date of discovery . . . ." MCL 211.154, as amended by 1982 PA 539.

In sum, the Legislature's adoption of 1982 PA 539 virtually eliminated all language in both MCL 211.154 and MCL 211.22 on which the *Norman Allan* Court relied in its analysis of those two statutory provisions. "[W]hen a legislative amendment is enacted soon after a controversy arises regarding the meaning of an act, it is logical to regard the amendment as a legislative interpretation of the original act . . . ." *Adrian School Dist v Michigan Pub School Employees' Retirement Sys*, 458 Mich 326, 337; 582 NW2d 767 (1998) (citations and quotation marks omitted). The Legislature consolidated the authority of the STC under § 154 to correct incorrect assessment values that result when property subject to taxation is "incorrectly reported or omitted" and eliminated the language in the second sentence of § 154 emphasized and relied on by the *Norman Allan* Court in reaching its conclusions. 1982 PA 539 must be considered the Legislature's rejection of the *Norman Allan* decision. Moreover, the plain language of § 154, read in light of the post-Proposal A tax scheme, supports the conclusion that § 154 confers jurisdiction on the STC whenever taxable property has been "incorrectly reported or omitted" for whatever reason and an incorrect "assessment value" results. Therefore, we conclude that *Norman Allan* is not reliable precedent or authority for our interpretation of § 154.

For all the foregoing reasons, we hold that the Tax Tribunal erred as a matter of law by concluding that the STC lacked jurisdiction in this case. Therefore, we

reverse the judgment of the Tax Tribunal and reinstate the order of the STC correcting the taxable values of petitioner's property for the tax years 2001 to 2003. As the prevailing party, respondent may tax costs pursuant to MCR 7.219.

BURISE v CITY OF PONTIAC

Docket No. 281443. Submitted February 10, 2009, at Lansing. Decided March 12, 2009, at 9:00 a.m.

Wilhelmena and Ralph Burise brought an action in the Oakland Circuit Court against the city of Pontiac, seeking damages for an injury suffered by Wilhelmena Burise when she stepped in a pothole while crossing a street within the city. The plaintiffs had given notice of the incident in a letter to the city and subsequently provided more detailed information on a claim form sent to them by the city. The additional information included the name of a witness. The city moved for summary disposition, arguing that the plaintiffs' original letter did not meet the notice requirements of MCL 691.1404(1) because it did not identify the witness. The court, Shalina Kumar, J., denied the motion, concluding that MCL 691.1404(1) was ambiguous concerning the method of notice and whether only one attempt at notice to the governmental agency was permitted. The city appealed.

The Court of Appeals *held*:

MCL 691.1404(1) unambiguously requires that a claimant bringing an action under the highway exception to governmental immunity must provide a notice to the governmental agency within 120 days from the time of the injury that (1) specifies the exact location and nature of the defect in the highway, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses. The statute does not delineate the form of the notice or when the proper notice is provided except that it must be within 120 days of the injury and contain the information required. The plaintiffs' first attempt at notice did not comply with the statute because it did not include the witness's name. The notice given in the claim form, however, met the requirements of the statute, and it does not matter that the information was on a form the city provided rather than in a format that the plaintiffs created. Because the plaintiffs served a legally sufficient notice within 120 days of the injury, the trial court did not err by denying the city's summary disposition motion.

Affirmed.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — DEFECTS IN HIGHWAYS — NOTICE OF HIGHWAY DEFECTS.

Before bringing suit under the highway exception to governmental immunity, a claimant must provide a notice to the governmental agency within 120 days from the time of the injury that (1) specifies the exact location and nature of the highway defect, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses (MCL 691.1404[1]).

Paskel Tashman & Walker, P.C. (by *Michael S. Tashman*), for the plaintiffs.

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

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

PER CURIAM. Defendant, the city of Pontiac, appeals as of right the trial court's order denying its motion for summary disposition brought pursuant to MCR 2.116(C)(7) (immunity granted by law). Because plaintiff Wilhelmena Burise[1] timely served defendant with "a notice" conforming to the requirements of MCL 691.1404(1), we affirm, although for reasons other than those relied on by the trial court. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff brought suit for an injury allegedly caused by a defect in a roadway within the city. Plaintiff contends that she tore her Achilles tendon when she

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[1] The parties stipulated the dismissal of claims brought by plaintiff Ralph Burise. Accordingly, the term "plaintiff" in the singular refers only to plaintiff Wilhelmena Burise.

stepped in a pothole as she crossed Saginaw Street. The incident occurred on June 13, 2006.

Pursuant to MCL 691.1404(1), plaintiff sought to provide notice of the incident to defendant in a letter dated August 1, 2006:

> Please be advised we represent Wilhelmina [sic] Burise. At approximately 12:45 p.m. on June 13, 2006, [she] slipped and fell on East Huron and Saginaw Street in the City of Pontiac while crossing Saginaw Street, her slip and fall due to a defective traveled portion of the roadway.
>
> The precise location by virtue of the addresses is located between Bo's Brewery, 51 North Saginaw, and the Pontiac Osteopathic Hospital Building at 64 North Saginaw. The nature of the defect was an extremely deep, wide and long pothole that had been in disrepair.
>
> Please find a copy of the photographs reflecting the precise location. The plaintiff's footwear was gym shoes and her injury was a torn Achilles tendon.

Plaintiff did not disclose or include the name of a known witness, Sheryl Barnett, who was with plaintiff when she fell and was injured.

On August 22, 2006, defendant, through its representative, Michigan Municipal Management Authority (MMMA), requested that plaintiff provide information on a claim form. Plaintiff completed the claim form and returned it to the MMMA under a cover letter dated October 10, 2006. The letter and completed claim form contained more detailed information than the initial letter from plaintiff, and also included Barnett's name and address. The MMMA received the claim form on the 120th day after the accident.

Plaintiff filed her complaint on August 10, 2007. In lieu of filing an answer, defendant moved for summary disposition. It argued that plaintiff's August 1, 2006, letter to defendant did not meet the statutory require-

ments of MCL 691.1404(1) and therefore plaintiff's claims should be dismissed; specifically, the August 1, 2006, letter did not identify Barnett as a witness. In support of its motion, defendant relied on our Supreme Court's recently released[2] opinion in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), which addressed MCL 691.1404(1). In *Rowland*, the Court determined that the "hard and fast deadline" of 120 days was constitutional and concluded "that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury." *Id.* at 200, 204 n 5. In response, plaintiff argued that nothing in the statute indicated that all the required information had to be contained in the first communication to a municipal defendant; instead, she argued that as long as a defendant received the required information within 120 days, the notice was sufficient. Further, plaintiff argued that the required information could be supplied in a piecemeal fashion; it did not need to be contained in one single communication.

The trial court determined that the statute was ambiguous concerning the method of notice and whether only one attempt at notice was permitted. The trial court denied defendant's motion for summary disposition, stating:

> Okay, the way this [statute] is written, I do think it's ambiguous when it makes a reference to, a notice and, the notice. I also think it's ambiguous because it does not describe the manner or method of notice. And, because it's ambiguous, I therefore think that I have the ability to look at the intent of the legislature in writing this and the purpose of the statute. And, I believe both the intent and

[2] *Rowland* was released on May 2, 2007.

> the purpose goes [sic] to providing the defendant notice, or providing the defendant information, using those words interchangeably, in order for them to have an ability to properly investigate the claim. I think that's the purpose of this statute.
>
> I don't think it's clear that it has to be one notice. It's—it's surely not clear that it has to be written notice. I think the Roland [sic] case specifically says that it has to be given within 120 days, and that was the focus of the Roland case. Everyone agrees that all the necessary notice and information was given to the defendant within 120 days. So, I'm therefore denying your motion.

This appeal followed.

II. STANDARDS OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). " 'MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.' " *Id*. (citation omitted). A plaintiff can overcome such a motion for summary disposition by alleging facts that support the application of an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

Questions of statutory interpretation are also reviewed de novo on appeal. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When interpreting the meaning of a statute, our main objective is to ascertain and give effect to the Legislature's intent. *Id.* The first step is to determine whether the language of the statute is plain and unambiguous. *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). If the language is unambiguous, we must as-

sume that the Legislature intended its plain meaning and, accordingly, we must apply the statute's language as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). In such instances, we must assume that every word has some meaning, and we must give effect to every provision, if possible. *Danse Corp v Madison Hts*, 466 Mich 175, 182; 644 NW2d 721 (2002). It is only when the statute's language is ambiguous that this Court is permitted to look beyond the statute's language to determine the Legislature's intent. *Casco Twp v Secretary of State*, 261 Mich App 386, 391; 682 NW2d 546 (2004).

III. ANALYSIS

On appeal, defendant argues that the statute is not ambiguous according to our Supreme Court and that the trial court erroneously injected an element of material prejudice into its analysis. It argues that the statute contemplates only one notice, which is the first notice provided by a claimant. Plaintiff's first notice was defective because the letter of August 1, 2006, did not state the name of a known witness. Defendant also argues that it should not be "punished" for being efficient in seeking further information from a claimant and that the trial court did so by considering answers provided on the claim form sent out by the MMMA and finding that defendant received all the information required by statute within 120 days. To the contrary, plaintiff argues that while notice is meant to inform and is required within 120 days, notice is not limited to the first attempt at providing notice. Plaintiff submits that the statute does not specify how a claimant must submit the required notice to a potential defendant and that a claimant may take as many steps as are necessary or reasonably required to convey the information outlined in the statute.

We affirm the trial court's order denying summary disposition, albeit for different reasons.[3] Simply stated, at issue is whether plaintiff complied with MCL 691.1404(1) when her initial notice to defendant did not contain all the required information, but her subsequent notice, filed within the 120-day period, did. We hold that while plaintiff's initial August 1, 2006, letter did not comply with the requirements set forth in MCL 691.1404(1) because plaintiff did not disclose the name of a known witness, her subsequent communication of October 10, 2006, was sufficient to provide defendant with the statutorily required notice.

The governmental tort liability act, MCL 691.1401 *et seq.*, provides broad immunity for governmental agencies when they are engaged in governmental functions. There are, however, some narrowly drawn exceptions to governmental immunity, including the highway exception. MCL 691.1402(1); *Glancy*, *supra* at 584. A governmental agency having jurisdiction over a highway is required to maintain the area of the highway under its jurisdiction in reasonable repair and convenient for public travel. See *Glancy, supra* at 584; MCL 691.1402(1). As a condition of bringing a suit against a governmental agency for failure to comply with the statute, a claimant must provide notice. "The principal purpose sought to be served by requiring notice is to provide the governmental agency with an opportunity to investigate the claim while the evidentiary [trail] is still fresh and, additionally, to remedy the defect before other persons are injured." *Hussey v Muskegon Hts*, 36 Mich App 264, 267-268; 193 NW2d 421 (1971).

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[3] When a trial court reaches the right result for the wrong reason, the ruling will not be disturbed. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 82; 709 NW2d 174 (2005), rev'd in part on other grounds 479 Mich 280 (2007).

MCL 691.1404(1) provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve *a notice* on the governmental agency of the occurrence of the injury and the defect. *The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant*. [Emphasis added.]

Accordingly, before bringing suit, a claimant must provide, within 120 days from the time of injury, notice to the governmental agency that (1) specifies the exact location and nature of the defect, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses.

In *Rowland*, while our Supreme Court did not specifically reach the question of the adequacy of a notice because its decision was based on the issue whether the deadline of 120 days was constitutional, it did hold as follows:

> MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*. [*Rowland*, *supra* at 219 (emphasis in original).]

We agree that MCL 691.1404(1) is unambiguous and must be enforced as written. The statute does not refer to the "initial" notice supplied by a claimant; it says "a" notice. The statute then identifies what "the" notice must contain. As our Supreme Court has noted, "the" is defined as a " 'definite article . . . used . . . before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an . . . .' " *Robinson v Detroit*, 462 Mich 439, 461; 613 NW2d 307 (2000), citing *Random House Webster's College Dictionary*. In order to interpret the statute as defendant desires us to do, this Court would have to read into the statute a provision that is clearly not there. This we cannot do. *Roberts*, *supra* at 63.

Reading the words of MCL 691.1404(1) according to their ordinary meaning, a claimant must simply provide "a notice," and "the notice" must contain certain information. The statute does not delineate the form of the notice or when the proper notice is provided except that it must be within 120 days of the injury and contain the identified information. Defendant received plaintiff's notice dated October 10, 2006, within 120 days of her injury. It contained the specific location and nature of the complained-of defect. It described the injuries sustained by plaintiff. It identified the name and address of the witness who was with plaintiff at the time of the incident. The notice met the requirements of MCL 691.1404(1). Defendant's objection to the October 10, 2006, communication because it included the required information on a form provided by defendant is without merit. The statute does not prohibit such a submission, nor does it require an original format created by a claimant. The trial court did not err by denying defendant's motion for summary disposition.

In coming to our conclusion, we disregard plaintiff's attempted notice of August 1, 2006.[4] MCL 691.1404(1) provides that a claimant "*shall* serve a notice" and "*shall* specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." (Emphasis added.) The Legislature's repeated use of the word "shall" indicates a mandatory requirement. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). A purported notice that does not comply with the statute is insufficient. Because plaintiff did not include the name of a known witness in the initial notice, plaintiff's initial notice was defective. But because plaintiff did, in fact, properly serve a legally sufficient notice within 120 days of the injury, plaintiff was in compliance with MCL 691.1404(1).

Affirmed.

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[4] Because the notice provided on October 10, 2006, was sufficient, we need not discuss the concept of substantial compliance set forth in *Meredith v City of Melvindale*, 381 Mich 572, 580-581; 165 NW2d 7 (1969).

In re CONTEMPT OF HENRY

Docket Nos. 280372 and 281318. Submitted March 11, 2009, at Detroit. Decided March 17, 2009, at 9:00 a.m.

Nancy A. Davis obtained a divorce from Charles M. Henry (the defendant) in the Oakland Circuit Court. The defendant subsequently amassed a large child support arrearage. The court, Cheryl A. Matthews, J., appointed a receiver to collect a lump sum retirement payment the defendant was due to receive. The defendant's sister, attorney Kathy L. Henry, represented him at the time. Numerous motions, hearings, and orders followed, some of which related to the requirement that Henry turn over to the receiver funds in her trust account derived from the lump sum payment. Following a series of evidentiary hearings, the court found Henry guilty of criminal contempt for acts that included violating the court's orders and perjury. The court sentenced Henry to two days in jail, fined her $7,500, and ordered her to pay attorney fees and costs. Henry separately appealed the contempt conviction and the order imposing attorney fees and costs, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. A criminal contempt proceeding is between the public and the defendant charged with contempt. MCR 3.606(A), however, provides that upon a proper showing on ex parte motion, a court must order a person accused of a contempt committed outside the court's immediate view and presence to show cause why he or she should not be punished for the contempt. Contrary to Henry's assertion, a prosecuting attorney need not initiate and prosecute criminal contempt proceedings. A private party, or the party's counsel acting in a representative capacity, may initiate and prosecute a motion to hold an opposing party in criminal contempt.

2. A criminal contempt proceeding requires some of the safeguards of an ordinary trial. Henry was not denied due process, however. Nothing in the record suggests that the receiver acted unethically, was prejudiced in prosecuting the contempt, or initiated the proceeding out of any animus toward Henry or that the process was abused once initiated.

3. The trial court did not convict Henry of any uncharged acts of criminal contempt. A defendant charged with criminal contempt is entitled to be informed of the nature of the charges against him or her and of the specific offenses with which he or she is charged. Henry faced only one criminal contempt charge arising out of her willfully and repeatedly ignoring the trial court's orders and lying to the court, a course of conduct that spanned several months. Henry was well aware of both the nature of the charge and the specific conduct with which she was charged. The trial court only found facts and made conclusions of law arising out of the original charge of criminal contempt of which Henry had notice. The trial court did not abuse its discretion.

4. MCL 600.1711(2) requires a hearing in the case of contempt committed outside the immediate view and presence of the court. The judge who presided over the proceeding in the context of which this indirect conduct occurred should preside over the contempt proceedings. Therefore, Judge Matthews properly presided over Henry's contempt proceeding.

5. The evidence was legally sufficient to support the trial court's finding that Henry committed perjury during the criminal contempt proceedings.

6. Henry's motion to disqualify the trial judge lacked both a legal and a factual basis. The trial court's aggravation with Henry stemming from Henry's disobedience showed nothing more than frustration and did not rise to the level of actual bias or prejudice, which are grounds for disqualification under MCR 2.003(B)(1).

7. The trial court's imposition of a $7,500 fine violated the ex post facto clauses of the United States and Michigan constitutions. The amended version of MCL 600.1715(1) authorizing a fine in that amount took effect after Henry committed the acts that gave rise to the charge of criminal contempt. The retroactive application of the version of the statute that enhanced the potential fine increased the level of punishment applicable. The $7,500 fine imposed must be vacated and the case remanded for resentencing with respect to the fine under the version of MCL 600.1715 in effect when Henry committed the contempt.

8. The trial court did not abuse its discretion by imposing attorney fees and costs in the criminal contempt proceeding. MCL 600.1721 requires the court to order the indemnification of any person who suffered an actual loss or injury caused by the contemnor's misconduct.

Affirmed in part, vacated in part, and remanded for resentencing.

1. CONTEMPT — CRIMINAL CONTEMPT — PROSECUTION OF CRIMINAL CONTEMPT PROCEEDINGS BY PRIVATE PARTIES.

A private party, or the party's attorney acting in a representative capacity, may initiate a criminal contempt proceeding for a contempt committed outside the immediate view and presence of the court; a prosecuting attorney need not initiate proceedings or prosecute a claim for indirect criminal contempt (MCR 3.606[A]).

2. CONTEMPT — CRIMINAL CONTEMPT — JUDGE PRESIDING AT CONTEMPT PROCEEDINGS.

In the case of a contempt committed outside the immediate view and presence of the court, the judge who presided over the proceedings in the context of which the indirect conduct constituting contempt occurred should preside over the contempt proceedings (MCL 600.1711[2]).

3. JUDGES — DISQUALIFICATION OF JUDGES — BIAS OF JUDGES — PREJUDICE OF JUDGES.

A judge is disqualified if he or she is personally biased or prejudiced for or against a party or attorney; judicial rulings do not generally constitute a basis for alleging bias unless the ruling displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes the heavy presumption of judicial impartiality (MCR 2.003[B][1]).

4. CONSTITUTIONAL LAW — CRIMINAL CONTEMPT — EX POST FACTO CLAUSE — RETROACTIVE APPLICATION OF CRIMINAL STATUTES.

The retroactive application of a statutory amendment that increases the fine that may be imposed is an increase in punishment that violates the ex post facto clauses of the United States and Michigan constitutions (US Const, art I, § 10; Const 1963, art 1, § 10).

Caplan & Associates, P.C. (by *David M. Caplan*), for Nancy A. Davis.

Linda D. Ashford, P.C. (by *Linda D. Ashford*), for Kathy L. Henry.

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

PER CURIAM. This criminal contempt matter arises out of the involvement of appellant, attorney Kathy

Henry, in the postjudgment child support enforcement case of her brother, defendant Charles Henry. Because appellant has not established error with regard to the trial court's criminal contempt order, we affirm that order. But appellant has established error with regard to her sentencing because the trial court's retroactive application of the amended version of MCL 600.1715, which enhanced the fine recoverable from appellant, violates constitutional ex post facto prohibitions. We affirm in part, vacate in part, and remand for resentencing with respect to the fine imposed, which shall be in accordance with the version of MCL 600.1715 in effect at the time appellant committed the contemptuous acts.

I

Plaintiff, Nancy Davis, obtained a default divorce judgment in 1994. Plaintiff received sole physical and legal custody of the couples' two children, and defendant was ordered to pay child support to plaintiff. By September 2006, defendant had amassed $30,054.29 in child support arrearages. Both plaintiff and the Oakland County Friend of the Court (FOC) attempted to collect the outstanding child support from defendant. In November 2006, plaintiff learned that defendant's employer, ThyssenKrupp Budd Company, was closing the plant where defendant worked. Defendant had accepted an early retirement offer and had signed a mutual consent retirement benefit package that was due to pay him a lump sum of $75,000 sometime in the month of January 2007.

On November 22, 2006, plaintiff filed a petition for an order to show cause for nonpayment of child support and a motion asking the trial court to direct defendant's payment of a lump sum or appoint a receiver, arguing

that the upcoming lump sum payment was her only opportunity to collect the unpaid child support. On receipt of plaintiff's petition, the trial court entered an order on November 28, 2006, ordering defendant to appear on December 13, 2006, and show cause regarding why he should not be held in contempt of court for failure to pay child support in violation of the default divorce judgment dated February 22, 1994.

The matter was assigned to a referee. Plaintiff, her counsel, defendant, and appellant, acting as defendant's counsel, were in attendance at a referee hearing on December 13, 2006. Appellant did not file an appearance as attorney of record for defendant. The referee recommended that defendant be ordered to pay the child support arrearage out of his lump sum payment, and the matter was referred to the trial court. The trial court indicated it could not hear the matter that day and instructed counsel to request that the matter be set for another date. Plaintiff's counsel did so for December 20, 2006. On that date, the trial court held a hearing regarding the referee hearing. Neither defendant nor his counsel, appellant, attended the hearing on December 20, 2006. Ultimately, on that date, the trial court issued the following order:

> Plaintiff having appeared on her Petition to show cause for non-payment of child support and offered oral argument, Defendant having failed to appear, and the court being fully advised;
>
> IT IS HEREBY ORDERED that Plaintiff's motion is granted. Specifically, Plaintiff is awarded the full child support arrearage as of today's date (12/20/06), from the lumpsum payment of $75,000 that Defendant is to receive from ThyssenKrupp Bud [sic] and/or UAW Local 306 within 10 days. David Finding [sic] is appointed receiver to collect and disburse said sums through the Friend of the Court and MISDU [Michigan's State Disbursement Unit].

> Defendant shall pay $500.00 in sanctions/atty [sic] fees to Plaintiff's attorney which shall also be collected and disbursed from the lumpsum payment by the receiver. An immediate injunction is issued and ThyssenKrupp Bud [sic], UAW Local 306 or any other Agent shall not disburse any funds to Defendant pending contact and direction by the receiver or further court order.

On December 21, 2006, the newly appointed receiver, David Findling, filed a motion for entry of an order delineating his powers and duties as receiver, with a proposed order attached. The trial court held a hearing January 3, 2007, on the receiver's motion dated December 21, 2006. The only person who appeared at the motion was John Polderman, an associate of Findling. The case was called, and the trial court granted the motion and then signed the proposed order attached to the December 21, 2006, motion. At this time, Polderman also informed the court that he had recently learned that ThyssenKrupp Budd Company had already disbursed a check to defendant on December 14, 2006, six days before the court issued its December 20, 2006, order. Polderman stated that he had not heard anything from defendant and that his firm, as receiver, was attempting to trace and recover the funds.

Later on the morning of the January 3, 2007, hearing, appellant checked in with the trial court clerk at about 9:40 a.m., after the case had already been called. The court clerk advised appellant that the motion had been granted. Appellant asked that the case be recalled, and the clerk informed her that recalling the case was not possible.

According to appellant, on January 18, 2007, appellant gave defendant a signed check drawn on her IOLTA [Interest on Lawyers Trust Accounts] account with the amount blank. Appellant directed defendant to go to the FOC and pay his child support arrearages in the

amount of approximately $29,000. According to appellant, the FOC would not accept the payment, informing defendant that he would have to turn over the funds to the receiver. Defendant left the FOC and did not contact or pay the receiver.

The next day, January 19, 2007, Findling filed a motion and order to show cause why appellant should not be held in contempt of court. In his motion, the receiver outlined the case against appellant as follows:

(1) After being appointed, the receiver learned that ThyssenKrupp Budd Company had disbursed a check to defendant on December 14, 2006, in the amount of $85,367.36, that the cancelled check was endorsed by both defendant and appellant, and that the check was deposited in appellant's IOLTA account.

(2) The receiver directed a letter to appellant on January 11, 2007, by certified mail and fax, demanding any information on the check and the location of the funds. He enclosed a copy of the court's December 20, 2006, order and requested a response from appellant by January 18, 2007.

(3) The receiver contacted appellant's office on January 18, 2007, but was advised that appellant was unavailable. On the same date, the FOC contacted him, advising him that defendant was at the FOC's office presenting a blank check drawn on appellant's IOLTA account. The FOC advised defendant that he should make payment to the receiver, in accordance with the prior order of the trial court. Defendant left the FOC's office but did not contact the receiver.

(4) On January 19, 2007, Polderman, the receiver's associate, encountered appellant at the Wayne Circuit Court. Polderman personally served appellant with the December 20, 2006, order of the court, as well as the amended order appointing the receiver. Polderman re-

quested that appellant promptly pay the receiver.

(5) Also on January 19, 2007, the receiver went to appellant's office and hand-delivered another copy of the amended order appointing the receiver. He contacted appellant on her cell phone and demanded that she turn over the funds in accordance with the court's orders. When the receiver asked appellant if she would comply with the court's orders, appellant indicated that she would file an "emergency motion" and that the receiver should "file [his] show cause."

(6) Appellant indicated that she had the funds in her account, but also indicated that she was never properly served with plaintiff's pleadings and that "the December 20, 2006 order does not accurately reflect what this Court ordered."

In conclusion, the receiver requested that the trial court hold appellant in civil contempt of court for "intentionally frustrating and failing to comply" with the court's orders. The receiver also requested that the court sanction appellant in the amount of $500 a day until she complied with the court's orders.

On January 24, 2007, appellant filed a motion to set aside the order appointing a receiver, to modify child support, and to set aside the order entered December 20, 2006. Appellant contended that neither she nor defendant had been notified of the December 20, 2006, hearing and as a result, plaintiff's counsel

> unilaterally induced the Court to enter an Order intercepting the proceeds from Defendant's employer, ordering that a receiver be appointed, and that Defendant pay future child support at a rate not commensurate with his income, and also ordering that he must pay counsel for Plaintiff's attorney fees and the expenses for a receiver.

The receiver responded to appellant's motion on January 29, 2007, arguing that appellant's motion was

merely an attempt to shift the focus from defendant and appellant's refusal to follow the court's orders, and again asked that the trial court hold appellant in contempt of court for failing to turn over defendant's funds that were in her possession so the receiver could distribute them in accordance with the court's orders. Plaintiff responded to appellant's motion on January 31, 2007, arguing that both defendant and appellant should be held in contempt of court for failing to pay the child support arrearage as ordered by the court.

On January 31, 2007, the trial court held a hearing on appellant's motion, but adjourned the receiver's motion to hold appellant in contempt of court. The motion hearing was very contentious. Appellant continued to assert that neither she nor defendant had received notice of the December 20, 2006, hearing. Plaintiff's counsel argued that defendant had been served by mail at two addresses and stated that appellant had not been mailed notice of the hearing because she had not filed an appearance with the court. Appellant admitted that she had not filed an appearance as the attorney of record until after the December 20, 2006, hearing. In fact, she stated that she had not filed it until about a week before the current hearing. Appellant resisted turning over the full amount of the funds to the receiver, stating that the money was "safe in [her] client trust account." But she later admitted that "part of the moneys are not even in my possession," that "there's been some disbursements," and that only $35,000 remained in her trust account. On February 1, 2007, the trial court entered an order commanding appellant to turn over all funds held on behalf of defendant to the receiver and to deliver an accounting to the receiver. The order also adjourned the show cause hearing regarding appellant's alleged contempt to February 28, 2007.

On February 2, 2007, appellant turned over $75,000 to the receiver. Appellant also submitted an accounting to the receiver, representing that defendant received the $85,367.36 check on December 19, 2006, that she "deposited $85,367.00 and reserved $75,000" in her trust account, and that on January 31, 2007 a $75,000 check was withdrawn from the account and forwarded to the receiver. Appellant also represented that $10,367.36 remained in the IOLTA account. On February 6, 2007, appellant turned over the remaining $10,367.36 to the receiver, making the full amount $85,367.36. Appellant submitted that she had misinterpreted the court's orders and initially believed that she was only required to turn over $75,000, not the full amount of $85,367.36.

On February 20, 2007, the receiver filed a brief in support of an evidentiary hearing, arguing that although appellant had purged her civil contempt, appellant should be held in criminal contempt of court for "wilfully and repeatedly" ignoring the court's orders and lying to the court regarding the disposition of funds held in her IOLTA account. The trial court held a series of criminal contempt evidentiary hearings on February 28, 2007, March 27, 2007, and May 22, 2007, during which the receiver acted as the prosecutor. On August 24, 2007, the trial court issued a written opinion and order, holding that appellant had committed criminal contempt in a series of violations stemming from her representation of defendant, including violations of the Michigan Rules of Professional Conduct, committing perjury, affirmatively lying to the court and lying to the court by omission, violating court orders, and failing to deliver and fully account for the funds at issue. The trial court held a sentencing hearing on September 6, 2007, at which the trial court imposed the criminal sanctions of two days in jail and a fine of $7,500 and awarded

attorney fees and costs in the amount of $13,567.39. Appellant now appeals as of right.

II

Appellant first argues that because criminal contempt proceedings are between the public and the defendant, the prosecuting attorney must appear and prosecute the case; thus, the trial court erred when it permitted the receiver to institute and prosecute the case. We review unpreserved issues for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

" 'Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.' " *People v Joseph*, 384 Mich 24, 33; 179 NW2d 383 (1970), quoting *Bloom v Illinois*, 391 US 194, 201; 88 S Ct 1477; 20 L Ed 2d 522 (1968). Criminal contempt proceedings arising out of civil litigation "are between the public and the defendant, and are not a part of the original cause." *Gompers v Bucks Stove & Range Co*, 221 US 418, 445; 31 S Ct 492; 55 L Ed 797 (1911). Therefore, appellant is correct in her assertion that criminal contempt proceedings are between the public and the defendant.

Appellant relies on the language in MCL 49.153 that states as follows:

> The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions,

> suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.

But MCR 3.606(A) specifically governs the initiation of contempt proceedings for conduct occurring outside the immediate presence of the court and states as follows:

> Initiation of Proceeding. For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
>
> (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or
>
> (2) issue a bench warrant for the arrest of the person.

Appellant ignores the fact that it is settled that our Supreme Court is the final arbiter of all matters of practice and procedure in the courts of this state. Const 1963, art 6, § 5; *Mumaw v Mumaw*, 124 Mich App 114, 120; 333 NW2d 599 (1983). In instances in which a statute and a specific court rule conflict, the court rule prevails. *In re Lafayette Towers*, 200 Mich App 269, 275; 503 NW2d 740 (1993).

Here, the receiver initiated the proceeding with a show cause motion brought pursuant to MCR 3.606(A). The record displays that the receiver was not appointed by the trial court to undertake the criminal contempt prosecution; rather, the receiver initiated the proceedings on his own. Recently, this Court addressed the question appellant has raised and specifically held that a prosecutor need not initiate proceedings or prosecute a claim for indirect criminal contempt. *DeGeorge v Warheit*, 276 Mich App 587, 600; 741 NW2d 384 (2007). According to the *DeGeorge* Court,

> because it is apparent that such an ex parte motion would ordinarily, if not always, be brought by a party to a case against an opposing party and because civil cases often involve only private parties, it is manifest that the Michigan Court Rules contemplate that a private party (and by obvious extension that party's attorney acting in a representative capacity) may initiate and prosecute a motion to hold an opposing party in criminal contempt. [*Id*.]

This Court is bound to follow *DeGeorge*. See MCR 7.215(J)(1). Appellant has not shown error.

III

Next, appellant asserts that the receiver's "appointment" as prosecutor violated appellant's due process rights. Specifically, appellant alleges that the receiver's decision to initiate criminal contempt charges may have been motivated by an opportunity to "avenge past grievances" with appellant or to "prolong the proceedings, in order to incur greater fees." Further, appellant alleges that the receiver thwarted defendant's attempt to pay the outstanding child support arrearages at the FOC and then only one day later filed his show cause motion to hold appellant in contempt of court.

Whether a party has been afforded due process is a question of law, subject to review de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). A trial court's findings in a contempt proceeding are reviewed for clear error and must be affirmed on appeal if there is competent evidence to support them. *Cross Co v UAW Local No 155*, 377 Mich 202, 217-218; 139 NW2d 694 (1966); *DeGeorge,* 276 Mich App at 591; *Brandt v Brandt*, 250 Mich App 68, 72-73; 645 NW2d 327 (2002). The appellate court may not weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the findings.

Cross Co, 377 Mich at 217. Clear error exists when this Court is left with the definite and firm conviction that a mistake was made. *DeGeorge,* 276 Mich App at 591.

No person may be deprived of life, liberty, or property without due process of law. US Const, Am XIV, § 1; Const 1963, art 1, § 17; *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004). The essence of the right of due process is the principle of fundamental fairness. *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003). The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). A criminal contempt proceeding requires some of the safeguards of an ordinary criminal trial. *DeGeorge,* 276 Mich App at 592. A defendant charged with contempt is entitled to be informed whether the proceedings are civil or criminal. *Id*. Further, a defendant in a criminal contempt proceeding is entitled to be informed of the charge, to be given an opportunity to prepare his or her defense, and to secure the assistance of counsel. *Id*. The defendant has a presumption of innocence and a right against self-incrimination. *Id*.

Appellant argues that she was denied due process in the criminal contempt proceeding because the process was not fundamentally fair. Essentially, she asserts that the receiver was not disinterested and was in fact motivated to pursue a claim against her in bad faith. Appellant makes her assertions with only unsupported allegations in her brief on appeal. Specifically, appellant alleges that the receiver's decision to initiate criminal contempt charges may have been motivated by an opportunity to "avenge past grievances" with appellant

or to "prolong the proceedings, in order to incur greater fees." Appellant does not support these allegations with any record evidence, and as such they amount to mere speculation and conjecture.

> It is not sufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." [*Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

In support of her argument, appellant identifies only one alleged event. She alleges that the receiver thwarted defendant's attempt to pay the outstanding child support arrearages at the FOC on January 18, 2007, and then only one day later filed his show cause motion to hold appellant in contempt of court. Appellant alleges in her brief on appeal that defendant told her that when he attempted to pay his child support arrearage at the FOC, an FOC employee refused to accept the check because " 'she had contacted David Findling on the phone and David Findling informed her to not accept that $29,000 from him.' " To establish that the unidentified FOC employee called the receiver and the receiver instructed the employee not to accept payment, appellant points only to her own testimony before the trial court at the contempt hearing. Though she had the opportunity to call witnesses, appellant did not call defendant, the unidentified FOC employee, or anyone else to substantiate her self-serving hearsay[1]

[1] The rules of evidence apply to a hearing on a contempt charge. *In re Contempt of Robertson*, 209 Mich App 433, 439; 531 NW2d 763 (1995). All relevant evidence is admissible unless the rules of evidence, or the United States or Michigan constitutions, provide otherwise. *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002); MRE 402. Under MRE

testimony. While the trial court heard appellant's testimony when this issue was explored during the evidentiary hearing, the trial court apparently did not credit appellant's testimony on this matter because it is not included as a finding of fact in the trial court's lengthy written opinion and order. By merely repeating her assertions on appeal, appellant has not shown clear error in the trial court's factual findings. *Cross Co,* 377 Mich at 218; *DeGeorge,* 276 Mich App at 591; *Brandt,* 250 Mich App at 73.

Further, nothing in the record suggests that the receiver acted unethically or was prejudiced in prosecuting the contempt. There is no evidence that the receiver initiated the contempt proceeding out of any animus toward appellant, or that once initiated the process was abused. Appellant has not established a due process violation or plain error on this record.

IV

Appellant argues that the trial court erred when it convicted appellant of uncharged acts of contempt. The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion. *Mason v Siegel*, 301 Mich 482, 484; 3 NW2d 851 (1942); *DeGeorge,* 276 Mich App at 591; *Brandt,* 250 Mich App at 73. If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

802, hearsay evidence is inadmissible absent an exception. "Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *Tobin v Providence Hosp*, 244 Mich App 626, 640; 624 NW2d 548 (2001); see MRE 801(c).

The *DeGeorge* Court recently set out the due process requirements in criminal contempt proceedings:

> When a contempt proceeding is criminal, it "requires some, but not all, of the due process safeguards of an ordinary criminal trial." [*In re Contempt of Dougherty*, 429 Mich 81, 91; 413 NW2d 392 (1987).] A defendant charged with contempt is entitled to be informed of the nature of the charge against him or her and to be given adequate opportunity to prepare a defense and to secure the assistance of counsel. [*In re Contempt of Rochlin*, 186 Mich App 639, 649; 465 NW2d 388 (1990).] A defendant charged with contempt is entitled to be informed not only whether the contempt proceedings are civil or criminal, but also the specific offenses with which he or she is charged. *Id*. [*DeGeorge,* 276 Mich App at 592.]

However, the charges need not be set forth "in the form and detail of a criminal information . . . ." *Cross Co,* 377 Mich at 215.

Appellant relies on this Court's decision in *In re Contempt of Rochlin*, 186 Mich App 639, 649; 465 NW2d 388 (1990), to support her argument that this Court must vacate her convictions of three uncharged acts of contempt because she was not given sufficient notice to defend against the charges. In *Rochlin*, the defendant was charged with three separate acts of criminal contempt. The defendant argued that he did not have sufficient notice to defend against the third charge concerning his failure to disclose, through perjury, his ownership interest in two automobiles. The trial court ultimately found defendant guilty of criminal contempt for perjury on the basis of his having made a false statement to conceal a bank account. *Id.* at 649. This Court determined that

> the act on which the third contempt charge was based was not the act of criminal contempt of which defendant was found guilty. Due process required that defendant receive

> more specific notice of the charge of which he was found guilty in order to give him the opportunity to prepare a defense against that particular charge. We are not persuaded that his being informed of the charge through the opening statement of plaintiff's counsel on the first day of the contempt trial afforded him that opportunity, even though there was a delay after that first day. Therefore, defendant's conviction of the criminal contempt of perjury must be reversed. [*Id*.]

The present case is distinguishable from *Rochlin* because here appellant faced only one criminal contempt charge arising out of her "wilfully and repeatedly" ignoring court orders and lying to the court throughout the representation of her brother in his postjudgment child support enforcement case and the defendant in *Rochlin* was charged with three counts of criminal contempt arising out of three separate acts. *Id*. In *Rochlin,* the defendant was not notified of the basis of his third contempt charge until the opening statement of the plaintiff's counsel on the first day of the contempt trial. *Id*. Clearly, the *Rochlin* defendant was not informed of the specific offenses with which he was charged. Unlike the defendant in *Rochlin*, appellant here was accused of only one act of criminal contempt arising out of a course of conduct spanning several months of her representation of defendant. The receiver outlined appellant's course of conduct throughout her representation of defendant that amounted to criminal contempt in his February 20, 2007, brief in support of an evidentiary hearing. The receiver alleged that though appellant had purged her civil contempt, she should be held in criminal contempt for "wilfully and repeatedly" ignoring court orders, lying to the court, behaving in a manner that was an affront to the dignity of the court, and making a mockery of the factfinding process. The record supports that appellant was

well aware of both the nature of the charge and the specific conduct with which she was charged.

Appellant also argues that the "criminal contempt-findings for violating MRPC 3.1, impeding the notification process and perjury must be vacated because [appellant] was not given notice and the reasonable opportunity to meet the charges by defense or explanation." When adjudicating contempt proceedings without a jury, a court must make findings of fact, state its conclusions of law, and direct entry of the appropriate judgment. *S Abraham & Sons, Inc v Dep't of Treasury*, 260 Mich App 1, 24; 677 NW2d 31 (2003).

After hearing testimony over the course of three hearings, the trial court issued a detailed 27-page opinion and order setting forth its findings of fact and conclusions of law and ultimately holding that appellant was guilty of criminal contempt. Appellant has cherry-picked certain of the trial court's findings and now alleges on appeal that they were not part of the receiver's original criminal contempt charge and thus must be vacated. But the trial court's opinion belies appellant's claim. The trial court only found facts and made conclusions of law arising out of the original charge of criminal contempt, of which appellant had notice. The trial court detailed several instances of contemptuous behavior spanning appellant's course of conduct throughout her representation of defendant, as it was required to do. *Id*. Our review of the opinion and order reveals that the trial court's findings merely supported the charged conduct, were made in support of the receiver's original charge of criminal contempt, and were not an attempt to sua sponte charge appellant with separate contempt charges. The trial court did not convict appellant of uncharged acts of criminal contempt and did not abuse its discretion. *Mason,* 301 Mich at 484; *DeGeorge,* 276 Mich App at 591; *Brandt,* 250 Mich App at 73.

V

Appellant argues that she was entitled to a full hearing before a different judge because the trial court deferred entering the contempt order for more than three months after the conclusion of the last contempt hearing. There is no doubt that this matter involved indirect contempt. A hearing must be conducted when the contempt is indirect. MCL 600.1711(2) directs that

> [w]hen any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend.

The judge who presided over the proceedings in the context of which the indirect contumacious conduct occurred should preside over the contempt proceedings. *Cross, Co*, 377 Mich at 212. Thus, the trial court properly presided over this indirect criminal contempt proceeding. *Id*.

Appellant essentially argues on appeal that during the hearing for her indirect contumacious conduct, she committed perjury, which is a form of direct contempt because it was committed in the presence of the court. When a contempt is committed in the immediate view and presence of a court and immediate corrective action is necessary, the court may summarily punish it. MCL 600.1711(1); *In re Contempt of Dudzinski*, 257 Mich App 96, 108; 667 NW2d 68 (2003); *In re Contempt of Scharg*, 207 Mich App 438, 439; 525 NW2d 479 (1994). Such direct contempt occurs when all the facts necessary to find the contempt are within the personal knowledge of the judge. *In re Scott*, 342 Mich 614, 618; 71 NW2d 71 (1955); *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 712; 624 NW2d 443 (2000).

When a court defers consideration of contempt until the conclusion of the trial, another judge must consider the charges. *Scharg,* 207 Mich App at 440.

In *Scharg*, the trial court cited five incidents that occurred during the course of the trial, in the court's presence, in which the court found Scharg to be disrespectful and disruptive. But the trial court deferred the contempt citation until the conclusion of the trial. After the trial court informed Scharg that it found his conduct contumacious, Scharg requested a hearing, which the court denied. On appeal, this Court held that because the trial court deferred the contempt order until the conclusion of the trial, Scharg was entitled to a full hearing before a different judge. *Id.* at 439.

This case is unlike *Scharg*. Here, appellant was already charged with indirect criminal contempt and was already participating in the evidentiary hearings required by MCL 600.1711(2). After hearing all the evidence at the three hearings, the trial court found that the evidence showed that appellant had perjured herself during the course of the criminal contempt hearings. The trial court certainly did not find that contempt occurred during a trial and then defer the contempt order until the conclusion of the trial like the court did in *Scharg*. Appellant has not demonstrated that she was entitled to a full hearing before a different judge. *Id*.

Appellant contends that the trial court should have immediately responded to her perjured testimony and subjected her to summary punishment. Indeed, it is within the court's discretion to summarily punish direct contempt. MCL 600.1711(1); *Dudzinski,* 257 Mich App at 108; *Scharg,* 207 Mich App at 439. However, the trial court needs to have all the facts necessary to take immediate corrective action. *Scott,* 342 Mich at 618;

Auto Club Ins Ass'n, 243 Mich App at 712. Appellant has not shown that the trial court had all the facts necessary to take immediate corrective action, as appellant committed perjury during the evidentiary hearing. Perhaps the trial court did not determine that appellant had perjured herself until after it considered all the facts in evidence. Further, the trial court has not taken any action against appellant with regard to her perjury during the contempt hearings. The court's findings relate only to the original contempt action. Appellant has not shown that the trial court abused its discretion. *Mason,* 301 Mich at 484; *DeGeorge,* 276 Mich App at 591; *Brandt,* 250 Mich App at 73. In any event, a party cannot successfully argue reversible error on appeal when that alleged error is due to the party's own conduct. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004), citing *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003).

VI

Appellant next argues that the evidence was legally insufficient to support the trial court's criminal contempt finding of perjury. "This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial." *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id*. at 474. "Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The elements of perjury are " '(1) the administration to the defendant of an oath authorized by law,

by competent authority; (2) an issue or cause to which facts sworn to are material; and (3) wilful false statements or testimony by the defendant regarding such facts.' " *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996) (citation omitted).

The court file indicates that on December 20, 2006, defendant was served with the initial order appointing a receiver. Defendant was also served with the December 21, 2006, receiver's motion for entry of an order. The proposed order delineating the receiver's powers and duties was attached to the December 21, 2006, motion. Appellant testified that she got a copy of the December 21, 2006, receiver's motion for entry of an order from her brother, who had received it in the mail. As would be expected, since she received the motion, appellant came to the court on January 3, 2007, albeit late, to represent her brother at the hearing on the receiver's December 21, 2006, motion. Appellant's own action of showing up to court on the date prescribed for the hearing of the December 21, 2006, motion belies her assertion that she knew only that a receiver had been appointed, but not that an order existed regarding the receiver's obligations. This is because the court clerk specifically testified that on the day of the January 3, 2007, hearing on the motion, after appellant arrived late, he told appellant that the motion had been called and the trial court had already granted the motion.

Appellant is a licensed attorney in the state of Michigan and admits that she has been practicing for 18 years. Appellant is most certainly aware that a court speaks through its written orders and judgments, not through its oral pronouncements. *Hall v Fortino*, 158 Mich App 663, 667; 405 NW2d 106 (1986). Thus, appellant was clearly aware that the trial court's granting of the receiver's motion for entry of an order meant

that the proposed order attached to the motion had been entered. This information taken together demonstrates the falsity of appellant's testimony at the contempt proceedings that she did not learn of the receiver's order until the receiver faxed it to her on January 11, 2007. The evidence at the evidentiary hearings and in the record support the trial court's finding that appellant lacked credibility and that appellant perjured herself while testifying in defense against her original charge of criminal contempt. Accordingly, the evidence was legally sufficient to support the trial court's contempt finding that appellant wilfully perjured herself during the criminal contempt proceedings. Appellant has not demonstrated error.

VII

Appellant argues that the trial judge should have been disqualified and, thus, that this case must be reversed and remanded for trial before a different judge. Appellant brought a motion to disqualify the trial judge, which was denied.[2] Because appellant moved to disqualify the judge in the trial court, the issue is preserved for appellate review. See MCR 2.003; *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). In reviewing a motion to disqualify a judge, this Court reviews the trial court's findings of fact for an abuse of discretion and reviews the court's application of those facts to the relevant law de novo. *Olson v Olson*, 256 Mich App 619, 637-638; 671 NW2d 64 (2003).

MCR 2.003(B)(1) provides that a judge is disqualified when the "judge is personally biased or prejudiced for or

[2] Order of September 5, 2007, denying the motion for disqualification of the trial judge, entered by the Honorable Wendy Potts, Chief Judge of the Oakland Circuit Court.

against a party or attorney." Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 554; 730 NW2d 481 (2007). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a ' "deep-seated favoritism or antagonism that would make fair judgment impossible" ' and overcomes a heavy presumption of judicial impartiality." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (citations omitted).

Appellant's request for disqualification of the trial judge lacked both a legal and a factual basis. The record is replete with evidence that the trial court issued orders and that appellant refused to comply. The trial court told appellant that she needed to comply with court orders and cautioned her time after time when she outright refused. A party must obey an order of a court with jurisdiction even if the order is clearly incorrect. *Kirby v Michigan High School Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998); *Dudzinski,* 257 Mich App at 110. While the record reveals that the trial court was indeed frustrated with appellant for her blatant noncompliance with the court's orders, the record does not display that the trial court was improperly "embroiled in a running controversy" with appellant, as she argues in her brief on appeal. Instead, the record reflects that the trial court repeatedly attempted to force appellant to turn over the funds to the receiver in accordance with the court's orders, which appellant did not agree with and took personally. It is plain from

the record that the trial court and appellant butted heads throughout defendant's proceedings regarding the child support arrearage because of appellant's deliberate refusal to comply with the court's orders. But it cannot be said that the trial court's objective aggravation with appellant stemming from appellant's own disobedience evidenced anything more than frustration, and it certainly did not rise to the level of actual bias or prejudice. *Gates,* 256 Mich App at 440. Appellant has failed to establish grounds to disqualify the trial judge.

VIII

Appellant asserts that her contemptuous acts occurred before March 30, 2007, and that the trial court's imposition of a $7,500 fine therefore violates the ex post facto clauses of the United States and Michigan constitutions. The determination whether a charge is precluded by the constitutional prohibition against ex post facto laws presents a question of law, which is reviewed de novo on appeal. *People v Monaco*, 262 Mich App 596, 601; 686 NW2d 790 (2004), aff'd in part and rev'd in part 474 Mich 48 (2006). Because appellant failed to preserve her contention that the trial court lacked statutory authority to require that she pay a $7,500 fine, we review this issue to determine whether any plain error affected appellant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

At appellant's sentencing on September 6, 2007, the trial court fined appellant $7,500 for criminal contempt in accordance with MCL 600.1715(1). MCL 600.1715(1) at that time stated (and currently states) in pertinent part:

> Except as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or

> imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court.

But MCL 600.1715 had recently been amended by 2006 PA 544 on December 28, 2006, and filed December 29, 2006. The new legislation was not ordered to take immediate effect, so its effective date was March 30, 2007, in accordance with Const 1963, art 4, § 27.[3] The prior version of MCL 600.1715(1) limited the fine to be assessed to $250 and stated as follows:

> Except as otherwise provided by law, punishment for contempt may be a fine of not more than $250.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 30 days, or both, in the discretion of the court.

Appellant now argues on appeal that her contemptuous acts occurred before March 30, 2007, and thus the trial court's imposition of a $7,500 fine violates the ex post facto clauses of the United States and Michigan constitutions.

Ex post facto laws are prohibited by Const 1963, art 1, § 10, and US Const, art I, § 10. *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003). Michigan's Ex Post Facto Clause is not interpreted more expansively than its federal counterpart. *Id*. at 317. Both clauses "are designed to secure substantial per-

[3] Const 1963, art 4, § 27 provides: "No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."

sonal rights against arbitrary and oppressive legislation and to ensure fair notice that conduct is criminal." *Id*. (citations omitted).

> The test for determining whether a criminal law violates the Ex Post Facto Clause of our Constitution, Const 1963, art 1, § 10, involves two elements: (1) whether the law is retrospective, i.e. whether it applies to events that occurred before its enactment, and (2) whether it disadvantages the offender, *People v Davis*, 181 Mich App 354, 357; 448 NW2d 842 (1989). A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence. *People v Harvey*, 174 Mich App 58, 60; 435 NW2d 456 (1989), quoting *People v Moon*, 125 Mich App 773, 776; 337 NW2d 293 (1983). Further, the Ex Post Facto Clause does not apply to legislative control of remedies and modes of procedure that do not affect matters of substance. *Davis, supra* at 358. [*People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).]

In *Slocum*, this Court rejected the prosecutor's contention "that [a] recently amended restitution statute provide[d] the [trial] court with the authority to order defendant to pay for [extradition] costs." *Id.* This Court reasoned that applying the recently enacted restitution statute to the defendant would violate the Ex Post Facto Clause because "it is clear that the amendment would make the statute apply to defendant's extradition, and that action occurred before the amendment of the statute," and because applying the statute imposing the extradition costs to the defendant would increase his punishment. *Id*. at 243-244.

The record reveals that on February 20, 2007, the receiver filed his brief arguing that although appellant had purged her civil contempt, appellant must be held in criminal contempt of court. Though the trial court held a series of criminal contempt evidentiary hearings on Feb-

ruary 28, 2007, March 27, 2007, and May 22, 2007, filed its opinion and order in the case on August 24, 2007, and sentenced appellant on September 6, 2007, it is undisputed that the criminal contempt was based on a series of contemptuous violations stemming from her representation of defendant that concluded before the March 30, 2007, effective date of revised MCL 600.1715(1).

Thus, we conclude that, as in *Slocum*, retroactive application of the amended version of MCL 600.1715 enhancing the fine recoverable from appellant violates constitutional ex post facto prohibitions by increasing the punishment for appellant's criminal contempt committed before the effective date of the amendment of MCL 600.1715(1). Because the trial court imposed the $7,500 fine without statutory authority and because amended MCL 600.1715 may not be applied retroactively to validate the trial court's imposition of the fine, we conclude that the unauthorized imposition of the $7,500 fine constituted a plain error that affected appellant's substantial right to not have her punishment increased beyond that applicable when appellant committed her criminal contempt before the amendment of MCL 600.1715. *Kimble,* 470 Mich at 312; *Slocum,* 213 Mich App at 243-244. Accordingly, we vacate the $7,500 fine imposed as part of appellant's sentence and remand this case for resentencing with respect to the fine imposed, which shall be in accordance with the version of MCL 600.1715 in effect when appellant committed the contempt.

IX

Finally, appellant asserts that her sentence must be vacated and the case remanded for resentencing because the trial court impermissibly imposed civil remedial sanctions of attorney fees and costs in the amount

of $13,567.39 in this action for criminal contempt.[4] The decision to award attorney fees as compensation for losses incurred because of the contempt and the determination of the reasonable amount of the fees are reviewed for an abuse of discretion. *Taylor,* 277 Mich App at 99. If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Id*. "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error." *Id*.

This Court, in *Taylor,* has already decided the question of the authorization of attorney fees for criminal contempt. The *Taylor* Court held as follows:

> MCL 600.1721 provides that, "[i]f the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant." Thus, under a plain reading of MCL 600.1721, a court must order a person found to be in contempt of court to indemnify any person who suffers an actual loss or injury as a result of the contemnor's misconduct. See *In re Contempt of Rochlin*, 186 Mich App 639, 650; 465 NW2d 388 (1990). The sum required by MCL 600.1721 "may include attorney fees that occurred as a result of the other party's contemptuous conduct." *Homestead Dev Co v Holly Twp*, 178 Mich App 239, 246; 443 NW2d 385 (1989).
>
> Because MCL 600.1721 does not make a distinction between civil and criminal contempt, but rather requires a trial court to order a contemnor to indemnify any person who suffers an "actual loss or injury" caused by the contemnor's "misconduct," we hold that the indemnification sanction mandated by MCL 600.1721 applies even when a trial court imposes a punitive (i.e., criminal) sanction on a contemnor. The trial court did not err when

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[4] Appellant does not challenge the reasonableness, necessity, or amount of the attorney fees and costs that the trial court assessed.

> it ordered defendants to indemnify plaintiff for the losses she actually suffered as a result of defendants' contemptuous conduct. [*Id.* at 100.]

We are bound to follow *Taylor*. See MCR 7.215(J)(1). As such, the trial court did not abuse its discretion when it granted attorney fees in this criminal contempt action. *Taylor,* 277 Mich App at 99.

X

In conclusion, the only error appellant has shown is in regard to her sentencing because the trial court's retroactive application of the amended version of MCL 600.1715 enhancing the fine recoverable from appellant violates constitutional ex post facto prohibitions.

Affirmed in part, vacated in part, and remanded for resentencing with respect to the fine imposed, which shall be in accordance with the version of MCL 600.1715 in effect when appellant committed the contempt. We do not retain jurisdiction.

Special Orders

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered February 5, 2009:

ROBERTS v TITAN INSURANCE COMPANY, Docket No. 280776. The Court orders that the motion for reconsideration is granted, and this Court's opinions issued in this matter on December 4, 2008, 281 Mich App 551 (2008), are hereby vacated. A new majority opinion and the concurring opinion are issued with this order.

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2. An organization lacks standing to bring an action to advocate the interests of its individual members if the individual members lack standing to bring the action. *Lansing Schools Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 282 Mich App 165.
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1. A private party, or the party's attorney acting in a representative capacity, may initiate a criminal contempt proceeding for a contempt committed outside the immediate view and presence of the court; a prosecuting attorney need not initiate proceedings or prosecute a claim for indirect criminal contempt (MCR 3.606[A]). *In re Contempt of Henry*, 282 Mich App 656.
2. In the case of a contempt committed outside the immediate view and presence of the court, the judge who presided over the proceedings in the context of which the indirect conduct constituting contempt occurred

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2. The term "torture," as used in the statute prohibiting the torture of animals, includes every act or omission that causes or permits an animal to suffer unjustifiable or unreasonable pain, suffering, or death (MCL 750.50b[2]). *People v Henderson*, 282 Mich App 307.
3. A person may be found to have failed to provide an animal with adequate care in violation of MCL 750.50(2)(a) as owner of the animal, as possessor of the animal, or as a person having charge or custody of the animal. *People v Henderson*, 282 Mich App 307.

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4. Trial courts are given wide latitude in balancing a defendant's right to counsel of choice against the needs of fairness and the demands of the court's calendar; a balancing of the defendant's right to counsel of his or her choice and the public's interest in the prompt and efficient administration of justice is performed to determine whether the defendant's right has been violated. *People v Aceval*, 282 Mich App 379.

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5. A new trial is the appropriate remedy when a defendant receives an unfair trial because of prosecutorial misconduct; barring a retrial should not be a remedy for such a due process violation because that remedy would be unduly broad and fail to address the specific harm that the defendant has suffered. *People v Aceval*, 282 Mich App 379.

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6. The Michigan Vehicle Code provision forbidding a trial court from ordering the expunction of a violation reportable to the Secretary of State under the Vehicle Code does not affect the court's authority under the Code of

Criminal Procedure to set aside a conviction (MCL 257.732[22]; MCL 780.621). *People v Droog*, 282 Mich App 68.

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7. A provision of the Sex Offenders Registration Act that forbids an individual who is required to register as a sex offender under article II of the act from residing in a school safety zone does not apply to an individual who was residing within a school safety zone as of January 1, 2006; an individual who falls under the exemption is not required to comply with a provision of the act that gives a person who resides in a school safety zone and who becomes a registered sex offender 90 days to relocate outside the zone unless the individual initiates or maintains contact with a minor within that student safety zone (MCL 28.735[1], [3][c], and [4]). *People v Zujko*, 282 Mich App 520.

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8. A harmful chemical substance, for purposes of the statutory provisions that make it a felony to use a harmful chemical substance in a manner that inflicts a serious impairment of a bodily function, is one that has an inherent or intrinsic ability or capacity to cause death, illness, injury, or disease; heated cooking oil is not a harmful substance as contemplated in those provisions (MCL 750.200h[i]; MCL 750.200i[1][b], [2][d]). *People v Blunt*, 282 Mich App 81.

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2. An award of treble damages pursuant to the statute governing damages for the concealment of stolen, embezzled, or converted property is calculated by multiplying the amount of actual damages by three; an award of treble damages is not calculated by adding the amount of actual damages to the amount determined by multiplying the

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1. Changing the school a child of divorced parents attends does not constitute a change in the child's established custodial environment; the parent seeking to effectuate the change through a modification of the child-custody provisions of a divorce judgment must prove by a preponderance of the evidence that the change is in the child's best interest (MCL 722.23; MCL 722.27[1][c]). *Parent v Parent*, 282 Mich App 152.
2. A dispute between divorced parents who share joint legal custody of a child over the child's schooling must

be resolved by the court according to the child's best interests (MCL 722.23; MCL 722.27[1][c]). *Parent v Parent*, 282 Mich App 152.

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2. Evidence of the identification of a person by his or her voice is competent if the identifying witness demonstrates certainty in the mind by testimony that is positive and unequivocal; voice identification must be based on a peculiarity in the voice or on sufficient previous knowledge by the witness of the person's voice. *People v Murphy (On Remand)*, 282 Mich App 571.

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3. Before bringing suit under the highway exception to governmental immunity, a claimant must provide a notice to the governmental agency within 120 days from the time of the injury that (1) specifies the exact location and nature of the highway defect, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses (MCL 691.1404[1]). *Burise v City of Pontiac*, 282 Mich App 646.

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3. There may be more than one "owner" of a vehicle for purposes of applying the no-fault automobile insurance act's definition of "owner" (MCL 500.3101[2][h]). *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339.
4. The phrase "having the use" of a motor vehicle for purposes of defining "owner" under the no-fault automobile insurance act means using the vehicle in ways that comport with concepts of ownership; the focus is on the nature of the person's right to use the vehicle; ownership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another; it is a regular pattern of unsupervised usage (MCL 500.3101[2][h]). *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339.
5. A person is not entitled to personal protection insurance benefits for accidental bodily injury if the person was using a motor vehicle that he or she had taken unlawfully unless it can be shown (1) that the person reasonably believed that he or she was entitled to take the vehicle and (2) that the person reasonably believed that he or she was entitled to use it; a person cannot reasonably believe that he or she is entitled to use a motor vehicle when the person knows that he or she is unable to legally operate it (MCL 500.3113[a]). *Amerisure Ins Co v Plumb*, 282 Mich App 417.
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JOINT LEGAL CUSTODY—*See*

PARENT AND CHILD 2

JUDGE PRESIDING AT CONTEMPT PROCEEDINGS—*See*

CONTEMPT 2

JUDGES

See, also, ATTORNEY AND CLIENT 2

DISQUALIFICATION OF JUDGES

1. A judge is disqualified if he or she is personally biased or prejudiced for or against a party or attorney; judicial rulings do not generally constitute a basis for alleging bias unless the ruling displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes the heavy presumption of judicial impartiality (MCR 2.003[B][1]). *In re Contempt of Henry*, 282 Mich App 656.

JUDGMENTS

PROCEEDINGS SUPPLEMENTARY TO JUDGMENTS

1. *Green v Ziegelman*, 282 Mich App 292.

JUDICIAL REVIEW—*See*

ADMINISTRATIVE LAW 1

JURISDICTION—*See*

TAXATION 3

LABOR RELATIONS

PUBLIC EMPLOYEES

1. An employer may seek severance of a mixed collective bargaining unit in a matter before the Michigan Employment Relations Commission under MCL 423.231 *et seq*., even in the absence of a request by an employee to do so. *Oakland Co v Oakland Co Deputy Sheriff's Ass'n*, 282 Mich App 266.

LEGAL RECOURSE—*See*

CONDOMINIUMS 1

LIMITATION OF ACTIONS—*See*

TAXATION 3

LINEUPS—*See*

EVIDENCE 2

LISTED OFFENSES—*See*

EVIDENCE 1

LOSS OF OPPORTUNITY TO SURVIVE OR ACHIEVE A BETTER RESULT—*See*

NEGLIGENCE 3

MEDICAL MALPRACTICE—*See*

NEGLIGENCE 2, 3

MEDICAL RECORDS—*See*

HEALTH 1

MOTOR FUEL TAX—*See*

TAXATION 2

MOTOR VEHICLES—*See*

INSURANCE 5

MUNICIPAL CORPORATIONS

See, also, GOVERNMENTAL IMMUNITY 1, 2
PUBLIC UTILITIES 1

ACTIONS

1. Actions brought by municipal corporations for the recovery of the possession of public property are not subject to periods of limitations; where a municipality brings an action to recover the property, a private landowner may not be found to have acquired the subject property by acquiescence; a private landowner may bring an action against a municipality to show that it acquired the subject property from the city under the doctrine of acquiescence (MCL 600.5821[2]). *Mason v City of Menominee*, 282 Mich App 525.

MUTUAL MISTAKE OF FACT—*See*

TAXATION 3

NEGLIGENCE

INFERENCES

1. *Gadigian v City of Taylor*, 282 Mich App 179.

MEDICAL MALPRACTICE

2. The failure of a hospital nurse to adequately report a patient's postsurgical condition to a physician does not constitute the cause in fact of the patient's injuries if the physician would not have altered a diagnosis or treatment had he or she received a better or earlier report. *Martin v Ledingham*, 282 Mich App 158.
3. A medical malpractice plaintiff seeking recovery for loss of an opportunity to survive or achieve a better result must show that the alleged malpractice reduced the opportunity by more than 50 percent; the difference between the opportunity before the malpractice and the opportunity after the malpractice must be greater than 50 percent (MCL 600.2912a[2]). *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558.

PREMISES LIABILITY

4. *Jimkoski v Shupe*, 282 Mich App 1.

NO-FAULT—*See*

INSURANCE 3, 4, 5, 6

NONHIGHWAY PURPOSES—*See*

TAXATION 2

NOTICE OF FORECLOSURE—*See*

CONDOMINIUMS 1

NOTICE OF HIGHWAY DEFECTS—*See*

GOVERNMENTAL IMMUNITY 3

NOTICE OF INTENT TO DIVERT A JUVENILE CASE—*See*

INFANTS 1

100-MILE LIMIT—*See*

PARENT AND CHILD 1

OPEN AND OBVIOUS DANGERS—*See*

NEGLIGENCE 4

ORGANIZATION'S STANDING TO BRING ACTIONS—*See*

ACTIONS 2

OTHER-ACTS EVIDENCE—*See*

EVIDENCE 1

OWNERS OF MOTOR VEHICLES—*See*

INSURANCE 3, 4

OWNERS OR REGISTRANTS OF UNINSURED MOTOR VEHICLES—*See*

INSURANCE 6

PARENT AND CHILD

CHILD CUSTODY

1. Where a child's custody is governed by court order, a custodial parent can move the child's residence by less than 100 miles without first obtaining permission from the court or the consent of the other parent (MCL 722.31[1]). *Pierron v Pierron*, 282 Mich App 222.
2. Parents sharing joint legal custody of a child share decision-making authority regarding the important decisions that affect the welfare of the child such as where the child will attend school; where such parents cannot agree on important decisions, it is the court's duty to determine the issue in the best interests of the child by focusing its consideration of each best-interest factor on the specific important issue affecting the welfare of the child (MCL 722.23). *Pierron v Pierron*, 282 Mich App 222.
3. A circuit court considering the best-interest factors stated in the Child Custody Act must consider the reasonable preference of the child where the court deems the child to be of sufficient age to express a preference; a child's preference need not be accompanied by detailed thought or critical analysis, but may not be arbitrary or inherently indefensible, in order to be a reasonable preference (MCL 722.23[i]). *Pierron v Pierron*, 282 Mich App 222.
4. Trial courts may consider psychological evaluations in making child-custody determinations but are not required to adopt any recommendations contained in

them; the Child Custody Act requires a court to independently determine what custodial placement is in the best interest of a child (MCL 722.21 *et seq*.). *McIntosh v McIntosh*, 282 Mich App 471.

5. Changes in a parent's financial circumstances, standing alone, are insufficient to warrant a hearing to determine whether a previously entered child custody order should be modified; such changes, standing alone, do not establish proper cause or a change of circumstances that would warrant conducting an evidentiary hearing following a motion for a change of custody; changes of financial circumstances may be addressed through motions for modification of child support. *Corporan v Henton*, 282 Mich App 599.

PENSIONS

PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

1. A member of the public school employees' retirement system does not leave service as a public-school employee in or outside Michigan for maternity, paternity, or child-rearing, within the meaning of a provision of the Public School Employees Retirement Act that allows the purchase of service credit for pension purposes for maternity, paternity, or child-rearing leaves of absence, if the member merely stops accepting day-to-day offers of hire as a substitute teacher (MCL 38.1375). *Bandeen v Pub School Employees' Retirement Bd*, 282 Mich App 509.

PERSONAL PROTECTION INSURANCE BENEFITS—*See*

INSURANCE 5, 6

PHYSICIANS AND SURGEONS—*See*

NEGLIGENCE 2

POSTJUDGMENT ATTORNEY FEES—*See*

COSTS 1

PREFERENCES OF CHILD—*See*

PARENT AND CHILD 3

PREJUDICE OF JUDGES—*See*

JUDGES 1

PREMISES LIABILITY—*See*

NEGLIGENCE 4

PRESUMPTION OF VALIDITY OF AFFIDAVITS—*See*

SEARCHES AND SEIZURES 2

PRESUMPTIONS—*See*

NEGLIGENCE 1

PRIVATE RIGHTS OF ACTION—*See*

CONDOMINIUMS 1

PROBABLE CAUSE—*See*

SEARCHES AND SEIZURES 1, 2

PROCEEDINGS SUPPLEMENTARY TO JUDGMENTS—*See*

JUDGMENTS 1

PROPERTY TAX—*See*

TAXATION 3

PROSECUTION OF CRIMINAL CONTEMPT PROCEEDINGS BY PRIVATE PARTIES—*See*

CONTEMPT 1

PROSECUTORIAL MISCONDUCT—*See*

CRIMINAL LAW 5

PSYCHOLOGICAL EVALUATIONS—*See*

PARENT AND CHILD 4

PSYCHOLOGISTS—*See*

HEALTH 1

PUBLIC EMPLOYEES—*See*

LABOR RELATIONS 1

PUBLIC LANDS—*See*

MUNICIPAL CORPORATIONS 1

PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM—*See*

PENSIONS 1

PUBLIC UTILITIES

MUNICIPAL CORPORATIONS

1. A municipality that, pursuant to MCL 123.141(1), is selling water extraterritorially directly to individual inhabitants of another municipality pursuant to a contract with that municipality must, pursuant to MCL 123.141(3), charge the individual inhabitants the actual cost of providing the service. *Oneida Charter Twp v City of Grand Ledge*, 282 Mich App 435.

REASONABLE REPAIR—*See*

GOVERNMENTAL IMMUNITY 1, 2

REBUTTABLE INFERENCES OF REASONABLE REPAIR—*See*

GOVERNMENTAL IMMUNITY 1, 2

REDUCTION OF DAMAGES AWARD—*See*

DAMAGES 1

REFUNDS OF TAX—*See*

TAXATION 2

REMANDS—*See*

COSTS 2

REPORTS OF PATIENT'S CONDITION—*See*

NEGLIGENCE 2

RESENTENCING—*See*

SENTENCES 1

RESIDENCE CHANGE BY ONE PARENT—*See*

PARENT AND CHILD 1

RESIDENCES OF REGISTERED SEX OFFENDERS—*See*

CRIMINAL LAW 7

RETROACTIVE APPLICATION OF CRIMINAL STATUTES—*See*

CONSTITUTIONAL LAW 1

RULES OF PROFESSIONAL CONDUCT—*See*

ATTORNEY AND CLIENT 2

SALES OF TANGIBLE PERSONAL PROPERTY—*See*

TAXATION 6

SCHOOL SAFETY ZONES—*See*

CRIMINAL LAW 7

SEARCH WARRANTS—*See*

SEARCHES AND SEIZURES 1, 2

SEARCHES AND SEIZURES

SEARCH WARRANTS

1. A reviewing court gives great deference to a magistrate's finding of probable cause to issue a search warrant; the reviewing court need only determine whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause; a substantial basis exists where there was a fair probability that contraband or evidence of the crime could be found in the particular place to be searched. *People v Mullen*, 282 Mich App 14.
2. An affidavit in support of a search warrant is presumed to be valid; a defendant is entitled to a hearing to challenge the validity of a search warrant if the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause; the same rule applies to material omissions from affidavits. *People v Mullen*, 282 Mich App 14.

SENTENCES

INVALID LIFE SENTENCES

1. A sentence whose maximum term is life imprisonment and minimum term is a term of years is invalid in its entirety; resentencing after such an invalid sentence is de novo, and the resentencing court is not precluded from imposing a minimum term that is longer than the original minimum (MCL 769.9[2]). *People v Parish*, 282 Mich App 106.

SERVICE CREDITS FOR PENSION PURPOSES—*See*
PENSIONS 1

SETTING ASIDE CONVICTIONS—*See*
CRIMINAL LAW 6

SEX OFFENDERS REGISTRATION ACT—*See*
CRIMINAL LAW 7

SIDEWALKS—*See*
GOVERNMENTAL IMMUNITY 1, 2

SINGLE BUSINESS TAX—*See*
TAXATION 4

SOCIAL SECURITY BENEFITS—*See*
DAMAGES 1

SPECIAL ASPECTS OF OPEN AND OBVIOUS DANGERS—*See*
NEGLIGENCE 4

SPECIAL ASSESSMENTS—*See*
TAXATION 1

STANDING—*See*
ACTIONS 1, 2, 3
GUARDIAN AND WARD 1

STATE TAX COMMISSION—*See*
TAXATION 5

STATUTORY DUTIES—*See*
CONDOMINIUMS 1

STOLEN, EMBEZZLED, OR CONVERTED PROPERTY—*See*
COSTS 1
DAMAGES 2

SUBPOENAS—*See*
HEALTH 1

SUBSTITUTE TEACHERS—*See*

PENSIONS 1

TAX TRIBUNAL—*See*

TAXATION 3, 5

TAXATION

INLAND LAKE LEVEL ACT

1. An appeal in the circuit court of a special assessment roll approved by a county board of commissioners pursuant to the Inland Lake Level Act is not governed by the appellate procedures specified in the Drain Code; the court rule on appeals from administrative agencies in contested cases applies to such an appeal (MCL 324.30714[4]; MCR 7.105). *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142.

MOTOR FUEL TAX

2. A taxpayer seeking a refund of the tax paid on motor fuel must establish that the taxpayer is an end user of the fuel and used the fuel for nonhighway purposes; the taxpayer must use the fuel to power the motor vehicle at issue to qualify as an end user; the taxpayer must employ the fuel for some purpose, apply it to its own purposes, or consume, expend, or exhaust it in order to use the fuel; use for nonhighway purposes means use for purposes other than to operate a vehicle on public roads or highways (MCL 207.1033, 207.1039). *AutoAlliance Int'l, Inc v Dep't of Treasury*, 282 Mich App 492.

PROPERTY TAX

3. The three-year limitations period of MCL 211.53a, rather than the general limitations periods of MCL 205.735, applies when the assessment and payment of property taxes involves a mutual mistake of fact; as used in MCL 211.53a, "mutual mistake of fact" means an erroneous belief about a material fact that affects the substance of the transaction that both parties share and on which the parties rely. *Briggs Tax Service, LLC v Detroit Pub Schools*, 282 Mich App 29.

SINGLE BUSINESS TAX

4. The Single Business Tax Act allows a taxpayer a full deduction for the cost of an asset in the year of acquisition, and the taxpayer must make an adjustment to its tax base in subsequent years to reflect the depreciation for that year; if the asset is transferred before it is fully depreciated, the unused portion of the capital acquisi-

tion deduction must be recaptured; adjustments for recapture of capital acquisition deductions apply to a transfer that qualifies as a casual transaction (MCL 208.4[1], 208.9[4], 208.23[a], 208.23b[a]). *Manske v Dep't of Treasury*, 282 Mich App 464.

STATE TAX COMMISSION

5. The State Tax Commission may place a corrected assessment value for the appropriate years on the appropriate assessment roll when the commission determines that property subject to taxation under certain statutes has been incorrectly reported or omitted for any previous year, but the correction is limited to the current assessment year and two years immediately preceding the date the incorrect reporting or omission was discovered and disclosed to the commission; a person against whom such an assessment is made may appeal the commission's order to the Tax Tribunal (MCL 211.154[1], [7]). *Superior Hotels, LLC v Mackinaw Township*, 282 Mich App 621.

USE TAX

6. *Fisher & Co, Inc v Dep't of Treasury*, 282 Mich App 207.

WORDS AND PHRASES

7. The term "assessment value," as used in MCL 211.154, means either "taxable value" or 50 percent of the true cash value of property subject to taxation. *Superior Hotels, LLC v Mackinaw Township*, 282 Mich App 621.

TEACHERS—*See*

PENSIONS 1

TENANTS BY THE ENTIRETY

CONTRIBUTION

1. The estate of a deceased spouse cannot, under an unjust enrichment theory, claim contribution from the surviving spouse with respect to property held as tenants by the entirety. *Tkachik v Mandeville*, 282 Mich App 364.

DIVORCE

2. A divorce ends a tenancy by the entirety and creates a tenancy in common (MCL 552.102). *Tkachik v Mandeville*, 282 Mich App 364.

THIRD PARTIES—*See*

INSURANCE 2

TORTURE—*See*

CRIMINAL LAW 2

TREBLE DAMAGES—*See*
DAMAGES 2

TRIAL—*See*
COSTS 2

UNINSURED MOTOR VEHICLES—*See*
INSURANCE 6

UNJUST ENRICHMENT—*See*
TENANTS BY THE ENTIRETY 1

UNLAWFUL TAKING OF A MOTOR VEHICLE—*See*
INSURANCE 5

UNLAWFUL USE OF A HARMFUL CHEMICAL SUBSTANCE—*See*
CRIMINAL LAW 8

USE OF A MOTOR VEHICLE—*See*
INSURANCE 4

USE OF MOTOR FUEL—*See*
TAXATION 2

USE TAX—*See*
TAXATION 6

VEHICLE CODE—*See*
CRIMINAL LAW 6

VIOLATIONS OF PROFESSIONAL AND JUDICIAL CONDUCT RULES—*See*
ATTORNEY AND CLIENT 2

VOICE IDENTIFICATION—*See*
EVIDENCE 2

WATER RATES—*See*
PUBLIC UTILITIES 1

WITNESSES

EVIDENCE

1. The rule of evidence that permits a witness to use a writing to refresh the memory of the witness does not limit its application to documents authored by the witness (MRE 612). *People v Hill*, 282 Mich App 538.

WOMEN, INFANTS, AND CHILDREN PROGRAM—*See*

ADMINISTRATIVE LAW 1

WORDS AND PHRASES—*See*

CONDOMINIUMS 1

CRIMINAL LAW 2

INSURANCE 3, 4

PARENT AND CHILD 3

TAXATION 2, 7

WRITING USED TO REFRESH MEMORY—*See*

WITNESSES 1