MICHIGAN APPEALS REPORTS

CASES DECIDED

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COURT OF APPEALS

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COURT OF APPEALS CASES

WORMSBACHER v PHILLIP R SEAVER TITLE COMPANY, INC

Docket No. 281209. Submitted February 4, 2009, at Detroit. Decided February 19, 2009. Approved for publication May 19, 2009, at 9:00 a.m.

Edwin Wormsbacher and W & F, L.L.C., brought an action in the Oakland Circuit Court against title insurers Phillip R. Seaver Title Company, Inc., and First American Title Insurance Company, alleging negligence and negligent misrepresentation regarding the defendants' failure during their title searches to advise the plaintiffs of a permanent injunction against the commercial use of parcels of realty purchased by the plaintiffs. The court, Daniel P. O'Brien, J., granted summary disposition for the defendants, ruling that one who contracts with a title insurer cannot maintain a tort action against the title insurer. Before signing the order of summary disposition, the court heard argument on a motion by the plaintiffs to amend their complaint to allege breach of contract. The court ultimately denied the plaintiffs' motion. The plaintiffs appealed.

The Court of Appeals *held*:

1. A title insurer and its agents do not have a professional duty of care to those who employ them, apart from their contractual obligations.

2. The trial court did not abuse its discretion by denying the plaintiffs' motion to amend their complaint. The proposed amendment was futile because it merely restated claims the plaintiffs had already made. Additionally, the proposed amendment was offered late and amendment would have prejudiced the defendants.

Affirmed.

ACTIONS — TORTS — TITLE INSURERS.

A person or entity that contracts with a title insurer may not bring a tort action against the title insurer concerning the title insurer's services to the person or entity.

Ronald Michael Solomon for the plaintiffs.

Miller, Canfield, Paddock and Stone, P.L.C. (by *LeRoy L. Asher, Jr.*, and *Nicole S. Kaseta*), for the defendants.

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

PER CURIAM. Plaintiff[1] appeals by right the trial court's order granting summary disposition in favor of defendants. We affirm.

I. BACKGROUND

This negligence and negligent misrepresentation case arose out of plaintiff's purchase of four residential lots in a Rochester Hills subdivision. Related to the purchase, plaintiff hired defendants to conduct title searches and to provide title commitments. Plaintiff alleged that he relied on defendants' title searches and that defendants failed to apprise him of a permanent injunction barring commercial use of the lots. Therefore, plaintiff argued that defendants were liable in tort. After a hearing, the trial court granted defendants' motion for summary disposition on the basis of *Mickam v Joseph Louis Palace Trust*, 849 F Supp 516 (ED Mich, 1993), which held that Michigan law does not recognize tort claims against title insurers.

On appeal, plaintiff raises two arguments. First, plaintiff argues that the trial court erred by granting summary disposition on the basis that Michigan does not recognize tort actions against title insurers. Second, plaintiff contends that the trial court erred by denying his motion for leave to amend his complaint to add a breach of contract claim.

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[1] Because Edwin Wormsbacher alleges that he is the sole owner of W & F, L.L.C., and because defendants do not dispute this fact, this Court refers to Wormsbacher as "plaintiff."

II. SUMMARY DISPOSITION

We review the trial court's decision to grant a motion for summary disposition de novo. *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657, 664; 753 NW2d 28 (2008).

A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone.[2] *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Summary disposition under MCR 2.116(C)(8) is appropriate when "the opposing party has failed to state a claim on which relief can be granted." *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and are construed in the light most favorable to the nonmoving party. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id*.

Plaintiff argues that the trial court erred when it granted summary disposition in defendants' favor based on *Mickam*. In *Mickam*, *supra* at 521-522, a federal district court, applying Michigan law, held that title insurers cannot be held liable in tort. The district

[2] We note that defendants relied on both MCR 2.116(C)(8) and MCR 2.116(C)(10) in support of their motion for summary disposition. A review of the record, however, demonstrates that both the parties and the trial court believed that the motion for summary disposition turned on whether *Mickam* precluded plaintiff from filing a tort action against his title insurers. Therefore, although the trial court did not specify as such, the trial court seemingly granted summary disposition under MCR 2.116(C)(8) for failure to state a claim.

court explained that, "[t]o protect the rights and expectations of the parties, a title insurer should be liable in accordance with the terms of the title policy only and should not be liable in tort. To hold otherwise does violence to the whole concept of insurance." *Id*. at 522. The *Mickam* court recognized that "no Michigan court has ever held that a title insurer or agent has a professional duty of care to those who employ them, outside of their contractual obligations." *Id*. at 521. Although the district court recognized the existence of a split among jurisdictions on this issue, it aligned with the decision that it considered most persuasive, *Anderson v Title Ins Co*, 103 Idaho 875; 655 P2d 82 (1982). *Mickam*, *supra* at 521-522. Applying the holding of *Mickam* to this case, plaintiff's complaint alleged two tort claims under which relief could not be granted. Therefore, the trial court correctly granted summary disposition in defendants' favor.

Plaintiff argues that factual differences between *Mickam* and this case render *Mickam* inapplicable. In *Mickam*, for example, the district court explained, "[w]hile Count II of Plaintiffs' complaint is titled 'Breach of Contract,' the parties have treated the claim as one for negligent misrepresentation as well." *Mickam*, *supra* at 520 n 3. In contrast, here, plaintiff pleaded both negligence and negligent misrepresentation. Plaintiff also insists that "the holding in *Mickam* was most certainly predicated upon the fact that the state trial court ruled that the Palace Trust was not a valid trust, coupled with the fact that the Mickams were not an insured under the policy." Plaintiff, however, provides no citations to support his assumptions. To the extent that plaintiff bases his reasoning on underlying files or records in *Mickam*, this Court cannot consider any documents not presented before the trial court at the time of its decision on the motion for summary

disposition in this case. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Further review of the relevant facts and issues reveals more similarities than differences between the two cases. Therefore, plaintiff's argument that *Mickam* is factually distinguishable fails.

Plaintiff next argues that the trial court erred by relying on *Mickam*. To buttress his argument, plaintiff relies on a 1939 United States Supreme Court case, which states, "nothing requires the state courts to adopt the rule which the federal or other courts may believe to be the better one, or to be consistent in their decisions if they do not choose to be." *Wichita Royalty Co v City Nat'l Bank of Wichita Falls*, 306 US 103, 109; 59 S Ct 420; 83 L Ed 515 (1939). The trial court, however, did not state that it felt required to accept the rule in *Mickam* as binding authority. Instead, the trial court made clear that *Mickam* offered only persuasive authority on which it could choose to rely. Plaintiff also directs our attention to *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), which explains that "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." Interestingly, after the Michigan Supreme Court clarified that lower federal court decisions represent only persuasive authority, the Court went on to rely on the decisions of two federal circuit courts of appeals because the Court found "their analyses and conclusions persuasive." *Id*. at 607. Similarly, here the trial court found the *Mickam* court's analysis persuasive, and the trial court's conclusion does not require reversal because "[a]lthough this Court is not bound by a federal court decision construing Michigan law, it may follow the decision if the reasoning is persuasive." *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997).

Plaintiff further argues that despite *Mickam*, numerous other state and federal district courts have imposed tort liability against a title insurance company. Plaintiff discusses several cases from other jurisdictions, none of which applies Michigan law. Additionally, plaintiff offers no caselaw to support his contention that this Court should ignore cases applying Michigan law and instead rely on cases applying other states' laws. Plaintiff also fails to adequately explain why we should ignore *Omega Healthcare Investors, Inc v First American Title Ins Co*, 2003 WL 79037 (D Mass, 2003), in which another federal district court applied Michigan law and dismissed a negligence claim against a title insurer on the basis of *Mickam*. Plaintiff briefly argues that we should disregard *Omega* because Massachusetts is one of the states that do not allow tort claims against title insurers. Plaintiff ignores, however, that the *Omega* court applied Michigan, not Massachusetts, law, stating that "[t]he application of Michigan law, however, does not allow Omega to assert its negligence claim." *Id*. at *3.

Plaintiff also relies on the Montana Supreme Court's decision in *Malinak v Safeco Title Ins Co of Idaho*, 203 Mont 69; 661 P2d 12 (1983). In *Malinak*, the court held that the lower court improperly granted summary judgment against a property owner when the lower court determined that the owner had no right of recovery against the title insurance companies that he hired. *Id*. at 70. In reaching its decision, the court viewed the roles of an abstractor and a title insurer as analogous:

> When a title insurer presents a buyer with both a preliminary title report and a policy of title insurance, two distinct responsibilities are assumed. In rendering its first service, the insurer serves as an *abstractor of title* and must list all matters of public record regarding the subject property in its preliminary report. The duty imposed upon

> an abstractor of title is a rigorous one: An abstractor of title is hired because of his professional skill, and when searching the public records on behalf of a client, he must use the degree of care commensurate with that professional skill. The abstractor must report all matters which could affect his client's interests and which are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made. Similarly, a *title insurer* is liable for his negligent failure to list recorded encumbrances in preliminary title reports. [*Id*. at 75 (quotation marks and citations omitted; emphasis added).]

Unlike the analogous roles that the *Malinak* court observed, however, Michigan distinguishes between title insurers and abstractors.

In *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), the Michigan Supreme Court clarified that title insurers and abstractors fill distinct roles, stating that "[i]t should be noted that this action is premised on negligence in a title search; an abstractor is not converted into a title insurer by virtue of our decision today." *Id*. at 21-22. Nowhere in *Polgar* does the Court recognize that parties may bring tort claims against title insurers. Instead, the Court addresses "the relatively narrow" issue whether a faulty abstractor should be liable for foreseeable, as well as known, reliance on the abstract by buyers. *Id*. at 9. The Court concluded that tort liability applies in this limited instance, stating, "We repeat that the only liability an abstracter has to an injured third-party is with respect to negligent performance of his or her contractual duty." *Id*. at 22. The federal district court in *Mickam* also noted the distinction that our Supreme Court made in *Polgar*. The court observed that while *Polgar* held that an abstractor could be liable in tort, "no Michigan court has ever held that a title insurer or agent has a professional duty of care to those who employ them,

outside of their contractual obligations." *Mickam*, *supra* at 521. Therefore, *Polgar* does not recognize tort claims against title insurers, and plaintiff's claims to the contrary are unpersuasive. In summary, the trial court's grant of summary disposition is affirmed.

III. LEAVE TO AMEND

We review a trial court's decision regarding a party's motion to amend its pleadings for an abuse of discretion. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). Thus, we defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.118(A) sets forth the requirements for amendment of pleadings. Specifically, MCR 2.118(A)(2) provides that "[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." *Kemerko Clawson, LLC v RxIv Inc*, 269 Mich App 347, 352; 711 NW2d 801 (2005). Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Reasons that justify denying leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility. *Id*.

In denying plaintiff's motion to amend, the trial court relied on defendants' arguments and pleadings. Many of defendants' arguments addressed the futility of allowing plaintiff to amend his complaint. An amend-

ment would be futile if it is legally insufficient on its face, and the addition of allegations that merely restate those allegations already made is futile. *PT Today, Inc v Comm'r of Financial & Ins Services Office*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Here, plaintiff's proposed amended complaint merely restated the tort claims appearing in his original complaint. Moreover, plaintiff's breach of contract claim pleaded the same elements of duty, reasonable care, and breach found in his existing tort claims. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998). Because plaintiff simply restated in his proposed amended complaint allegations already pleaded, the trial court's decision to deny plaintiff's motion to amend fell within the range of principled outcomes.

Further, plaintiff's motion to amend was not timely. Plaintiff could have asserted the breach of contract claim in his original complaint, in his response to defendants' motion for summary disposition, or during oral argument on defendants' motion for summary disposition. Plaintiff failed to do so. As counsel for the defendants argued, "He rolled the dice, he lost, you've ruled. Anything afterward, the *Amburgey* case, says that its not timely."

In *Amburgey v Sauder*, 238 Mich App 228, 230; 605 NW2d 84 (1999), this Court held that a woman bitten by a horse as she walked through a stable could not amend her complaint to assert a negligence claim. In this Court's view, discussing the negligence claim in the context of mediation and the motion for summary disposition did not bring the claim under the purview of MCR 2.118(C)(1). *Amburgey*, *supra* at 247-248. We

"recognized both the prejudice to the defendant and the untimeliness of the requested amendment" when the plaintiff did not move to amend until after the order granting summary disposition was entered. *Id*. at 248. Although here the trial court did not sign the order granting defendants' motion for summary disposition until after oral argument regarding plaintiff's motion to amend, this Court's reasoning in *Amburgey* remains instructive. In both cases, the prejudice stems from the fact that the new allegations were offered late, and not from the fact that they might cause the defendant to lose on the merits. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). Therefore, in addition to being futile, we consider plaintiff's motion to amend both untimely and prejudicial.

Affirmed.

PEOPLE v ANDERSON

Docket No. 276639. Submitted May 6, 2009, at Detroit. Decided May 19, 2009, at 9:05 a.m.

Jeffry G. Anderson pleaded guilty of aggravated assault in the Oakland Circuit Court, Steven N. Andrews, J., and was sentenced to a jail term of 183 days and probation for two years. The defendant appealed by delayed leave granted, challenging the sentence requirements that he register as a sexual offender and that he have no contact with children younger than 16 years of age.

The Court of Appeals *held*:

1. The trial court did not err in ordering the defendant to register as a sex offender pursuant to the Sex Offenders Registration Act (SORA), MCL 28.271 *et seq*. MCL 28.723(1)(a) requires registration for certain offenses listed by SORA. Aggravated assault is not a listed offense under SORA. However, the catchall provision of SORA, MCL 28.722 (e)(*xi*), requires registration for any other violation of state law or a local municipal ordinance that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. A sentencing court may consider all record evidence when determining if a defendant must register under SORA, as long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence. In this case, the seven-year-old victim's testimony at the defendant's preliminary examination established that the aggravated assault, which consisted of touching the victim underneath her underwear, was of a sexual nature.

2. The trial court did not improperly rely on the results of the defendant's polygraph examination when determining the facts underlying the defendant's conviction. The trial court relied on the defendant's admission and on the record in deciding whether the aggravated assault was sexual in nature.

3. The defendant's discharge from parole rendered moot the issue whether the trial court properly imposed as a condition of probation the requirement that the defendant have no contact with children under 16 years of age.

Affirmed.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

Hertz Schram, P.C. (by *Gary P. Supanich*), for the defendant.

Before: WILDER, P.J., and METER and FORT HOOD, JJ.

METER, J. Defendant appeals by delayed leave granted his plea-based conviction of aggravated assault, MCL 750.81a. Defendant was sentenced to 183 days in jail and two years' probation. On appeal, he challenges only the provisions of the judgment of sentence requiring him to register as a sex offender and to have no contact with minor children under the age of 16. We affirm.

As an introductory matter, defendant argues that the relevant published caselaw regarding whether he should have been ordered to register as a sex offender is not binding. Specifically, he contends that this Court is not bound by *People v Meyers*, 250 Mich App 637, 649; 649 NW2d 123 (2002), which held that a trial court should consider the facts of the particular offense of which a defendant is convicted in determining if the offense constitutes a sexual offense under the Sex Offenders Registration Act (SORA) catchall provision, MCL 28.722(e)(*xi*). Defendant contends that this is because the Michigan Supreme Court, in *People v Althoff*, 477 Mich 961; 724 NW2d 283 (2006) *(Althoff I)*, declared that holding to be dictum. Further, defendant argues that *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), and *People v Althoff (On Remand)*, 280 Mich App 524; 760 NW2d 764 (2008) *(Althoff II)*, are not binding because the panel in *Golba*, *supra* at

610, erroneously stated that it was bound by the *Meyers* decision, and the panel in *Althoff II*, *supra* at 534, in turn stated that it was bound by the erroneous *Golba* decision. We disagree.

Although the Michigan Supreme Court declared that the relevant *Meyers* holding was dictum, defendant's argument that *Golba* and *Althoff II* are not binding is misguided. The panel in *Golba* did state that it was bound by *Meyers*. *Golba*, *supra* at 610. However, critically, in its own independent analysis, the panel in *Golba* concluded that it agreed with the holding in *Meyers*. *Id*. at 611. The *Althoff II* panel noted that the *Meyers* holding had been deemed dictum and that *Golba* had erroneously concluded that it was bound to follow the *Meyers* holding. *Althoff II*, *supra* at 534. However, the *Althoff II* panel still concluded that it was bound by the *Golba* panel's statutory interpretation. *Id*. Therefore, pursuant to MCR 7.215(J)(1), the holdings in the published decisions of *Golba* and *Althoff II* bind us.

Defendant argues that even if the underlying factual circumstances are considered, there is no record support for concluding that his aggravated assault, by its nature, constituted a sexual offense. We disagree.

The construction and application of SORA, MCL 28.721 *et seq*., presents a question of law that is reviewed de novo on appeal. *Golba*, *supra* at 605. Additionally, this Court reviews the "underlying factual findings of the trial court at sentencing for clear error." *Id*. at 613. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

SORA "requires an individual who is convicted of a listed offense after October 1, 1995, to register as a sex offender. MCL 28.723(1)(a)." *Golba*, *supra* at 605. 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 "listed offense" is defined by MCL 28.722(e) to include violations of specific statutes, but aggravated assault is not a listed offense. However, the act also includes a "catchall" provision that requires registration for "[a]ny 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." MCL 28.722(e)(*xi*).

The catchall provision requires the simultaneous existence of three conditions: "(1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation, (2) the violation must, by its nature, constitute a sexual offense, and (3) the victim of the violation must be under 18 years of age." *Althoff II*, *supra* at 532 (citations and quotation marks omitted). The second condition is not to be determined solely by reference to the legal elements of the offense of which the defendant was convicted. *Id*. at 532-534. Rather, "the particular facts of a violation are to be considered in determining whether the violation 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age' under MCL 28.722(e)(*xi*)." *Althoff II*, *supra* at 534.

In this case, defendant pleaded guilty of aggravated assault, which is not a listed offense, but is a state law violation under MCL 750.81a. Also, it is undisputed that the victim was less than 18 years old at the time of the assault. Therefore, the remaining question is whether the assault, by its nature, constituted a sexual offense.

When applying SORA, "a sentencing court may consider all record evidence in determining if a defendant must register under SORA, as long as the defendant has

the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence." *Althoff II*, *supra* at 541-542. Defendant argues that the record for the underlying facts must be developed through the trial process or through admissions under the minimum standards of due process. However, judicial fact-finding outside of the avenues of trial or admissions does not violate due process because SORA is a remedial regulatory scheme that furthers a legitimate state interest of public safety, and compliance with the statute is not a punishment. *Id*. at 540.

The factual basis for defendant's plea was that he touched the victim and it caused harm to her. According to defendant, the touching took place from the summer of 2003 to November 2005. The testimony of the seven-year-old victim at the preliminary examination, which is part of the record evidence, indicated that defendant had touched her underneath her underwear on at least nine occasions. These incidents took place in either her mother's bedroom at night or in defendant's car when he drove the victim to school. Defendant was able to challenge this testimony through cross-examination at the preliminary examination. The victim's mother testified that the victim had recanted on three occasions. Despite the mother's testimony, the evidence showed by a preponderance of the evidence that the aggravated assault, by its nature, constituted a sexual offense. Defendant admitted to touching the victim in a harmful way over a period of approximately a year and a half and the victim's description of the touching, which was the only basis for establishing how the touching occurred, indicated it was of a sexual nature. Therefore, the trial court did not err by ordering defendant to register as a sex offender.

Defendant also argues that the trial court erred by relying on his polygraph examination as a part of its rationale for ordering him to register as a sex offender. First, this issue was not properly presented for appeal because it was not raised in the statement of questions presented in defendant's appellate brief. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

At any rate, we find no merit to defendant's argument.[1] It is true that, generally, a court may neither solicit nor consider polygraph-examination results for sentencing, *People v Towns*, 69 Mich App 475, 478; 245 NW2d 97 (1976), and the consideration of polygraph-examination results is generally considered error that requires resentencing, *People v Allen*, 49 Mich App 148, 151-152; 211 NW2d 533 (1973). However, significantly, defendant does not request a full resentencing. He only argues that he should not have been required to register as a sex offender on the basis of information relating to the polygraph examination. As noted above, SORA is merely a remedial regulatory scheme and compliance with the statute is not a punishment. *Althoff II*, *supra* at 540. Moreover, the record does not suggest that the trial court relied on the polygraph-examination results in making its finding about the underlying facts of defendant's conviction. Defendant admitted committing aggravated assault and the trial court relied on the remainder of the record to determine that the underly-

[1] We note that there is no indication from the record that the trial court relied on defendant's polygraph examination in deciding whether to order defendant to register as a sex offender. Although the trial court made the unorthodox offer for defendant to take a polygraph examination and indicated that if the results were favorable, they would be considered for sentencing, the results were not a part of the presentence investigation report and defense counsel only mentioned to the trial court that the results were "unfavorable."

ing circumstances of the assault were inherently sexual. Appellate relief is unwarranted.

Finally, while not making any argument in the body of his appellate brief regarding the probation provision involving the prohibition of contact with children less than 16 years of age, defendant includes a request for relief from that part of his probation. However, defendant was discharged from his probation on September 19, 2008. Therefore, because defendant is no longer subject to the challenged condition of his probation, this issue is moot. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 50; 748 NW2d 221 (2008). Accordingly, we decline to address it.

Affirmed.

AVERILL v DAUTERMAN

Docket No. 283129. Submitted May 12, 2009, at Detroit. Decided May 19, 2009, at 9:10 a.m.

Carleton E. Averill II, a member of Gleaner Life Insurance Society (a fraternal benefit society), brought a derivative action on behalf of the society in the Lenawee Circuit Court against Dudley Dauterman and other members of the society's board of directors. The plaintiff sought a declaratory judgment that the defendants breached fiduciary duties owed to the society's members, an award of compensatory damages to the society, and an injunction directing the defendants to hire independent counsel and investigate and remedy their alleged wrongdoing. The court, John G. McBain, J., granted summary disposition for the defendants, ruling that the plaintiff had failed to state a claim on which relief can be granted in view of provisions of the Insurance Code that grant the Attorney General sole authority to sue fraternal benefit societies. The plaintiff appealed.

The Court of Appeals *held*:

Under MCL 500.8191 of the Insurance Code, a fraternal benefit society that has exceeded its powers or is conducting its business fraudulently in a manner hazardous to its members may be sued by the Attorney General upon the request of the Insurance Commissioner. MCL 500.8193 also provides that a petition for an injunction against a fraternal benefit society shall not be recognized unless commenced by the Attorney General upon request of the Insurance Commissioner. Accordingly, the statutory scheme that controls fraternal benefit societies does not permit the plaintiff's action.

Affirmed.

INSURANCE — FRATERNAL BENEFIT SOCIETIES — ACTIONS — MEMBERS OF FRATERNAL BENEFIT SOCIETIES.

A member of a fraternal benefit society cannot bring an action on behalf of the society against the society's board of directors for allegedly exceeding its powers or for alleged fraudulent conduct hazardous to members of the society; only the Attorney General, at

> the request of the Insurance Commissioner, may bring such an action (MCL 500.8191[1], [2], [5]; MCL 500.8193).

Shumaker, Loop & Kendrick, LLP (by *Peter D. Silverman*), for the plaintiff.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Mark A. Bush* and *Graham K. Crabtree*), for the defendants.

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

PER CURIAM. Plaintiff appeals as of right the trial court's order dismissing this derivative action filed on behalf of Gleaner Life Insurance Society (Gleaner), a fraternal benefit society. We affirm.

I. FACTS

Gleaner is a fraternal benefit society that provides insurance to its certificate holders, or "members." Michigan defines "fraternal benefit society" as

> [a]n incorporated society, order, or supreme lodge, without capital stock . . . conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system with ritualistic form of work, having a representative form of government, and that provides benefits in accordance with this chapter . . . . [MCL 500.8164.]

The parties do not dispute that Gleaner is such a society. Plaintiff, a member of Gleaner, filed this action, framing it as a derivative action on behalf of Gleaner against defendants, who comprise Gleaner's board of directors.[1] Plaintiff's complaint alleges that defendants

[1] In a derivative proceeding, the plaintiff seeks to enforce a claim of the corporation. *Futernick v Statler Builders, Inc*, 365 Mich 378, 386; 112 NW2d 458 (1961). The members do not sue in their own right and derive only incidental benefit. *Id*. Any recovery belongs to the corporation. *Id*.

failed to act in the best interests of Gleaner's members, including himself, and breached their fiduciary duties to Gleaner's members. Specifically, plaintiff identified eight acts of wrongdoing by defendants and alleged that Gleaner and all its members were harmed by the "downward financial spiral" that resulted from those acts. Plaintiff sought a judgment (1) declaring that defendants had breached their fiduciary duties of good faith, fair dealing, and loyalty, (2) awarding Gleaner compensatory damages, and (3) enjoining defendants by directing them to hire independent counsel and investigate and remedy wrongdoing. Plaintiff also sought costs and expenses, including attorney fees. Defendants moved for summary disposition, alleging that they were entitled to summary disposition under MCR 2.116(C)(6) because plaintiff had filed a previous action that was pending in federal court in Ohio, and that they were entitled to summary disposition under MCR 2.116(C)(8) because plaintiff is not permitted to bring a derivative action on behalf of a fraternal benefit society. The trial court granted defendants' motion pursuant to MCR 2.116(C)(8).

II. SUMMARY DISPOSITION

The trial court did not err in determining that defendants were entitled to summary disposition under MCR 2.116(C)(8) because, under the Insurance Code, a member of a fraternal benefit society is not permitted to bring a derivative action on behalf of the society.

In considering this issue, we reject plaintiff's argument that defendants' motion should be analyzed under MCR 2.116(C)(10) rather than MCR 2.116(C)(8). Defendants moved for summary disposition under MCR 2.116(C)(8) and expressly indicated that they were not bringing their motion under MCR 2.116(C)(10). More-

over, the trial court's order cites MCR 2.116(C)(8) as the basis for its decision, and the question presented is purely a legal one. Thus, we review defendants' motion under MCR 2.116(C)(8). As this Court explained in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998):

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. [Citations omitted.]

Defendants argue that fraternal benefit societies are governed by chapter 81A of the Insurance Code, MCL 500.8161 *et seq*. MCL 500.8191 provides in relevant part:

> (1) If the commissioner upon investigation finds that a domestic society has exceeded its powers, has failed to comply with any provision of this chapter, is not fulfilling its contracts in good faith, has a membership of less than 400 after an existence of 1 year or more, or is conducting business fraudulently or in a manner hazardous to its members, creditors, the public, or the business, the commissioner shall notify the society of his or her findings and state in writing the reasons for his or her dissatisfaction. . . .
>
> (2) If the society pursuant to subsection (1) does not present good and sufficient reasons why it should not be enjoined or why an action in quo warranto should not be commenced, the commissioner may request the attorney general to commence an action to enjoin the society from transacting business or to commence an action in quo warranto.

Further, MCL 500.8191(5) provides:

> An action under this section shall not be recognized in any court of this state unless brought by the attorney general upon request of the commissioner. If a receiver is to be appointed for a domestic society, the court shall appoint the commissioner as the receiver.

Similarly, MCL 500.8193 provides, "An application or petition for injunction against any domestic, foreign, or alien society, or lodge of such a society, shall not be recognized in any court of this state unless commenced by the attorney general upon request of the commissioner." These clauses authorize the insurance commissioner to investigate whether a domestic society has "exceeded its powers . . . or is conducting its business fraudulently or in a manner hazardous to its members" and to request that the attorney general bring an action to enjoin the society from transacting business or to commence an action in quo warranto.

When interpreting statutes, our primary goal is to ascertain and give effect to the intent of the Legislature. *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 136; 762 NW2d 178 (2009). First, we look at the specific language of the statute, considering the fair and natural import of the terms employed, in view of the subject matter of the law. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 274; 744 NW2d 10 (2007). Clear statutory language must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

Relying on *Jaffe v Harris*, 109 Mich App 786; 312 NW2d 381 (1981), plaintiff argues he has a common-law

right to file such an action and that his is not "an action under this section." In *Jaffe*, the statute at issue read, "A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." *Id*. at 790, citing former MCL 449.226. This Court held that the plain language of this statute does not bar a derivative action brought by a limited partner. *Id.* at 792-794. The Court then found a limited partnership to be analogous to a cestui que trust or preferred stockholders of a corporation and held that the plaintiff had a common-law right to bring a derivative action.

This case, in contrast, involves a fraternal benefit society, not a limited partnership, and *Jaffe* provides common-law guidance only if the statues at issue do not preclude plaintiff's suit. Plaintiff asserts without citation, and without offering his own interpretation of the above-quoted statutes, that there is no statutory limit on members' rights to bring suit. However, MCL 500.8193 plainly prevents any party, including members, from seeking an injunction against a fraternal benefit society, except for the Attorney General, acting at the request of the Commissioner of Insurance. Moreover, plaintiff's claims that the directors' actions harmed Gleaner and its members financially fall squarely within the type of claim described in MCL 500.8191(1), and thus constitute an "action under [that] section." Under MCL 500.8191(5), only the Attorney General may bring such claims. Plaintiff appears to be arguing that the statute does not include an express provision precluding members from bringing claims alleging that the society is harming its members and only provides the procedure that applies when the commissioner brings suit. We disagree. If that reading were correct, the Legislature would have no need to

enact subsection 5 of the statute. "We cannot presume that the legislature would do a useless thing." *Dearborn Twp v Dearborn Twp Clerk*, 334 Mich 673, 684; 55 NW2d 201 (1952). By its plain language, the statutory scheme that controls fraternal benefit societies does not permit such an action or remedy unless brought "by the attorney general upon request of the [insurance] commissioner." Plaintiff's remedy here was to petition the Commissioner of Insurance to investigate Gleaner and its board for misconduct proscribed by the Insurance Code.[2] The trial court did not err in dismissing plaintiff's action under MCR 2.116(C)(8).[3]

Affirmed.

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[2] Defendants do not raise the argument that plaintiff has failed to exhaust his administrative remedies, nor does plaintiff argue that he has already done so. We therefore do not decide here whether that avenue is still open to plaintiff.

[3] Because this conclusion is dispositive, we do not need to address whether the action should have been dismissed under MCR 2.116(C)(6); however, we note that to the extent defendants are correct in their argument that this is not really a derivative suit but merely plaintiff seeking to remedy his own, personal claims in another venue, MCR 2.116(C)(6) would bar the claims. See, e.g., *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986).

LIPAROTO CONSTRUCTION, INC v GENERAL SHALE BRICK, INC

Docket No. 282920. Submitted May 13, 2009, at Detroit. Decided May 21, 2009, at 9:00 a.m.

Liparoto Construction, Inc., brought an action in the Wayne Circuit Court against General Shale Brick, Inc., Lincoln Brick & Stone, and State Auto Property & Casualty Insurance Company, alleging breach of contract and breach of warranties related to the discoloration of bricks on a home that the plaintiff constructed. The court, Kathleen Macdonald, J., granted Lincoln Brick summary disposition on the ground that the plaintiff's action was barred by a one-year contractual limitations period. The court granted General Shale summary disposition after concluding that there was no genuine issue of material fact regarding whether the discoloration was caused by the plaintiff's misuse. The court also granted State Auto summary disposition. The plaintiff appealed.

The Court of Appeals *held*:

1. An unambiguous contractual provision for a shortened period of limitations must be enforced as written unless the provision violates the law or public policy or is otherwise unenforceable under traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability. For a contract or a contractual provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists when the weaker party had no realistic alternative to accepting the provision. Substantive unconscionability exists when the challenged provision is not substantively reasonable. A provision is not substantively unconscionable simply because it is foolish for one party or very advantageous to the other. A provision is substantively unreasonable if its inequity is so extreme as to shock the conscience.

2. The trial court did not err by granting summary disposition to Lincoln Brick. The plaintiff presented no evidence supporting its assertion that the contractual limitations period was procedurally unconscionable. For example, the plaintiff did not offer evidence that it was unable to purchase the brick from another supplier or that Lincoln Brick was unwilling to provide the brick under different terms. The plaintiff also failed to establish that the

provision was substantively unconscionable on the ground of its allegation that the defect in the brick was undetectable for several months. In fact, the plaintiff became aware of the problem within the one-year period. Applying the doctrine of equitable tolling to a contractual limitations period such as this would be inconsistent with the deference afforded to the parties' freedom of contract, including the freedom to avoid by contract what might otherwise be an applicable rule of law.

3. The trial court did not err by granting General Shale summary disposition. There was no genuine issue of material fact that improper cleaning with acid caused the discoloration. The plaintiff did not dispute the cleaning, but questioned whether cleaning instructions were attached to the bricks. Unsworn statements, such as those offered by the plaintiff, however, are not sufficient to create a genuine issue of material fact to oppose summary disposition.

4. Summary disposition under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the position of the party opposing the motion. Summary disposition for Lincoln Brick and General Shale was not premature.

5. State Auto's policy provided coverage for bodily injury and property damage caused by an occurrence, which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In the context of this and similar definitions, damage resulting from negligence or a breach of warranty would constitute an occurrence triggering the policy's liability coverage only if the damage in question extended beyond the insured's work product, which was not the case here.

Affirmed.

1. LIMITATION OF ACTIONS — CONTRACTUAL LIMITATIONS PROVISIONS — DEFENSES TO CONTRACT ACTIONS — UNCONSCIONABLE CONTRACT PROVISIONS.

An unambiguous contractual provision for a shortened period of limitations must be enforced as written unless the provision violates the law or public policy or is otherwise unenforceable under traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability; for a contract or contractual provision to be considered unconscionable, both procedural and substantive unconscionability must be present; procedural unconscionability exists when the weaker party had no realistic alternative to accepting the provision; substantive unconscionability exists when the challenged provision is not substantively reason-

able, but a provision is not substantively unconscionable simply because it is foolish for one party or very advantageous to the other; a provision is substantively unreasonable if its inequity is so extreme as to shock the conscience.

2. INSURANCE — COVERAGE UNDER INSURANCE POLICIES — OCCURRENCES OR ACCIDENTS TRIGGERING INSURANCE COVERAGE — NEGLIGENCE — BREACH OF WARRANTY.

In the context of an insurance policy providing coverage for bodily injury and property damage caused by an occurrence, which the policy defines as "an accident," damage resulting from negligence or a breach of warranty would constitute an occurrence triggering the policy's liability coverage only if the damage in question extended beyond the insured's work product.

Lyden, Liebenthal & Chappell, Ltd (by *Erik G. Chappell*), for Liparoto Construction, Inc.

Law Offices of John Colucci (by *John G. Colucci*) for General Shale Brick, Inc.

Kreis, Enderle, Callander & Hudgins (by *Raymond C. Schultz*) for Lincoln Brick & Stone.

Law Office of David C. Anderson, P.C. (by *David Carl Anderson*), for State Auto Property & Casualty Insurance Company.

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

PER CURIAM. Plaintiff, Liparoto Construction, Inc., appeals as of right two trial court orders, one order granting summary disposition in favor of defendants General Shale Brick, Inc., and Lincoln Brick & Stone and the other order granting summary disposition in favor of defendant State Auto Property & Casualty Insurance Company, both pursuant to MCR 2.116(C)(10). Because the trial court correctly concluded that plaintiff's action against Lincoln Brick was barred by a contractual one-year limitations period and that General Shale was entitled to summary

disposition because there was no genuine issue of material fact that improper cleaning was the cause of the discoloration of the bricks involved in this case, we affirm summary disposition in favor of Lincoln Brick and General Shale. Further, because there was no genuine issue of material fact with respect to whether plaintiff's loss arose from an "occurrence" within the meaning of the policy, and plaintiff's loss was also subject to policy exclusions, summary disposition in favor of State Auto was also proper. We affirm.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff, a general contractor, contracted to build a house for Dorothy and Clayton Ainscough. Plaintiff built the brick exterior of the house with Sonora brick it purchased from Lincoln Brick. General Shale manufactured the Sonora brick. After plaintiff completed the brickwork in early 2006, the Ainscoughs reported that the bricks had become discolored and that the problem worsened when the bricks were wet. General Shale determined that the bricks became discolored because their lime-coating reacted with an acid cleaner that a contractor used postmanufacturing, contrary to General Shale's explicit cleaning instructions. In December 2006, the Ainscoughs brought an administrative complaint against plaintiff with the Department of Consumer and Industry Services (now the Department of Energy, Labor, and Economic Growth). Plaintiff contacted its business liability insurer, State Auto, whose investigator concluded that the problem was attributable to a latent defect that occurred during manufacturing or warehousing. State Auto denied plaintiff's claim for coverage. Plaintiff thereafter entered into a mediation agreement with the Ainscoughs in which plaintiff agreed to undertake the necessary actions to correct the stained brick.

Plaintiff thereafter brought this action against defendants, alleging claims for breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose against General Shale and Lincoln Brick and claims for breach of contract against Lincoln Brick and State Auto. The trial court granted summary disposition in favor of Lincoln Brick on the ground that plaintiff's action was barred by a one-year contractual limitations period and in favor of General Shale on the ground that there was no genuine issue of material fact that the discoloration of the brick was caused by plaintiff's misuse. State Auto argued that it was entitled to summary disposition because the discoloration of the bricks did not constitute an "occurrence" within the meaning of its policy or, alternatively, was expressly excluded from coverage. State Auto also argued that plaintiff violated the policy by voluntarily entering into a mediation agreement with the Ainscoughs without its consent. The trial court granted summary disposition in favor of State Auto, stating that the insurance policy was not "a bond to secure that [plaintiff's] work is [done] properly." Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

This Court reviews a trial court's summary disposition decision de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed, supra* at 537. The motion 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. *Id.*

III. LINCOLN BRICK

Plaintiff argues that the trial court erred by granting summary disposition in favor of Lincoln Brick on the ground that the action was barred by the one-year contractual limitations period set forth in Lincoln Brick's invoice. Under the Uniform Commercial Code (UCC), MCL 440.1101 *et seq.*, the purchaser of defective goods seeking to recover for economic loss and incidental and consequential damages must bring its action for recovery against the seller within four years of tender and delivery of the goods. MCL 440.2725; *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 526-527; 538 NW2d 424 (1995). However, parties to a contract may agree to a shortened period of limitations. An unambiguous contractual provision providing for a shortened limitations period is to be enforced as written unless the provision violates the law or public policy or is otherwise unenforceable under traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141-142 & n 1; 706 NW2d 471 (2005). For a contract or a contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. *Id.* at 143. "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id.* at 144. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.* However, a contract or contract provision is not substantively unconscionable simply because it is foolish for one party or very advantageous to the other. *Id.* "Instead, a term is substantively unreasonable

where the inequity of the term is so extreme as to shock the conscience." *Id.*

While plaintiff asserts that the contractual limitations period is procedurally unconscionable because it had no realistic alternative to acceptance of the term, plaintiff did not present any evidence in support of this assertion. For instance, plaintiff presented no evidence that it was unable to purchase the brick from another supplier or that Lincoln Brick was unwilling to provide the brick under different terms. Accordingly, plaintiff failed to establish a question of fact regarding procedural unconscionability.

Plaintiff also failed to establish that the one-year limitations provision was substantively unconscionable because the defect was not detectable for several months. The record reveals that the bricks were shipped in December 2004 and installed in early 2005. The record also shows that plaintiff became aware of the problem by summer 2005. Consequently, there is no support for plaintiff's argument that the alleged defect remained undetectable until it was too late to bring an action for relief. Under these circumstances, plaintiff has not shown that the one-year limitations provision shocks the conscience.

Plaintiff alternatively argues that equitable tolling should preclude Lincoln Brick from relying on the one-year contractual limitations period. Plaintiff did not raise an equitable tolling argument in the trial court. Accordingly, this issue is not preserved and is subject to review for plain error affecting plaintiff's substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Application of the doctrine of equitable tolling to contractual limitations periods would be inconsistent with the deference afforded to parties' freedom to con-

tract, including the freedom to avoid, by contract, what might otherwise be an applicable rule of law. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510-511; 741 NW2d 539 (2007). Plaintiff's reliance on *Lewis v Detroit Automobile Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986), and this Court's decision in *Ward v Rooney-Gandy*, 265 Mich App 515, 519-520; 696 NW2d 64 (2005), is misplaced because *Lewis* was overruled by *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582-583, 586; 702 NW2d 539 (2005), and this Court's decision in *Ward* was summarily reversed in *Ward v Rooney-Gandy*, 474 Mich 917 (2005). Accordingly, the trial court did not err by granting summary disposition in favor of Lincoln Brick on the basis of the contractual limitations period.

IV. GENERAL SHALE

The trial court granted summary disposition for General Shale on the ground that there was no question of fact that the brick discoloration was caused by improper acid cleaning, for which General Shale was not at fault. General Shale submitted an affidavit from its engineering manager, James Bryja, indicating that a "cube tag" (which provides product information and cleaning instructions) is affixed to every package of bricks. An exemplar of the cube tag in use for Sonora bricks in 2005 was submitted with Bryja's affidavit. The cube tag contains the notation "CLEANING CATEGORY C" and includes cleaning information for categories A, B, and C. This information states that category C bricks should be cleaned with a nonacidic detergent because the acid-reactive coating is subject to color range changes if exposed to acid. The cube tag also states "GENERAL SHALE DISCLAIMS ANY AND ALL RESPONSIBILITY FOR DAMAGES RESULTING FROM CLEANING METHODS AND MATERIALS." General Shale's plant manager, Michael Baker,

stated in his affidavit that he examined the bricks and determined that they had been cleaned with acid. Tony Martinez of Tony's Caulking admitted that his company used an acid-based cleaner on the bricks. The Ainscoughs also stated in their administrative complaint against plaintiff that they saw the brick cleaners use a product that was labeled "acid."

Indeed, plaintiff does not dispute that the bricks were cleaned with an acid. Rather, plaintiff questions whether the cube tag was actually attached to the bricks. But plaintiff did not submit any evidence showing a genuine issue of material fact with respect to this issue. Plaintiff contends that it established a question of fact regarding the cause of the discoloration by providing a copy of a report prepared for State Auto by a forensic engineer, Joseph Czajka, that stated that the color variation occurred at the factory or warehouse before arrival on the job site. However, unsworn statements, such as Czajka's report, are not sufficient to create a genuine issue of material fact to oppose summary disposition under MCR 2.116(C)(10). *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 321; 575 NW2d 324 (1998). Accordingly, the trial court did not err by finding that there was no genuine issue of material fact that the brick discoloration was caused by improper acid cleaning and by granting summary disposition in favor of General Shale on that basis.

V. WHETHER SUMMARY DISPOSITION WAS PREMATURE

Plaintiff argues that summary disposition in favor of Lincoln Brick and General Shale was premature because discovery was not yet complete. A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the non-

moving party's position. *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002).

Summary disposition in favor of Lincoln Brick was based on the one-year contractual limitations period, which is not a matter that requires further factual development. Indeed, parol evidence is inadmissible to vary clear and unambiguous contractual language. *In re Kramek Estate*, 268 Mich App 565, 573-574; 710 NW2d 753 (2005). Accordingly, there is no fair likelihood that further discovery would yield support for plaintiff's action against Lincoln Brick.

Summary disposition in favor of General Shale was based on evidence that the brick discoloration was caused by improper cleaning, not by any latent defects. Plaintiff had the opportunity to determine the cause of the discoloration after the Ainscoughs first reported the problem and in the Ainscoughs' prior proceeding. Plaintiff also had the opportunity to obtain an affidavit from Czajka in order to present his expert opinion as admissible evidence. Similarly, plaintiff's own employees and subcontractors were in the best position to provide sworn statements regarding the packaging materials and labels that may or may not have been attached to the shipment of Sonora brick. Under the circumstances, plaintiff has not shown a fair likelihood that further discovery could enable plaintiff to establish a question of fact with respect to either the cause of the discoloration or the presence of the cube tag. For these reasons, plaintiff has failed to show that summary disposition was premature.

VI. STATE AUTO

Plaintiff argues that the trial court erred by granting summary disposition in favor of State Auto on the ground that the discoloration was not an "occurrence"

within the meaning of its policy. An insurance policy is construed in accordance with Michigan's well-established principles of contract construction. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007). The policy must be enforced according to its terms, and a court may not hold an insurer liable for a risk it did not assume. *Id.* A court may not create an ambiguity in a policy if the terms are clear and unambiguous, and the failure to define a relevant term does not render the policy ambiguous. *Id*. at 82-83. Rather, reviewing courts must interpret the terms of the policy in accordance with their commonly used meanings. *Id.* at 83.

State Auto's policy provides coverage for bodily injury and property damage caused by an "occurrence." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The parties address three cases involving definitions of "occurrence" and "accident" in the context of property damage arising from the use of defective products.

In *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962), several persons brought actions against the insured, a manufacturer of steel tubing that was installed in floors and used to heat buildings, alleging that defective tubing caused substantial property damage. The insured's liability insurance carrier denied coverage for defense and indemnification costs on the ground that the lawsuits involved claims for breach of warranty and the underlying incidents were not caused by accidents. *Id.* at 152-153. The United States Court of Appeals for the Sixth Circuit disagreed and concluded that defective equipment caused substantial damage to the customers' homes. *Id.* at 153.

In *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369; 460 NW2d 329 (1990), the insured was a concrete contractor on a construction project. The insured incurred the cost of removing and replacing concrete after the concrete obtained from a supplier proved to be defective. *Id.* at 371-372. The insured presented a claim to its insurer pursuant to a policy that defined "occurrence" as " 'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . . .' " *Id.* at 373. This Court held that the installation of defective concrete was not an "occurrence" within the meaning of the policy. The Court distinguished *Bundy* as follows:

> We find Vector's reliance on *Bundy* misplaced. *Bundy* stands for nothing more than the proposition that an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by "accidents" where the insured's faulty work product damages the property of others. In the instant case Vector seeks what amounts to recovery for damages done to its own work product, and not damage done to the property of someone other than the insured. [*Id.* at 377.]

This Court in *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134; 610 NW2d 272 (2000), further clarified the distinction between *Bundy* and *Hawkeye-Security* in the context of an "accident" as it relates to a contractor's losses arising from a subcontractor's defective products. In *Radenbaugh*, the insured, a mobile home dealer, provided erroneous schematics and instructions to the contractors who constructed the mobile home's basement foundation. These errors caused substantial damage to the home and its basement. *Id.* at 136. The insurer denied the

insured's claim for defense and indemnification coverage on the ground that the loss did not constitute an occurrence within the meaning of the policy, which defined "occurrence" as " 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.' " *Id.* at 140. This Court rejected the insurer's reliance on *Hawkeye-Security, supra*, in support of its application of the term "occurrence" and distinguished *Hawkeye-Security* as follows:

> Were the underlying complaint limited to claims relating solely to the insured's product, we would agree with defendant. However, it is clear that the underlying complaint alleged damages broader than mere diminution in value of the insured's product caused by alleged defective workmanship, breach of contract, or breach of warranty. [*Id.* at 141.]

The Court considered the extensive damage to the buyers' home, all of which resulted from the insured's erroneous instructions. *Id.* at 141-142. The Court contrasted the factual circumstances in *Hawkeye-Security*, in which the Court held " 'that the defective workmanship of Vector, *standing alone*, was not the result of an occurrence within the meaning of the insurance contract.' " *Radenbaugh, supra* at 143, quoting *Hawkeye-Security, supra* at 378 (emphasis in *Radenbaugh*). The Court also discussed the distinction between *Hawkeye-Security* and *Bundy,* stating: "In *Bundy*, the insured's defective workmanship caused damage to the property of others. The property damage that was not confined to the insured's own work product was deemed to be " 'unforeseen, unexpected, and unintended and therefore an occurrence.' " *Radenbaugh*, *supra* at 144.

The *Radenbaugh* Court also emphasized that in *Bundy*, the Sixth Circuit "rejected defendant's argument that an occurrence cannot arise based on the

insured's negligence or breach of warranty." *Id*. Rather, the court in *Bundy* had recognized that claims involving breach of warranty or negligence could constitute an accident. *Id*. This Court indicated that such claims constitute an accident when "the underlying action alleged more than damage to the insured's own product." *Id*. This condition was satisfied in *Radenbaugh* because the insured's faulty instructions rendered the basement unusable. *Id.* at 144-145.

The *Radenbaugh* Court also extensively quoted *Calvert Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435 (ED Mich, 1992), a case harmonizing *Hawkeye-Security* and *Bundy*. The court in *Calvert* held that these two cases " 'can be reconciled by focusing on the property damage at issue in each case.' " *Radenbaugh, supra* at 147, quoting *Calvert, supra* at 438. The key distinction was that in *Bundy*, " 'the insured's defective workmanship resulted in damage to the property of others,' " whereas in *Hawkeye-Security* " 'the insured's defective workmanship resulted only in damage to the insured's work product.' " *Radenbaugh*, *supra* at 147, quoting *Calvert*, *supra* at 438. The *Radenbaugh* Court adopted this reasoning as its own and concluded that the damage to the mobile home constituted an "occurrence" as defined by the subject policy. *Radenbaugh*, *supra* at 148.

In this case, "occurrence" is defined in the same manner as it was defined in *Radenbaugh*. The definition of "occurrence" in *Hawkeye-Security* is more detailed, but is not significantly different in substance. This Court in *Radenbaugh* held that damage resulting from negligence or breach of warranty would constitute an occurrence triggering the policy's liability coverage only if the damage in question extended beyond the insured's work product. Here plaintiff did not allege,

and presented no evidence, that there was damage beyond its own work product. Accordingly, the trial court did not err by concluding that plaintiff failed to establish an occurrence within the meaning of the policy.[1]

Affirmed. Defendants may tax costs.

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[1] On appeal, plaintiff also argues that all three defendants were not entitled to summary disposition under additional grounds that defendants raised before the trial court. In light of our conclusions that the trial court properly granted summary disposition for each defendant for the reasons discussed in this opinion, it is unnecessary to consider these alternative grounds.

PRIORITY HEALTH v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES

Docket No. 278373. Submitted February 4, 2009, at Grand Rapids. Decided May 21, 2009, at 9:05 a.m.

Priority Health, a health maintenance organization (HMO), sought a declaratory ruling by the Commissioner of the Office of Financial and Insurance Services on whether an HMO can require a reasonable and uniformly applied minimum premium contribution level from an employer under the small employer group health coverage act, MCL 500.3701 *et seq*. The commissioner ruled that an HMO cannot require such a contribution. The Kent Circuit Court, George S. Buth, J., affirmed the commissioner's ruling when Priority Health petitioned for judicial review. The Court of Appeals denied Priority Health's application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 480 Mich 1073 (2008).

The Court of Appeals *held*:

The Insurance Commissioner correctly ruled that the small employer group health coverage act does not allow Priority Health to impose minimum-contribution requirements on employers as a condition for issuing a health benefit plan.

1. MCL 500.3707(1) provides that a small employer carrier shall issue any health benefit plan to any small employer that applies for the plan and agrees to make the required premium payments and to satisfy the other reasonable provisions of the health benefit plan not inconsistent with chapter 37 of the Insurance Code. MCL 500.3701(n) defines "premiums" as all money paid by a small employer, a sole proprietor, eligible employees, or eligible persons as a condition of receiving coverage from a small employer carrier, including any fees or other contributions associated with the health benefit plan. The minimum-contribution requirement at issue in this case is not included in the statutory definition of "premium."

2. MCL 500.3711 provides that a small employer carrier that offers health coverage in the small employer group market in connection with a health benefit plan shall renew or continue in force that plan at the option of the small employer or sole proprietor, but makes specific exceptions to guaranteed renewal. Among those ex-

ceptions is lack of payment. "Lack of payment" means lack of premium payment, not lack of the minimum-contribution payment at issue. A lack of a minimum-contribution payment is not cause for nonrenewal of a policy.

Affirmed.

INSURANCE — GROUP HEALTH INSURANCE — SMALL EMPLOYER GROUP HEALTH INSURANCE PLANS — MINIMUM PREMIUM CONTRIBUTION LEVELS.

A health maintenance organization offering a small employer group health insurance plan may not impose on an employer a minimum premium contribution level as a condition for issuing coverage (MCL 500.3701[n], 500.3707[1], 500.3711).

Nuyen, Thomtishen and Auon, P.C. (by *Joseph T. Auon* and *Bradley H. Darling*), for the petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *William A. Chenoweth*, Assistant Attorney General, for the respondent.

Amicus Curiae:

Honigman Miller Schwartz and Cohn LLP (by *Timothy Sawyer Knowlton*) for the Michigan Association of Health Plans.

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

PER CURIAM. Petitioner, Priority Health, appeals by leave granted the circuit court's order affirming a declaratory ruling issued by respondent, Commissioner of the Office of Financial and Insurance Services.[1] We originally denied petitioner leave to appeal.[2] Thereafter, petitioner sought leave to appeal in the Michigan Su-

[1] In April 2008, the name of respondent's name was officially changed to the Office of Financial and Insurance Regulation. Executive Order No. 2008-1.

[2] *Priority Health v Comm'r of the Office of Financial & Ins Services*, unpublished order of the Court of Appeals, entered October 12, 2007 (Docket No. 278373).

preme Court; in lieu of granting leave to appeal, the Supreme Court remanded the matter to this Court "for consideration as on leave granted." *Priority Health v Comm'r of the Office of Financial & Ins Services*, 480 Mich 1073 (2008). For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEEDINGS

Petitioner is a health maintenance organization (HMO) licensed in the state of Michigan. On April 20, 2006, it requested a declaratory ruling from respondent on the following question:

> Under the Michigan Small Employer Group Health Coverage Act, MCL 500.3701 *et seq*., may a health maintenance organization require a minimum premiums contribution level from the employer if the level is reasonable and applied uniformly?

Priority Health had refused to issue coverage under the act unless the employer contributed either 75 percent of the single premium amount or 50 percent of the total premium amount. Respondent, relying on the plain language of MCL 500.3707 and its interplay with MCL 500.3711, concluded that petitioner was not allowed to include a minimum contribution requirement in its agreements with small employers. Petitioner appealed to the circuit court, which agreed with respondent's analysis and upheld its ruling. The case is now before us.

II. STANDARDS OF REVIEW

We review de novo questions of law, such as the proper interpretation of a statute. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97; 754 NW2d 259 (2008). An agency's construction of a statute

> "is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." [*Id.* at 103, quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935).]

III. ANALYSIS

The issue in this case is one of first impression: Does chapter 37 of the Insurance Code, MCL 500.3701 *et seq*., allow petitioner to impose employer minimum contribution requirements as a condition for obtaining and maintaining health benefit plans? The parties agree that the answer is found in the plain language of the applicable statutes; however, they disagree on the statutes' proper interpretation. We begin by outlining the guiding rules of statutory construction.

"The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute's plain language." *Houdek v Centerville Twp*, 276 Mich App 568, 581; 741 NW2d 587 (2007). "If the meaning of a statute is clear and unambiguous, then judicial construction to vary the statute's plain meaning is not permitted." *Id.* "The Legislature is presumed to have intended the meaning it plainly expressed." *Watson v Bureau of State Lottery*, 224 Mich App 639, 645; 569 NW2d 878 (1997). Also, "unless explicitly defined in a statute, 'every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.' "

Yudashkin v Holden, 247 Mich App 642, 650; 637 NW2d 257 (2001), quoting *Michigan State Bldg & Constr Trades Council, AFL-CIO v Director, Dep't of Labor*, 241 Mich App 406, 411; 616 NW2d 697 (2000). Because undefined terms must be given their plain and ordinary meanings, it is proper to consult a dictionary to define terms. *Allison v AEW Capital Management, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008).

The act at issue provides in part:

> A small employer carrier shall issue any health benefit plan to any small employer that applies for the plan and agrees to make the required premium payments and to satisfy the other reasonable provisions of the health benefit plan not inconsistent with this chapter. [MCL 500.3707(1).]

Thus, the first question is whether minimum contribution requirements are properly considered part of "the required premium payments."

"Premium" is statutorily defined as "all money paid by a small employer, a sole proprietor, eligible employees, or eligible persons as a condition of receiving coverage from a small employer carrier, including any fees or other contributions associated with the health benefit plan." MCL 500.3701(n). Petitioner argues that a minimum contribution requirement is included in the definition of premium because it is a "contribution" associated with the health benefit plan. "Contribution" is defined as "something contributed." *Random House Webster's College Dictionary* (2000). "Contribute" means to give money along with others, "as to a common supply or fund." *Id.* "Associate" means to connect, join, combine, unite, or bring into relation with. *Id*. A "health benefit plan" is "an expense-incurred hospital, medical, or surgical policy or certificate, nonprofit health care corporation certificate, or health maintenance organization contract," MCL

500.3701(k), and refers to the agreement between the insurer and employer, see MCL 500.3713. Taken together, the plain definition of "premium" is all money paid, including fees and any other money given that is connected to the agreement between the insurer and the employer paid by the listed individuals. It does not explicitly authorize an HMO to impose minimum contribution requirements. Rather, it merely legislates that all money paid be considered part of the premium.

"Minimum contribution requirements" is a term of art; it has a particular meaning. While legal terms of art are to be accorded their peculiar and appropriate meanings, *Allison*, *supra* at 427, the Legislature did not use the words "minimum contribution requirements." In order to reach the conclusion advocated by petitioner and the amicus curiae, we would have to define "other contributions" beyond its plain, ordinary meaning and use a technical, term-of-art definition. Such a construction of an unambiguous statute is impermissible. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 705; 736 NW2d 594 (2007) (It is a violation of "a cardinal cannon of statutory interpretation" to read language into statutory provisions.). "When the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional." *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002). Further, "[e]ach word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (citations omitted).

Still, holding that "minimum contribution requirements" are not included in the act's definition of "premium" does not end our analysis. MCL 500.3707(1) requires[3] petitioner to issue a plan to any employer that applies for the plan, agrees to make the required premium payments, and agrees "to satisfy the other reasonable provisions of the health benefit plan not inconsistent with" chapter 37. Therefore, the second question is whether petitioner's provision for a minimum contribution requirement is both reasonable and not inconsistent with the other provisions in chapter 37.

MCL 500.3711 states:

> (1) Except as provided in this section, a small employer carrier that offers health coverage in the small employer group market in connection with a health benefit plan shall renew or continue in force that plan at the option of the small employer or sole proprietor.
>
> (2) Guaranteed renewal under subsection (1) is not required in cases of: fraud or intentional misrepresentation of the small employer or, for coverage of an insured individual, fraud or misrepresentation by the insured individual or the individual's representative; lack of payment; noncompliance with minimum participation requirements; if the small employer carrier no longer offers that particular type of coverage in the market; or if the sole proprietor or small employer moves outside the geographic area.

The doctrine of *expressio unis est exclusio alterius* provides that "an express mention of one thing generally implies the exclusion of other similar things that were not mentioned." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 151; 662 NW2d 758 (2003). While the doctrine cannot be applied

[3] The use of the word "shall" in the statute legislates mandatory action. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008).

if it defeats the Legislature's intent, it is a means to determine that intent. *Id.* Under MCL 500.3711(2), the Legislature delineated six specific reasons for which an insurer does not have to renew a health benefit plan. Had it intended to permit nonrenewal for failure to pay minimum contribution requirements, it could have so specified. It did not.

Therefore, petitioner's minimum contribution requirement is included in MCL 500.3711(2), if at all, under the lack of payment category. The statute does not define "payment." Black's Law Dictionary (8th ed) defines the term as "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation." So, lack of payment means lack of payment of the premium. As all money paid in connection with the plan is part of the premium, MCL 500.3701(n), it is to that payment that MCL 500.3711(2) must necessarily refer. Because "premium" does not include "minimum contribution requirements," failure of the employer to pay the contribution is not cause for nonrenewal. It would be unreasonable and inconsistent to require such contributions as a prerequisite for initial coverage when renewal could not be denied on the basis of a failure to pay those contributions. Accordingly, we hold that respondent correctly ruled that the small employer group health coverage act does not allow petitioner to impose minimum contribution requirements on employers as a condition for issuing a health benefit plan.[4]

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[4] Much was made below of the legislative history of MCL 500.3711. The House version expressly included noncompliance with minimum participation "or employer contribution" requirements among the permissible grounds for nonrenewal, while the Senate version did not. SB 460; 2003 Journal of the House 745-748. The House's additional language was left out of the final version adopted by the conference committee. 2003 Journal of the Senate 1023, 1028; 2003 Journal of the House 1089, 1094.

Additionally, we find no merit in petitioner's argument that respondent previously interpreted a similarly worded statute, MCL 500.2213b,[5] to allow minimum contribution requirements before chapter 37 was enacted and that such an interpretation should be employed in the context of chapter 37. Because petitioner fails to cite any authority to support its assertion that respondent has always interpreted MCL 500.2213b in the manner advocated, we consider this argument abandoned. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008) (a party may not simply announce its position and leave it to this Court to look for authority to support or reject the position). In any event, we are not bound by the decisions of administrative agencies on questions of law. *In re Complaint of Rovas*, *supra* at 102.

Finally, petitioner argues that allowing minimum contribution requirements is good public policy and consistent with the purpose of chapter 37. But as this Court has observed, "[t]he Michigan Legislature is the

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Because the statute is unambiguous, we have no reason to turn to the legislative history. *City of Warren v Detroit*, 261 Mich App 165, 169; 680 NW2d 57 (2004). In any event, legislative history is of little value. Equally cogent arguments can be made for why the language was stricken. Either it was an intentional rejection of minimum contribution requirements or it was unnecessary because it was already encompassed by the term "lack of payment."

[5] MCL 500.2213b states, in pertinent part,

> (2) Except as provided in this section, an insurer that delivers, issues for delivery, or renews in this state an expense-incurred hospital, medical, or surgical group policy or certificate under chapter 36 shall renew or continue in force the policy or certificate at the option of the sponsor of the plan.
>
> (3) Guaranteed renewal is not required in cases of fraud, intentional misrepresentation of material fact, lack of payment, if the insurer no longer offers that particular type of coverage in the market, or if the individual or group moves outside the service area.

proper institution in which to make such public policy determinations, not the courts." *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 45; 737 NW2d 187 (2007). Thus, we do not address petitioner's policy arguments.

We affirm. No taxable costs pursuant to MCR 7.219, a question of public policy involved.

HUGHES v ALMENA TOWNSHIP

Docket No. 279085. Submitted February 3, 2009, at Grand Rapids. Decided May 26, 2009, at 9:00 a.m.

Allan and Sally Hughes petitioned the Van Buren Circuit Court for judicial review of a decision by the Almena Township Zoning Board of Appeals (ZBA) that upheld a denial by the Almena Township Board of Trustees of the Hugheses' preliminary site plan for a planned unit development (PUD). The court, William C. Buhl, J., reversed the decision of the ZBA, reversed the township board's decision to deny the preliminary site plan, and ordered that the preliminary site plan be deemed approved. The township appealed by leave granted.

The Court of Appeals *held*:

1. The provisions of the now-repealed Township Zoning Act (TZA), MCL 125.271 *et seq*., govern the proceedings in this matter because the statute that repealed the TZA, the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., provides that the repeal of the TZA does not alter, limit, void, affect, or abate any pending litigation, administrative proceedings, or appeal that, like this matter, existed on the effective date of the Michigan Zoning Enabling Act. MCL 125.3702(2).

2. The TZA required a circuit court to affirm an agency decision unless it did not comply with the constitution and laws of the state, it was based on improper procedure, it was not supported by competent, material, or substantial evidence on the record, or it did not represent a reasonable exercise of discretion granted by law to the agency. MCL 125.293a(1).

3. The trial court erred by ruling that the township's zoning ordinance's provisions regarding review and approval of a PUD were in direct conflict with the TZA's review and approval process. The ordinances validly place final responsibility for the review and approval of PUDs in the township board pursuant to MCL 125.286c, although preliminary steps take place before the zoning administrator and the planning commission. Because the ordinance designates the township board as the final review body and decision maker, the board must independently determine whether the proposed PUD meets the requirements of the ordinance after

it has received the planning commission's recommendation. The board may require additional evidence from an applicant to ensure that the PUD meets all pertinent legal requirements.

4. The TZA did not prohibit the planning commission from reviewing a proposed PUD and making a recommendation to the township board.

5. The township board was required to hold a public hearing pursuant to MCL 125.286c(5), which it did. The ordinance is not invalid for failing to mention the township board's statutory duty to hold a public hearing. The requirement for such a hearing may be read into the ordinance, which requires the planning commission, but not the board, to hold a public hearing.

6. The township's ordinance validly grants the ZBA the right to hear the appeal in this case in the manner required by the TZA. The ZBA followed proper procedure in reviewing and affirming the township board's decision to deny the PUD application. The circuit court erred by holding that the ZBA failed to follow proper procedure. The ZBA had the same power as the township board to review and obtain evidence not presented to the planning commission and the power to review approval of the PUD application. The ZBA was not limited to the record of the administrative body whose decision it was reviewing. Only the circuit court's review of the ZBA's decision is limited to the evidence of the ZBA's record.

7. The essentials of procedural due process are adequate notice, an opportunity to be heard, and a fair and impartial tribunal. Although the township board denied approval of the preliminary site plan immediately after township trustee Marv Flick stated that the soil maps of the area showed that the area did not drain water well and the Hugheses were not able to present evidence to rebut that information before the board voted, the Hugheses were on notice regarding the potential drainage problems and could have addressed that concern during the public comment sessions before the board and the ZBA, but did not do so. There was no denial of the Hugheses' right to present argument or evidence regarding the issue.

8. The evidence shows that the township afforded the Hugheses a fair and impartial tribunal.

9. The decision of the ZBA was supported by competent, material, and substantial evidence.

10. A local land use agency may properly consider relevant public comments as evidence in considering a proposed PUD.

11. The township board and the ZBA were not authorized to approve the PUD because the township's ordinance requires a

PUD to consist of two or more principal uses and the proposed PUD only contained one principal use.

12. The township ordinance gave the board the authority to deny or table a PUD application if it determined that approval would result in premature development of the area involved. The ZBA's determinations that the proposed PUD did not conform to the township's master plan and the area should not be developed were supported by competent, material, and substantial evidence on the record.

13. Duress occurs in the land use, administrative context when the decision maker is improperly pressured to serve an interest other than that of the voters, taxpayers, members of the general public, justice, and due process. To determine whether there was duress, the question is whether the officer, by reason of a personal interest in the matter, was placed in a situation of temptation to serve his or her own purposes to the prejudice of those for whom the law authorizes the officer to act as a public official. There was no evidence that Trustee Flick had any personal, pecuniary interest in the outcome of the proceedings. Flick was representing the interests of the township and its residents in seeking compliance with the zoning ordinances and did not encourage the members of the ZBA to serve an interest other than that which they were bound to serve. The trial court erred by concluding that Flick's appearances were improper procedure or duress.

14. The trial court erred by ruling that the township was estopped from arguing that the proposed PUD did not meet the ordinance's definition of a PUD. The Hugheses could not justifiably rely on any representations from the zoning administrator or the planning commission that were contrary to the lawfully adopted ordinances. There were no exceptional circumstances that would warrant application of equitable estoppel. The order of the circuit court must be vacated and the case must be remanded to the circuit court for the entry of an order affirming the decision of the ZBA.

Vacated and remanded.

Schuitmaker, Cooper, Schuitmaker & Cypher, P.C. (by *M. Brian Knotek*), for Allan and Sally Hughes.

Kelly L. Page for Almena Township.

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

PER CURIAM. Respondent Almena Township appeals by leave granted the circuit court's June 14, 2007, order that (1) reversed the decision of the Almena Township Zoning Board of Appeals (ZBA) to uphold the denial by the Almena Township Board of Trustees (township board) of petitioners Allan and Sally Hugheses' preliminary site plan for a planned unit development (PUD), (2) reversed the township board's decision to deny petitioners' preliminary site plan, and (3) approved petitioners' preliminary site plan. We vacate the circuit court's order and remand to the circuit court for the entry of an order affirming the ZBA's decision.

I. SUMMARY OF FACTS AND PROCEEDINGS

On December 23, 2005, the Hugheses submitted a preliminary site plan for a proposed PUD (Charlen Acres) to the Almena Township zoning administrator. Charlen Acres was a 24-unit, single-family residential community on 27.62 acres and included 2.9 acres of permanent open space.

On November 14, 2005, the Almena Township Planning Commission held a pre-application conference pursuant to § 14.04 of the Almena Township Zoning Ordinance, revised May 3, 2004, edition (ordinance). The planning commission determined that the proposed PUD was located in the agricultural-suburban residential (ASR) district.

On December 23, 2005, the Hugheses submitted their formal preliminary site plan application to the zoning administrator as the ordinance required. The zoning administrator, Bruce Dean, reviewed the site plan and determined that the proposed PUD was permitted in the ASR district pursuant to § 14.02(A)(1),[1] but that several

[1] Undesignated section references are to the Almena Township Zoning Ordinance.

items needed to be addressed by the Hugheses before approval. Dean then concluded by noting:

> Based on the preliminary nature of the submission and review process, the information related [to] the issues identified above should be provided prior to or at the [planning commission] meeting on 01/09/2006. Though incomplete, the review of the application in its present form, with any additional information provided by the applicant, will allow the applicant to prepare for a submission of a plan for final review pursuant to Section 14.06(C).
>
> Upon a finding that the criteria for site plan and development standards have been satisfied, the planning commission shall set a public hearing for consideration of the final PUD plan.

On January 9, 2006, the planning commission reviewed the Charlen Acres preliminary site plan and concluded that many of the issues Dean raised were addressed in a new site plan drawing the Hugheses distributed at the meeting. Dean noted that the Hugheses still needed to address some issues before the February 13, 2006, public hearing for the site plan. Those issues were also noted in the planning commission's meeting minutes.

On February 2, 2006, the Hugheses submitted a revised drawing, which Dean reviewed. The Hugheses still needed to complete a survey and submit soil profiles supported by soil borings, among other things, for final submission. Dean noted that the "applicant has committed to provide information required to complete the site plan, . . . to obtain final approval."

Almena Township gave notice that the planning commission's scheduled February 13, 2006, meeting would include a public hearing regarding the Hugheses' preliminary site plan. The notice was sent to the owners of 10 parcels situated within 300 feet of the proposed PUD.

On February 13, 2006, the planning commission held a public hearing regarding the Hugheses' preliminary site plan and found that the PUD map was "in compliance with [the] statute for PUD Standards." During the public hearing, eight individuals raised concerns over potential urban sprawl, the need for larger parcels, increased traffic and noise, lack of a buffer zone for neighboring residents, adverse effects on hunting and farming, increased light pollution, possible health and safety issues, destruction of a pond and wetlands, and effects on the existing environment. Township trustee Marv Flick was one of the individuals who spoke during the public comment portion of the public hearing. Flick questioned why the Hugheses had not planned more buffer zones for existing residents. After the public comment period, the planning commission made findings of fact and concluded that certain conditions have to be imposed on the PUD. The planning commission unanimously recommended approving the preliminary site plan with conditions to the township board.

Almena Township published notice that the township board's scheduled March 14, 2006, meeting would include a public hearing regarding the Hugheses' preliminary site plan. This notice was sent to the owners of 14 parcels within 300 feet of the proposed PUD.

At the March 14, 2006, township board meeting, 16 individuals spoke against the proposed PUD, citing inconsistency with the master plan, the failure to meet the ordinance's definition of a PUD, premature development, increase in density, noise, and traffic, safety concerns, high water tables, and environmental concerns. Trustee Flick then moved to deny the application primarily because (1) the soils in the area were not conducive to drainage and the water tables were high, and (2) there were safety concerns regarding ingress

and egress based on the traffic analysis and the road commission's recommendation to deny the site plan. Flick believed that the proposed PUD would constitute "premature development" of the area. The minutes reflected Trustee Flick's reasons:

> 1. The public input for the most part, if not unanimously, showed enough negative response to section 14.08 (standards of review) to paragraphs F [traffic and safety], G [project's compatibility and interrelationships between mix of unit types, densities, and uses], H [no adverse noise, odor, light or other external effects on surrounding area], and I [minimum disturbance to the environment] . . . .
>
> 2. Also paragraph B of Section 14.08 states in part that the proposed PUD shall conform to the intent and purpose of the township zoning ordinance and its regulations and standards of the PUD.
>
> 3. This combined with all the good reasoning expressed her [sic, here] this evening should be a substantial reason for denial.
>
> 4. The original intent of a PUD was to be able to have two different land uses, which is not the case, not to put as many houses as possible in a small area.

Trustee Wayne Nelson moved to amend Flick's motion, but after much discussion, both motions were withdrawn, and Trustee Nelson moved to adopt the following language:

> The Almena Township Board hereby determines that the proposed development of Charlen Acres is inconsistent with the [PUD] section of the township's zoning ordinance, is clearly inconsistent with the township's Master Land Use Plan, and would be a seriously incompatible use of the proposed site due to environmental sensitivities. Therefore, the preliminary site plan for Charlen Acres is denied as a PUD, to be accompanied as supporting information, both the language prepared by Marv Flick and the reasons, along with the standards for review of the zoning ordinance itself, under Section 14.08 and in particular the definition,

> of a [PUD], accompanying along with the standards for review in Section 14.08 (B [conformity of a PUD to intent and purpose of ordinance and to other law], F, G, H, and I) and Section 14.10 [authority of township board to deny, table, or approve a PUD] in the Zoning Ordinance pertaining to PUD's, which is what this motion is based upon.

The above language was adopted and the township board unanimously denied the Hugheses' request for preliminary site plan approval.

The Hugheses appealed the township board's decision to the circuit court. The circuit court ruled that the Hugheses had not exhausted their administrative remedies and remanded the case to the ZBA, but retained jurisdiction.

On January 22, 2007, the ZBA held a public hearing to address the Hugheses' appeal. During the main public comment period, two individuals argued that the Hugheses' proposed development did not satisfy the ordinance's requirement that a PUD be comprised of two or more uses: Charlen Acres contained only one. One ZBA member, Ron Marvin, who also was a planning commissioner, mentioned that the conditions the planning commission imposed for approval of the site plan were never satisfied. During its discussion, the ZBA referred to multiple sections of the ordinance and looked at the township's master plan, soil maps, and soil descriptions. The ZBA concluded that: (1) the interrelationships of the PUD were not acceptable; (2) the PUD would adversely affect adjacent and surrounding land; (3) it would adversely disturb the environment; (4) the area was environmentally sensitive and should be protected according to the law; and (5) the soil was poorly suited to septic tank absorption fields and sewage lagoons. Thereafter, the ZBA received further public comment. Three people, including Flick, argued that

the PUD should not be approved because the sump pumps on surrounding properties run constantly. ZBA member Marvin then moved to uphold the township board's decision to deny the Hugheses' preliminary site plan PUD request. The motion was based on "the findings of this meeting today, and the extensive discussion" of several sections of the ordinance, including §§ 14–17, the ordinance's definitions of a PUD and environmentally sensitive area, more specifically on §§ 14.07(B)(1); 16.03(AA)(1); 14.08(A), (B), (G), and (I); 17.04 (A) and (B); 17.07(A)(2) and (3), and (B). The motion was also based on the master plan and the topography map's showing that the area's low elevation was not suitable for drainage. Further, the future land use map showed the area as one of very low density residential. The motion also mentioned another map within the master plan, the soil descriptions, and the maps of soils from the county website. The ZBA unanimously approved the motion.

The Hugheses appealed the ZBA's decision to the circuit court. After hearing oral argument, the circuit court ruled that respondent was estopped from arguing that the proposed development did not meet the definition of a PUD. The circuit court went on to opine that (1) the ordinance "mixes the duties that by statute should be in the Township Board or the Zoning Administrator or the ZBA with what it designates is to be done by the Planning Commission," and (2) Trustee Flick's appearances before the planning commission and the ZBA created the appearance of a less than impartial and open-minded public official who applied improper pressure on board members whose tenure was in the hands of the official. Ultimately, the circuit court concluded that the ordinance required inappropriate and unlawful procedures that

resulted in a material injustice or prejudice to the Hugheses. Specifically, the court determined that the ZBA wrongly conducted a review de novo rather than reviewing the administrative decision of the township board and that this required petitioners to overcome "a double gauntlet in trying to get a preliminary site plan approved." The circuit court reversed the decisions of the ZBA and the township board and ordered that the preliminary site plan be deemed approved.

II. STANDARD OF REVIEW

Before its repeal by the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., effective July 1, 2006, MCL 125.3702(1)(c), the Township Zoning Act (TZA), MCL 125.271 *et seq*., was the basic legislative authority that granted townships the power to pass ordinances concerning zoning. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 99 n 4; 693 NW2d 170 (2005). We note that petitioners submitted their preliminary site plan application for administrative approval and filed their initial appeal in the circuit court before the effective date of the MZEA. Consequently, the TZA governs these proceedings because the MZEA provides that the repeal of the TZA shall not be construed to "alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on [the effective date of the MZEA]." MCL 125.3702(2).

Under the TZA, a circuit court reviewing a zoning decision had to affirm the agency decision unless it (a) did not comply with the constitution and laws of the state, (b) was based on improper procedure, (c) was not supported by competent, material, and substantial evidence on the record, or (d) did not represent the reasonable exercise of discretion granted by law to the

agency.[2] MCL 125.293a(1); *Pellegrom*, *supra* at 100; *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996).

In general, we review de novo a circuit court's decision in an appeal from a ZBA decision, *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004), because the interpretation of the pertinent law and its application to the facts at hand present questions of law, *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 408; 761 NW2d 371 (2008). On appeal, the factual findings of the ZBA are to be accorded deference. *Id*.; *Norman Corp*, *supra* at 198. This Court reviews the circuit court's determination regarding ZBA findings to determine "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA]'s factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).[3] This standard regarding the substantial evidence test is the same as the familiar "clearly erroneous" standard. *Id*. A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. *Id*. at 234-235.

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[2] The same standard applies under the MZEA. See MCL 125.3606(1).

[3] The *Boyd* Court considered the standard of review applicable to a Civil Service Commission decision, which had already been appealed to the circuit court under MCL 600.631 with respect to whether the agency decision was "supported by competent, material and substantial evidence on the whole record," Const 1963, art 6, § 28. *Boyd*, *supra* at 232. The *Boyd* Court adopted the reasoning of Professor Don LeDuc from his treatise, Michigan Administrative Law, § 9:49, ch 9, pp 68-69, which approved the reasoning of the Supreme Court in *Universal Camera Corp v Nat'l Labor Relations Bd*, 340 US 474; 71 S Ct 456; 95 L Ed 456 (1951), regarding secondary judicial appeals of administrative decisions. See *Boyd*, *supra* at 233-234. Because the substantial evidence test under Const 1963, art 6, § 28, is worded nearly identically to that of MCL 125.293a(1)(c), we believe that the reasoning adopted by the *Boyd* Court also applies to appeals of zoning decisions.

The substantial evidence test also encompasses a quantitative component. " 'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998).

III. ANALYSIS

A. THE VALIDITY OF THE ORDINANCE

The circuit court held that the ZBA's decision to uphold the township board's denial of the preliminary site plan was not authorized by law or based on proper procedure because the zoning ordinance's provisions regarding review and approval of a PUD were in direct conflict with the TZA's review and approval process. We disagree.

We review questions of statutory interpretation de novo. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). Ordinances are treated as statutes for the purposes of interpretation and review. *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). An ordinance is also clothed with every presumption of validity. *Id.*; *Kropf v Sterling Hts*, 391 Mich 139, 154; 215 NW2d 179 (1974) (citations omitted).

Townships have no inherent powers; they possess only those powers expressly granted them by the Legislature or the Michigan Constitution or "fairly implied" therefrom. *Hess v Cannon Twp*, 265 Mich App 582, 590; 696 NW2d 742 (2005). Const 1963, art 7, § 34, provides: "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this

constitution and by law shall include those fairly implied and not prohibited by this constitution." In accordance with this constitutional provision, we liberally construe statutes granting power to Michigan townships in the township's favor. *Hess*, *supra* at 590-591. Moreover, when interpreting statutes we must ascertain and give effect to the intent of the Legislature. *Pellegrom*, *supra* at 101-102. If the language is clear, we assume that the Legislature intended the plainly expressed meaning, and we enforce it as written. *Id.*; *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422; 616 NW2d 243 (2000). If the language is ambiguous, we apply a reasonable construction that best accomplishes the intent of the Legislature. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994).

The TZA permitted, but did not require, townships to authorize planned unit developments. MCL 125.286c. If a township authorized PUDs, it had to establish requirements for application, review, and approval, MCL 125.286c(2) to (5), and had to designate the body, board, or official charged with the responsibility of reviewing site plans and granting approval, MCL 125.286e(2). "The review and approval of planned unit developments shall be by the zoning board, an official charged with administration of the ordinance, or the township board." MCL 125.286c(2). The TZA further stated that the "body or official charged in the ordinance with review and approval of planned unit developments shall hold at least 1 public hearing on the request." MCL 125.286c(5). The word "shall" as used in a statute is considered to require mandatory conduct. *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). In addition, the PUD applicant could have been required to submit a site plan for review. MCL 125.286e(2).

Article 14 of the township's zoning ordinance authorizes planned unit developments and sets forth the application procedures for a PUD. First, the applicant must submit an application with a site plan to the zoning administrator. Section 14.06(A). The zoning administrator, after checking the application for completeness, transmits the application and site plan to the planning commission. Section 14.06(B). The planning commission is required to hold a public hearing on the application and site plan. Section 14.06(C). At the public hearing, the applicant is required to present evidence proving that the PUD adheres to all pertinent standards and requirements. Section 14.06(D). The planning commission may require additional evidence, feasibility studies and analyses, and impact assessments to properly review the PUD application and site plan. Sections 14.05 and 14.06(D).

After the public hearing, the planning commission is required, with the assistance of the zoning administrator, to determine and provide evidence in a report to the township board that the PUD application, site plan, and supplementary materials submitted by the applicant establish that the proposed PUD (1) conforms to the township's master plan, (2) conforms to the intent and purpose of the township's zoning ordinance, and (3) meets the ordinance's PUD regulations and standards, among other things. Section 14.08. This report must recommend either approval, approval with conditions, or denial with reasons, to the township board. Section 14.06(E). After reviewing the application, site plan, and the planning commission's recommendations, the township board must approve, approve with conditions, deny, or table the application and site plan for future consideration. Section 14.06(G). Further, the township board is granted the authority to deny or table an application for approval of a PUD site plan, if the board

concludes, after the planning commission submits its report, that the PUD site plan "will result in premature development of the area involved, or will result in premature or improper scheduling of public improvements such as, but not limited to, roads, utilities, schools, and other facilities." Section 14.10. Until the township board approves the preliminary site plan, it is not binding. Sections 14.06(H) and 20.07(D).

We conclude that the ordinance validly places final responsibility for the review and approval of PUDs in the township board pursuant to MCL 125.286c, although preliminary steps take place before the zoning administrator and the planning commission. The ordinance states that the township board "shall review the application and site plan . . . and shall approve, approve with conditions, deny, or table for future consideration, the application and site plan." Section 14.06(G). The ordinance further states that the planning commission only makes a "recommendation" to the township board, the entity which then takes "final action." Sections 14.06(E) and (G). There is no binding approval of a preliminary site plan until the township board provides it. Sections 14.06(H) and 20.07(D). Thus, while the planning commission conducts a public hearing, reviews the PUD application and its preliminary site plan, and submits a report with recommendations to the township board, the township board has the ultimate authority to review and approve the PUD in accordance with MCL 125.286c. Furthermore, because the ordinance designates the township board as the final review body and decision maker, and the planning commission's report is merely a recommendation, we conclude that the township board must independently determine whether the proposed PUD meets the ordinance requirements. Consequently, we conclude that it is fair to infer that the township board has the same authority as

the planning commission to require additional evidence from the applicant to ensure that the PUD meets all pertinent legal requirements. Const 1963, art 7, § 34.

We also conclude that the ordinance validly grants authority to the planning commission to review the proposed PUD and make recommendations on it to the township board. MCL 125.286c(2) stated that the review and approval of PUDs "shall be" by the zoning board, the zoning administrator, or the township board. But, nothing in the statute precluded assistance in the review process, such as the gathering of information or the making of a recommendation by another body. See, e.g., MCL 125.286c(4)(b) (which required that PUD regulations specify "the participants in the review process") and MCL 125.286c(5) (which provided that the "zoning ordinance may provide for preapplication conferences").

In *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 261-262; 566 NW2d 514 (1997), our Supreme Court reviewed whether a municipal ordinance was preempted by statute. While preemption is not an issue in this case, the Supreme Court concluded that the relevant nuisance abatement statutes did not completely inhibit the municipality from providing other means to abate nuisances and, in doing so, it quoted with approval 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409: " 'The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.' " (Emphasis omitted.) The test to determine whether a provision of an ordinance conflicts with a statute is " 'whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.' " *Id.* (em-

phasis omitted.) The Legislature did not, through the TZA, expressly prohibit review by the planning commission of PUD applications ultimately subject to review and approval by the township board. Liberally construing the statute in favor of the township, we believe that the ordinance's designation of the planning commission to review proposed PUDs and make recommendations to the township board to aid it in making its final decision is a fair implication of the statute.

Additionally, the ordinance is not invalid for failing to mention the township board's statutory duty to hold a public hearing. The Legislature is presumed to be aware of all existing statutes when enacting a new statute, *Craig v Detroit Pub Schools Chief Executive Officer*, 265 Mich App 572, 575; 697 NW2d 529 (2005), particularly laws on the same subject, *People v Ventura*, 262 Mich App 370, 376; 686 NW2d 748 (2004). Statutes that are *in pari materia* must be read together as one law and should be reconciled if possible even if they appear to conflict. *McNeil v Charlevoix Co*, 275 Mich App 686, 701; 741 NW2d 27 (2007); *Craig*, *supra* at 575. Here, the ordinance requires the planning commission, but not the township board, to hold a public hearing. The township board was required to hold a public hearing pursuant to MCL 125.286c(5), which it did in this case. Thus, we read this requirement into the ordinance. See, e.g., *Pletz v Secretary of State*, 125 Mich App 335, 365; 336 NW2d 789 (1983) (reading a search warrant requirement into the administrative inspection section of a lobbying act).

B. THE PROCEDURES EMPLOYED HERE

We now turn to the question whether the ZBA validly exercised the powers granted to it by the ordinance and by statute. MCL 125.290(1) provided that for "[PUD] decisions, an appeal may be taken to the board of

appeals only if provided for in the zoning ordinance." The ordinance does provide for an appeal to the ZBA. Section 22.07. The TZA also provided:

> The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal was taken . . . . [MCL 125.293.]

Section 22.10(G) of the ordinance tracks the language of the statute:

> The [ZBA] shall . . . reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination appealed from, and shall make such order, requirement, decision or determination as, in its opinion, ought to be made in the premise and to that end shall have all the powers of the Zoning Administrator, Township Board and Planning Commission from whom the appeal is taken.

We conclude that the ordinance validly grants the ZBA the right to hear the appeal in the manner required by statute and that the ZBA followed proper procedure in reviewing and affirming the township board's decision to deny the Charlen Acres proposal. For that reason, the Hugheses' argument and the circuit court's holding that the ZBA failed to follow proper procedure by not limiting itself to the record is incorrect.[4]

MCL 125.293 provided that the ZBA had "all the powers of the officer or body from whom the appeal was taken . . . ." The township board in this case had the power to review and obtain evidence not presented to the planning commission and the power to review

[4] Although the ZBA stated that it was limiting itself to the record, because of our resolution of this issue, we find it unnecessary to determine whether the ZBA actually did so.

approval of the PUD application. Thus, according to the TZA and Almena Township's ordinance, the ZBA had those same powers. The ZBA is not limited to the record of the administrative body whose decision it is reviewing. Only the circuit court's review of the ZBA's decision was limited to the evidence on the ZBA's record. MCL 125.293a(1) stated that the "decision of the board of appeals rendered pursuant to [MCL 125.293] shall be final" and "[u]pon appeal, the circuit court shall review the record and decision of the board of appeals to insure that the decision: . . . (c) [i]s supported by competent, material, and substantial evidence on the record." When the Legislature employed language stating that the administrative appellate body's fact-finding is final and subject to limited judicial review, it was making it clear that judicial review of the administrative appellate body's decision is to be of the findings of fact made by the administrative appellate body and not the findings of fact made by the administrative agency. See *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992).[5] The Legislature knows the difference between judicial and administrative appellate review. See *id.* at 267. If the Legislature wanted to limit the ZBA's review of a township board decision to the township board's record, it would have done so. *Id*.

C. DUE PROCESS

The Hugheses assert that their rights to due process were violated even if the ordinance is valid; therefore, the circuit court's order approving the PUD should be affirmed. We disagree.

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[5] *Holden* was implicitly overruled in *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997), but the Court subsequently expressly overruled *Goff* and reaffirmed *Holden*. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697; 614 NW2d 607 (2000).

The essentials of procedural due process are adequate notice, an opportunity to be heard, and a fair and impartial tribunal. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995); MCL 125.293a(1)(a) to (c). "Administrative procedures must provide the affected party an opportunity to explain its position and rebut adverse evidence." *Westland Convalescent Ctr v Blue Cross & Blue Shield of Michigan*, 414 Mich 247, 272; 324 NW2d 851 (1982) (opinion by FITZGERALD, J.). "The critical element provided by a judicial trial or an administrative hearing is the opportunity for a party to present arguments and evidence in support of its position before a decision is rendered, the chance to respond before final action is taken." *Id*. at 268.

During the township board's meeting and after receiving limited public comment, the board held a discussion. Trustee Flick stated he had "pulled the soil charts for this area, on-line, finding that none [of the soils were] condusive [sic] to drainage, and high water tables are in place." Immediately after the discussion, the board unanimously passed a motion denying the request for preliminary site plan approval. "The board did not allow open public comment" until after it had already denied the request. Therefore, there was no window of opportunity within which the Hugheses could have presented evidence specifically rebutting the soil maps and descriptions before the township board reached its decision. The Hugheses were also not afforded the opportunity to present evidence rebutting the soil maps and descriptions at the ZBA level. Although additional evidence could have been submitted to the ZBA before the ZBA made its decision, the ZBA stated that it was limiting itself to the record of the township board. Nevertheless, we conclude that the

Hugheses' were not denied their right to due process even if they lacked an opportunity to specifically rebut the soil evidence.

The parties were aware of the high water tables and drainage issues at the proposed development site, and there was other evidence of these problems besides the soil maps and descriptions. Because the Hugheses were on notice that high water tables were an issue, they could have addressed that concern during the public comment sessions before both the township board and the ZBA. They did not do so. Consequently, there was no denial of the Hugheses' right to present argument or evidence regarding the issue of high water tables.

Further, Almena Township afforded the Hugheses a fair and impartial tribunal. "[T]he right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Livonia v Dep't of Social Services*, 423 Mich 466, 508; 378 NW2d 402 (1985). Actual bias need not be shown "[i]f the situation is one in which 'experience teaches that the probability of actual bias on the part of a decisionmaker is too high to be constitutionally tolerable.' " *Id*. at 509, quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). For example, the following situations present that risk: (1) the decision maker has a pecuniary interest in the outcome; (2) the decision maker has been the target of personal abuse or criticism from the party before the decision maker; (3) the decision maker is enmeshed in other matters involving the petitioner, and (4) the decision maker might have prejudged the case because of prior participation as an accuser, investigator, fact-finder, or initial decision maker. See *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). The Hugheses do not allege any of these situations here. Instead, they argue that the

township board was partial because (1) notice of the township board's public hearing was sent out to 14 parcels and their property owners, whereas the notice of the planning commission's public hearing was only sent to 10 parcels and their property owners, and (2) the township board's meeting was advertised as a public hearing but was conducted as a regular meeting.

MCL 125.286c(5) provided that the "body or official charged in the ordinance with review and approval of [PUDs] shall hold at least 1 public hearing on the request." It further stated that "[n]otification of the public hearing shall be given in the same manner as required by section 16b(3) [MCL 125.286b(3)] for public hearings on special land uses." The referenced statute referred to "subsection (2)," which required notice be given "to the owners of property for which approval is being considered, to all persons to whom real property is assessed within 300 feet of the boundary of the property in question, and to the occupants of all structures within 300 feet." MCL 125.286b(2).

No evidence was ever adduced regarding why the number of parcels and property owners increased from 10 to 14 between the planning commission's public hearing and the township board's hearing. Any assumption regarding why the number of parcels and property owners increased would be pure speculation, and this Court's decision must be based only on established facts. *Michigan Aero Club v Shelley*, 283 Mich 401, 412; 278 NW 121 (1938); *Stockler v Dep't of Treasury*, 75 Mich App 640, 645; 255 NW2d 718 (1977). Further, the Hugheses offer no information or authority to support how a public hearing is to be conducted versus how a regular meeting is to be conducted. This Court will not search for authority to sustain or reject a party's position. *Spires v Bergman*, 276 Mich App 432, 444; 741

NW2d 523 (2007). The failure to cite sufficient authority results in the abandonment of an issue on appeal. *Id*. And the record fails to support the conclusion that the township board was biased or partial.

In addition, there is no support on the record to show that the township board prejudged the PUD application. Those serving as adjudicators are presumed to act with honesty and integrity in the absence of evidence showing that the circumstances pose "such a risk of actual bias or prejudgment that the practice must be forbidden . . . ." *Withrow*, *supra* at 47. We find no authority to support finding that the circumstances of this case constitute an intolerably high risk of bias. *Crampton*, *supra* at 351.

D. COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE

We conclude that the ZBA's decision was supported by competent, material, and substantial evidence on the record.[6] MCL 125.293a(1)(c). A court must defer to the administrative agency's findings of fact, *Great Lakes Society*, *supra* at 408, and, when there is substantial evidence, may not substitute its discretion for that of the administrative agency, *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). The court should not "set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994) (opinion by BOYLE, J.).

To enable review, the board of zoning appeals must specify the factual findings underlying its decision.

[6] *Great Lakes Society*, *supra* at 408. The circuit court did not reach this issue, basing its decision on other grounds. We address it because it presents a question of law and the facts necessary for its resolution have been presented. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 324; 651 NW2d 811 (2002).

Reenders, *supra* at 378-379. A local land use agency may properly consider relevant public comments as evidence. *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 407; 534 NW2d 143 (1995). If it were otherwise, the TZA's public hearing and notice requirements regarding a proposed PUD would be defeated. *A & B Enterprises v Madison Twp*, 197 Mich App 160, 164; 494 NW2d 761 (1992).

The ZBA found that Charlen Acres did not meet the definition of a PUD. The ordinance confers on the ZBA the authority to interpret its terms. Section 22.07; See, also, *Szluha v Avon Charter Twp*, 128 Mich App 402, 406-407; 340 NW2d 105 (1983), and MCL 125.290. The ordinance defines "planned unit development" as a "planned residential, commercial, industrial, public or semi-public land use development *consisting of two or more principal uses* located on a parcel of land . . . and approved by the Township after a site plan review . . . ." (Emphasis added.) The ZBA interpreted the ordinance to require two or more principal uses based on the ordinance's clear definition of a PUD. It is undisputed that the PUD site plan only contained one principal use, single-family residential. Given the ordinance's plain definition of a PUD, there was no authority by which the township board or the ZBA could approve the PUD.

The ordinance's standards for reviewing a PUD provide in § 14.08(G) that the mix of housing unit types and densities and the mix of residential and nonresidential areas have acceptable interrelationships. Dale Sweet, a farmer who owns the parcel east of the site, spoke in opposition to the development at the planning commission's public hearing because the development would adversely affect his farming and hunting land. Bob Gaudio, who owns the property north of the site, also expressed concern about hunting on his land being

affected by the development. The Department of Environmental Quality (DEQ) characterized the area of the site as "wooded wetlands . . . meaning that the water table at any given time is just below the surface or lower." The Almena Township master plan labels the area in which the site is located as "an extensive river and creek wetland and floodplain network." On the basis of ample evidence in the record, the ZBA concluded that the interrelationships between the proposed PUD and adjacent uses and between the proposed PUD and the site's environment were unacceptable.

The ZBA also concluded that the area should not be developed. Section 14.10 of the ordinance states that the township board shall have the authority to deny or table an application for approval of a PUD site plan if the PUD site plan will result in premature development of the area involved. The ZBA found that the PUD site satisfied the definition of an environmentally sensitive area under the ordinance on the basis of site designations set forth in the township's master plan maps, soil maps, and soil descriptions. The maps within the master plan showed that the PUD was in an area "in the lowest area of this very wet township," which area cuts through and is a part of one of the township's main waterways, and the property is part of the extensive river and creek wetland and flood plain network. Soil maps and soil descriptions posted on the county website supported the ZBA's finding that the site is poorly suited to septic tank absorption fields and sewage lagoons. The fact that the DEQ characterized the area as "wooded wetlands," meaning that the water table was at any given time just below the surface or lower, and the comments made by property owners who own land adjacent to the proposed development site that their sump pumps run constantly, further supported the ZBA's determination that the site should not be

developed. Public comment before the township board also supported this finding. Thus, the ZBA's determination that the area should not be developed was supported by competent, material, and substantial evidence on the record.

The ZBA additionally found that Charlen Acres was inconsistent with the township's master plan. Section 14.08(A) requires the proposed PUD to conform to the township master plan. The ZBA noted that the future land use map within the master plan labels this proposed development site as "very low density"—as opposed to medium and low density. The ZBA also noted that the land use policy in the master plan defines "low density as 10-20 units per 40 acres." Thus, "very low density" consists of 9 or fewer units per 40 acres (1 unit for about every 4.44 acres). The proposed development would contain 24 units on 27.62 acres (1 unit for about every 1.15 acres). Therefore, Charlen Acres was almost four times denser than the density contemplated in a "low density area." This fact also supported the ZBA's finding that the proposed development was inconsistent with the master plan.

The soil maps and soil descriptions, the public comments by township residents stating that the area is very low and that their sump pumps run constantly, and the township's master plan constituted substantial evidence supporting the ZBA's findings that the site's environment and its soils were not suitable for the proposed PUD.

E. TRUSTEE FLICK

On appeal, Almena Township argues that the circuit court erred in ruling that Trustee Flick's appearances constituted duress. The Hugheses argue that the circuit court did not hold that Flick's conduct constituted

duress as a matter of law, but rather concluded that Flick's conduct was a procedural defect that, when considered with all the other procedural defects in this case, denied the Hugheses their right to due process. During oral argument before the circuit court, however, the Hugheses argued that Flick's appearances constituted duress. While the circuit court's ruling on this issue was vague, the court's comments that Trustee Flick's appearance before the planning commission and the ZBA "renders the appearance of improper pressure being placed on board members whose tenure may be at the hands of that elect [sic, elected] official" embodies the concept of duress in the context of land use planning decisions.

Duress occurs in the land use, administrative context when the decision maker is improperly pressured to serve an interest other than that of " 'the voters, taxpayers, members of the general public, justice, and due process.' " *Abrahamson v Wendell (On Rehearing)*, 76 Mich App 278, 281; 256 NW2d 613 (1977), quoting *Barkey v Nick*, 11 Mich App 381, 385; 161 NW2d 445 (1968). To determine whether there was duress, " 'the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official.' " *Dep't of Transportation v Kochville Twp*, 261 Mich App 399, 404; 682 NW2d 553 (2004), quoting *Aldom v Borough of Roseland*, 42 NJ Super 495, 502; 127 A2d 190 (1956). In *Kochville Twp*, the township supervisor, while the ZBA was considering several variance requests regarding setbacks of signs and buildings, expressed his view that the variances should not be granted because they would increase the nonconformities legally existing. *Kochville Twp*, *supra* at 401. The supervisor also stated that if the ZBA granted the

variances, those variances would remain with the property forever, so subsequent owners could continue the nonconformities. *Id*. This Court held that even though the township supervisor was a member of the township board that had powers of appointment over the ZBA, his appearances did not constitute duress because he did not have a personal, pecuniary interest in the outcome of the proceedings. *Id*. at 404-405. In the instant case, there was no evidence that Trustee Flick had any personal, pecuniary interest in the outcome of the proceedings. By raising, at the meeting before the planning commission, the necessity to buffer current residents and by explaining that "one of the biggest reasons for denial by the township board of this PUD, in [Flick's] opinion, is the water run-off of the road which would drain back to the pond and adjoining neighbors properties," Flick was representing the interests of the township and its residents in seeking compliance with the zoning ordinance. See §§ 14.08(D) and (G) to (I), 17.01, 17.04, 17.07. Trustee Flick "did not encourage the [ZBA] members to serve an interest other than that which they were bound to serve." *Kochville Twp*, *supra* at 405.

Moreover, the circuit court erred by relying on *Pollard v Berrien Circuit Judge*, 42 Mich App 308; 201 NW2d 646 (1972), and *Wayne Co Prosecutor v Recorder's Court Judge*, 66 Mich App 315; 239 NW2d 185 (1975), to conclude that Trustee Flick's appearances were improper. These cases are inapposite. Flick did not initiate a cause of action or an appeal, nor was he challenging the decision of an entity with jurisdiction superior to that of the township board. Instead, he merely expressed why he did not believe the proposed PUD complied with the requirements of the zoning ordinance. Flick's appearances did not inject bias into the planning commission's recommendations or the

ZBA's decisions regarding the PUD, and the circuit court erred by ruling that the appearances constituted improper procedure or duress.

F. ESTOPPEL

Finally, we hold that the circuit court erred by ruling that Almena Township was estopped from arguing that Charlen Acres did not meet the ordinance's definition of a PUD. An equitable estoppel arises where (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575; 425 NW2d 180 (1988). Zoning authorities will not be estopped from enforcing their ordinances absent exceptional circumstances. *Id*. Casual private advice or assurance of success from township officials does not constitute exceptional circumstances. *Id*. at 576. Further, everyone dealing with a municipality and its agents is charged with knowledge of the restrictive provisions of lawfully adopted ordinances. *Fass v Highland Park*, 326 Mich 19, 30-31; 39 NW2d 336 (1949).

The Almena Township Zoning Ordinance defines a PUD as consisting of two or more principal uses and provides that the township board must approve a PUD application and site plan. The Hugheses, therefore, could not justifiably rely on any representations from the zoning administrator or the planning commission. The planning commission could only recommend the township board approve or deny the PUD. The township board denied the proposal, as it had the authority to do. Even assuming arguendo that the Hugheses justifiably relied on the planning commission's recom-

mendation of approval, the record does not demonstrate that there were exceptional circumstances, such as receiving a permit and making significant expenditures in reliance on it, warranting the application of equitable estoppel. See *Pittsfield Twp v Malcolm*, 375 Mich 135, 147-148; 134 NW2d 166 (1965). The elements of equitable estoppel or exceptional circumstances are not present, and the circuit court erred in estopping the township from asserting that the ordinance's definition of a PUD required it to deny the PUD site plan.

IV. CONCLUSION

Because we vacate the circuit court's opinion for the reasons stated above and reinstate the ZBA's decision, we need not address Almena Township's arguments that the circuit court lacked authority to enter an order deeming petitioners' preliminary site plan as approved. For the same reason, we decline to address whether the circuit court's failure to require the parties to file briefs resulted in error requiring reversal.

We vacate the circuit court's order and remand for entry of an order affirming the decision of the ZBA. We do not retain jurisdiction. As the prevailing party, respondent-appellant may tax costs pursuant to MCR 7.219.

MARQUETTE GENERAL HOSPITAL, INC v CHOSA

Docket No. 285697. Submitted May 12, 2009, at Marquette. Decided May 26, 2009, at 9:05 a.m.

Marquette General Hospital, Inc., brought an action in the Baraga Circuit Court against Bryan K. Chosa and Baraga County, seeking payment for in-patient medical services provided at Marquette General Hospital to Chosa at a time when he was a Baraga County Jail inmate. The court, Garfield W. Hood, J., granted summary disposition for the defendants, ruling that the plaintiff had failed to meet the requirements of MCL 801.4 when seeking payment from the county. The plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 801.4(1), all charges and expenses of safekeeping and maintaining county jail inmates charged with an offense are to be paid from the county treasury. MCL 801.4(2) requires a provider of health care to a county jail inmate to make a reasonable effort to determine whether the inmate is covered by a health care policy, certificate of insurance, or other source of payment for medical expenses. If the health care provider determines that the inmate is a Medicaid recipient or a beneficiary of any health care policy, certificate of insurance, or other source of payment, the health care provider must first seek reimbursement from that source before submitting a bill to the county. When submitting an invoice to a county for the payment of medical expenses, a health care provider must also submit a statement that the provider has made a reasonable effort to determine whether the inmate was covered by a health care policy, certificate of insurance, or other source of payment for medical expenses.

2. In this case, the plaintiff failed to meet the statutory requirement of submitting a statement that it had made a reasonable effort to secure payment from third parties such as Medicaid and the Indian Health Service before submitting a bill to Baraga County. Nevertheless, the record evidence indicates that the plaintiff attempted to collect from those third parties, and MCL 801.4 does not provide a sanction for the plaintiff's noncompliance with the statement requirement. Accordingly, dismissal of the action with prejudice was improper and contrary to the longstand-

ing public policy of placing ultimate responsibility for the cost of maintaining jail inmates on the county.

Affirmed in part, reversed in part, and remanded.

COUNTIES — JAILS — PROVIDERS OF HEALTH CARE TO JAIL INMATES — COUNTY REIMBURSEMENT FOR JAIL INMATES' HEALTH CARE.

A provider of health care to a county jail inmate, when billing a county for the cost of such care, is required by a statute to provide a statement that the provider has made a reasonable effort to determine whether the inmate was covered by a health care policy, certificate of insurance, or other source of payment; the statute, however, provides no sanction for noncompliance (MCL 801.4[2]).

Randolph B. Osstyn for Marquette General Hospital, Inc.

Joseph P. O'Leary, Prosecuting Attorney, for Baraga County.

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

DAVIS, J. Plaintiff, Marquette General Hospital, Inc. (the Hospital), appeals as of right the Baraga Circuit Court's order granting summary disposition in favor of defendants. At issue is defendant Baraga County's liability for the cost of medical services provided by the Hospital to defendant Bryan Keith Chosa, who was an inmate at the Baraga County Jail at the time. Although the general legal principles involved were well-established by statute in the earliest days of Michigan's statehood, this case presents an issue of first impression regarding a procedural requirement added to the statute by the Legislature in 2006. We reverse and remand.

The general facts in this case are simple and undisputed. On July 15, 2006, Chosa was admitted at the Hospital for in-patient medical services. The record does not specify precisely what those services were. But from reading the medical billing summary, several cop-

ies of which are found in the lower court record, it is clear that the services related to cardiac problems. Furthermore, his admission was apparently an emergency, and counsel for Baraga County would later tell the trial court that "we actually [had] to modify a bond at one point to get [Chosa] out of jail because of precisely the type of issues that brought us here." Chosa was, in any event, discharged on July 19, 2006, and was returned to the Baraga County Jail.

The medical bill for Chosa's care came to $31,305.42, and an account for that sum was stated between the parties. Miki Wipfli, the Hospital's business office manager stated in an affidavit that the only medical coverage that it was aware of at the time was "ABW Medicaid or Adult Medical Program," which only covered outpatient services and therefore would not apply to Chosa's in-patient services. He further stated that, after verifying the accuracy of that belief, the Hospital informed the Baraga Department of Human Services on August 7, 2006, that Chosa was not eligible for Medicaid. On August 16, 2006, the Hospital sent a bill to the Baraga County Jail.

According to a copy of an Application Eligibility Notice from the Michigan Family Independence Agency, Chosa applied for state assistance—specifically, disability and Medicaid—on August 23, 2006. On September 26, 2006, Baraga Undersheriff Bob Teddy wrote a letter to the Hospital stating his assumption that the Hospital had already explored Medicaid eligibility and advising the Hospital for the first time that Chosa was a member of the Keweenaw Bay Indian Community and possibly eligible for medical services through the Indian Health Service. Teddy also wrote that "MCL 801.4 mandates that you explore this source of payment as well as any other possible sources of payment before resubmitting

you [sic] invoice to my Office." Wipfli stated in his affidavit that the Hospital did not receive Teddy's letter until October 23, 2006.[1] He further stated that this was the first time the Hospital was made aware that Chosa might be eligible for Indian health care.

Wipfli stated that the Hospital "accordingly" billed the Keweenaw Bay Indian Community's Health Association on October 4, 2006.[2] On January 29, 2007, the Keweenaw Bay Indian Tribal Health Fund sent a letter to the Hospital denying payment because "[a]pproval was not obtained from an IHS authorizing official within 72 hours following receipt of this EMERGENCY SERVICE." In the meantime, on November 8, 2006, the Family Independence Agency denied disability and Medicaid to Chosa because he was "not disabled per MRT." (The record does not disclose what the acronym stands for.) Wipfli's affidavit states that various individuals employed by Baraga County were apprised of the ongoing attempts to obtain payment for Chosa. Those communications appear to be the only items of material fact in dispute, although given that those communications were apparently only verbal, it is additionally disputed whether they are even relevant under the applicable statute.

The instant suit was commenced on January 18, 2008, in the general posture of bill collection. Baraga

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[1] This date is almost certainly a typographical error. The copy of Undersheriff Teddy's letter that is included in the record, although a poor copy, appears to have been stamped as "received" on October 3 of an unreadable year, presumably 2006.

[2] We note the contradiction in Wipfli's statement that the Hospital sent a bill on October 4, 2006, based on a communication received on October 23, 2006. Baraga County contends that Wipfli's affidavit is, at best, so poorly drafted that it should be disregarded. However, we consider the evidence in the record before us, and as to this particular incongruity, see note 1.

County admitted that the medical services were rendered, that an account stated for $31,305.42 existed between the parties, and that, as a *general* statutory matter, defendant Baraga County is responsible for the payment of that money for Chosa's medical services. MCL 801.4(1). Baraga County contends, however, that the Hospital failed to comply with certain statutory prerequisites to payment.

Under MCL 801.4(1), with some listed exceptions, "all charges and expenses of safekeeping and maintaining prisoners and persons charged with an offense[ ] shall be paid from the county treasury, the accounts therefor being first settled and allowed by the county board of commissioners." The substance of MCL 801.4(1) has *literally always* been "on the books" in Michigan, a substantially identical provision being found in the 1838 Rev Stat, part 4, tit 2, ch 10, § 3; later found in the 1846 Rev Stat, ch 171, § 4. Other than the more recent insertion by the Legislature of the mentioned exceptions, counsel for Baraga County accurately conceded that, traditionally, "it's always been done this way."

The exceptions to MCL 801.4(1) are at issue in this case. 2006 PA 20 added subsection 2, which became effective on February 9, 2006—approximately five months before the medical services were rendered in this case. Specifically, MCL 801.4(2) provides:

> If medical care or treatment is provided to an individual described in subsection (1), the health care provider shall make a reasonable effort to determine whether that individual is covered by a health care policy, a certificate of insurance, or other source for the payment of medical expenses. If the county sheriff who has custody over the individual is aware that the individual is covered by any health care policy, certificate of insurance, or other source of payment, the sheriff shall provide that information to

> the health care provider. If the health care provider determines that the individual, at the time of admission or treatment, is a medicaid recipient or a beneficiary of any health care policy, certificate of insurance, or other source for the payment of some or all of those expenses, the health care provider shall first seek reimbursement from that source, subject to the terms and conditions of the applicable health care policy, certificate of insurance, or medicaid contract, before submitting those expenses to the county. When submitting an invoice to the county for the payment of medical expenses under this section, a health care provider shall provide a statement that the health care provider has made a reasonable effort to determine whether the individual was covered by a health care policy, certificate of insurance, or other source for the payment of medical expenses. A county may enter into agreements with health care providers to establish procedures for the submission of invoices for medical expenses under this section and the payment of those invoices.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). This Court likewise reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003), amended on other grounds 468 Mich 1216 (2003).

In summary, the facts in this case show that: (1) the Hospital attempted to obtain payments for Chosa's medical care from a variety of third-party sources, including Medicaid, before billing Baraga County; (2) Baraga County was aware that Indian health care might be available but did not inform the Hospital of this until at least 69 days after Chosa's treatment; and (3) the only "statement" or "statements" made by the Hospital to Baraga County regarding the efforts it undertook to acquire third-party payment were verbal.

Baraga County contends, and the trial court agreed, that the Hospital failed to comply with the requirements of MCL 801.4(2) by failing to make reasonable efforts to locate and seek payments from third parties and by failing to submit with its invoice the requisite statement detailing those efforts. We disagree.

Baraga County contends that the Hospital did not make reasonable efforts to secure alternative payment almost entirely because the Hospital did not seek payment from the Keweenaw Bay Indian Community. Baraga County contends that the Hospital should have known about the possibility of Indian health care for Chosa, but it provides no evidence in support of this assertion beyond the somewhat bizarre request for this Court to "take judicial notice of the fact that Plaintiff-appellant routinely bills the Keweenaw Bay Indian Community (KBIC) for reimbursement for medical services provided to tribal members." Baraga County apparently bases its assertion on the additional contention that "while it may not be politically correct to say so[,] it is objectively true that Mr. Chosa's appearance in no way disguises his Native American heritage." The Hospital, more reasonably, points out that Baraga County is effectively urging this Court to adopt a policy of acting on assumptions based on physical appearance. In any event, the record evidence shows that Baraga County was aware of Chosa's heritage and that Baraga County informed the Hospital of this in a letter dated September 26, 2006. The record contains no evidence whatsoever that the Hospital knew or should have known anything about Chosa's heritage earlier than that date.

In contrast, the evidence shows that Baraga County *was* aware of a possible source of payment based on Chosa's heritage. We note that MCL 801.4(2) places an

affirmative obligation on the county sheriff to inform the health care provider if the county sheriff is aware of any possible source of payment—which apparently did not take place until Undersheriff Teddy's letter. In short, if the untimely disclosure of Chosa's heritage and the lost opportunity for Indian health care coverage could be asserted as a violation of MCL 801.4(2), which could excuse payment, the evidence in the record shows only that Baraga County violated a duty thereunder, not the Hospital.[3] It appears that the Hospital did undertake reasonable efforts to secure third party payment from known possible sources before billing Baraga County.

The evidence does show that the Hospital did not provide a statement that the health care provider has made a reasonable effort when it submitted an invoice to the county for the payment of medical expenses. We agree with the Hospital's observation that nothing in MCL 801.4(2) *explicitly* states that the "statement" must be in writing. However, the statutory requirement that the statement be provided with the invoice, and reasonable business practice, leads to only one rational conclusion: that the statement must be in the same format and effectively in the same "package" as the invoice. Because it borders on being inconceivable that the invoice would *not* be in writing, the statement must also be in writing. Therefore, unless the parties avail themselves of the option of arranging an alternative billing procedure, we conclude that the statement of efforts by the medical provider must be documented and included with the invoice. A mere verbal statement, unless the invoice is the same, is insufficient.

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[3] There is some suggestion that not even the sheriff knew about Chosa's heritage until the time of the letter, in which case Baraga County might not have violated its obligations under the statute, but the assertion that the Hospital should have known would be even less reasonable.

Finally, while we concede the trial court's conclusion that the Hospital did not satisfy the statutory prerequisites of a written "statement" in support of its invoice for payment, we disagree with the trial court's resolution of the case. The statute does not provide a sanction for noncompliance. The Legislature's purpose in amending the statute was to clearly place responsibility on medical providers to seek alternative sources of payment and to assure the county that such efforts have been undertaken; it was not to provide a technicality by which the county may evade payment for legitimate medical services rendered if an alternative source of payment does not exist. The only implied consequence of noncompliance, therefore, is that Baraga County is not yet obligated to pay the bill for Chosa's medical care. We have not been advised of any time limitation within which the Hospital must file the required statement. In fact Undersheriff Teddy's letter explicitly invited the Hospital to resubmit its invoice. We conclude that dismissal with prejudice was improper and contrary to the longstanding and still important public policy of placing ultimate responsibility for the cost of maintaining persons in county custody on the county. The Hospital may yet fulfill the requirements of MCL 801.4(2) by resubmitting an invoice with the proper statement.

We affirm the trial court's finding that the Hospital failed to comply with MCL 801.4(2) on the limited basis of the Hospital's failure to provide a written statement with its invoice. We reverse the trial court's grant of summary disposition with prejudice, and we remand for proceedings consistent with this opinion as the trial court may deem appropriate and necessary. We do not retain jurisdiction. No costs, a public question being involved.

PEOPLE v DUPREE

Docket No. 281408. Submitted March 3, 2009, at Detroit. Decided May 28, 2009, at 9:00 a.m.

A Wayne Circuit Court jury convicted Robert M. Dupree of being a felon in possession of a firearm (felon-in-possession). The defendant's counsel argued at trial that the defendant could not be convicted of felon-in-possession because he only possessed the firearm temporarily in order to defend himself in a life-threatening situation during an altercation and shooting at a party. The defendant's counsel did not request a specific instruction concerning temporary possession, but sought only the standard self-defense instruction. The court, Brian R. Sullivan, J., gave an instruction on its own initiative. Following objections and arguments, the court finally instructed the jury that it could not find the defendant guilty if it concluded that (1) the defendant had the gun because he took it from someone else who was in wrongful possession or that the defendant took the gun because of necessity, (2) the possession was brief, and (3) the defendant intended to deliver the gun to the police at the earliest possible time. The defendant's counsel objected, arguing that while the jury could consider momentary innocent possession as a defense to felon-in-possession, it could also consider possession for self-defense as a separate defense, which did not require an intent to deliver the gun to the police. Following the conviction, the defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. The common-law defense of duress is available to a defendant charged with being a felon in possession of a firearm.

2. The elements of the defense are those set forth in *People v Lemons*, 454 Mich 234, 247 (1997). They require a defendant to offer evidence from which a jury could conclude (1) that there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct caused that fear in the defendant's mind, (3) the fear or duress operated on the defendant's mind at the time of the defendant's act, and (4) the defendant committed the act to avoid the threatened harm. A defendant who is otherwise prohibited

from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another person from death or serious physical harm. The threatening conduct must be present, imminent, and pending. The threat must have arisen without the negligence or fault of the defendant. The defendant's unlawful possession must end when the need for protection ends.

3. The defendant offered sufficient evidence to support the defense.

4. The error in the jury instruction was not harmless. By giving the instruction, the trial court effectively directed a verdict of guilty on the felon-in-possession charge. The defendant is entitled to a new trial.

Reversed and remanded for a new trial.

M. J. KELLY, J., would further hold that the defendant's counsel did not waive his earlier claim of instructional error. Judge KELLY would also hold that self-defense is a common-law defense applicable to a charge of felon-in-possession and that the distinction between the defenses of duress and self-defense is largely immaterial in felon-in-possession cases, those defenses having merged into a defense of justification. In addition to satisfying the *Lemons* elements, a defendant asserting a duress defense to a felon-in-possession charge may only possess the firearm unlawfully as a last resort when he or she has no reasonable legal alternative to violating the law in order to avoid the threatened harm.

GLEICHER, J., concurring, would further hold that the trial court's addition of an unnecessary requirement in its instruction impermissibly shifted the burden of proof to the defendant and implicated the defendant's due process rights. The incorrect instruction therefore qualified as preserved constitutional error and was not harmless beyond a reasonable doubt.

MURRAY, P.J., dissenting, agreed that the trial court erred by giving an instruction on temporary innocent possession as a defense—a defense that is no longer recognized in Michigan—but would conclude that the error was harmless. The defendant did not request any instruction on justification, self-defense, or duress. Thus, the defendant waived any argument concerning a justification defense. Moreover, even if these defenses were recognized as applying in felon-in-possession cases, the facts presented by the defendant did not support an instruction for any of those defenses. Because the facts do not support the defense, justification as a defense to felon-in-possession should not be adopted as a new rule in this case.

CRIMINAL LAW — DEFENSES — DURESS — FELON IN POSSESSION OF A FIREARM.

The common-law defense of duress is available to a defendant charged with being a felon in possession of a firearm; the defense requires the defendant to offer evidence from which a jury could conclude (1) that there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct caused that fear in the defendant's mind, (3) the fear or duress operated on the defendant's mind at the time of the defendant's act, and (4) the defendant committed the act to avoid the threatened harm; a defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another person from death or serious physical harm; the threatening conduct must be present, imminent, and pending, and the threat must have arisen without the negligence or fault of the defendant; the defendant's unlawful possession of the firearm must end when the need for protection ends.

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 *Joseph A. Puleo*, Assistant Prosecuting Attorney, for the people.

Ernst Law Firm, PLC (by *Kevin Ernst*), for the defendant.

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

M. J. KELLY, J. Defendant Roberto M. Dupree appeals by delayed leave granted his jury conviction of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction (felon-in-possession), MCL 750.224f. The trial court sentenced Dupree as a fourth-offense habitual offender, MCL 769.12, to serve 48 months to 30 years in prison. On appeal, Dupree argues that the trial court improperly instructed the jury on his theory that he could not be convicted of being

a felon-in-possession if he only temporarily took possession of the firearm at issue in order to defend himself during a life-threatening altercation. In order to resolve this issue, we must first determine whether temporary possession of a firearm for self-defense during a life-threatening altercation constitutes an affirmative defense to being a felon-in-possession under Michigan law. We must then determine whether that defense applied in this case and whether the trial court properly instructed the jury on that defense. We conclude that there is such a defense under Michigan law, that it applied to the facts of this case, and that the trial court improperly instructed the jury on this defense. Further, because we conclude that the instructional error was not harmless, we reverse Dupree's conviction of being a felon-in-possession and remand for a new trial on this charge.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE FIGHT AND SHOOTING

Dupree's conviction arises out of a fight and shooting at a party in September 2005. On the day in question, Dupree and a female companion went to the home of Dupree's sister-in-law, Adrian Dupree, to celebrate the birthday of Dupree's brother. Adrian's niece, Ashley Horton, and Horton's boyfriend, Damond Reeves, also attended the party. The party lasted several hours and primarily took place in the backyard. After it started to become dark, the party began to wind down and the remaining guests prepared to leave. At around this time, Dupree had an altercation with Reeves in the front of the home.

At trial, Reeves testified that he was preparing to leave the party when he asked Adrian to go inside and

get Horton. According to Reeves, Dupree was looking at him and then called him a name and pushed him for no reason. Reeves testified that he and Dupree "tussled" for a time in the front yard, but Dupree eventually broke away from him, went into the house, and came out with a .38 caliber revolver. Reeves stated that Dupree then shot him three times.

Horton testified that she was in the house when she heard that Dupree and Reeves were fighting. Horton stated that she went out onto the porch and saw them fighting, but let them fight awhile. Horton said that she eventually tried to break up the fight, but Dupree pulled a gun and struck her in the face with it. Although the sequence of events was not entirely clear, Horton testified that she went into and out of the house on at least two occasions and that she called the police twice. Horton further testified that, at some point, Dupree came into the house, put the gun to her chin, and pulled the trigger. She stated that the gun did not fire—"it just clicked."

Dupree and his witnesses disputed the version of events proffered by Horton and Reeves. Fallon Dupree testified that she was Dupree's niece and that she attended the party with her boyfriend, Brandon Monroe. Fallon stated that Horton and Reeves were very drunk and that they had been fighting throughout the party. At some point shortly before the fight, Horton went into Adrian's house and Reeves tried to follow her. Fallon said that after Reeves came onto the porch, Adrian was in the way and Reeves pushed her off the porch. Dupree then stepped in front of Reeves and told him that he could not show such disrespect to his sister-in-law and asked him to leave. In response, Reeves pushed Dupree and, after Dupree grabbed Reeves's shirt, both men fell off the porch. Fallon

testified that when Dupree grabbed Reeves's shirt, the shirt bunched up and she could see a gun tucked into Reeves's waist. After she saw the gun, Fallon and Monroe decided to leave. Fallon stated that, as she was leaving, she heard a gunshot.

Monroe's testimony at trial largely followed that of Fallon. Monroe stated that he too saw the gun on Reeves as Reeves and Dupree fell off the porch. Monroe also testified that he and Fallon decided to leave when they saw the gun.

Dupree testified that, as the party was winding down, he was on the front porch with Adrian. He stated that Horton and Reeves had had some "issue" between them throughout the party and that around the time of the altercation Horton came onto the porch. Dupree said that Adrian told Horton to go inside and Horton did. At that point, Reeves came onto the porch and tried to force his way into the house after Horton. When Adrian got in the way, Reeves pushed her off the porch. Dupree testified that he intervened and Reeves pushed him. As he lost his balance, Dupree grabbed Reeves and both men fell off the porch. Dupree said that when he grabbed Reeves, Reeves's shirt came up and he saw a gun tucked into his waist.

Dupree said that he was immediately afraid because Reeves was a very large man—6 feet 5 inches and about 300 pounds—and armed. Dupree said Reeves went for the gun and that he also tried to grab it. Dupree stated that he continued to struggle with Reeves over the gun when it went off. As the struggle moved toward the street, Dupree said the gun went off two more times. Dupree said he told Reeves to "just stop" and to "let go" when Reeves said "I'm hit" several times. Reeves then wandered over to a neighboring house. Dupree testified that he then walked back to the porch and asked Adrian

to look and see if he (Dupree) had been hit. Dupree stated that his female companion came out and said "let's go" and he went with her. Dupree said that as they drove off, his companion told him to get rid of the gun, and he threw it out the window. Dupree denied hitting Horton and denied putting the gun to her head.

B. THE DEFENSE AND THE JURY INSTRUCTIONS

On the basis of these events, the prosecution charged Dupree with five felonies: assault with the intent to murder Reeves, see MCL 750.83, assault with the intent to murder Horton, felon-in-possession, felonious assault against Horton, see MCL 750.82, and carrying or possessing a firearm during the commission of a felony (felony-firearm), see MCL 750.227b. Dupree's trial counsel defended against these charges by arguing that Dupree did not assault Horton in any way and that his actions against Reeves were justified as self-defense. With regard to the felon-in-possession charge, Dupree's trial counsel argued that Dupree's temporary possession was justified under the circumstances.

Although Dupree's trial counsel argued that Dupree's temporary possession could not support a conviction for felon-in-possession under the facts of the case, he did not request a specific instruction to that effect. Instead, Dupree's trial counsel only requested a standard self-defense instruction. Nevertheless, the trial court on its own initiative instructed the jury that it could find Dupree not guilty of being a felon-in-possession if it concluded that he had possessed the gun under certain limited circumstances:

> As to being a felon in possession, [Dupree] claims that the gun was produced in a struggle. And of course, if that's the case that the gun was produced during the course of a struggle and you find that it happened that way, that would

> be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself.

After the jury left, Dupree's trial counsel objected to this instruction. Specifically, Dupree's trial counsel objected to that part of the instruction indicating that temporary possession for self-defense was a defense as long as Dupree did not keep the gun "any longer than necessary to defend himself." Dupree's counsel would rather have had the instruction state that it was a defense as long as Dupree had not kept the gun "any longer than necessary." Following this objection, the trial court asked Dupree's counsel to research the matter and present his authorities on the next trial date.

On the next trial date, Dupree's trial counsel stated that he had not found any authorities that indicated that the trial court's instruction was incorrect. However, the prosecutor suggested that the trial court should further instruct the jury regarding the felon-in-possession charge using an instruction on momentary innocent possession from a case then before our Supreme Court. The trial court agreed.

After the jury was brought in, the trial court instructed it concerning momentary innocent possession as a defense to the charge of being a felon-in-possession. The trial court indicated that the elements of this defense were

> that the defendant had the gun because he had taken it from someone else who was in wrongful possession of it, or he took it from him because of necessity, because he needed to. Second, that the possession after taking the gun was brief. And third, that it was the defendant's intention to deliver the gun to the police at the earliest possible time.

The trial court clarified that this instruction replaced the previous instruction. Dupree's trial counsel ob-

jected to this instruction as well. He stated that, although the jury could consider momentary innocent possession as a defense, it could also consider possession for self-defense as a separate defense, which did not require an intent to deliver the gun to the police.

After deliberating, the jury found Dupree not guilty on the charge of assaulting Reeves with the intent to murder him, not guilty on the charge of assaulting Horton with the intent to murder her, not guilty of feloniously assaulting Horton, and not guilty of felony-firearm. However, the jury found Dupree guilty on the charge of being a felon-in-possession.

This appeal followed.

II. INSTRUCTIONAL ERROR ON DUPREE'S AFFIRMATIVE DEFENSES TO BEING A FELON-IN-POSSESSION

A. STANDARDS OF REVIEW

This Court reviews de novo claims of instructional error. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). Likewise, this Court reviews de novo questions of law such as the proper interpretation of criminal statutes in the context of traditional common-law principles. See *People v Tombs*, 472 Mich 446, 451-459; 697 NW2d 494 (2005).

B. WAIVER

As a preliminary matter, I believe we must first address the prosecution's argument that this Court is without authority to review Dupree's claim of instructional error because Dupree's trial counsel extinguished any error when he waived Dupree's right to have the jury properly instructed. The prosecution notes that after the trial court instructed the jury on the revised defense of innocent misconduct, the trial court asked

defendant's trial counsel if he had anything further to add, to which he responded, "No, your honor." On appeal, the prosecution argues that this response constituted a waiver of Dupree's claim of error. I do not agree that this statement constituted an intentional relinquishment of Dupree's right to have the jury properly instructed on his defense theory. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In contrast to the prosecution's claim that Dupree's trial counsel took "varying stances" on the instructional issue, I conclude that Dupree's trial counsel was both consistent and persistent in his objections. Dupree's trial counsel did not request a particular instruction regarding defenses to being a felon-in-possession. Instead, he appeared to believe that the standard self-defense instruction was sufficient and actually argued to the jury that Dupree could not be convicted of being a felon-in-possession if he took the gun in self-defense. The trial court did not agree that the standard self-defense instruction was adequate; the trial court expressed its belief that, absent a more specific instruction, the jury would have to find Dupree guilty of being a felon-in-possession. For that reason, the trial court instructed the jury that, if it found that Dupree took the gun in the fight and only possessed it as long as necessary to defend himself, the jury should find Dupree not guilty of being a felon-in-possession. Dupree's trial counsel objected to this instruction on the ground that the trial court should have limited the instruction to "as long as necessary" rather than including the modifying phrase "to defend himself." In response to this objection, the trial court instructed Dupree's counsel to research the matter and present his authorities on the next trial date.

On the next trial date, Dupree's counsel indicated that he had not found any authorities that contradicted

the trial court's earlier instruction. At this point, the prosecutor asked the trial court to reinstruct the jury on Dupree's affirmative defense. Specifically, the prosecutor asked the trial court to modify the instruction to include elements applicable to the defense of momentary innocent possession, including the requirement that the defendant have the intent to turn the gun over to the police. Dupree's trial counsel again objected. He noted that, although the jury might properly consider this, the law did not actually include a duty to turn the firearm over to the police. This objection was entirely consistent with the theory of Dupree's trial counsel that possession while necessary to ensure one's safety is an affirmative defense to being a felon-in-possession. Despite this objection, the trial court asserted that the law required this instruction, explained its reasoning, and then gave the jury the new instruction over the objection. It was only after this that the trial court asked Dupree's trial counsel whether he had anything further. Taken in context, Dupree's trial counsel's response is nothing more than an assertion that he had no *further* objections. Consequently, Dupree's trial counsel did not waive his earlier claims of instructional error.

C. AFFIRMATIVE DEFENSES TO BEING A FELON-IN-POSSESSION

1. DURESS AND SELF-DEFENSE

An affirmative defense is not a defense that is directed at an element of the crime; rather it is one " 'that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it . . . .' " *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997), quoting 21 Am Jur 2d, Criminal Law, § 183, p 338; see also *People v Pegenau*, 447 Mich 278, 319; 523 NW2d 325 (1994) (opinion by BOYLE, J.) (noting that "an affirmative defense in effect concedes the facial criminality of the

conduct and presents a claim of justification or excuse"). Michigan has long recognized the existence of two common-law affirmative defenses that are relevant to the facts of this case: duress and self-defense. See *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975) (noting that duress is a "well recognized defense"), citing *People v Repke*, 103 Mich 459; 61 NW 861 (1895); *People v Coughlin*, 65 Mich 704, 705; 32 NW 905 (1887) (examining the burden of proof when a defendant claims that a killing was justified by self-defense).

The defense of duress involves a situation in which the defendant acted under threat of death or serious bodily harm. See *Luther*, 394 Mich at 622 (noting that the defendant allegedly escaped from prison out of fear of homosexual rape). In such cases, the defense "excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act . . . ." *Id.* It is sometimes characterized as a choice of evils and is applicable to situations in which it is preferable, as a matter of social policy, to permit a person to commit a crime in order to avoid a greater harm. *Lemons*, 454 Mich at 246. In order to establish duress, the defendant must offer evidence from which a jury could conclude the following:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm. [*Luther*, 394 Mich at 623.]

Similarly, common-law self-defense excuses an otherwise unlawful act—typically the killing of another

person—under circumstances in which the defendant acted out of fear of death or serious bodily harm. *People v Riddle*, 467 Mich 116, 126-127; 649 NW2d 30 (2002). The otherwise unlawful act will only be justified under this defense "if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *Id.* at 127.

Under the facts alleged by the defense at trial, Dupree was presented with a clear choice of evils: he had to either commit the crime of being a felon-in-possession by taking Reeves's gun or risk death or serious bodily harm at Reeves's hands. Thus, the defense of duress appears applicable. Likewise, Dupree presented evidence from which a jury could find—and apparently did find—that he acted in self-defense when he struggled over the gun with Reeves and ultimately shot Reeves three times. However, there are no published Michigan authorities directly addressing the application of traditional common-law defenses to MCL 750.224f.[1] Consequently, it is not clear whether or how these defenses might apply to the crime of being a felon-in-possession.

In order to determine whether possession under duress or in self-defense constitutes an affirmative

[1] As the prosecution in this case has noted, our Supreme Court has specifically held that there is no momentary innocent possession defense to MCL 750.224f. *People v Hernandez-Garcia*, 477 Mich 1039, 1040 (2007), overruling *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986). However, the momentary innocent possession defense adopted by the Court in *Coffey* was not premised on traditional common-law defenses such as duress and self-defense. See *Coffey*, 153 Mich App at 314-315. Further, although our Supreme Court briefly mentioned the defense of duress in *Hernandez-Garcia*, it did not directly address whether and to what extent that defense was applicable. See *Hernandez-Garcia*, 477 Mich at 1041 (order), 1042 (CAVANAGH, J., dissenting).

defense to the prohibition against the possession of firearms by felons, I believe we must first turn to the language of the statute itself. Under MCL 750.224f, a person who has been convicted of a felony may not "possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm" unless certain conditions are met. See also *People v Perkins*, 473 Mich 626; 703 NW2d 448 (2005). Although the statute exempts persons who have had their felonies expunged or set aside or who have been pardoned, see MCL 750.224f(4), it does not otherwise provide for affirmative defenses. Normally, that would end our inquiry. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002) (stating that, if statutory language is clear, "no further construction is necessary or allowed to expand what the Legislature clearly intended to cover"). However, at least four justices of our Supreme Court have recognized that criminal statutes must be interpreted in light of Anglo-American criminal jurisprudence and the background rules of the common law. See *Tombs*, 472 Mich at 452-459 (opinion by KELLY, J.), 465-466 (opinion by TAYLOR, C.J., concurring in relevant part).

In *Tombs*, Justice KELLY analyzed whether a defendant had to possess the criminal intent to distribute or promote child pornography in order to be convicted of violating MCL 750.145c(3). *Id.* at 452. Justice KELLY first noted that the statutory language did not include an explicit *mens rea* requirement. *Id.* Nevertheless, Justice KELLY rejected the contention that this silence reflected a legislative intent to permit convictions without proving any *mens rea*. Instead, Justice KELLY noted that the common law traditionally disfavored offenses that did not require criminal intent, *id.* at 453-454, citing *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952), and cited with approval federal authority for the proposition that criminal statutes

must be construed " 'in light of the background rules of the common law,' " *Tombs*, 472 Mich at 455, quoting *Staples v United States*, 511 US 600, 605; 114 S Ct 1793; 128 L Ed 2d 608 (1994). For that reason, "[a]bsent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature's intent not to eliminate" the common-law requirement of criminal intent. *Tombs*, 472 Mich at 456-457.[2]

Using this same reasoning, I conclude that the Legislature's enactment of MCL 750.224f must be construed against the background of Anglo-Saxon common law, which includes the defenses of duress and self-defense. See *United States v Panter*, 688 F2d 268, 271 (CA 5, 1982). As the court in *Panter* aptly noted, the Legislature's "failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense. This conclusion is unassailable; statutes rarely enumerate the defenses to the crimes they describe." *Id.*, citing *United States v Bailey*, 444 US 394; 100 S Ct 624; 62 L Ed 2d 575 (1980). Indeed, to conclude that the traditional common-law defenses do not apply would ascribe an effect to MCL 750.224f that is " 'more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.' " *Panter*, 688 F2d at

[2] I note that Michigan courts have already determined that statutes criminalizing the possession of weapons generally require proof that the person charged knowingly possessed the weapon even in the absence of statutory language to that effect. See *Hernandez-Garcia*, 477 Mich at 1040 n 1 (noting that, in order to be convicted of carrying a concealed weapon, MCL 750.227, the accused must have knowingly possessed the weapon); *People v Davis*, 126 Mich App 66, 69; 337 NW2d 315 (1983) (noting that, in order to be convicted of carrying or possessing a firearm during the commission of a felony, MCL 750.227b, the defendant must have knowingly possessed the firearm).

271, quoting *Morissette*, 342 US at 250. And I will not lightly presume that the Legislature intended to deprive persons—even ex-felons—of the fundamental right to defend against a sudden and potentially deadly attack. See *Panter*, 688 F2d at 271 ("We do not believe that Congress intended to make ex-felons helpless targets for assassins."). Because there is no indication that the Legislature intended to abrogate or modify the application of traditional common-law affirmative defenses to MCL 750.224f, I conclude that the defenses of duress and self-defense are still applicable to a charge of being a felon-in-possession.

2. THE JUSTIFICATION DEFENSE

Courts in many foreign jurisdictions have recognized that a defendant might be justified in temporarily possessing a firearm—even though the possession is unlawful—if the possession is immediately necessary to protect the defendant or another from serious bodily harm. However, there is no consensus on the proper label for this defense; courts have used the terms duress, necessity, self-defense, and justification.[3] Fur-

[3] See *State v Padilla*, 114 Hawaii 507, 513-514; 164 P3d 765 (Hawaii App, 2007) (recognizing a justification defense to being a felon-in-possession if the possession is immediately necessary to protect the defendant or another from serious physical harm); *State v Parker*, 127 Wash App 352, 354-355; 110 P3d 1152 (2005) (recognizing a necessity defense to felon-in-possession statute and listing elements); *People v Jones*, 4 Misc 3d 782, 787; 781 NYS2d 852 (NY Sup Ct, 2004) (recognizing justification defense for felon-in-possession); *Humphrey v Commonwealth*, 37 Va App 36, 47-48; 553 SE2d 546 (2001) (holding that, because the legislature did not abrogate the common-law defenses applicable to the felon-in-possession statute, the defendant could proffer the affirmative defense of necessity); *Commonwealth v McCambridge*, 44 Mass App 285, 291; 690 NE2d 470 (1998) (recognizing necessity defense); *Ex parte Taylor*, 636 So 2d 1246, 1247 (Ala, 1993) (recognizing that self-defense is a defense to a charge of possession of a firearm); *State v Castrillo*, 112

thermore, several courts have recognized that, in felon-in-possession cases, the distinction between the defenses of duress and self-defense is largely immaterial. *United States v Butler*, 485 F3d 569, 572 n 1 (CA 10, 2007) (recognizing that these defenses have become merged in modern decisions); see also *State v Padilla*, 114 Hawaii 507, 513-514; 164 P3d 765 (Hawaii App, 2007). I agree with those courts and, for the sake of simplicity, shall use the term "justification" to describe the defense at issue.

Although I have determined that a defendant may raise a justification defense to a charge of being a felon-in-possession, I nevertheless conclude that this defense must be analyzed in the context of the purpose underlying MCL 750.224f. See *Butler*, 485 F3d at 575, quoting *United States v Perez*, 86 F3d 735, 737 (CA 7, 1996) ("We must take care not to transform the narrow, non-statutory justification exception . . . into something permitting a felon to possess a weapon for extended periods of time in reliance on some vague 'fear' of street violence. Indeed, '[i]f ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters.' "); *State v Castrillo*, 112 NM 766, 771; 819 P2d 1324 (1991) (noting that the elements of duress must be analyzed in the context of the purpose behind the prohibition against the possession of firearms by felons). With the enactment of MCL 750.224f, our Legis-

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NM 766, 770-773; 819 P2d 1324 (1991) (holding that duress is an affirmative defense to the otherwise nearly strict liability imposed by New Mexico's prohibition against possession of firearms by felons); *Marrero v State*, 516 So 2d 1052, 1054-1055 (Fla App, 1987) (recognizing a limited justification defense to being a felon-in-possession); *People v Govan*, 169 Ill App 3d 329, 336; 523 NE2d 581 (1988) (describing defense of necessity); *State v Crawford*, 308 Md 683, 698-699; 521 A2d 1193 (1987) (recognizing a necessity defense to a charge of being a felon-in-possession); *State v Blache*, 480 So 2d 304 (La, 1985) (adopting defense of justification for charge of being a felon-in-possession).

lature determined that those persons who have committed felonies should not be permitted to possess or use firearms. The purpose behind the prohibition is to ensure that those persons who are more likely to misuse firearms do not maintain ready possession of them. See *People v Tice*, 220 Mich App 47, 51-52; 558 NW2d 245 (1996); *Castrillo*, 112 NM at 771 ("Its purpose is to keep firearms from felons because the law presumes they are more likely to unlawfully use firearms or to resort to force in violation of the law."). This purpose would be severely undermined if former felons were permitted to arm themselves whenever they happened to have some generalized fear of being attacked. See *Perez*, 86 F3d at 737 (noting that former felons are likely to live in areas where they are exposed to danger and engage in behaviors that expose them to danger). For that reason, I conclude that a defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another from death or serious physical harm. See *Lemons*, 454 Mich at 247 (noting that, under a duress defense, the threatening conduct must be imminent); *Riddle*, 467 Mich at 127 (noting that self-defense is available only if the defendant reasonably believes that the threat of death or serious bodily injury is imminent). Likewise, the defendant's unlawful possession must end as soon as the immediacy of the threatened harm has passed:

> The defendant is entitled to maintain possession of the firearm so long as the imminent need for the protection persists. The defendant cannot obtain possession of the firearm before the imminent need for protection arises, *see United States v Hudson*, 414 F3d 931, 933-934 (CA 8, 2005); *Perez*, 86 F3d at 736-37, and must terminate possession of the firearm at the earliest possible opportunity once

> the danger has passed. *See Butler*, 485 F3d at 572-573; *United States v Paolello*, 951 F2d 537, 540-542 (CA 3, 1991); *United States v Beasley*, 346 F3d 930, 935-936 (CA 9, 2003). [*Padilla*, 114 Hawaii at 513-514 (citation format modified).]

I further agree with those authorities that have held that a defendant may only raise justification as a defense to otherwise unlawful possession of a firearm if the defendant did not recklessly or negligently place himself or herself in a situation where he or she would be forced to engage in criminal conduct. See *Riddle*, 467 Mich 127 n 19 (noting that one who starts a fight or goes someplace expecting a fight cannot claim self-defense); *Perez*, 86 F3d at 737 ("More often than not the basis of his fear will be his own involvement in illegal activities; and when the danger that gives rise to the fear results from engaging in such activities—from 'looking for trouble'—the defense is barred."); *United States v Agard*, 605 F2d 665, 668 (CA 2, 1979) (noting that the defense of duress is not available if the defendant initiated the altercation). Likewise, a defendant may only resort to unlawful possession as a last resort; that is, the defendant must have no reasonable legal alternative to violating the law in order to avoid the threatened harm. See *Hudson*, 414 F3d at 934 (noting that the defendant could have reported her fear about a rogue officer to the police instead of arming herself); *Perez*, 86 F3d at 737 (noting that the defendant could have called the police and asked them to investigate the suspicious persons sitting in a car outside his home). Thus, using the elements of duress as the foundation, see *Lemons*, 454 Mich at 247, I conclude that a defendant may raise justification as a defense to being a felon-in-possession by introducing evidence from which the jury could conclude all the following:

(1) The defendant or another person was under an unlawful and immediate threat that was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, and the threat actually caused a fear of death or serious bodily harm in the mind of the defendant at the time of the possession of the firearm.

(2) The defendant did not recklessly or negligently place himself or herself in a situation where he or she would be forced to engage in criminal conduct.

(3) The defendant had no reasonable legal alternative to taking possession, that is, a chance to both refuse to take possession and also to avoid the threatened harm.

(4) The defendant took possession to avoid the threatened harm, that is, there was a direct causal relationship between the defendant's criminal action and the avoidance of the threatened harm.

(5) The defendant terminated his or her possession at the earliest possible opportunity once the danger had passed.

3. NATURE OF THE INSTRUCTIONAL ERROR

In the present case, Dupree introduced evidence from which a reasonable jury could have concluded that each element of the justification defense had been met. Dupree, Fallon, and Monroe testified that Reeves started the fight at issue when he pushed Dupree and that Reeves was armed. Dupree further testified that he feared Reeves not only because he saw the gun, but also because Reeves was very large. Dupree also stated that he began to struggle with Reeves over the gun when Reeves tried to grab it and that the gun went off three times during the struggle. Thus, there was evidence that Dupree was placed under an unlawful and immediate threat of death or serious

bodily harm and that the threat was sufficient to have caused in the mind of a reasonable person the fear of death or serious bodily harm.

Moreover, there was testimony that suggested that Dupree was lawfully present at his brother's birthday party, was not armed before the fight with Reeves, and only took possession of the gun at issue during the struggle. Given this testimony and the testimony that Reeves started the fight, a reasonable jury could have concluded that Dupree did not recklessly or negligently place himself in a situation where he would be forced to engage in criminal conduct and that there was no reasonable legal alternative to his taking possession of the gun in order to avoid the threatened harm.

Finally, although there was evidence from which a jury could have concluded that Dupree failed to timely terminate possession of the gun, there was also evidence from which a reasonable jury could have concluded that Dupree did terminate his possession at the earliest possible moment after the danger had passed. Dupree testified that the struggle over the gun finally ended after he told Reeves to "just stop" and to "let go," after which Reeves said "I'm hit" several times and then moved off. This testimony suggested that Reeves was still struggling over the gun even after being shot and that it was Reeves who ultimately broke off the fight. There was testimony that, after Dupree and Reeves separated, Reeves went across the street and sought help from a neighbor and eventually went back into the street, where he was picked up by some passers-by. Dupree said that he kept the gun after his separation from Reeves and walked back to the house, where he asked Adrian to check and see if he had been hit. Dupree still possessed the gun when his female companion came out and urged him to get into her truck and leave. Dupree testified that he finally got rid of the gun

while driving away from the scene. Thus, although there is testimony that the physical struggle had ended and that the parties had separated, it is not entirely clear whether Reeves actually left the scene before or after Dupree left with his female companion. Given this testimony, a jury could have found that it was reasonably necessary for Dupree to maintain possession in order to ensure that Reeves did not return and try to retake possession of the gun. Consequently, Dupree introduced sufficient evidence to present a justification defense.

Although Dupree was entitled to a jury instruction on his justification defense to being a felon-in-possession, Dupree's trial counsel did not request such an instruction. Instead, Dupree's trial counsel apparently relied on a the self-defense instruction when he argued to the jury that Dupree could not be convicted of being a felon-in-possession if he acquired possession during the fight. Hence, the trial court did not err by failing to give a modified duress or self-defense instruction similar to the one discussed above. Nevertheless, the trial court determined on its own initiative that it should instruct the jury that if it found that Dupree acquired the gun from Reeves during the fight, Dupree would not be guilty of being a felon-in-possession if he had only kept the gun as long as necessary to defend himself. With this instruction, the trial court essentially recognized that the justification defense applies only as long as the defendant relinquished the unlawful possession at the earliest possible opportunity once the danger has passed. Hence, this instruction was not entirely inaccurate and might not have prejudiced Dupree's defense.

Nevertheless, on the following day the prosecution asked the trial court to modify its earlier instruction by telling the jury that it could only find Dupree not guilty of being a felon-in-possession if it also found that

Dupree intended to turn the gun over to the police within a reasonable time. Dupree's trial counsel objected to this instruction because he felt that his theory of self-defense did not require a finding that Dupree intended to turn the gun over to the police; rather, Dupree's unlawful possession was excused as long as his possession was necessary to ensure his protection. Dupree's trial counsel was correct; although the jury might have been instructed under the now-defunct momentary innocent possession theory as an alternative basis for excusing Dupree's continued possession after the fight ended, see *People v Hernandez-Garcia*, 477 Mich 1039, 1040 (2007), overruling *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986), this defense was distinct from the justification defense presented by Dupree's trial counsel. And Dupree presented evidence from which the jury could have found that Dupree's continued possession was excused under a duress or self-defense theory.

Finally, I cannot agree with the prosecution's assertion that any error in the instruction was harmless.[4] As I have noted, Dupree was entitled to present a justification defense to being a felon-in-possession, yet by reinstructing the jury in the way that it did, the trial court

[4] The prosecution relies on the fact that Dupree was not entitled to have an instruction on momentary innocent possession for the proposition that the trial court's instructions could not have prejudiced Dupree. This argument assumes that either Dupree was not entitled to present a defense of duress or self-defense to a charge of being a felon-in-possession or that the instructions did not adversely affect Dupree's defense. However, as discussed earlier, I have concluded that Dupree was entitled to present a justification defense based on duress or self-defense. Likewise, to the extent that the jury might have been able to consider self-defense as a justification, the trial court specifically instructed the jury that its momentary innocent possession instruction modified its earlier instruction that Dupree would not be guilty of being a felon-in-possession if he acquired the gun during the struggle and only kept it as long as necessary to defend himself. Thus, the latter instruction effectively nullified Dupree's defense to this charge.

effectively eliminated the possibility that the jury could find that Dupree's continued possession after his separation from Reeves was justified. There was no evidence that Dupree intended to turn the gun over to police; indeed, Dupree testified that he threw the gun out of the window as his female companion drove him from the scene of the fight. Assuming that the jury followed the trial court's final instructions, see *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the trial court effectively directed a verdict of guilty on the charge of being a felon-in-possession. Therefore, this error was not harmless. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). For this reason, we reverse Dupree's conviction on the charge of being a felon in possession of a firearm, vacate his sentence for that offense, and remand for a new trial consistent with this opinion.

Reversed and remanded for a new trial. We do not retain jurisdiction.

GLEICHER, J. (*concurring*). I concur with the lead opinion's conclusion that the incorrect jury instruction resulted in error requiring reversal of defendant's conviction. I write separately to highlight the reasons that a new trial is required and to respond to the dissent.

The lead opinion holds that "a defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another from death or serious physical harm." *Ante* at 106. As the lead opinion explains, the precise elements of this narrowly circumscribed defense appear in *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997). In *Lemons*, the Supreme Court specifically noted that the contours of the duress defense include that "the threatening conduct or act of compulsion must be 'present,

imminent, and impending[, that] [a] threat of future injury is not enough,' and that the threat 'must have arisen without the negligence or fault of the person who insists upon it as a defense.' " *Id*., quoting *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920).

The ability of a defendant charged with being a felon in possession of a firearm[1] to employ a defense of duress should not be a matter of great debate. Our Supreme Court recognized in *Lemons* that "[d]uress is a common-law affirmative defense" and applies in situations "where the crime committed avoids a greater harm." *Lemons*, *supra* at 245-246. In *Dixon v United States*, 548 US 1; 126 S Ct 2437; 165 L Ed 2d 299 (2006), the United States Supreme Court assumed that duress constituted a viable defense to an analogous federal statute criminalizing the acquisition of a firearm while under indictment, 18 USC 922(n). See also *People v Hernandez-Garcia*, 477 Mich 1039, 1041 (2007), in which our Supreme Court presumed that duress could constitute a defense to a charge of carrying a concealed weapon, MCL 750.227(2), and *United States v Mason*, 344 US App DC 91, 94; 233 F3d 619 (2000) ("Both the Government and the defendant agree that there is a 'justification' defense to a felon's possession of a gun in violation of [18 USC 922(g)(1)].").[2]

Although defendant in the instant case labeled his defense "self-defense" rather than "duress," he unquestionably presented to the jury a scenario entirely consistent with a classic duress defense. The initial jury instruction given by the trial court properly encapsulated a duress defense:

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[1] MCL 750.224f.

[2] Several courts have criticized or rejected the analysis in *Mason*. See, e.g., *United States v Gilbert*, 430 F3d 215, 220 (CA 4, 2005); *United States v Mercado*, 412 F3d 243, 252 (CA 1, 2005); *United States v Baker*, 508 F3d 1321, 1325 (CA 10, 2007).

> As to being a felon in possession, [Dupree] claims that the gun was produced in a struggle. And of course, if that's the case that the gun was produced during the course of a struggle and you find that it happened that way, that would be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself.

However, instead of giving this instruction, the trial court inexplicably informed the jury regarding the elements of "innocent possession," a different and distinct defense.

Courts have applied the defense of temporary innocent possession in felonious weapon or drug possession contexts under circumstances that do not present an imminent threat of bodily injury or death. For example, in *Mason*, the defendant, a convicted felon, found a weapon in a paper bag near a schoolyard. He was arrested after he carried the weapon into the Library of Congress, and claimed that he intended to give the gun to an officer who worked at the library. In *People v Martin*, 25 Cal 4th 1180, 1191; 108 Cal Rptr 2d 599; 25 P3d 1081 (2001), the California Supreme Court applied the innocent possession defense to the momentary or transitory possession of contraband for the purpose of disposing it. The courts recognizing an innocent possession defense generally emphasize that otherwise criminal possession of contraband may qualify as truly innocent only if a defendant promptly turns the contraband over to the police. But no court has engrafted this requirement onto the duress defense. As the dissent appears to recognize, the innocent possession defense played no role in this case.[3]

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[3] The dissent correctly observes that other courts have rejected the central holding in *Mason*, which permits an "innocent possession" defense under limited circumstances. But it bears emphasizing that neither the lead opinion nor this concurrence relies on *Mason*'s holding.

Despite acknowledging the irrelevance of the innocent possession instruction read by the trial court, the dissent opines that "providing the instruction was *beneficial* to defendant's cause and gave defendant an opportunity to have his misconduct (illegally possessing a firearm) excused by the jury." *Post* at 121 (emphasis in original). I respectfully disagree. The instruction given actually *foreclosed* any possibility that the jury would excuse defendant's brief possession of a firearm because it injected an unnecessary requirement—turning the weapon over to the police—that defendant unquestionably had not fulfilled. The trial court's instruction was not merely imperfect, it essentially instructed the jury that defendant had failed to prove an essential element of the defense.

Furthermore, I respectfully reject the dissent's contention that provision of the incorrect instruction "at least gave defendant some slight ability to defend against this charge, more than had no instruction been given at all." *Post* at 121. Defendant requested, and the trial court initially gave, a self-defense instruction that justified defendant's brief possession of the gun. When the trial court added to the instruction the requirement that defendant had to promptly turn the weapon over to the police, it negated defendant's claim of self-defense.

When a defendant raises the duress defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress. *People v Field*, 28 Mich App 476, 478; 184 NW2d 551 (1970). Similarly, "[o]nce evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). The trial

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Rather, both Judge KELLY and I recognize that the innocent possession defense was entirely inapplicable in this case.

court's instruction here that defendant bore an obligation to prove that he had intended "to deliver the gun to the police at the earliest possible time" was not only incorrect under the circumstances of this case, but also impermissibly shifted the burden of proof to defendant. The injection of an inapplicable element into defendant's self-defense or duress claim decreased the prosecution's burden to negate these claims. Furthermore, because a defendant has a state and federal constitutional right to present a defense, "[i]nstructional errors that directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense." *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002).

In my view, the incorrect instruction provided by the trial court qualified as preserved constitutional error.[4] Preserved constitutional error requires reversal unless the error is shown to be harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The jury disbelieved all the prosecution's witnesses and determined that defendant had acted in self-defense. While the facts are somewhat unclear with respect to whether defendant gave up possession of the weapon as soon as the claimed duress had lost its coercive force, *Lemons*, *supra* at 247 n 18, sufficient evidence supported a rational conclusion that defendant did not have a reasonable opportunity to safely escape from Damon Reeves without taking the gun. Whether defendant then possessed the gun longer than absolutely necessary inherently involves a judgment concerning defendant's credibility, a question for the

[4] Regardless of whether defendant forfeited or waived more specific instructions regarding his duress defense, defendant indisputably objected to the instruction regarding his intent to deliver the gun to the police at the earliest possible time.

jury. Because it appears likely that the jury rested its verdict entirely on the basis that defendant lacked any intent to turn the weapon over to the police, in my view the instructional error was not harmless beyond a reasonable doubt.

MURRAY, P.J. (*dissenting*). We granted defendant's delayed application for leave to appeal to decide whether defendant's conviction for being a felon in possession of a firearm, MCL 750.224f, should be reversed. For the reasons that follow, and with all due respect to my colleagues, I would affirm the conviction.

The only issue properly raised on appeal is whether the trial court erred in instructing the jury on the defense of temporary innocent possession as a defense to the charge of felon-in-possession. As explained below, although the trial court erred in giving the instruction on temporary innocent possession, the error was harmless.

Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005); *People v Canales,* 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructional errors are presumed to be harmless, MCL 769.26, but the presumption "may be rebutted by a showing that the error resulted in a miscarriage of justice," *People v Lukity,* 460 Mich 484, 493; 596 NW2d 607 (1999).

Following closing arguments, the trial court instructed the jury on the elements of felon-in-possession[1]

[1] Specifically, the trial court accurately instructed the jury that the prosecution

and informed the jury that the parties stipulated that defendant had been previously convicted of a specified felony. Additionally, and without any request from defendant or the prosecutor, the trial court provided the jury with an instruction on the defense of temporary innocent possession to the charge of felon-in-possession. The instruction was as follows:

> As to being a felon in possession, he claims that the gun was produced in a struggle. And of course, if that's the case that the gun was produced during the course of a struggle and you find that it happened that way, that would be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself.

After the jury was excused from the courtroom, defense counsel objected to the language that the weapon could not be held "any longer than necessary to defend himself." The trial court, after again noting that defendant had not requested any defense instruction for this charge, requested that defense counsel provide any law that supported a modified instruction.[2]

Three days later, before the jury was to begin its deliberations, defense counsel was unable to provide the trial court with any relevant law on the issue. However, the prosecution noted that pending before the Supreme Court was *People v Hernandez-Garcia*, 474 Mich 1000 (2006), in which the Court was faced with a similar issue whether a "momentary innocent possession" de-

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> has to prove the following two elements: First, the defendant possessed or used a firearm in this State. Second, that the defendant was convicted of a specified felony which precludes him from being eligible to possess or use a firearm in this State—possess, use or transport a firearm in this State.

[2] The jury did not begin deliberations that day and was ordered to return to court three days later to begin deliberations.

fense existed to a charge of carrying a concealed weapon. The trial court then noted that on the basis of *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986), *People v Weeder*, 469 Mich 493; 674 NW2d 372 (2004), and *United States v Mason*, 344 US App DC 91; 233 F3d 619 (2001), the prior instruction should be modified to include a requirement that defendant intended to "deliver the gun to the police at the earliest possible time." Over defense objection,[3] the trial court then gave the jury another instruction that expanded on the temporary innocent possession defense:

> I'm not going to repeat what the elements of [felon in possession of a weapon] are. But the defense is—there is a defense to that. And if the person had a brief or momentary possession of the weapon based on necessity, that's a defense to being a felon in possession. And the elements to that are that the defendant had the gun because he had taken it from someone else who was in wrongful possession of it, or he took it from him because of necessity, because he needed to. Second, that the possession after the taking of the gun was brief. And third, that it was the defendant's intention to deliver the gun to the police at the earliest possible time. The law imposes that duty as a concomitant part of that.

After this modified instruction was read to the jury, and at the conclusion of its deliberations, defendant was convicted of felon-in-possession.

In reviewing de novo this assertion of instructional error, *People v Heikkinen,* 250 Mich App 322, 327; 646 NW2d 190 (2002), I agree with the majority that the trial court erred in instructing the jury on the defense of

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[3] Although defendant had no caselaw to support his objection, he argued that there was no legal requirement that "the defendant's intention [was] to deliver the gun to the police at the earliest possible time." But as the trial court correctly concluded, our caselaw at that time provided for that exact defense to a charge of carrying a concealed weapon. *Coffey, supra* at 315 (applying that defense to carrying a concealed weapon).

temporary innocent possession to the felon-in-possession charge. However, I disagree that this was not harmless error.

Although not decided at the time the trial court instructed the jury, since then the Michigan Supreme Court addressed a similar issue in *People v Hernandez-Garcia,* 477 Mich 1039, 1040 (2007), in which it held that momentary innocent possession of a concealed weapon was not a defense to a charge of unlawfully carrying a concealed weapon. In so holding, the Court overruled *Coffey*, one of the three cases explicitly relied on by the trial court and from which the language for the instruction seems to have come. *Id*. Hence, the Michigan law that supported the trial court's instruction is no longer good law, and the instruction provided was erroneous.[4]

As with carrying a concealed weapon, *People v Hernandez-Garcia,* 266 Mich App 416, 418; 701 NW2d 191 (2005), affirmed in part and vacated in part on other grounds 477 Mich 1039 (2007), and felony-firearm, *People v Burgess,* 419 Mich 305, 308; 353 NW2d 444 (1984), felon-in-possession is a general intent crime. A general intent crime requires only "the intent to perform the physical act itself." *People v Fennell,* 260 Mich App 261, 266; 677 NW2d 66 (2004) (citation and quotation marks omitted). The felon-in-possession statute prohibits a person convicted of a felony from possessing a firearm. MCL 750.224f. Because momentary innocent possession is not a defense to general intent crimes involving possession of a weapon, the trial court erred when it instructed the jury that this was a defense to felon-in-possession.[5]

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[4] Though *Weeder* contains some discussion about the evidence needed to support a requested instruction that was not given, see *Weeder, supra* at 499 n 3, it does not address the specific instruction at issue here.

[5] *Mason*, to the extent that it–like *Coffey*–held that there is a momentary innocent possession defense, stands in isolation amongst the federal

This instructional error was clearly harmless. Indeed, providing the instruction was *beneficial* to defendant's cause and gave defendant an opportunity to have his misconduct (illegally possessing a firearm) excused by the jury. This holds true because, as noted throughout this opinion, defendant never requested an instruction on any defense to this charge. In other words, because defendant stipulated that he had committed a specified felony, and because no defense instruction was requested and defendant admitted possessing a gun, his chances of acquittal were nonexistent. Thus, the incorrect instruction at least gave defendant some slight ability to defend against this charge, more than had no instruction been given at all. The trial court even recognized that fact when defendant objected to part of the initial justification instruction. Unfortunately for defendant, however, the jury apparently did not find that the facts supported this defense. Consequently, defendant would have been in no better position had the instruction not been given, and because the instruction on the elements of the crime was otherwise correct, the instructional error was harmless.

A finding of harmless error would normally conclude the analysis. However, the lead opinion does not simply reject the temporary innocent possession defense, but goes on to propose that a federal justification defense that was neither requested nor provided should be recognized in Michigan. However, as I will explain later,

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landscape on this issue. That the opinion stands alone, however, is not necessarily reason enough to reject its analysis. But, in my view, the more recent appellate authority that rejects the *Mason* court's analysis as inconsistent with the plain language of the federal felon-in-possession statute is much more persuasive. See, e.g., *United States v Baker,* 508 F3d 1321, 1325-1327 (CA 10, 2007); *United States v Johnson,* 459 F3d 990, 996-997 (CA 9, 2006), and *United States v Gilbert,* 430 F3d 215, 218-220 (CA 4, 2005), and the cases they cite.

the facts as testified to by defendant do not support an instruction under the hybrid defense of justification (which incorporates some elements of the defenses of duress and self-defense) as adopted by the lead opinion.

Before addressing the lack of a factual basis for that type of instruction, it is important to emphasize that defendant *never* requested any instructions on justification, self-defense, or duress in relation to the felon-in-possession charge. Indeed, the trial court specifically noted, and defense counsel acknowledged, that defendant *never* requested instructions with regard to *any* defenses to felon-in-possession,[6] and only objected to a part of the temporary innocent possession instruction that the trial court raised and gave sua sponte. For that reason, any argument to our Court that a justification, self defense, or duress instruction should have been provided has been waived, unless the failure to provide the instruction resulted in manifest injustice. *People v Messenger,* 221 Mich App 171, 177; 561 NW2d 463 (1997).[7] Here, even if Michigan law recognized any one of these as a defense to a felon-in-possession charge, because the evidence did not support a self-defense, duress, or justification instruction to the charge of felon-in-possession, the failure to so instruct did not constitute manifest injustice. This conclusion does not, as suggested by the concurring opinion, usurp the jury's fact-finding role. Instead, it assumes the truth of defen-

[6] Both the lead opinion and the concurrence seem to overlook that fact, but the whole premise of their conclusion is based on transforming a duress defense (that was never requested) into a justification defense (that was never requested).

[7] Or it could also be safely concluded that defendant has waived the issue by failing to raise the issue before the trial court. As noted, defendant never requested any defense instruction on this charge, so he should be precluded from now seeking appellate relief on an issue not raised below. See *People v Grant,* 445 Mich 535, 546; 520 NW2d 123 (1994).

dant's own testimony and concludes whether that testimony can legally support the defense. This is completely proper in application of the harmless error test. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

The defense of self-defense permits a defendant who is in reasonable fear of imminent danger to push back against the attacker with that amount of force necessary to defend himself. *People v Riddle,* 467 Mich 116, 119; 649 NW2d 30 (2002); *People v Kemp,* 202 Mich App 318, 322; 508 NW2d 184 (1993). Defendant was charged with, and acquitted of, an offense that involved the use of force against another. The charge of felon-in-possession, however, did not necessarily arise specifically from that incident. Indeed, the charge also arose out of defendant's continued possession of the firearm after Reeves had left the premises. Since the jury could have reasonably concluded that defendant possessed the firearm after the physical confrontation ended (a fact that defendant testified to at trial), the evidence did not support the defense of self-defense.[8] See, e.g., *People v Truong* (*After Remand*), 218 Mich App 325, 328, 337-338; 553 NW2d 692 (1996) (finding no imminent danger to support a claim of self-defense when the decedent had attacked the defendants two days earlier and had threatened to kill the defendants in the future); *Kemp*, *supra* at 321-323 (finding self-defense inapplicable when the defendant proceeded into a house after the victim, who was holding a gun, had already closed the door as the defendant approached the house).

The evidence similarly did not support the defense of duress, which is applicable in situations in which the

[8] Indeed, defense counsel's objection to part of the "innocent possession" instruction was the concern that the jury could convict defendant on the basis of the fact that he possessed the gun after the incident was over.

crime was committed to avoid a greater harm. *People v Lemons,* 454 Mich 234, 245-246; 562 NW2d 447 (1997). A successful duress defense excuses the defendant from an otherwise-criminal act because he was compelled to commit the act, the compulsion or duress overcame the defendant's free will, and his actions lacked the required *mens rea*. *People v Luther,* 394 Mich 619, 622; 232 NW2d 184 (1975). Again, defendant testified that he continued to hold onto the gun after Reeves had left the premises and after he had entered his girlfriend's vehicle and driven away. Clearly, there was no duress at that point in time, and so the evidence did not support a duress instruction.[9]

Finally, rather than adopting the federal justification defense to a felon-in-possession charge, I would hold that because the facts do not reasonably support the defense, it should not be established in this case as a new rule of law in this state. The justification defense recognized by many state and federal courts is " 'very narrow[]' " and is to be used only in " 'extraordinary circumstances' " where there is " 'imminent danger.' " *United States v White,* 552 F3d 240, 247 (CA 2, 2009), quoting in part *United States v Deleveaux,* 205 F3d 1292, 1297 (CA 11, 2000), and *United States v Perrin*, 45 F3d 869, 874-875 (CA 4, 1995).

In light of the evidence in this case, the defense is unavailable because defendant possessed the firearm longer than absolutely necessary after any threat of "imminent danger" ended. See, e.g., *United States v Lemon*, 824 F2d 763, 765 (CA 9, 1987) (finding that no

[9] The concurring opinion states that recognition of the duress defense to felon-in-possession "should not be a matter of great debate," yet only cites opinions that have either "presumed" or "assumed" (but not decided) that such a defense exists to similar crimes. *Ante* at 113. Apparently the "great debate" has not yet crystallized into a decision on this exact issue.

imminent danger existed when the defendant's attacker had left the scene); see, also, *United States v Nolan*, 700 F2d 479, 484 (CA 9, 1983) (holding that the justification defense was inapplicable when the defendant pursued the alleged assailant after the assailant left the bar). Indeed, "[i]t has been only on the rarest of occasions that our sister circuits have found defendants to be in the type of imminent danger that would warrant the application of a justification defense." *Perrin*, *supra* at 874. Instructive is *United States v Williams,* 389 F3d 402, 404 (CA 2, 2004), in which the defendant admitted that he took a firearm from a 15 year old to " 'get the gun off the street,' " and while he was headed for an incinerator to dispose of the gun, he dropped it when confronted by the police. While assuming that a necessity defense was available to a federal firearm possession charge, the court held that the defendant's possession "extended . . . possession of a firearm far beyond the fleeting sort of possession" illustrated by the caselaw. *Id.* at 405.

In sum, I would affirm defendant's conviction because the trial court's instruction was harmless error and defendant has waived any argument that a justification or other similar defense should have been provided. Additionally, even if defendant had made such a request, it would not have applied in this case.

I would affirm.

CITY OF ANN ARBOR v AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME) LOCAL 369

Docket No. 283814. Submitted March 13, 2009, at Lansing. Decided May 28, 2009, at 9:05 a.m.

The city of Ann Arbor brought an action in the Washtenaw Circuit Court against American Federation of State, County, and Municipal Employees Local 369, seeking to vacate a portion of an arbitrator's award that applied a provision of the parties' collective bargaining agreement beyond the expiration date of the agreement and until the successor agreement was reached. The parties had agreed by virtue of certain "ground rules" that the agreement would remain in effect until the successor agreement was reached but disagreed whether the disputed provision was extended by that agreement. The arbitrator determined that the provision remained in effect during the extension. The defendant moved for summary disposition, alleging that Michigan's period of limitations for an action to vacate an arbitration award is six months and that the plaintiff's action was not timely. The court, Archie C. Brown, J., denied the motion, ruling that the residual six-year period of limitations set forth in MCL 600.5813 applied to the plaintiff's claim and that even if a six-month limitations period applied, it would be equitably tolled under the circumstances presented. The court granted summary disposition in favor of the plaintiff, concluding that the arbitrator exceeded his authority by relying on the "ground rules," and not solely on the collective bargaining agreement, to determine that the contract period applicable to the disputed provision concluded on the date that the successor agreement was ratified. The defendant appealed.

The Court of Appeals *held*:

1. The trial court correctly held that an action to vacate an arbitration award is subject to a six-year period of limitations. There is no statute or court rule setting forth a limitations period specifically for actions seeking to vacate labor arbitration awards arising from collective bargaining agreements. The plaintiff's action to vacate a portion of the arbitration award is subject either

to the six-year limitations period for contract actions under MCL 423.9d(4) or to the six-year residual catch-all limitations period set forth in MCL 600.5813.

2. The arbitrator did not act beyond the material terms of the collective bargaining agreement from which his authority was derived and did not do anything other than arguably construe or apply the agreement in reaching his conclusions. The factual findings of the arbitrator are not subject to judicial review. There was no basis for the trial court to modify the arbitrator's award. The order granting summary disposition in favor of the plaintiff must be reversed and the case must be remanded to the trial court for entry of an order granting summary disposition in favor of the defendant.

Reversed and remanded.

ARBITRATION — COLLECTIVE BARGAINING — VACATION OF ARBITRATION AWARDS — LIMITATION OF ACTIONS.

Actions seeking to vacate labor arbitration awards arising from collective bargaining agreements are subject to either the six-year limitations period for contract actions under MCL 423.9d(4) or the six-year residual catch-all limitations period set forth in MCL 600.5813.

Stephen K. Postema and *Nancy L. Niemela* and *Dykema Gossett PLLC* (by *Melvin J. Muskovitz* and *F. Arthur Jones II*) for the plaintiff.

Miller Cohen, P.L.C. (by *Bruce A. Miller* and *Eric I. Frankie*), for the defendant.

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

BANDSTRA, P.J. Defendant, American Federation of State, County, and Municipal Employees (AFSCME) Local 369, appeals as of right the trial court's order granting summary disposition to plaintiff, city of Ann Arbor, in this action arising from a dispute over the scope of an arbitration award. We reverse and remand for the entry of an order granting summary disposition in favor of defendant.

At issue here is the meaning of language in a so-called "me too" provision of a collective bargaining agreement (CBA) entered into by the parties for the three-year period from July 1, 1998, to June 30, 2001.[1] This "me too" provision provides that

> [i]f another bargaining unit receives an increase higher than the settlement with AFSCME, such increase will also be granted to AFSCME for this contract period as a "me too" on wages. If gained by Police or Fire bargaining units, a "me too" [sic] retroactivity on wages for retirees.

The parties did not reach agreement on a successor contract as of the CBA's June 30, 2001, expiration date. By virtue of "ground rules" mutually agreed to by the parties on April 21, 2001, the CBA was to remain in effect until a successor contract was ratified by both parties. Before the parties reached agreement on a successor contract, defendant filed its grievance, alleging that plaintiff violated the "me too" provision of the CBA by refusing to give defendant's members wage increases provided to members of another bargaining unit.

The parties executed a successor collective bargaining agreement, which was ratified by plaintiff on October 7, 2002. Defendant ratified the agreement sometime between August 21, 2002, and October 7, 2002. Thus, pursuant to the "ground rules," the CBA remained in effect until October 7, 2002.

Defendant's grievance remained unresolved through the process outlined in the CBA, and on March 25, 2002, defendant demanded arbitration. Ultimately, the arbitrator determined that defendant was entitled to the

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[1] The purpose of this provision was to induce defendant to enter into a contract with plaintiff before bargaining was complete with all other units, without being concerned about whether plaintiff would then grant higher increases to those bargaining units with which it subsequently reached agreement.

"me too" increase it sought, concluding that "the longevity/wage structure increases received by the [other bargaining unit] shall be awarded to AFSCME for the contract period from July 1, 1998, to June 3[0], 2001, and as extended by the parties."

Following the issuance of the arbitrator's opinion, plaintiff granted the "me too" increases to defendant, limited to the period from July 1, 1998, to June 30, 2001. Plaintiff asserted that the arbitration award did not include the period during which the CBA was extended pursuant to the mutually agreed to "ground rules" pending completion of a successor agreement, because that period was not part of the "contract period" within the meaning of the CBA's "me too" provision. Plaintiff argued that the phrase "and as extended by the parties" in the arbitration award meant only that the awarded "me too" increases would continue if, but only if, the parties agreed to extend the "me too" benefit by including it in the successor agreement. Defendant disagreed, asserting that the arbitrator's language "and as extended by the parties" referred to and encompassed the parties' mutual agreement, set forth in the "ground rules," to extend the CBA until such time as a successor agreement was ratified by both parties and that the increases thus extended until October 7, 2002. Unable to resolve their disagreement, the parties ultimately agreed to return to the arbitrator to seek clarification of the award.

Following a hearing on this issue and the submission of posthearing briefs, on April 24, 2007, the arbitrator issued a second opinion and award clarifying that " '[a]s extended by the parties' means until ratification by the parties on October 7, 2002. The ground rules mutually adopted on April 24, 2001, stated that the agreement is to remain in effect until both parties ratify the successor contract." The arbitrator reasoned that, by mutual

agreement of the parties, "[t]he employees continued to be paid under the terms and conditions of the 1998-2001 contract until the new contract was ratified. This means that the 'me-too' wage increases continued to be part of the 1998-2001 agreement until it was officially superceded."

On May 16, 2007, 21 days after the arbitrator clarified his award, plaintiff filed a complaint to vacate a portion of arbitrator's award. It asserted that the arbitrator exceeded his authority under the CBA by awarding defendant the "me too" increases for the period from June 30, 2001, until October 7, 2002.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7). Defendant relied on a decision issued by the United States Court of Appeals for the Sixth Circuit, *Badon v Gen Motors Corp*, 679 F2d 93 (CA 6, 1982), a case filed under § 301 of the Labor Management Relations Act, 29 USC 185, to argue that the Michigan limitations period for an action to vacate a labor arbitration award is six months. Thus, defendant argued that plaintiff's complaint should be dismissed as untimely because it was filed more than six months after the arbitrator issued his October 28, 2005, award granting defendant's grievance.

Plaintiff initially acknowledged that a six-month limitations period generally applies to such claims, but argued that the limitations period should be equitably tolled given the unusual circumstances presented here, including the necessity of seeking clarification of the award from the arbitrator, that much of the delay in returning to the arbitrator was caused by defendant, and that plaintiff filed its complaint less than one month after the arbitrator issued his second opinion clarifying the phrase "and as extended by the parties." Later, in a reply to defendant's motion, plaintiff denied

that Michigan imposes a six-month limitations period on claims to vacate an arbitration award, asserting for the first time that such actions are subject to the six-year residual statute of limitations set forth in MCL 600.5813.

The trial court agreed and denied defendant's motion for summary disposition. The trial court ruled that the residual six-year limitations period set forth in MCL 600.5813 applied to plaintiff's claim to vacate a portion of the arbitration award and that even if a six-month limitations period applied, it would be equitably tolled considering the circumstances presented.

Plaintiff likewise moved for summary disposition, asserting that the arbitrator exceeded his authority by extending the "me too" benefits until October 7, 2002, because he did so relying on the "ground rules" (which extended the CBA pending ratification of a successor agreement) and not by interpreting language contained in the CBA. Defendant opposed the motion, asserting that the arbitrator was acting within his authority when he interpreted the "contract period" as including the parties' mutually agreed extension of the CBA until such time as the successor agreement was ratified. At the conclusion of oral argument, the trial court granted plaintiff's motion. It concluded that the arbitrator exceeded his authority by relying on the "ground rules," and not solely on the CBA, to determine that the "contract period" for purposes of the "me too" increases concluded on October 7, 2002.

Defendant first argues on appeal that the trial court erred in determining that actions to vacate an arbitration award are governed by a six-year limitations period. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v*

Ameribank, 468 Mich 557, 561; 664 NW2d 151 (2003); *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; 651 NW2d 188 (2002). The question regarding the applicable limitations period presents a question of law that this Court also reviews de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003); *City of Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002).

The parties agree, correctly, that there is no statute or court rule setting forth a limitations period specifically for actions seeking to vacate labor arbitration awards arising from collective bargaining agreements. Although arbitration is addressed in both statutory provisions and court rules, there is no limitations period plainly applicable to actions relating to labor arbitration awards.

The Legislature has declared, in § 1 of the labor mediation act, that it is "the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes . . . ." MCL 423.1. In furtherance of this policy, the Legislature has provided:

> (1) Any labor dispute, other than a representation question, may lawfully be submitted to voluntary arbitration in the manner provided in this section. . . .
>
> (2)(a) When a labor dispute involves the meaning or interpretation of an existing collective agreement between an employer and a labor organization and the collective agreement provides for the use of a designated arbitrator to decide disputes thereunder, or provides the method for selection of arbitrator or arbitrators, the provisions of that agreement shall be binding upon the parties, and shall be complied with unless the parties agree to submit the dispute to some other arbitration procedure.

* * *

> (4) An award rendered in a proceeding hereunder shall be enforceable at law or in equity as the agreement of the parties. [MCL 423.9d.]

However, the labor mediation act does not contain any limitations period for actions to enforce, vacate, or modify arbitration awards. MCR 3.602 establishes limitations periods for filing a complaint to vacate an arbitration award (21 days), a motion to vacate an award (91 days), or a complaint to correct or modify an arbitration award (21 days). MCR 3.602(J) and (K). However, that rule only governs statutory arbitration conducted under chapter 50 of the Revised Judicature Act (RJA), MCL 600.5001 to 600.5035. MCR 3.602(A). The pertinent provisions of the RJA specifically except collective bargaining agreements from that chapter. MCL 600.5001(3). Thus, the limitations periods set forth in MCR 3.602 do not apply to awards such as that at issue here.

In the absence of a specifically applicable limitations period, defendant urges that a six-month period is mandated by the Sixth Circuit's decision in *Badon*, *supra*. Alternatively, plaintiff asserts that, in the absence of any specifically applicable limitations period, this action is governed by the six-year residual limitations period set forth in MCL 600.5813.

At issue in *Badon* was the proper limitations period for a Michigan employee's "hybrid" action, brought under § 301 of the Labor Management Relations Act, 29 USC 141 *et seq*. (hereafter LMRA), against his former employer for breach of contract and against his union for unfair representation. The Sixth Circuit observed that the United States Supreme Court had instructed federal courts to "apply the most analogous state statute to section 301 suits as a matter of federal law" and that "the most appropriate [limitations] statute was that pertaining

to the vacation of arbitration awards." *Badon*, *supra* at 95-96, citing *Int'l Union, UAW v Hoosier Cardinal Corp*, 383 US 696, 704-705; 86 S Ct 1107; 16 L Ed 2d 192 (1966), and *United Parcel Service v Mitchell*, 451 US 56, 62; 101 S Ct 1559; 67 L Ed 2d 732 (1981).

Having decided that it was to apply the Michigan limitations period for actions to vacate arbitration awards, the court next attempted to ascertain Michigan law on this issue. It began by noting that the limitations period relating to arbitration awards set forth in the Michigan Court Rules applied only to statutory arbitration under the RJA, which explicitly excludes from its operation " 'collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment.' " *Badon, supra* at 98, quoting MCL 600.5001(3). The *Badon* court then explained:

> By excluding labor disputes from statutory arbitration, Michigan has relegated labor arbitration to the realm of the common law. Appellants have not directed us to, nor have we found, any authority limiting the time in which labor arbitration awards may be vacated in Michigan. [The plaintiff] has, however, cited several cases which he claims employ Michigan's residual six-year personal action statute. [MCL 600.5813]. Unfortunately none of the cases cited is apposite. . . .
>
> In summary, we are left without guidance by the state of Michigan with respect to the time period within which actions to vacate labor arbitration awards must be brought. We must therefore decide this federal question on the strength of our own reasoning. That process leads us to conclude that the most appropriate statute of limitations under these circumstances is the six-month period found at section 10(b) of the National Labor Relations Act, 29 U.S.C. § 106(b). Although that period specifically governs unfair labor charges brought before the National Labor Relations Board, the policy behind that time period applies with

> equal force when similar charges are brought to a federal court under section 301 of the [LMRA]. [*Badon*, *supra* at 99.]

The *Badon* court commented that the six-month limitations period presented " 'the proper balance between the national interests in [a] stable bargaining relationship and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system.' " *Id*., quoting *Mitchell*, *supra* at 70.

This Court applied *Badon* in *Romero v Paragon Steel Div, Portec, Inc (On Remand)*, 129 Mich App 566, 572-573; 341 NW2d 546 (1983). In *Romero*, on remand from our Supreme Court for reconsideration in light of *Badon*, this Court, quoting extensively from *Badon* and adopting its reasoning, determined that a six-month limitations period applied to bar the plaintiff's claims against his employer for wrongful discharge brought under § 301 of the LMRA. This Court also determined that a teacher's claim against his union alleging breach of the duty of fair representation was barred by a six-month limitations period, "[l]ikewise [finding] the result reached . . . [in] *Badon* to be sound." *Ray v Org of School Administrators & Supervisors, Local 28*, 141 Mich App 708, 711; 367 NW2d 438 (1985). Similarly, this Court applied *Badon* to again bar as untimely an action by an employee against her union and its agent, alleging that the union failed to file a timely grievance for arbitration on her behalf following termination of her employment. *Ogletree v Local 79, Service Employees Int'l Union*, 141 Mich App 738, 739-740, 743; 368 NW2d 882 (1985).

Next, this Court mentioned *Badon* in *Meadows v Detroit*, 164 Mich App 418, 434-435; 418 NW2d 100 (1987). That case involved an action by a former police officer against his employer alleging wrongful discharge

(among other claims) and against his union for breach of the duty of fair representation. In that context, this Court explained:

> When a duty of fair representation claim is asserted by itself or in combination with a claim of wrongful discharge, this Court has held that a six-month period of limitations applies. *Romero* [*supra* at 572-573]; *Ray* [*supra*]; *Ogletree* [*supra* at 745]. The adoption of such a brief limitations period is based on the following sound policy rationale:
>
> "Where the parties have contracted to settle claims among themselves, their final decisions should not be exposed to collateral attack for long periods but should become final rather quickly. See *UMW v Barnes & Tucker Co*, 561 F2d 1093, 1096 (CA 3, 1977) ('It is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties.')[.] Otherwise, the internal system will be just another step into a lengthy process of litigation rather than an efficient and unitary method of disposing of the high volume of grievances generated under any large scale employment contract." [*Romero*, *supra*, p 569, quoting *Badon* [*supra*]. See also *DelCostello v Int'l Brotherhood of Teamsters*, 462 US 151; 103 S Ct 2281; 76 L Ed 2d 476 (1983).] [*Meadows*, *supra* at 434-435.]

Of note to the instant appeal, neither *Badon* nor any of the aforementioned cases actually involved actions to vacate, modify, or enforce arbitration awards. Rather, *Badon* and its Michigan progeny applied a six-month limitations period to claims that a union had breached its duty of fair representation, whether brought alone or in conjunction with claims against the employer for wrongful termination or other improper employment action. *Meadows*, *supra*.

The limitations period applicable to an action to enforce an arbitration award was at issue in *Walkerville Ed Ass'n v Walkerville Rural Communities School*, 165 Mich App 341, 345; 418 NW2d 459 (1987). This Court

noted that Michigan law does not specify a limitations period for enforcing a labor arbitration award arising from private-sector collective bargaining agreements, or from public-sector agreements where the challenged employer action was not submitted to the Michigan Employment Relations Commission (MERC). Faced with this, this Court affirmed a trial court's decision extending by analogy the six-month limitations period found in § 16(a) of the public employment relations act (PERA), MCL 423.216(a), to the plaintiff's claim seeking enforcement of an arbitration award not meeting the conditions of that act. After noting that neither MCR 3.602(I) nor MCL 423.216(a) applied to the case before it, this Court reasoned:

> An arbitration proceeding, being based on an agreement, is contractual in nature. The difficulty in this case arises because of MCL 423.9d . . . , which, while allowing public labor disputes to be resolved by arbitration, does not specify a limitation period for enforcing the arbitration award. Rather, the award rendered "shall be enforceable at law or in equity as the agreement of the parties." MCL 423.9d(4) . . . . This requirement suggests that an arbitration award in the public sector should be subject to the six-year limitation period for contracts contained in the Revised Judicature Act, MCL 600.5807(8) . . . . This limitation period, although perhaps applicable under strict rules of statutory construction, appears to be an unduly lengthy period for enforcing an arbitration award. This is particularly so when viewed with the statutory declaration that the best interests of the people of this state are served by the prompt settlement of labor disputes. MCL 423.1 . . . . Similar policy considerations, under federal labor law, along with a consideration of the competing interests affected by the limitation period, have led federal courts to adopt the six-month limitation period contained in § 10(b) of the National Labor Relations Act, 29 USC 160(b), for arbitration purposes.

> We conclude that the trial court did not err in adopting the six-month limitation period. A six-month period is part of PERA; it effectuates the state's express policy in favor of the prompt resolution of labor disputes in the public sector. Adoption of the six-month limitation period also contributes to statute of limitation uniformity. [*Walkerville*, *supra* at 345 (some citations omitted).]

Subsequently, however, our Supreme Court refused to apply this Court's decision in *Walkerville*, holding that PERA's six-month limitations period could not be applied by analogy and that actions to enforce arbitration awards are instead governed by the six-year limitations period for breach of contract actions and, where specific performance or other equitable relief is sought, are also subject to the equitable doctrine of laches. *Rowry v Univ of Michigan*, 441 Mich 1, 9-11; 490 NW2d 305 (1992). Stated differently, the Court explained that "a plaintiff ordinarily has six years to seek enforcement of an arbitration award[,]" although "in certain cases this time period may be substantially diminished if a plaintiff's arbitration award grants equitable relief and a delay in its enforcement is shown to prejudice the defendant in a way that evokes laches to bar the plaintiff's claim." *Id*. at 11-12.

We find particularly noteworthy Justice GRIFFIN's " 'reluctant' " concurrence in *Rowry*, "express[ing] . . . concern that application of a limitation period of six years, rather than six months, will seriously undermine state and federal policies favoring the prompt resolution of labor disputes" and urging the Legislature "to address this issue and to provide a more appropriate period of limitation in keeping with its stated policy of encouraging expeditious resolution of labor disputes." *Id*. at 12, 17. More specifically, Justice GRIFFIN (joined by Justice BOYLE) reasoned as follows:

In its analysis, the majority concludes that the six-year period generally applicable to contract actions is the appropriate limitation period to apply to this plaintiff's action to "enforce" a labor arbitration award. However, this case involves more than a simple breach of contract or a straightforward refusal to comply with an arbitration award. Plaintiff's cause of action arises out of a collective bargaining agreement between his union and his employer. The agreement establishes a grievance procedure designed to effect the prompt resolution of disputes. Such a procedure is in keeping with a state policy that discourages long delays in the resolution of labor disputes.

When it adopted the labor mediation act, our Legislature stated:

"It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes . . . ." [MCL 423.1 . . . .]

This act encourages use of arbitration in the settlement of disputes by providing that an agreement to arbitrate "shall be binding upon the parties," and stating that the arbitration award "shall be enforceable at law or in equity as the agreement of the parties."

Concern at the state level for rapid resolution of labor disputes is consistent with established policy at the federal level. In *DelCostello* [*supra*], the United States Supreme Court rejected the application of an extended state contract limitation period in an action arising from a collective bargaining agreement that provided for grievance resolution through arbitration. The Court explained:

"This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later.' " [462 US 169, quoting (*Mitchell, supra* at 64).]

Recognizing the importance of stable relationships in the workplace and the need for finality in a collectively bar-

gained grievance procedure, the Court elected to apply the six-month limitation period of § 10(b) of the Labor-Management Relations Act, 29 USC 160(b), "a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here . . . ." *DelCostello*, 462 US 169.

In *Samples v Ryder Truck Lines, Inc*, 755 F2d 881, 888 (CA 11, 1985), the United States Court of Appeals for the Eleventh Circuit applied the *DelCostello* rationale to an employee's action to enforce a labor arbitration award. The court found Georgia's six-year contract limitation period inapplicable because "a grievance arising during the term of a collective bargaining agreement bears little likeness to a common law breach of contract claim." Similarly, in *Int'l Ass'n of Machinists v Allied Products Corp*, 786 F2d 1561, 1564 (CA 11, 1986), the Eleventh Circuit applied the six-month limitation period to a union's action to compel arbitration, explaining that Alabama's six-year limitation period for contract actions "contravenes the federal policy of the prompt resolution of labor disputes."

As I see it, the same rationale counsels against application of a six-year contract limitation period in the instant case. . . . Surely, if a policy of prompt resolution of labor disputes is to have meaning, a relatively short limitation period should govern resort to the courts after exhaustion of a grievance procedure.

Although the Legislature has taken pains to declare that it is the public policy of this state to encourage prompt resolution of labor disputes, unfortunately, it has failed to provide suitable statutes of limitations for the implementation of that policy.

I agree with the reasoning set forth in *Walkerville* [*supra*] and I would adopt it in this case if the Legislature had not provided a residual or "catch-all" statute of limitations requiring:

"All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." [MCL 600.5813 . . . .]

> It is at least arguable that MCL 600.5807(8) . . . [the period of limitations for contract actions applied by the majority] does not apply in this case because that subsection establishes a limitation period for "actions to recover damages or sums due for breach of contract," whereas this plaintiff primarily seeks reinstatement to his position as a bus driver. However, because I conclude that the residual statute is applicable in any event, I am compelled to agree that plaintiff's claim is governed by a six-year limitation period.
>
> Rather than allow a wide disparity to develop in the treatment of similar claims presented by public and private employees, I urge the Legislature to address this issue and to provide a more appropriate period of limitation in keeping with its stated policy of encouraging expeditious resolution of labor disputes. [*Rowry*, *supra* at 12-17.]

In her concurrence, Justice RILEY agreed with the majority that the six-year period of limitations for contract actions was applicable to the plaintiff's attempt to enforce his arbitration award. She reasoned that

> [a]s the majority has recognized, the only reference in the labor mediation act, MCL 423.1 *et seq*. . . . , which applies to the enforcement of arbitration awards is § 9d(4), which provides:
>
> "An award rendered in a proceeding hereunder shall be enforceable at law or in equity as the agreement of the parties." [MCL 423.9d(4) . . . .]
>
> Two factors contribute to the conclusion that the six-year provision for breach of contract must apply here. First, as the majority recognized, the Legislature did not provide for an express time frame to enforce arbitration awards in the labor mediation act itself. Therefore, we are left with the belief that the Legislature intended for us to apply the existing six-year period of limitation for breach of contract actions to govern this issue. Second, we have held that "[a]n arbitrator's jurisdiction and authority to resolve a particular dispute concerning the appropriate interpretation of a collective bargaining agreement derives exclusively from the contractual agreement of the parties . . . ."

> Given that an arbitrator is bound by the terms of the collective bargaining agreement, there is nothing that would have precluded the parties from establishing a time limitation shorter than six years.
>
> Because neither the labor mediation act nor the collective bargaining agreement (nor the arbitration award itself) provides a statute of limitation to enforce an arbitration award, the six-year period of limitation for breach of contract must apply. [*Rowry*, *supra* at 18-19 (some citations omitted).]

Justice RILEY joined in Justice GRIFFIN's "call to the Legislature to address this issue and provide a more appropriate period of limitation in keeping with its stated policy of encouraging expeditious resolution of labor disputes." *Id*. at 18 n 1.

Despite the urgings of Justices GRIFFIN, BOYLE, and RILEY, however, the Legislature has taken no action in the nearly 17 years since *Rowry* was decided to provide a specific statute of limitations for the enforcement, or for actions seeking the vacation, of labor arbitration awards. Thus, this Court is left to construe its own earlier decisions (applying a six-month limitations period to actions against a union for unfair representation or actions brought under § 301 of the LMRA) and our Supreme Court's decision in *Rowry* (imposing a six-year limitations period on actions to enforce an arbitration award) to determine the applicable limitations period for actions, such as the instant action, that seek to vacate an arbitration award arising from a collective bargaining agreement. In this context, we conclude, albeit reluctantly, that actions to vacate arbitration awards are subject to a six-year limitations period.

We find that actions to vacate arbitration awards are more akin to actions to enforce arbitration awards than to actions for unfair representation. In *Rowry*, our Supreme Court held that the enforcement of an arbi-

tration award is subject to the six-year limitations period for breach of contract because "arbitration is a matter of contract. It is the agreement that dictates the authority of the arbitrators and the disputes to be resolved through arbitration." *Rowry*, *supra* at 10. Certainly, the same logic is equally applicable in the context of an action to vacate an arbitration award. Thus, we must reject defendant's suggestion that we should limit *Rowry*'s application to enforcement, not vacation, actions. We have no authority to impose such a limitation when nothing in *Rowry* would even vaguely suggest it.

Considering the Supreme Court's analysis in *Rowry* and the lack of legislative action thereafter, defendant can offer no compelling substantive legal basis to support the application of a six-month limitations period here. Thus, here, as in *Rowry*, despite the Legislature's "declared- . . . public policy of this state" favoring "prompt settlement of labor disputes," MCL 423.1, this Court is compelled to conclude that plaintiff's action to vacate a portion of the arbitration award is subject to the six-year limitations period for contract actions (considering that such awards are "enforceable at law or in equity as the agreement of the parties" under MCL 423.9d[4], as suggested by *Rowry*) or to the six-year residual "catch-all" limitations period set forth in MCL 600.5813 (as suggested by Justice GRIFFIN in his concurrence in *Rowry*) for "[a]ll other personal actions" to which specific limitations periods are not applicable.[2]

Defendant next argues that the trial court erred by granting plaintiff's motion for summary disposition, because the arbitrator's award constituted an arguable

[2] Having concluded that plaintiff's claim is governed by a six-year limitations period, we need not address plaintiff's argument that any six-month limitations period was equitably tolled under the unique circumstances of this case.

construction of the terms of the CBA and was within his authority. We agree.

This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004); *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004); *Tokar v Albery,* 258 Mich App 350, 352; 671 NW2d 139 (2003). Judicial review of an arbitrator's decision is narrowly circumscribed. *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002). A court may not review an arbitrator's factual findings or decision on the merits. *Id*. Likewise, a reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). Nor may a court substitute its judgment for that of the arbitrator. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). "[H]ence [courts] are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way." *Id*. The inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator. *Police Officers Ass'n of Michigan*, *supra* at 343. If, in granting the award, the arbitrator did not disregard the terms of his or her employment and the scope of his or her authority as expressly circumscribed in the contract, " 'judicial review effectively ceases.' " *Id*., quoting *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). Thus, " 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' " a court may not overturn the decision even if convinced that the arbitrator committed a serious error. *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 760;

442 NW2d 773 (1989), quoting *United Paperworkers Int'l Union, AFL-CIO v Misco, Inc*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987).

As discussed earlier, the issue for arbitration was whether certain provisions of plaintiff's bargaining agreement with another bargaining unit triggered the "me too" clause in the CBA, which, as previously noted, provides:

> If another bargaining unit receives an increase higher than the settlement with AFSCME, such increase will also be granted to AFSCME for this contract period as a "me too" on wages. If gained by Police or Fire bargaining units, a "me too" [sic] retroactivity on wages for retirees.

At issue here is the arbitrator's interpretation of the phrase "for this contract period" as used in this provision. "[T]his contract period" is not defined in the CBA. However, two provisions address the termination and duration of the agreement:

> 55. TERMINATION AND MODIFICATION
>
> This Contract shall continue in full force and effect until 11:59 p.m. on June 30, 2001. If either party desires to modify or change this contract, it shall follow the procedure for negotiations as set forth in the paragraph entitled "Duration of Contract".
>
> 56. DURATION OF CONTRACT
>
> This Contract shall become effective as of its date of execution, and shall remain in full force and effect until 11:59 p.m., June 30, 2001, and from year to year thereafter unless either party hereto serves written notice upon the other at least ninety (90) calendar days prior to the expiration date of any subsequent automatic renewal period of its intention to amend, modify or termination [sic] this contract.

The parties did not reach agreement on a successor contract as of the CBA's June 30, 2001, expiration date.

It is not clear whether either party, or which of them, complied with paragraph 56 of the CBA by serving written notice on the other party of an intent to amend, modify, or terminate the CBA. What is clear is that, on April 24, 2001, the parties executed a written document, titled "Ground Rules for Negotiations," which specifically provided that the CBA was to "remain in effect" until a successor contract was ratified by both parties. The arbitrator, having been presented with the "ground rules" during the hearings, determined that the "me too" provision's phrase "for this contract period" included the period during which the parties agreed that the CBA would "remain in effect." The arbitrator reasoned that, by virtue of the mutually agreed "ground rules," "[t]he employees continued to be paid under the terms and conditions of the 1998-2001 contract until the new contract was ratified." Accordingly, the arbitrator further reasoned that the "me too" wage increase provision also continued to be part of the 1998-2001 agreement until it was officially superseded by ratification of the successor agreement.

The trial court ruled, as argued by plaintiff, that because the arbitrator relied on the "ground rules" to determine the duration of the phrase "for this contract period," and because those benefits were not extended in the successor contract, the arbitrator acted outside his authority by awarding "me too" benefits for the period from July 1, 2001, to October 7, 2002. Considering the limited scope of judicial review and that the arbitrator certainly was " 'arguably construing or applying' " the contractual language "for this contract period" having considered the evidence presented, *Michigan Ass'n of Police*, *supra* at 760, quoting *Misco, Inc*, supra at 38, we conclude that the trial court erred

by granting plaintiff's motion for summary disposition to vacate this portion of the arbitrator's award.[3]

The CBA provides that "[a]n arbitrator shall have no power to add to, subtract from or modify any of the terms of this contract . . . ." Contrary to plaintiff's assertion, considering the parties' written agreement that the contract would remain in effect during negotiations, the arbitrator cannot be said to have added to, subtracted from, or modified the CBA in issuing his award. Rather, being required to determine the duration of "this contract period," the arbitrator merely gave effect to the parties' own mutual agreement that the CBA would remain the operative agreement between the parties during the negotiation period. The CBA clearly contemplated that the parties might extend its operation by mutual agreement. Thus, giving effect to such an extension, even if achieved other than as contemplated in the CBA, does not contradict or offend the CBA in any way.

Certainly, there is no dispute that both parties operated under the CBA until October 7, 2002. As noted by the arbitrator, plaintiff's employees/defendant's members were paid under, and remained subject to all the provisions of, the CBA until that date. The arbitrator reasoned that if the contract's termination date was extended and the contract remained in effect after June 30, 2001, then the "me too" provision would also continue to be in effect during that contract period. On this basis, finding that the parties did in fact extend the termination date of the CBA, the arbitrator concluded that defendant's members were entitled to "me too"

[3] In reaching this conclusion, we observe that any consideration of whether "me too" benefits were included in the successor agreement is wholly irrelevant to the determination of the duration of "this contract period."

benefits for the entire operative contract period, from July 1, 1998, to October 7, 2002. We find no basis to conclude that the arbitrator acted beyond the material terms of the contract from which his authority was derived, *Saveski*, *supra* at 554, or that he was doing anything other than " 'arguably construing or applying the contract,' " *Michigan Ass'n of Police*, *supra* at 760, quoting *Misco, Inc*, *supra* at 38, in reaching this conclusion. Further, under the circumstances presented here, the determination of the duration of "this contract period" was a factual finding to be made by the arbitrator, and the arbitrator's factual findings are not subject to judicial review.[4] *Police Officers Ass'n of Michigan*, *supra* at 343.

There being no basis for the trial court to modify the arbitrator's award, it was defendant, and not plaintiff, who was entitled to summary disposition. We reverse and remand for the entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

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[4] In this context, we note that plaintiff apparently did not object to the arbitrator's receipt of the "ground rules" at the hearings and that plaintiff participated in returning to the arbitrator to seek clarification of the award, knowing that defendant asserted that the award encompassed the mutually agreed extension of the CBA during the negotiation period.

PEOPLE v MCMULLAN

Docket No. 281844. Submitted March 11, 2009, at Detroit. Decided June 2, 2009, at 9:00 a.m.

A jury in the Genesee Circuit Court, Geoffrey L. Neithercut, J., convicted Angelo R. McMullan of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. The defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by refusing the defendant's request for a jury instruction on involuntary manslaughter. Involuntary manslaughter is a necessarily included lesser offense of murder. If a defendant is charged with murder, the trial court should instruct the jury on involuntary manslaughter only if the instruction is supported by a rational view of the evidence. Murder is a homicide committed with malice, and involuntary manslaughter is the unintentional killing of another committed with a lesser *mens rea* of gross negligence or an intent to injure. Malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Malice can also be inferred from the use of a deadly weapon. The facts in this case support a finding of malice and preclude a finding of involuntary manslaughter. The defendant fought with the victim, repeatedly asked his wife to give him his loaded gun and took it from her when she refused, went after the victim after the victim retreated to his car, trapped the victim in the victim's car, then pointed and fired a gun at the victim's chest at close range.

2. The defendant's trial counsel did not deprive the defendant of effective assistance of counsel by failing to anticipate that a prosecution witness would receive a favorable plea agreement in exchange for his testimony and by failing to cross-examine the witness accordingly. The other evidence against the defendant was overwhelming and the defendant could have been convicted on the basis of his testimony alone.

3. The defendant cannot establish prosecutorial misconduct based on the prosecution's failure to disclose its witness's plea

agreement. A prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony. MCR 6.201(B)(5). Pursuant to *Brady v Maryland*, 373 US 83 (1963), the prosecutor must disclose any information that would materially affect the credibility of prosecution witnesses. To establish a *Brady* violation, a defendant must prove that the state possessed evidence favorable to the defendant, that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence, that the prosecution suppressed the favorable evidence, and that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. In this case, the defendant cannot meet the last requirement in light of the overwhelming evidence against him when the testimony of the witness with the plea agreement is disregarded.

Affirmed.

BANDSTRA, J., concurring in part and dissenting in part, agreed with the majority except for its conclusion that the trial court properly refused to instruct the jury on involuntary manslaughter. The evidence was sufficient to allow a rational fact-finder to conclude that the defendant had committed the homicide with a lesser *mens rea* of gross negligence or an intent to injure and without malice. The fact-finder also could have concluded that the defendant's drug-induced intoxication was sufficient to rob his act of the necessary elements of murder. The case should be remanded for a new trial by a properly instructed jury.

1. HOMICIDE — MURDER — LESSER-INCLUDED OFFENSES — INVOLUNTARY MANSLAUGHTER — JURY INSTRUCTIONS.

Involuntary manslaughter is a necessarily included lesser offense of murder, but a defendant charged with murder is entitled to a jury instruction on involuntary manslaughter only if a rational view of the evidence supports such an instruction.

2. CRIMINAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant, in order to demonstrate ineffective assistance of counsel, must show that counsel's performance fell below an objective standard of reasonableness and that the performance so prejudiced the defendant as to deprive the defendant of a fair trial; prejudice exists if the defendant shows a reasonable probability that the outcome would have been different but for counsel's errors.

3. CRIMINAL LAW — TRIALS — WITNESSES — PROSECUTION WITNESSES — DUTY OF PROSECUTION TO DISCLOSE EVIDENCE.

The prosecution must disclose any information that would materially affect the credibility of its witnesses; to establish a violation of this duty to disclose, a defendant must prove that the state possessed evidence favorable to the defendant, that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence, that the prosecution suppressed the favorable evidence, and that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, *Donald A. Kuebler*, Chief, Research, Training, and Appeals, and *Vikki Bayeh Haley*, Assistant Prosecuting Attorney, for the people.

Patrick K. Ehlmann for the defendant.

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

SAAD, C.J. A jury convicted defendant of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 30 to 75 years in prison for the second-degree murder conviction, 5 to 15 years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. Defendant appeals and, for the reasons set forth below, we affirm.[1]

[1] Although defendant initially failed to file a timely claim of appeal, the United States District Court for the Eastern District of Michigan granted habeas relief to defendant and ordered the state of Michigan to reinstate his appeal as of right in this Court. *McMullan v Jones,* unpublished

I. JURY INSTRUCTION

Defendant claims the trial court erred when it refused to give the jury an involuntary manslaughter instruction. This Court reviews de novo questions of law arising from jury instructions. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). To warrant reversal of a conviction, the defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

A homicide committed with malice is murder. *People v Mendoza*, 468 Mich 527, 534-536; 664 NW2d 685 (2003). In contrast, the unintentional killing of another, " 'committed with a lesser mens rea of gross negligence or an intent to injure, and not malice,' " is common-law involuntary manslaughter. *Gillis, supra* at 138, quoting *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004). Common-law involuntary manslaughter is a necessarily included lesser offense of murder. *Mendoza*, *supra* at 540-542. If a defendant is charged with murder, the trial court should instruct the jury on common-law involuntary manslaughter, but only if the instruction is supported by a rational view of the evidence. *Id.* at 541. Unlike the dissent, we do not believe that a rational view of the evidence in this case supports an instruction for involuntary manslaughter.

Here, were we to agree that one of the bases for the trial court's refusal to give the instruction was incorrect —that defendant committed a felony by stealing the victim's money after the shooting—a rational view of the evidence nonetheless would not support an instruc-

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opinion and order of the United States District Court for the Eastern District of Michigan, entered August 30, 2006 (Docket No. 05-70807-DT), slip op at 11.

tion for involuntary manslaughter. To find involuntary manslaughter, a defendant must not act with malice. *Gillis, supra* at 138. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke,* 457 Mich 442, 464; 579 NW2d 868 (1998). "[M]alice is implied when the circumstances attending the killing demonstrate an abandoned and malignant heart . . . ." *Id.* at 467. It can also "be inferred from the use of a deadly weapon." *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

Here, the evidence supports a finding of malice and not a lesser *mens rea* of gross negligence, as defendant claims. Defendant was angry at the victim over payment for a cocaine deal and had a fistfight in an apartment complex parking lot. The fight ended and the victim got into his station wagon. Defendant then repeatedly demanded that his wife give him his loaded revolver. When defendant's wife refused to give him the gun, defendant grabbed it from her and returned to and escalated the altercation with the victim. He approached the victim's car and pushed the door to prevent the victim from getting out of his vehicle. After the victim fell back into his seat, defendant pointed the gun at the victim, within one foot of his chest. Defendant cocked back the hammer of the revolver, which was the only way the gun could fire. Then, defendant pulled the trigger, shooting the victim at close range in his chest. Thereafter, defendant rifled through the critically injured victim's pockets and took his money. These facts support a finding of malice and preclude a finding of involuntary manslaughter.

The only evidence suggesting that defendant did not commit this homicide with malice is his own testimony

that he did not intend to kill the victim, that he assisted in taking the victim to the hospital, and that he displayed remorse. This does not constitute the kind of substantial evidence necessary to support a lesser offense instruction, *People v Silver*, 466 Mich 386, 393; 646 NW2d 150 (2002), and the facts certainly do not "rationally fit within the legal purview of manslaughter . . . ." *Holtschlag, supra* at 16 n 8.[2] Again, in light of evidence that defendant demanded a loaded weapon from his wife after the physical altercation concluded, returned to the victim and maintained a dominant position over him by physically forcing the victim back into the vehicle, pointed the gun close to the victim's chest, cocked the hammer, pulled the trigger, and stole the victim's money, no rational jury could conclude that defendant acted without malice. Defendant's alleged display of remorse does not alter this conclusion. Once defendant saw the gruesome result of his act, he may have regretted his conduct, but this does not alter the fact that his actions denote malice. To rule otherwise opens the door to ex post facto rationalizations of cold-blooded murder, like the one defendant committed here. The trial court correctly refused to give the jury an instruction on involuntary manslaughter.

II. ASSISTANCE OF COUNSEL

Defendant contends that his attorney was ineffective because he did not know that one of the prosecution witnesses, Gregory McDowell, may have received le-

[2] We acknowledge that defendant claims not to remember cocking the hammer or pulling the trigger and that he denies searching the victim's pockets for money, but the gun could not have discharged without the deliberate act of pulling back the hammer and he acknowledged that firing a revolver at a person's chest is likely to cause serious injury or death. Moreover, a witness testified that defendant indeed searched the victim's pockets immediately after shooting him.

nience in anticipation of his testimony against defendant and counsel failed to cross-examine McDowell about his plea agreement.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485. Effective assistance is strongly presumed, and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.* at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show (1) that his attorney's performance fell below an objective standard of reasonableness and (2) that the performance so prejudiced him that he was deprived of a fair trial. *Grant, supra* at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

There is no evidence that, at the time McDowell testified, a plea agreement existed. McDowell had been charged with possession of cocaine, but did not enter a guilty plea until two days later. Defense counsel's performance cannot fall below an objective standard of reasonableness for failing to cross-examine the witness regarding a nonexistent agreement.

Defendant also claims that defense counsel should have anticipated McDowell's plea agreement because (1) McDowell testified for the prosecution, but was also facing charges, and (2) McDowell was granted supervised release

even though he failed to appear at his arraignment. Were we to agree, counsel's performance would not have so prejudiced defendant that he was deprived of a fair trial. *Grant, supra* at 485-486. McDowell's testimony was the same as defendant's except with regard to whether defendant searched the victim's pockets after the shooting. Given the evidence relating to the actual shooting of the victim, there was clearly overwhelming evidence to convict defendant of second-degree murder on the basis of defendant's testimony alone.

The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). The victim died as a result of a gunshot fired by defendant. Defendant admitted the fistfight and explained that the victim's failure to pay for the cocaine would have disrupted defendant's ability to support his drug habit.

Notwithstanding that the evidence clearly supports a conviction of second-degree murder, defendant claims that, absent McDowell's testimony regarding the search of the victim's pockets, the jury would have been more likely to convict defendant of voluntary manslaughter. The elements of voluntary manslaughter are: "(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Time lapsed after the fistfight stopped and the victim retreated to his car. Meanwhile, defendant repeatedly asked his wife to give him the revolver and she refused. Thereafter, defendant approached his wife and

"snatched" the revolver from her. Given this lapse of time, during which a reasonable person could have controlled his passions, the jury could not have found defendant guilty of voluntary manslaughter beyond a reasonable doubt. Thus, defendant fails to show a reasonable probability that the outcome would have been different but for the defense counsel's failure to anticipate McDowell's plea agreement and to cross-examine McDowell accordingly. *Grant*, *supra* at 486.

III. PROSECUTORIAL MISCONDUCT

Defendant also asserts that if his ineffective assistance of counsel claim fails, the prosecutor engaged in misconduct by failing to disclose McDowell's plea agreement.[3]

Under MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony. Similarly, pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the prosecutor must disclose any information that would materially affect the credibility of his witnesses. See *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). To establish a *Brady* violation, a defendant must prove

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.* at 281-282.]

Were we to decide that the prosecutor should have

[3] This Court reviews preserved claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair or impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

disclosed information about McDowell's anticipated plea agreement, defendant would fail to satisfy the fourth prong of the *Brady* test. Defendant has not shown that a reasonable probability exists that the outcome of the proceedings would have been different had the prosecutor disclosed evidence of a plea agreement or expectations for lenience in anticipation of an agreement. *Lester*, *supra* at 282. Again, regardless of McDowell's testimony, there was substantial evidence for the jury to have rejected a voluntary manslaughter instruction and convict defendant of second-degree murder. Furthermore, "a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Lester*, *supra* at 283. Evidence of the plea agreement or expectations for lenience would only have served as an additional basis to impeach McDowell, who had already been impeached by discrepancies between his preliminary examination testimony and his trial testimony. In light of defendant's failure to prove this element of the *Brady* test, we need not remand for an evidentiary hearing to address whether the prosecutor fulfilled his duty to disclose.

Affirmed.

HOEKSTRA, J., concurred.

BANDSTRA, J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's conclusion that the trial court did not err by failing to provide the jury the requested instruction on involuntary manslaughter as a necessarily included lesser offense. In all other respects, I concur with the majority opinion.

The Supreme Court most recently and comprehensively articulated our standard of review in *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002). "[T]he failure to instruct the jury regarding . . . a necessarily lesser included offense is error requiring reversal . . . if, after reviewing the entire cause, the reviewing court is satisfied that the evidence presented at trial 'clearly' supported the lesser included instruction," *id*. at 388, meaning that there was "substantial evidence to support the requested lesser instruction" at trial. *Id*. at 388 n 2.

Reviewing the "entire cause," I begin by noting that the trial court erred by considering the request for the instruction on involuntary manslaughter under *People v Ryczek*, 224 Mich 106; 194 NW 609 (1923). The trial court relied on *Ryczek*'s description of the elements of involuntary manslaughter and concluded that, under the facts of this case, those elements could not be satisfied. However, as explained in *People v Holtschlag*, 471 Mich 1, 11; 684 NW2d 730 (2004), "*Ryczek's* description of involuntary manslaughter was never meant to define the *elements* of the crime of manslaughter." (Emphasis in original.) Most notably, the trial court here concluded that *Ryczek* prohibited an involuntary manslaughter instruction because the victim was killed in the context of a felony.[1] *Holtschlag* reasoned that, at least since *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), whether "a 'felony' has been committed is simply not dispositive in determining whether either 'murder' or 'manslaughter' has been committed and, thus, the 'felony' language in *Ryczek's* manslaughter description is essentially irrelevant." *Holtschlag*, *supra* at 10.

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[1] The felony was defendant's alleged taking of money from the victim's pockets following the shooting. However, even if the *Ryczek* rule that a killing in the context of a felony could not be involuntary manslaughter was still good law, the jury might nonetheless have properly found defendant guilty of involuntary manslaughter if it believed his account that he did not take money from the victim.

The crucial difference between second-degree murder (of which defendant was convicted) and involuntary manslaughter (concerning which the requested instruction was denied) is the presence or absence of malice. "[T]he only element distinguishing murder from manslaughter is malice. . . . [T]he elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003).

"Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). In contrast, the killing of another, "committed with a lesser mens rea of gross negligence or an intent to injure, and not malice . . . is not murder, but only involuntary manslaughter." *Holtschlag*, *supra* at 21-22. In other words, conviction of involuntary manslaughter rather than murder is appropriate in such a "lesser mens rea" case because "the offender's mental state is not sufficiently culpable to reach the traditional malice requirements." *Mendoza*, *supra* at 541 (quotation marks and citation omitted).

Reviewing the evidence presented at trial, I conclude that no reasonable fact-finder could find that defendant did not shoot and kill the victim. However, the crucial question that remained was his state of mind in doing so.[2] There was ample evidence in the record from which a reasonable fact-finder could have concluded that defen-

[2] To the extent the trial court considered the malice question at all, it merely concluded, "Well, here, we know they're in a fight situation. Where there's a fight, there's malice." While the fact of the altercation between defendant and the victim is relevant in determining defendant's state of mind at the time he brandished the gun, it does not necessarily establish malice in that regard.

dant acted without malice. He and the victim, Jimmy Smith, had been longtime associates, using and selling controlled substances together for 30 years. On the evening of the altercation that resulted in Smith's death, he and defendant were arguing about a previous transaction in which Smith claimed that defendant had supplied him with fake Vicodin pills. Smith claimed that, as a result and in compensation for that, Smith should not be required to pay for cocaine that defendant had supplied to him, a proposition with which defendant vociferously disagreed. The resulting fistfight did not settle the matter as Smith still refused to give defendant the money he thought he was owed for the cocaine.

Defendant testified that he wanted to scare Smith into giving him the money, by threatening him with a gun. He testified that, at the time, he had ingested rock cocaine and that this made him feel like "a big man." Further, he testified that, earlier in the day, he had taken a dose of methadone, which he claimed provided a "high." A witness, Gregory McDowell, testified that he considered defendant to be under the influence of controlled substances because he fidgeted and paced. Further, the director of a methadone treatment center confirmed that defendant was in treatment at the time of the shooting. Defendant testified that he did not intend to shoot Smith and that he could not recall cocking the hammer or pulling the trigger to do so. He claimed that the gun merely "went off."

Following the shooting, the record shows that defendant took steps to assist Smith. Together with William Henry Russell, Jr., defendant laid Smith on the rear passenger seat of a car and took him to the emergency room entrance of a hospital. Russell testified that defendant had tears in his eyes at the time.

Notwithstanding all of this, a rational fact-finder could certainly have disbelieved defendant with respect to his intent and state of mind and concluded that the malice necessary to support a second-degree murder conviction existed at the time the gun was fired. That would be the proper analysis if defendant claimed that there was insufficient evidence to support the conclusion that he was guilty of second-degree murder. As the majority points out, for example, malice can be inferred simply from the use of a deadly weapon such as occurred here and a challenge to the second-degree murder conviction would properly be rejected. There was ample evidence to conclude that defendant acted with malice.

However, considering the argument defendant actually raises, I conclude that the evidence here was sufficient to allow a rational fact-finder to conclude otherwise, i.e., that defendant acted with a "lesser mens rea" and that his "mental state [was] not sufficiently culpable to reach the traditional malice requirements." *Holtschlag*, *supra* at 21-22; *Mendoza*, *supra* at 541 (quotation marks and citation omitted). Malice may be inferred from the use of a deadly weapon, but it does not have to be. A rational fact-finder could have believed defendant when he said that he did not intend to fire the weapon he was using merely to scare Smith, i.e., that he did not intend to do the act (firing the weapon) that caused Smith's death. That conclusion would be consistent with the long history defendant had with Smith, his attempts to help Smith following the shooting, his apparent grief at what had occurred and especially his corroborated accounts of being under the influence of drugs at the time the shooting occurred. As was the case with the defendant's "intoxication" in *People v Droste*, 160 Mich 66, 78-79; 125 NW 87 (1910), the fact-finder here might have concluded that, "at the moment" the gun discharged, defendant's drug use was

sufficient "to rob his act of the necessary elements of murder." While *Droste* is an ancient precedent, its conclusion in this regard was recently cited with approval in *Mendoza*, *supra* at 542-543. This is not to say, of course, that the jury would have found a lack of malice; it is merely to say that, given the record, it could have. By failing to instruct the jury on involuntary manslaughter and thus precluding that possible outcome, the trial court erred.

I reject the prosecutor's arguments that any error in this regard was without prejudice to defendant. The prosecutor argues that "defendant fails to show plain error affecting his substantial rights" because "the trial court instructed the jury on the lesser offense of voluntary manslaughter." Apparently, the argument is that, because the fact-finder did not find defendant guilty of voluntary manslaughter, it would necessarily have also rejected involuntary manslaughter if it had been instructed to consider it. That argument overlooks the fact that voluntary manslaughter and involuntary manslaughter are different offenses with different elements. " 'In contrast to the case of voluntary manslaughter . . . the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to reach the traditional malice requirements.' " *Mendoza*, *supra* at 541, quoting *United States v Browner*, 889 F2d 549, 553 (CA 5, 1989). The jury might well have concluded that there was no "provocation induced passion" to support a voluntary manslaughter conviction but that defendant's mental state nonetheless warranted a conviction of involuntary manslaughter.

Further, I reject the prosecutor's claim that, because the jury convicted defendant of second-degree murder, it necessarily found that defendant acted with malice,

so that "an instruction on common law involuntary manslaughter would not have produced a different result." The prosecutor's argument here is that the jury would simply have acquitted defendant if it concluded that he acted without malice. That argument has been specifically rejected by our Supreme Court in *Silver*, *supra* at 393 n 7:

> One might argue that the jury would have acquitted defendant if it believed his testimony. However, this is too facile. The United States Supreme Court rejected such an argument in *Keeble v United States*, 412 US 205, 212-213; 93 S Ct 1993; 36 L Ed 2d 844 (1973), when it stated:
>
> "[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."

The facts of this case are somewhat similar to those in *Silver*. At issue there was the state of mind of a defendant who had clearly and admittedly entered a residence without permission. *Id*. at 392. Nonetheless, the defendant claimed that he had no intent to steal or commit any other offense while in the dwelling. The trial court instructed the jury regarding first-degree home invasion but denied defendant's request for an instruction on the lesser included offense of breaking and entering without permission. *Id*. at 390. The Supreme Court reasoned that "[i]f the jurors believed defendant [acted without the appropriate criminal motive], they realistically could not act on [that belief]

unless they had an instruction that gave them that choice. Not to give them an instruction that allowed them to agree with defendant's view of the events in this case undermines the reliability of the verdict." *Id*. at 393.

The same is true here. Consistently with the result in *Silver*, I would reverse defendant's conviction of second-degree murder and remand the case for a new trial by a properly instructed jury. *Id*. at 394.

KIDDER v PTACIN

Docket No. 284224. Submitted March 10, 2009, at Lansing. Decided June 2, 2009, at 9:05 a.m.

Lori Kidder, as personal representative of the estate of decedent Sheldon Steeb, brought a medical malpractice, wrongful death action in the Calhoun Circuit Court against Philip C. Ptacin, M.D., and DayOne Family Healthcare. The defendants moved for summary disposition, arguing that under *Waltz v Wyse*, 469 Mich 642 (2004), the action was barred by the statute of limitations because it was filed more than two years after the date of the alleged malpractice and no saving provision applied. The court, Conrad J. Sindt, J., denied the motion, ruling that *Waltz* cannot apply retroactively to bar the plaintiff's action. The Court of Appeals, BORRELLO, P.J., and SAWYER and FITZGERALD, JJ., in an unpublished opinion per curiam, issued January 23, 2007 (Docket No. 257703), reversed and remanded for the entry of an order of summary disposition in favor of the defendants, holding that *Waltz* applies retroactively, as decided in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503 (2006). After the trial court dismissed this case on remand, the Supreme Court issued an order in *Mullins* stating that *Waltz* does not apply to causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007). The plaintiff moved to reinstate her action in light of the *Mullins* order, and the trial court, Stephen B. Miller, J., granted the motion. The defendants appealed.

The Court of Appeals *held*:

1. Under the law of the case doctrine, an appellate court ruling binds all lower tribunals with regard to the issue decided by the appellate court. A lower court may not decide a legal question differently where the facts remain materially the same. The trial court was bound by the earlier Court of Appeals decision in this case that *Waltz* applied to the plaintiff's action.

2. MCR 2.612(C)(1)(e), which authorizes relief from judgment where a prior judgment on which it is based has been reversed or

vacated, does not apply to this case. The prior opinion in this case ordering summary disposition for the defendants has not been reversed or vacated. Only its holding has been overruled in a subsequent case.

3. MCR 2.612(C)(1)(f), which authorizes relief from judgment for any other reason justifying relief from the operation of the judgment, does not apply to this case. The defendants were neither parties to *Mullins* nor among those similarly situated parties whose cases were pending in the appellate process. The interests of justice militate against allowing a defeated party's action to spring back to life because others have availed themselves of the appellate process.

Reversed and remanded for a grant of summary disposition in favor of the defendants.

Daniel C. Brown, PLLC (by *Daniel C. Brown*), for the plaintiff.

Aardema, Whitelaw & Sears-Ewald, PLLC (by *Dolores Sears-Ewald* and *Timothy P. Buchalski*), for the defendants.

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

PER CURIAM. Defendants appeal by leave granted the trial court's order reinstating this medical malpractice, wrongful death action. We reverse and remand to the trial court with instructions to grant summary disposition in favor of defendants. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In an earlier appeal involving this litigation, this Court's opinion presented a concise statement of the pertinent facts:

Decedent (DOB 5-3-00) died on May 16, 2000 after receiving treatment from defendants. Plaintiff, decedent's mother, was appointed personal representative of decedent's estate, and letters of authority were issued to her on September 21, 2000. On May 3, 2002, plaintiff filed a notice

of intent (NOI) to file a medical malpractice action, as required by MCL 600.2912d. During the time period relevant to this case, the filing of a[n] NOI tolled the statute of limitations for 182 days. Plaintiff filed suit alleging medical malpractice on November 19, 2002.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's complaint was barred by the statute of limitations because it was filed more than two years after the date of the alleged malpractice, and no saving[ ] provision applied. Defendants relied on *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), in which the Supreme Court held that the tolling period provided for in MCL 600.5856(d) did not apply to the saving[ ] provision in MCL 600.5852. The trial court denied the motion, concluding that *Waltz*, *supra*, did not apply retroactively to bar plaintiff's action. Subsequently, the trial court entered an order staying proceedings pending defendants' appeal of the order denying summary disposition. Since the entry of the trial court's order, this Court has held that the holding in *Waltz*, *supra*, applies retroactively. *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006).

* * *

Decedent died on May 16, 2000; thus, the cause of action accrued on that date. Plaintiff's letters of authority were issued on September 21, 2000. Plaintiff did not file suit on or before either May 16, 2002, the date the two-year statute of limitations applicable to medical malpractice actions expired,[1] or September 21, 2002, the date the two-year saving provision expired.[2] [Unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No. 257703), slip op at 1-2 (some citations omitted).]

This Court concluded that in light of its resolution of the conflict presented in *Mullins*, applying *Waltz* retro-

[1] See MCL 600.5805(6).

[2] See MCL 600.5852.

actively, plaintiff's suit was not timely and was thus barred by the statute of limitations. *Id.* at 2. This Court additionally held that judicial tolling was not available to save the cause of action. *Id*. at 2-3. Accordingly, this Court reversed and remanded this case to the trial court with instructions to grant summary disposition in favor of defendants. *Id*. at 3.

The trial court complied with this Court's directive. After the trial court's dismissal of the case, this Court's conflict resolution decision in *Mullins* was reversed. Our Supreme Court held, "this Court's decision in *Waltz* . . . does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 [609 NW2d 177] (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided." *Mullins v St Joseph Mercy Hosp*, 480 Mich 948, 948 (2007) (order on application).

With this new development in caselaw suggesting that *Waltz* need not be applied to claimant in her circumstances, plaintiff moved to reinstate her case in the trial court. Plaintiff cited MCR 2.612(C)(1)(e) (authorizing relief from judgment where "a prior judgment on which it is based has been reversed or otherwise vacated"), and (f) ("[a]ny other reason justifying relief from the operation of the judgment"). The trial court granted the motion while stating its expectation that the issue would ultimately be decided by the appellate courts.

In this appeal, defendants argue that the trial court erred in reinstating the case. They state that plaintiff's failure to appeal the judgment of this Court, ordering summary disposition in favor of defendants, made that decision the law of the case, which the trial court was obliged to follow. We agree.

"This Court reviews for abuse of discretion a trial court's decision concerning a motion to reinstate an action." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000). A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). See also *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

"Under the law of the case doctrine, an appellate court ruling on a particular issue binds . . . all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same." *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997) (citations omitted).

In this case, MCR 2.612(C)(1)(e) does not apply because this Court's decision ordering the grant of summary disposition in favor of defendants has not been reversed or otherwise vacated; its holding has been *overruled* by subsequent caselaw. There is an important distinction.

Reversing or vacating a decision changes the result in the specific case before an appellate court. On the other hand, a decision to overrule a particular rule of law affects not only the specific case before the appellate court, but also future litigation. A decision to overrule is an appellate court's declaration that a rule of law no longer has precedential value. See *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 665; 633 NW2d 1 (2001). However, an appellate court's pronouncement that a rule of law no longer applies does not change the result of an effective judgment. *Id.* In the instant case, this Court's decision was in effect, as the time for filing an application with our Supreme Court had lapsed. MCR 7.215(F)(1)(a). Accordingly, the

fact that this Court's decision in *Mullins* was overruled did not implicate this Court's earlier decision in the instant case.

MCR 2.612(C)(1)(f) is likewise inapplicable. Just as "equity aids the vigilant, not those who sleep on their rights," *Falk v State Bar of Michigan*, 411 Mich 63, 113 n 27; 305 NW2d 201 (1981) (RYAN, J., joined by MOODY and FITZGERALD, JJ.) (quotation marks and citations omitted), so does the appellate process. See *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982) (denying relief to an appellant who, "wholly apprised of the facts which constituted his cause of action, chose to sleep on his rights until a subsequent appellate court decision roused him to action"). The instant defendants were neither parties to *Mullins* nor among those similarly situated parties whose cases were pending in the appellate process. Instead, as earlier indicated, the dismissal of plaintiff's case had become final (an effective judgment). The interests of justice truly militate against allowing a defeated party's action to spring back to life because others have availed themselves of the appellate process.

Furthermore, MCR 2.612 envisions a court relieving a party from its own judgment, not the judgment of a higher authority. No provision of the rule allowed the trial court in this case to relieve plaintiff from the judgment embodied in this Court's January 23, 2007, opinion.

For these reasons, we reverse the result below and again remand this case to the trial court with instructions to grant summary disposition in favor of defendants.

Reversed and remanded. We do not retain jurisdiction.

CHEN v WAYNE STATE UNIVERSITY

Docket Nos. 283420 and 283575. Submitted May 12, 2009, at Detroit. Decided June 2, 2009, at 9:10 a.m.

Dr. Kuo-Chun Chen brought an action in the Wayne Circuit Court against Wayne State University, seeking damages and other relief related to his treatment while working as a professor and to the University's handling of his personal property and a patent. The plaintiff specifically alleged that he was discriminated against because of his national origin, age, and a disability and that he was retaliated against for protesting the discrimination. He also pleaded a claim and delivery count seeking the return of his personal property, a count alleging violation of the Freedom of Information Act, MCL 15.231 *et seq*., and a count alleging breach of contract. The plaintiff stipulated the dismissal of the counts for breach of contract and claim and delivery, and the court, Robert L. Ziolkowski, J., dismissed those claims without prejudice. The plaintiff then filed those claims in the Court of Claims. At some point, the case in the Court of Claims was consolidated with the case in the circuit court and Judge Ziolkowski heard both cases. The plaintiff was permitted to amend his complaints, but he did not state a claim based on the Freedom of Information Act. The Court of Claims then dismissed the claims of breach of contract and claim and delivery, but allowed the plaintiff to amend the complaint in the Court of Claims action to add as defendants the current chairperson and two former chairpersons of the University's department of biological sciences and to allege gross negligence against the individuals and negligence against the University with regard to the handling of the plaintiff's property. The Court of Claims then dismissed the negligence claims against the individual defendants and, on May 16, 2006, entered an order dismissing the negligence claim against the University. The order stated that the order resolved the last pending claim in the Court of Claims and closed the case. Judge Ziolkowski dismissed the circuit court claims on March 15, 2007, and denied reconsideration of that order on May 3, 2007, and May 8, 2007. The Court of Appeals dismissed the plaintiff's appeals in both cases for lack of jurisdiction because they were not timely filed. Unpublished orders of the Court of Appeals, entered August 30, 2007 (Docket

Nos. 278332, 278333). The plaintiff applied for leave to appeal both cases, and the Court of Appeals granted leave to appeal both the circuit court order (Docket No. 283420) and the Court of Claims order (Docket No. 283575) in unpublished orders entered August 20, 2008. The appeals were consolidated.

The Court of Appeals *held*:

1. The consolidation of the two cases at the trial court level did not merge the two cases and both retained their separate identities. Therefore, the time to appeal each individual case is determined by reference to the final judgment or order in each case. The application for leave to appeal the Court of Claims case was not filed within one year of the May 16, 2006, final order in that case, as required by the version of MCR 7.205(F)(3)(a) in effect at the time the application was granted. Therefore, the Court of Appeals did not have the discretion to grant the application. The appeal in Docket No. 283575 must be dismissed for lack of jurisdiction. The application for leave to appeal the circuit court case, Docket No. 283420, was timely filed.

2. The plaintiff was required to show that he suffered an adverse employment action in order to establish his discrimination and retaliation claims under the Civil Rights Act, MCL 37.2202(1) and 37.2701. An adverse employment action must be materially adverse to the employee, that is, it must be more than a mere inconvenience or minor alteration of job responsibilities. Materially adverse employment actions are akin to the termination of employment, a demotion shown by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. There must be an objective basis for demonstrating that the employment action is adverse because a plaintiff's subjective impressions are not controlling.

3. There was no objective evidence presented to show that the alleged refusal to assign the plaintiff a new lab constituted an adverse employment action.

4. The plaintiff failed to present any evidence that a department chairperson's threat to revoke the plaintiff's tenure resulted in a materially adverse change in the terms or conditions of his employment. The threat did not rise to the level of an adverse employment action.

5. There was no evidence that the changes that occurred to the plaintiff's teaching duties amounted to an adverse employment action.

6. There was no evidence that a department chairperson's actions or omissions with regard to not restoring the plaintiff's regular graduate faculty status or allowing the plaintiff to supervise a graduate student had any effect on the plaintiff's employment.

7. The plaintiff abandoned on appeal his claims regarding merit increases and other miscellaneous adverse actions.

8. The circuit court did not err in granting summary disposition in favor of the University with regard to the claims based on discrimination and retaliation. The order in Docket No. 283420 must be affirmed.

Appeal in Docket No. 283575 dismissed and order appealed in Docket No. 283420 affirmed.

1. ACTIONS — CONSOLIDATION OF ACTIONS — APPEAL OF CONSOLIDATED ACTIONS.

Where two cases involve claims that could not have been brought as separate counts in a single complaint, but are nevertheless consolidated for administrative convenience, the consolidated cases are not merged and both cases retain their separate identities; a circuit court case and a Court of Claims case that are joined for trial are not merged and both cases retain their separate identities, and the time to appeal each case must be determined by reference to the final judgment or order for each case (MCL 600.6421).

2. CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — ADVERSE EMPLOYMENT ACTIONS.

A plaintiff who brings a discrimination or retaliation claim against an employer under § 102 or § 701 of the Civil Rights Act must establish that he or she suffered an adverse employment action; what might constitute an adverse employment action in one employment context might not be actionable in another; an employment action must be materially adverse to the employee, not a mere inconvenience or minor alteration of job responsibilities in order to be actionable; there must be an objective basis for demonstrating that an employment action was adverse because an employee's subjective impressions are not controlling (MCL 37.2202, 37.2701).

Eisner & Mirer, P.C. (by *Jeanne Mirer* and *Eugene Eisner*), for the plaintiff.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Donna J. Donati* and *Megan P. Norris*), for the defendants.

Before: BORRELLO, P.J., and MURPHY and M. J. KELLY, JJ.

PER CURIAM. In these consolidated appeals, plaintiff Dr. Kuo-Chun Chen appeals by leave granted the trial court's orders granting summary disposition in favor of defendant Wayne State University (the University). In Docket No. 283420, Chen argues that the trial court, which was sitting as the circuit court, erred when it dismissed under MCR 2.116(C)(10) Chen's claims of age and national origin discrimination and retaliation. In Docket No. 283575, Chen argues that the trial court, which was sitting as the Court of Claims, erred when it refused to permit him to amend his complaint to add new parties and new theories of recovery. We conclude that we lack jurisdiction to hear Chen's claims of error in Docket No. 283575 and that the trial court did not err when it dismissed Chen's claims in Docket No. 283420. For these reasons, we dismiss the appeal in Docket No. 283575 and affirm in Docket No. 283420.

I. FACTS AND PROCEDURAL HISTORY

A. BASIC FACTS

This case has its origins in the progression of Chen's career at the University over a period of more than 25 years. Chen is a citizen of the United States, but was born in China and speaks English with a Chinese accent. The University hired Chen as an associate professor for its department of biological sciences in 1968. Chen's field of study is genetics. He became a tenured associate professor in 1971.

Before joining the University's faculty, Chen began the development of a device, which he called the Micro-

wave Guide Exposure System (the Microwave Device), with his former roommate at graduate school. Chen completed the Microwave Device with the help of others after he joined the University. He assigned his patent rights to the University, which obtained a patent for it in 1982. The University released the patent to Chen in 1995.

Chen apparently did not have any serious difficulties at the University until after Dr. Albert Siegel became the department's chairperson in 1972. Dr. John Taylor, who joined the department's faculty in the same year as Chen, testified that Chen apparently did not like Siegel. Taylor said that Siegel treated Chen as though he were a "pseudo molecular biologist" and believed that Chen's courses were "out-of-date or just plain wrong." Indeed, Taylor stated that Siegel and some other faculty members had their graduate students leave Chen's courses. In a memo written some years after Siegel's chairmanship, Taylor stated that Siegel tried to "change [Chen], then isolated him and then gave up." Siegel testified that the problems he had with Chen were related to Chen's ability to get things done on his own. Siegel explained that other professors who had inadequate space worked hard at improving their space, "got their research programs well funded and started right in working and attracting graduate students and did the best they could under the circumstances." Siegel stated that the problem with Chen was that he "was not of that nature. He didn't try to help himself."

Chen testified at his deposition that Taylor was apparently jealous of Chen's achievements and status and alleged that Taylor used his position to impede Chen's efforts at the University. Specifically, Chen noted that Taylor was apparently bothered by the fact that the University hired Chen as an associate professor

whereas the University hired Taylor as an assistant professor. Although Chen started as an associate professor, Taylor eventually surpassed Chen and became a full professor. In addition, in 1974, Taylor replaced Siegel as the department's chairperson.

Taylor testified that he was not jealous of Chen and that he and Chen were originally friends. He stated that they spent a significant amount of time together when they first joined the University. Taylor also stated that he supported Chen by acting as an intermediary in the acquisition of devices for Chen's lab. Taylor testified that, after he became the department's chairperson, he met with Chen and recognized that Chen had inadequate lab space. Taylor stated that he tried to help Chen by moving him to a better lab and also tried to obtain funds to modernize Chen's lab. However, he was unable to help Chen because Chen's "tastes were always better than what I could afford" and Chen would not compromise. Taylor stated that he eventually gave up trying to help Chen.

Chen also testified that Taylor was biased against him because of his Chinese national origin, which was shown by the fact that Taylor referred to him as being "Chinese Mafia." Taylor admitted that he had used the phrase "Chinese Mafia," but said that he did not direct it at Chen. Taylor explained that Chen had asked him for assistance in a business matter involving his brother-in-law, who lived in Taiwan. Taylor stated that he referred Chen to a friend who was Chinese for help with the business matter. Taylor said that his friend called him and indicated that Taylor and Chen might want to avoid dealings with Chen's brother-in-law. After that, Taylor stated that he would use the phrase "Chinese Mafia" in connection with discussions concerning Chen's brother-in-law.

Dr. David Adamany, who was the University's president, testified that Taylor was a productive researcher and that he was appointed to chair the department in an effort to strengthen the department's research program. Adamany stated that faculty members who were not active researchers resisted Taylor's efforts. He stated that the relations between Taylor and those faculty members eventually deteriorated to the point that the department was no longer able to make progress on improving research. Dr. Robert Arking testified that he was a full professor in the department and that he had served on various committees. He stated that Taylor had favorites on the faculty and that Chen was not one of them. Arking said that the faculty committee eventually asked Taylor to step down as chairperson because of issues with hiring, the budget, and faculty relations.

About 1980, Chen requested a promotion to full professor. Chen testified that Taylor handled the request and deliberately refused to submit Chen's request to the faculty. Chen admitted that there was an advisory committee that considered his request, but stated that Taylor controlled this committee. Arking testified that it was possible to get promoted without the support of the chairperson, but that it would be more difficult. Taylor stated that the committee considered Chen's promotion to full professor in 1980 and 1981 and decided not to recommend promotion to the faculty in both years. Taylor stated that he did not oppose Chen's promotion.

Chen testified that he also had a condition that caused an irregular heartbeat. According to Chen, starting in about 1980, the stress of his job triggered problems with his condition. Chen stated that this condition sometimes interrupted his work and that he even collapsed once during class and had to be rushed to

the hospital. Chen testified that Taylor was aware of his condition. He ultimately had the condition surgically corrected in 1991.

In 1987, Siegel again briefly served as the chairperson for the department. During that time, Siegel wrote a memo to Chen noting that Chen had made a conscious decision to stop researching and advising Chen that, for that reason, he would have to teach more classes. Siegel testified that after he assigned Chen more classes, there was a constant stream of complaints by undergraduate students concerning the students' ability to understand Chen. On the basis of these complaints, Siegel recommended that Chen seek help at the University's English Language Institute, but Chen refused. Siegel stated that Chen did not acknowledge a problem and blamed the students.

Dr. Stanley Gangwere replaced Siegel as the department's chairperson later in 1987. Gangwere testified that Taylor was a controversial chairperson and, for that reason, he tried to "separate" himself "from any association" with Taylor's policies. Chen testified that Taylor appeared to have a good relationship with Gangwere. Chen further testified that, from the beginning, Gangwere refused to support him and Chen opined that this must have been the result of Taylor's influence over Gangwere. Gangwere stated that Taylor did not advise him and that he had official and unofficial complaints about Chen by students concerning their ability to understand Chen's English.

In 1988, the University began a renovation and construction project. To accommodate the renovations, the department temporarily rearranged the lab and office assignments for the faculty. Gangwere asked Chen to vacate his current lab and office so that Taylor could occupy it along with some adjacent space that

Chen had requested earlier. Gangwere temporarily assigned Chen space in the natural sciences building. Because the new lab space was smaller, Gangwere gave Chen, as he did every professor, the option of placing some of his property in storage for the duration of the renovation. Chen elected to have his Microwave Device placed into storage.

Chen disliked the new lab and refused to use it. He indicated that the lab was too small and had large vent fans that made it unacceptable for use as a lab. Arking testified that Chen's new lab was very small, but had adequate utilities and could be used for research. Gangwere testified that almost every professor lost space during the renovation period. Indeed, Dr. Dwight Freeman testified that he too was moved during the renovation and that he was moved into an old dealership from the 1920s that was "abysmal."

The University hired Dr. P. Dennis Smith to replace Gangwere as the department's chairperson in 1989. Chen stated that Smith did not show much interest in him and, from this, he concluded that the previous chairpersons—Taylor, Siegel, and Gangwere—must have influenced Smith to form a negative opinion about him. Chen testified that Smith brought in new professors without regard to their ability to teach specific courses because it was hoped that these teachers would bring in grant money. However, when these professors failed to obtain the expected grant money, Smith assigned some of Chen's teaching responsibilities to these professors. Chen said that Smith criticized Chen's accent and indicated that he had received student complaints. Chen stated that he thought Smith wanted to take his tenure away and get rid of him.

Smith testified that he had numerous student complaints about Chen's ability to communicate. As a

result, Smith decided to sit in on one of Chen's classes. Smith wrote a memo describing his review of the class. In the memo, Smith stated that Chen appeared to know the material well but the students appeared to have trouble following the lecture. Smith also noted frustration on the part of students who attempted to pose questions to Chen. Smith testified that he advised Chen to get help from the language institute and suggested using more visual aids in teaching the course.

In 1991, the University finished its construction of its biological sciences building. Smith assigned Chen office and lab space, but Chen refused to use either room. Chen claimed that the office was contaminated from the use of radioactive isotopes in the rooms. However, Chen did not investigate whether the rooms were unusable and did not ask to have them decontaminated. Instead, Chen continued to use the office temporarily assigned to him during the renovations.[1] Smith testified that the room at issue likely was not radioactive, but had only been used for some sort of radiometric counter. He also stated that, had Chen brought up the issue with him, he would have followed up on the problem. Smith said that he thought that Chen had just given up on research. Smith also testified that he was aware that Chen refused to move and had continued to use his old office.

Chen later obtained permission from Linda Van Thiel to use another office in the same building that housed his current office. Van Thiel testified that Chen wanted the office for additional space. The office was part of a suite of offices in Room 309. She stated that the agreement was informal and that she never got permission or

[1] Although there was a memo clearly assigning this room to Chen, Chen testified that he was never assigned an office during the renovation. Rather, he stated that another faculty member gave him permission to use the office.

told anyone about the arrangement. She also testified that she informed Chen that if a particular funding request came through, the space would be renovated into a computer lab. She said that she informed Chen when the funding finally came through.

In July 1994, Dr. Jack Lilien replaced Smith as the chairperson. Shortly after the change, Chen sent Lilien a letter notifying Lilien that he felt he was not in a position to do research and requesting help. Chen later had a meeting with Lilien. Chen testified that he told Lilien about his past unfair treatment by previous chairpersons and told him that he did not have an office or space for research. Chen said that he initially got along well with Lilien.

Lilien testified that when he was hired as chairperson of the department he was told to refocus the mission of the department on research and the procurement of extramural funding. To that end, Lilien stated that he intended to eliminate the department lecturers to free positions for tenure-track faculty who would perform research. Lilien stated that he also evaluated the faculty and assessed whether each member was an active researcher. Lilien stated that Chen appeared to have ceased being a productive researcher in 1980. Lilien said that he met with Chen and heard Chen's concerns, but that Chen declined his offer to assign him a new lab and refused his suggestion to work with another faculty member to restart his research. After this, Lilien testified, he thought it might be best to develop a teaching plan for Chen.

Chen testified that, in 1994, a graduate student approached him about serving as the student's graduate advisor. Chen stated that he asked Lilien for permission to serve as the student's graduate advisor. As part of his request, Chen mentioned that he would need

a new lab. Chen stated that Lilien refused because Chen was not a member of the regular graduate faculty. Apparently, the University's graduate school had downgraded Chen's status to associate graduate faculty in 1990 because he had not published a paper in a number of years and associate graduate faculty were not permitted to advise graduate students. Chen testified that he was unaware that there were two ranks in the graduate faculty and was unaware that he had been demoted. After the graduate committee informed Chen that he could not advise the student, Chen stated that he decided to actively research again and asked Lilien for a lab.

In the fall semester of 1994, Chen taught an introductory genetics course. Several undergraduate students complained to Lilien about Chen's ability to teach the class. Lilien responded by asking Chen to give copies of his transparencies to the students before each class, but Chen refused. Lilien testified that students taking Chen's genetics course began to complain about Chen almost immediately after Lilien began serving as the chairperson for the department. Chen testified that the students who complained were simply unhappy with their grades and did not want to properly prepare for class. Lilien informed Chen in January 1995 that he would teach only one of the two sections for introductory genetics during the winter semester. Lilien asked a different professor to teach the other section to accommodate the students who wanted to retake the course after the problems with Chen's fall class. In February 1995, Lilien informed Chen that he would not be assigned to teach any undergraduate courses and asked Chen to work with a professor at the language institute to improve his English communication. Chen declined to get help from the professor because he felt the program could not help him improve his teaching. Lilien again asked Chen to go to get help in March 1995.

In May 1995, Lilien offered Chen the option to take an early retirement. Chen testified that he thought Lilien offered him the early retirement because he felt that Chen was too old and in poor health and, for that reason, should be replaced. Chen also said that Lilien threatened to have Chen's tenure taken away if he did not accept the early retirement offer. Arking testified that Lilien consulted with the senior faculty about offering Chen an early retirement. Arking also stated that Lilien told him he wanted Chen to retire because Chen "wasn't pulling his weight."

The department placed most graduate level genetics courses on hold in the fall of 1995 while a planning group, which apparently included Chen, developed new courses. In November 1995, Lilien gave Chen formal notification of his decision not to assign Chen to teach any undergraduate classes. Lilien explained that his decision was based on student complaints and Chen's refusal to obtain help from the language institute. The department's Salary Advisory Committee endorsed Lilien's decision later that same month. Chen then requested a review hearing under his collective bargaining agreement. A panel of Chen's peers conducted the hearing in April 1996. The panel concluded that Chen "does have a communication problem as it relates to the teaching of undergraduate students," but that the communication problem does not appear to affect Chen's graduate courses. The panel recommended that Chen be allowed to teach at least one course each semester, which should preferably be a graduate course. The panel also recommended that a panel be convened to prepare a "comprehensive program" to assist Chen "to improve his communication and teaching skills."

In March 1996, Lilien sent out two memos notifying the faculty, staff, and graduate students that the second

and third floors of the natural sciences building would soon be renovated. The notice indicated that all personal belongings had to be removed from these floors or they would be discarded. Chen indicated that he never received these memos. Chen admitted that he does not like computers and that he does not use e-mail. Chen also stated that he has had trouble receiving regular campus mail. A staff person testified that, because Chen and one other professor refused to use e-mail, she made hard copies of all memos and placed the memos into the professors' mailboxes. At the time of the notices, Chen had some personal property in an interior office in Room 309. One of the items Chen had in that office was an original manuscript of a textbook that he was preparing. In April 1996, a staff person instructed two students to remove Chen's personal property from the interior office in Room 309 and place it in storage.

In March and May 1996, Chen filed claims with the Equal Employment Opportunity Commission alleging discrimination.

In November 1996, Chen requested that the Promotion and Tenure Committee recommend that the graduate school upgrade his status from associate graduate professor to regular graduate professor. The committee declined the request and recommended that the graduate school renew Chen's status as an associate graduate professor.

In April 1997, Chen informed Lilien that his personal property from the natural sciences building was missing. He also asked Lilien to help him locate his Microwave Device from storage. A staff person testified that Chen was shown the boxes that contained the materials, but that Chen claimed that some items were missing. Chen alleged that among the items missing from the office in Room 309 was his manuscript for his textbook, which was

the only copy he had. The University was also unable to find the Microwave Device that had been placed in storage approximately eight years earlier.

Chen visited China in the summer of 1997 and met with an old acquaintance from an earlier visit. Chen testified that the acquaintance had since started a new business and was interested in purchasing his patent for the Microwave Device even though that patent was set to expire in two years. Chen produced an agreement that offered $1.75 million for the patent, but only if Chen could find the Microwave Device and reproduce his results. Because the University was unable to produce the Microwave Device, Chen was purportedly unable to consummate the agreement.

B. PROCEDURAL HISTORY

On September 8, 1997, Chen sued the University for damages and other relief related to his treatment while working as a professor and to the University's handling of his personal property and patent. Specifically, Chen alleged that the various chairpersons discriminated against him because of his national origin (Count I), age (Count II), and disability (Count IV), and retaliated against him when he protested against the discrimination (Count III). Chen further demanded the return of his personal property—including the Microwave Device and the manuscript for his textbook (Count V for claim and delivery). Chen also alleged that the University violated the Freedom of Information Act, MCL 15.231 *et seq.*, when it failed to turn over certain documents (Count VI), and alleged that the University breached its contract with him when it failed to market his patent (Count VII).

On November 7, 1997, the University moved for dismissal of Counts V and VII of Chen's claims on the ground that the Court of Claims had exclusive subject-

matter jurisdiction over those claims. Chen conceded that these claims should have been brought in the Court of Claims and stipulated their dismissal. On November 18, 1997, the trial court entered an order dismissing without prejudice Chen's claims for claim and delivery and breach of contract. Two days later, Chen filed a complaint in the Court of Claims that restated his counts based on claim and delivery and breach of contract. At some point, Chen's case in the Court of Claims was consolidated with his case in the circuit court.

In January 2000, Chen moved to amend his "complaints" and attached a single complaint to the motion. The complaint restated his claims premised on discrimination and retaliation, which he indicated were his circuit court claims. The complaint also restated Chen's counts for claim and delivery and breach of contract. Chen alleged that the Court of Claims had jurisdiction over those counts. Chen did not state a claim based on the Freedom of Information Act. In his brief in support of his motion, Chen referred to the amended complaint as the "combined complaints." The University stipulated that the complaint could be amended, and the trial court entered an order permitting the amendment.

In July 2000, the University moved for summary disposition of Chen's counts of claim and delivery and breach of contract. The University argued that Chen failed to establish that the University had possession of his property at the time that he filed the count for claim and delivery, which is a prerequisite for establishing claim and delivery. The University also argued that, under the agreement applicable to Chen's patent, the University had no duty to market the patent. For these reasons, the University asked for dismissal of these claims with prejudice. On September 18, 2000, the trial

court entered an order dismissing Chen's breach of contract claim and taking the University's motion regarding the claim and delivery count under advisement.

On December 4, 2000, Chen moved for permission to file a second amended complaint, but only with regard to his complaint in the Court of Claims. In the second amended complaint, Chen alleged that three new defendants—all current or former chairpersons of the University's department of biological sciences—were grossly negligent in their handling of his property and that this resulted in the loss of the property. Chen also argued that the University was negligent in its handling of the same property. Chen did not restate his count based on claim and delivery.

On December 11, 2000, the University filed a motion asking the trial court to finalize its decision to dismiss Chen's count for claim and delivery. Apparently, the trial court decided to dismiss this count after a conference held in chambers on November 21, 2000.[2] The University also asked the trial court to deny Chen's attempt to amend the complaint to add a negligence count. The University acknowledged that the trial court had indicated at the conference that Chen could add the negligence count, but argued that the amendment exceeded the scope of the trial court's grant by naming new parties and by being filed after the deadline set by the trial court. On January 2, 2001, the trial court granted the University's motion to dismiss Chen's count for claim and delivery, but granted Chen's motion to amend his complaint in the Court of Claims. The trial court gave Chen until January 5, 2001, to file the amended complaint. Chen filed the amended complaint on January 9, 2001.

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[2] The University attached two affidavits describing the conference.

On January 26, 2001, the University moved to dismiss Chen's negligence claim stated in the second amended complaint on the grounds that the University had governmental immunity and the claims against the named individuals were time-barred. In his reply to this motion, Chen argued that the University was not immune because its conduct amounted to a taking of private property for which compensation must be paid. On March 22, 2001, the trial court entered an order dismissing Chen's negligence claims against the individual defendants, but not against the University. The trial court indicated that it was taking the University's motion under advisement pending additional briefing on Chen's claim that the University's actions amounted to a taking.

On May 16, 2006, the trial court entered an order dismissing Chen's negligence claim against the University and "dismissing with prejudice" Chen's attempt to add a claim based on takings. This order stated that it resolved "the last pending claim in the Court of Claims case No. 97-16809-CM and closes the case."

The trial court dismissed Chen's circuit court claims on March 15, 2007, and denied reconsideration of that order on May 3, 2007. The trial court entered a second order denying reconsideration on May 8, 2007. Chen appealed both cases on May 30, 2007. However, because the claims were filed more than 21 days after the May 3, 2007, order denying reconsideration, this Court dismissed both claims for lack of jurisdiction and instructed Chen to apply for leave to appeal under MCR 7.205.[3]

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[3] See *Chen v Wayne State Univ*, unpublished order of the Court of Appeals, entered August 30, 2007 (Docket No. 278332), and *Chen v Wayne State Univ*, unpublished order of the Court of Appeals, entered August 30, 2007 (Docket No. 278333).

On February 4, 2008, Chen applied for leave to appeal the dismissal of his claims in the circuit court. The appeal was assigned Docket No. 283420. On February 11, 2008, Chen applied for leave to appeal the dismissal of his claims in the Court of Claims. That appeal was assigned Docket No. 283575. On August 20, 2008, this Court granted both applications for leave to appeal and consolidated the appeals.[4]

II. CLAIMS IN DOCKET NO. 283575

In Docket No. 283575, Chen argues that the trial court erred when it refused to permit him to amend his complaint in the Court of Claims. Specifically, Chen argues that the trial court should have permitted him to amend his complaint to include claims that the University's handling of his personal property—including his manuscript and Microwave Device—amounted to a taking of private property for which compensation must be made. In addition, Chen argues that the trial court should have allowed him to add a claim of grossly negligent bailment against the chairpersons who allegedly were responsible for his lost property. However, before proceeding to examine these claims of error, we must first determine whether this Court properly granted leave to appeal in Docket No. 283575.

A. APPELLATE JURISDICTION

On appeal, the University argues that this Court does not have jurisdiction over the appeal in Docket No. 283575. The University contends that the final judg-

[4] See *Chen v Wayne State Univ*, unpublished order of the Court of Appeals, entered August 20, 2008 (Docket No. 283420), and *Chen v Wayne State Univ*, unpublished order of the Court of Appeals, entered August 20, 2008 (Docket No. 283575).

ment in Chen's case in the Court of Claims was the order dismissing his last claim in that case, which the court entered on May 16, 2006. Because this Court may only grant a delayed application for leave to appeal within one year of entry of a final judgment, see MCR 7.205(F)(3)(a), the University argues that this Court lacked the authority to grant leave to appeal in Docket No. 283575. Whether this Court has jurisdiction to hear an appeal is always within the scope of this Court's review. *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004); MCR 7.216(A)(10). Therefore, even though this Court has already granted leave to appeal, we must nevertheless review our jurisdiction before proceeding to the issues raised in Docket No. 283575.

B. STANDARD OF REVIEW

The jurisdiction of the Court of Appeals is governed by statute and court rule. See Const 1963, art 6, § 10; *Walsh*, 263 Mich App at 622. This Court reviews de novo the proper interpretation of statutes and court rules as questions of law. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). Hence, whether this Court has jurisdiction is a question of law that this Court reviews de novo. *Id.*

C. THE COURT OF APPEALS JURISDICTION

Under Michigan's Constitution, the jurisdiction of the Court of Appeals is that which has been "provided by law . . . ." Const 1963, art 6, § 10. The phrase "provided by law" vests the authority to act in the Legislature and does not encompass our Supreme Court's rulemaking authority. *People v Bulger*, 462 Mich 495, 508-509; 614 NW2d 103 (2000), overruled in part on other grounds *Halbert v Michigan*, 545 US 605 (2005). However, the constitution also provides that the Su-

preme Court may prescribe rules for "practice and procedure" in the Court of Appeals. Const 1963, art 6, § 10.

The Legislature has granted jurisdiction to the Court of Appeals over certain "orders and judgments which shall be appealable as a matter of right[.]" MCL 600.308(1). These include "[a]ll final judgments from the circuit court, court of claims, and recorder's court . . . ." MCL 600.308(1)(a). The Legislature also granted this Court jurisdiction over certain "orders and judgments which shall be reviewable only upon application for leave to appeal . . . ." MCL 600.308(2). Although the Legislature specifically provided jurisdiction where leave to appeal is granted for certain types of final judgments or orders, it also gave this Court jurisdiction over appeals from "[a]ny other judgment or interlocutory order as determined by court rule." MCL 600.308(2)(e). In addition, the Legislature gave our Supreme Court broad authority to promulgate rules that permit appeals to this Court and to determine whether those appeals would be as of right or by leave granted. See MCL 600.309. Hence, this Court's jurisdiction is generally ascertained by reference to our Supreme Court's rules.

Under the court rules, this Court has jurisdiction over appeals from a "final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6) . . . ." MCR 7.203(A)(1). However, the court rules also provide that, generally, a party must file its claim of appeal from a final judgment or order within 21 days of the entry of that final judgment or order. MCR 7.204(A)(1)(a). The time limit for an appeal as of right is jurisdictional. MCR 7.204(A). Hence, failure to comply with the timing requirements for an appeal as of right

deprives this Court of jurisdiction to consider the appeal as of right. Nevertheless, this Court also has jurisdiction over appeals by leave granted, which includes appeals from "any judgment or order when an appeal of right could have been taken but was not timely filed." MCR 7.203(B)(5). Although appeals by leave granted must also generally be filed within 21 days after entry of the "judgment or order," see MCR 7.205(A), the court rules specifically grant this Court discretion to grant leave with regard to untimely appeals. MCR 7.205(F)(1). But that discretion is limited: this Court may not grant leave to appeal if the untimely appeal "is filed more than 12 months" after the entry of "a final judgment or other order that could have been the subject of an appeal of right . . . ." MCR 7.205(F)(3)(a).[5] The establishment of a firm deadline prevents stale applications for leave to appeal; it forces the parties to raise claims of error while the participants still have a sound grasp of the facts and events surrounding the litigation.

D. CLAIMS OF APPEAL FROM CONSOLIDATED CASES

The current appeal involves two consolidated cases: a case involving claims of discrimination and retaliation in the circuit court and a case involving claims based on property and contract in the Court of Claims. The claims in the case in the Court of Claims were dismissed on May 16, 2006, but the claims in the case in the circuit

[5] We note that, since the grant of leave to appeal in this case, our Supreme Court has amended MCR 7.205 to permit this Court to grant leave to appeal beyond this one-year limit under specified circumstances. See Administrative Order No. 2007-40, 483 Mich li (2009). However, for purposes of this appeal, we shall apply the version of MCR 7.205 in effect when this Court granted Chen's applications for leave to appeal in August 2008. See *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332; 602 NW2d 596 (1999).

court were not finally resolved until May 3, 2007. Because Chen did not file an appeal within 21 days of either order, Chen could not appeal as of right. Instead, Chen had to rely on this Court's discretionary ability to grant leave to appeal with regard to otherwise untimely appeals. MCR 7.205(F)(1). But Chen did not apply for leave to appeal until February 2008. Although the February 2008 application for leave to appeal was within one year of the order finally resolving Chen's circuit court claims, the application was more than 20 months after the May 2006 order dismissing his claims in the Court of Claims. Hence, we must determine whether MCR 7.205(F)(3)(a) bars this Court from granting leave to appeal those latter claims.

On appeal, Chen argues that the consolidated cases must be treated as a single case for purposes of appeal. Thus, according to Chen, the final order applicable to the appeals in this case was the order entered in May 2007. Chen relies in part on the definition of "final judgment" or "final order" provided under MCR 7.202(6). However, the definition of final judgment or order does not address situations involving consolidated cases. Instead, the rule specifically defines the final judgment or order for "a civil case"—that is, the definition of final judgment or order refers to the final judgment or order in a *single* case. See MCR 7.202(6)(a). Consequently, MCR 7.202(6)(a) cannot be understood to require consolidated cases to be treated as a single case for purposes of determining the timeliness of appeals.[6] Because the court rules dealing with appellate jurisdiction do not address this issue, we shall

[6] Chen also relies on an unpublished case in which this Court determined that the final judgment or order under MCR 7.202(6) for consolidated cases is the final judgment or order that disposes of all the claims for all the parties in the consolidated cases. However, for the reasons stated, we find this analysis unpersuasive. See MCR 7.215(C)(1).

examine those court rules and authorities addressing the treatment of consolidated cases.

The court rules provide trial courts with the discretion to consolidate multiple cases when the cases involve "a substantial and controlling common question of law or fact . . . ." MCR 2.505(A). However, this court rule is silent with regard to whether the consolidated cases are effectively merged into a single case. As one commentator has noted, the "term 'consolidation' is used to describe two different situations in which separate actions are 'joined' and tried together." 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2505.3, p 79.

> The first situation is that in which there are two or more actions pending, normally between the same parties, and the actions are joined together to form a single action in which a single judgment is entered. The second situation is that in which several actions are ordered to be tried together but each retains its separate character and requires the entry of a separate judgment. This type of consolidation does not merge the actions, the parties in one action do not become parties to the other, and the pleadings in one action are not considered pleadings in the other. [*Id.*]

Nevertheless, although the term "consolidation" is often used to refer to both situations, Longhofer cautioned against treating MCR 2.505(A) as applying to both. Michigan Court Rules Practice, *supra*, p 80. This is because Michigan already makes elaborate provision for joinder when cases arise out of the same transaction or occurrence:

> Theoretically, if two separate actions arise out of the same transaction or occurrence and involve the same basic subject matter, MCR 2.203(A) requires that they be joined in the original action. A defendant's request that claims not so joined be "consolidated" is in reality a motion for compulsory joinder under MCR 2.203(A), to be evaluated

> by the standards set forth in that rule, and is not a true motion for consolidation under MCR 2.505(A).
>
> Conversely, if the separate actions involve claims that could have been joined under MCR 2.203(B), but which were not, MCR 2.505(A) is hardly sufficient justification to *require* merger of those actions at a later time. The actions should, appropriately, retain their individual identities. This is especially true if additional parties are present. [*Longhofer*, *supra*, p 80 (emphasis in original).]

Although no court has directly confronted the issue present in this appeal, the few Michigan courts to have addressed consolidation generally agree that consolidated cases should retain their separate identities.

In *People, ex rel Director of Conservation v Babcock*, 38 Mich App 336, 340; 196 NW2d 489 (1972), the Court examined whether a trial court could properly enter a single judgment for two cases that had been consolidated under the predecessor to MCR 2.505(A). See GCR 1963, 505.1. On appeal, the plaintiff argued that the trial court properly issued a single judgment; the plaintiff noted that "after consolidation the two cases were treated as one and that it can perceive no reason for entering separate judgments." *Babcock*, 38 Mich App at 342. In examining the issue, the Court in *Babcock* noted that consolidation can refer to two different situations: "First, where several actions are pending between the same parties stating claims which could have been brought in separate counts of a single claim. Second, 'where several actions are . . . tried together but each retains its separate character and requires the entry of a separate judgment'." *Id.* at 342, quoting 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), Rule 505, p 364. The Court then explained that the case before it represented the second situation and, for that reason, rejected the notion that a single judgment could be entered for consolidated cases: "a consolidation does

not merge the two cases." *Babcock*, 38 Mich App at 343. Rather, under those circumstances, "they keep their separate identities and parties in one action do not become parties to the other, and pleadings in one are not pleadings in the other." *Id.* (citations omitted). For that reason, the Court further explained that "[w]hen a decision is rendered, it is to be rendered separately in each case." *Id.* Thus, under *Babcock*, where two cases involve claims that could not have been brought as separate counts in a single complaint, but are nevertheless consolidated for administrative convenience, the consolidated cases retain their separate identities.

In another case involving the effect of consolidation, this Court noted that res judicata could apply between consolidated cases because consolidation is a matter of " 'convenience and economy in administration' " and " 'does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.' " *Bergeron v Busch*, 228 Mich App 618, 623; 579 NW2d 124 (1998), quoting *Johnson v Manhattan R Co*, 289 US 479, 496-497; 53 S Ct 721; 77 L Ed 1331 (1933), and citing, among other cases, *Babcock*, 38 Mich App at 342-343.

In the present case, the Court of Claims had exclusive jurisdiction over Chen's contract claims and the University's handling of his personal property. MCL 600.6419(1)(a). Hence, the circuit court was without jurisdiction to adjudicate those claims. For that reason, the trial court dismissed those claims without prejudice and Chen filed a separate complaint in the Court of Claims. However, Chen's case in the Court of Claims was consolidated with his case in the Wayne Circuit Court under MCL 600.6421, which provides that "[c]ases in the court of claims may be joined for trial with cases arising out of the same transaction or series of transactions which are

pending in any of the various courts of the state." Although this statute refers to the joining of cases, it does not provide for their complete merger. Rather, the joining is "for trial" and, even then, MCL 600.6421 provides that the case involving the claims in the Court of Claims must be "tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury . . . ." Indeed, this Court has held that MCL 600.6421 does not permit the circuit court to exercise subject-matter jurisdiction over claims against the state. See *Lumley v Univ of Michigan Bd of Regents*, 215 Mich App 125, 133; 544 NW2d 692 (1996). Thus, the case in the circuit court must be treated as separate from that in the Court of Claims even though the same trial court presides over each. *Id.* at 134-135 (noting that the verdict in the circuit court case can be inconsistent with the verdict in the Court of Claims case when decided by separate triers of fact). As this Court explained in *Todd v Dep't of Corrections*, 232 Mich App 623; 591 NW2d 375 (1998), a trial court sitting as both a circuit court and the Court of Claims for related cases must be careful to ensure that it does not confuse its jurisdiction:

> Further, although one of the aims of MCL 600.6421; MSA 27A.6421 is to ensure the speedy and efficient resolution of cases arising out of the same transaction, a circuit court cannot assume subject-matter jurisdiction in order to promote efficiency where there is otherwise no jurisdiction. The circuit judge's authority to sit as a Court of Claims judge extended only to the Court of Claims case and, consequently, only to claims asserted against the state in the Court of Claims case. The circuit court had no subject-matter jurisdiction over a claim against the state brought in the circuit court case, and the circuit court could not assume that jurisdiction on its own. The claim for indemnification should have been brought in the Court of Claims. [*Todd*, 232 Mich App at 631-632 (citations omitted).]

Because MCL 600.6421 provides for the administrative consolidation of cases similar to the consolidation provided under MCR 2.505, see *Longworth v Dep't of State Hwys*, 110 Mich App 771, 775-776; 315 NW2d 135 (1981) (characterizing the joining of cases under MCL 600.6421 as a "consolidation" for reasons of efficiency), we conclude that the consolidation did not merge the two cases; instead, both cases retained their separate identities. *Babcock*, 38 Mich App at 343; *Todd*, 232 Mich App at 628-629. Because the cases retained their separate identities, the time for appeal must be determined by reference to the final judgment or order for the individual cases. See MCR 7.202(6)(a)(i); MCR 7.203(A)(1) and (B)(5). The trial court, sitting as the Court of Claims, entered the final order disposing of all Chen's claims in the Court of Claims in May 2006. Thus, Chen had to file his application for leave to appeal within one year of that date. Because Chen did not file his application for leave to appeal until February 2008, it was untimely and this Court did not have the discretion to grant leave to appeal.[7] MCR 7.205(F)(3)(a). Consequently, we must dismiss Chen's appeal in Docket No. 283575 for lack of jurisdiction.[8]

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[7] Although not raised by the parties, we note that tolling would not have rendered Chen's appeal timely. See *Beavers v Barton Malow Co*, 480 Mich 1049 (2008), citing *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1981), and *People v Kincade (On Remand)*, 206 Mich App 477, 483; 522 NW2d 880 (1994).

[8] We are cognizant that in *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 40; 539 NW2d 526 (1995), it was stated that "this Court possesses jurisdiction to consider cases on leave granted even when the time requirements are not met." However, *Cipri* involved a jurisdictional challenge based on MCR 7.205(A), rather than the time limit provided by MCR 7.205(F)(3). *Cipri*, 213 Mich App at 38-40. Further, the Court's holding was premised on the fact that, although the time limit provided under MCR 7.205(A) had passed, the Court still had the authority to grant leave under MCR 7.205(F). *Cipri*, 213 Mich App at 39. Thus, understood in context, the decision in *Cipri* stands for the proposition

III. CLAIMS IN DOCKET NO. 283420

A. STANDARD OF REVIEW

In Docket No. 283420, Chen argues that the trial court erred when it granted summary disposition and dismissed his claims premised on national origin and age discrimination and retaliation.[9] This Court reviews de novo a trial court's decision whether to grant summary disposition. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006).

B. ADVERSE EMPLOYMENT ACTION

Chen first argues that the trial court erred when it concluded that Chen had not presented evidence that he suffered an adverse employment action that can support his discrimination and retaliation claims.

In the present case, Chen alleged that the University unlawfully discriminated against him because of his national origin and age, and retaliated against him after he raised his discrimination claims with the Equal Employment Opportunity Commission. Michigan's Civil Rights Act (the CRA) provides, in relevant part,

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that, where this Court has the discretion to grant leave to appeal and properly does so, it necessarily has jurisdiction to consider the appeal. This case is significantly different. Under MCR 7.205(F)(3), this Court had no discretion to grant Chen's application for leave to appeal. And this Court's erroneous decision to grant the application did not give it jurisdiction where it otherwise had none. See *People v Tull*, 460 Mich 857 (1999) (statement of CORRIGAN, J.) ("The language in MCR 7.205(F)(3) operates as a jurisdictional limitation on the ability of the Court of Appeals to grant leave where the application is filed more than twelve months after entry of judgment."), but see *id*. at 859 (statement of KELLY, J.) (noting that the Supreme Court has on at least one occasion waived the strict time limit and ordered the Court of Appeals to consider an untimely appeal where the unique equities warranted it).

[9] Chen has not appealed the dismissal of his claims premised on the Freedom of Information Act or discrimination based on disability.

that an employer shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . national origin [or] age . . . ." MCL 37.2202(1). The CRA also prohibits employers from retaliating against a person "because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701(a). In order to establish a claim under both MCL 37.2202 and MCL 37.2701, the plaintiff must establish that he or she suffered an adverse employment action. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998) (opinion by WEAVER, J.); *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005).

There is no exhaustive list of what constitutes adverse employment actions. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003). And what might constitute an adverse employment action in one employment context might not be actionable in another employment context. See *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 363; 597 NW2d 250 (1999). Hence, whether Chen suffered an adverse employment action must be ascertained in light of the unique characteristics of his status as a tenured professor at a major state university. Nevertheless, regardless of the employment context, in order to be actionable, an employment action must be materially adverse to the employee—that is, it must be more than a mere inconvenience or minor alteration of job responsibilities. *Meyer v Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000). In addition, there must be an objective basis for demonstrating that the employment

action is adverse because a plaintiff's subjective impressions are not controlling. *Wilcoxon*, 235 Mich App at 364. Materially adverse employment actions are akin to " ' "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." ' " *Id.* at 363, quoting *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876, 886 (CA 6, 1996), quoting *Crady v Liberty Nat'l Bank & Trust Co*, 993 F2d 132, 136 (CA 7, 1993).

1. ASSIGNMENT OF A LAB

Chen first argues that the failure to "restore" his laboratory constituted an adverse employment action capable of supporting his discrimination claims.

As a preliminary matter, we agree that changes in access to a lab can constitute an adverse employment action under some circumstances. See, e.g., *Chuang v Univ of California Davis Bd of Trustees*, 225 F3d 1115, 1125-1126 (CA 9, 2000) (noting that evidence that the forcible relocation of the plaintiffs' lab disrupted ongoing research, damaged equipment, caused the loss of samples, resulted in the loss and withholding of research grants, and caused staff to quit was sufficient to establish a question of fact regarding whether the relocation constituted an adverse employment action). Testimony established that the inability to access a lab might affect a professor's ability to engage in certain types of research, obtain extramural funding, direct graduate students, and publish peer-reviewed articles. Nevertheless, not every professor needs a lab in order to materially contribute to his or her department. Testimony established that, even without a lab, a professor can

teach graduate and undergraduate classes, publish texts or other course materials, and participate in a variety of other departmental activities. Likewise, testimony established that the individual needs of a professor will vary over time depending on whether the professor is actively engaging in research and on the nature of the research. Hence, not every professor will need a lab in order to successfully pursue his or her employment. For that reason, an employer's decision to take away a lab or refuse to assign a lab may or may not constitute an adverse employment action depending on the facts peculiar to the professor's employment needs.

Here, Chen does not dispute that he had a lab from 1980 to 1988. Despite this, Chen apparently did not use the lab to conduct research, obtain grants, or supervise graduate students. In 1988, Gangwere assigned Chen a new lab, but Chen refused to use it because he claimed it was too small and had a fan that purportedly made the room unsuitable. In 1991, Smith assigned Chen yet another lab. However, Chen again refused to use it because it was ostensibly radioactive.[10] Thus, by the time Lilien assumed the department's chairmanship in 1994, Chen had not been actively using a lab to do research, obtain grants, or supervise graduate students for more than 10 years.[11] During these years, Chen's employment duties had largely been confined to teach-

[10] There is no record evidence that this lab was ever reassigned to a different professor. Hence, it is possible that this lab is still assigned to Chen. Nevertheless, because the University does not argue that Chen currently has a lab, we will proceed on the assumption that he does not have access to a lab.

[11] Because the prior assignments occurred more than three years before Chen filed his compliant, even if those assignments constituted adverse employment actions, they would not be actionable. See *Garg*, 472 Mich at 284-285.

ing. Further, although Chen presented evidence that he informed Lilien that he wanted to have access to a lab in order to do research and to supervise a graduate student, he did not present evidence that he had developed a research proposal that required a lab and he no longer met the requirements for supervising a graduate student. And Chen's subjective belief that access to a lab was essential was, by itself, insufficient to establish a question of fact regarding whether he actually needed a lab in order to perform his duties. *Wilcoxon*, 235 Mich App at 364; see also *Green v Maricopa Co Community College School Dist*, 265 F Supp 2d 1110, 1120-1122 (D Ariz, 2003) (noting that the plaintiff failed to meet her burden of proving that the defendant's interference with facilities important to her job performance rose to the level of an adverse employment action). Consequently, under the facts of this case, there was no objective evidence that Lilien's alleged refusal to assign Chen a new lab constituted an adverse employment action.

2. THREAT TO START TENURE REVOCATION PROCEEDINGS

Chen next argues that Lilien's threat to start tenure revocation proceedings unless Chen retired also constituted an adverse employment action. In the present case, it is undisputed that Chen is still a tenured professor at the University. Indeed, it is undisputed that tenure revocation proceedings have never been formally initiated against Chen. And, even assuming that a threat of tenure revocation could under some circumstances constitute an adverse employment action, Chen failed to present any evidence that the threat of tenure revocation itself resulted in a materially adverse change in the terms or conditions of his employment. *Meyer*, 242 Mich App at 570. Hence, the threat did not rise to the level of an adverse employment action.

3. TEACHING DUTIES

Chen also argues that he suffered an adverse employment action when Lilien eliminated all his teaching duties. We agree that permanently removing a professor from all teaching duties might rise to the level of an adverse employment action. However, the mere alteration of job responsibilities—such as the assignment to new or different classes—does not, by itself, constitute an adverse employment action. *Id.* at 569. In this case, there is no evidence that Lilien's decision to stop assigning general undergraduate courses to Chen and to temporarily suspend Chen's graduate level courses amounted to an adverse employment action. Although Chen testified that he liked to teach general undergraduate courses because it helped to channel students into his graduate level classes, he also testified that he did not begin to teach general undergraduate courses until about 1987 or 1988. Hence, Chen apparently did not teach general undergraduate courses for the majority of his career without any adverse effect on his compensation, status, or benefits. Likewise, although Lilien suspended Chen's teaching of graduate level courses for a time, there is no evidence that the decision was intended to be permanent and Chen resumed teaching graduate level courses in less than a year. There is also no evidence that Chen's suspension from teaching graduate classes during that period adversely affected his compensation, status, or benefits. Hence, there was no evidence that these changes to Chen's teaching duties amounted to an adverse employment action. *Wilcoxon*, 235 Mich App at 364.

4. GRADUATE FACULTY STATUS

Chen also argues that Lilien's refusal to restore Chen's regular graduate faculty status and to permit

him to supervise a graduate student constituted adverse employment actions. However, there is no evidence that Lilien caused Chen to be demoted to associate graduate faculty status. Indeed, the evidence suggests that Chen had that status since before Lilien assumed the chairmanship. Similarly, there is no evidence that Lilien could establish an exception from the rule that only regular graduate faculty may supervise graduate students. Hence, there is no evidence that Lilien's actions or omissions with regard to Chen's graduate faculty status and desire to supervise a graduate student had any effect on Chen's employment. *Peña*, 255 Mich App at 314.

5. MERIT INCREASES

Chen also contends that he was "deprived [of] the tools to do research or serve on Committees," which resulted in his inability to obtain a merit increase in his pay. We agree that the failure to grant a merit increase, which is otherwise warranted, can constitute an adverse employment action. However, Chen does not identify the specific committees or dates on which he would have served had he not been deprived of his ability to serve and Chen does not specifically identify how he was deprived of the ability to serve—that is, he does not present any evidence that at some point he tried to serve on a committee and was prevented from doing so as a result of another's actions or omissions. Chen also failed to present evidence that his inability to serve on a committee directly affected his ability to obtain a merit increase in salary. Likewise, Chen does not identify the merit increase he would have otherwise received had he had the "tools to do research." Given Chen's failure to argue this issue and support it with citations of items in the record and legal authorities, we

conclude that he has abandoned this claim on appeal. See *Hamade*, 271 Mich App at 173.

6. MISCELLANEOUS ADVERSE ACTIONS

Finally, Chen also argues that he suffered adverse employment actions when the University lost his property, when Lilien instructed the faculty and staff not to help or talk to Chen, when Lilien humiliated Chen by discussing Chen's situation with others, by the lack of support from Lilien and previous chairpersons, and through ongoing harassment. On appeal, Chen does not state how these acts adversely affected his employment and does not cite authority to support his contention that these actions rose to the level of adverse employment actions. Therefore, we conclude that he has also abandoned his claims that these constituted adverse employment actions. *Id.*

Nevertheless, even if we were to conclude that these claims had not been abandoned, we would conclude that they did not rise to the level of adverse employment actions. Chen's subjective impression that his employment was adversely affected by the failure of various chairpersons to support him, by ongoing harassment, and by Lilien's decision to discuss Chen's situation with other faculty does not establish adverse employment actions. See *Peña*, 255 Mich App at 314. Rather, Chen had to identify objectively verifiable acts or omissions that adversely affected a term or condition of his employment. *Id.* For that reason, evidence of ostracism or isolation, by itself, does not constitute evidence that there was a change in employment conditions sufficient to constitute an adverse employment action. *Id.* at 315.

Chen also did not present any evidence that his ability to serve on the department's faculty was adversely affected by his loss of property. Indeed, he

successfully served as a professor for more than eight years without his Microwave Device and apparently worked for approximately a year before he realized that his personal property from Room 309 was missing. Likewise, after he discovered that his personal property was missing, he continued to teach and continued to earn the same compensation and benefits. Consequently, although Chen now clearly desires his property, there is no evidence that the loss of personal property affected the conditions of his employment in such a manner that it constituted an adverse employment action. See *Wilcoxon*, 235 Mich App at 363.

When faced with the University's motion for summary disposition, Chen failed to establish that he suffered an adverse employment action, which was an essential element of Chen's claims premised on discrimination and retaliation. *Lytle*, 458 Mich at 172-173; *Garg*, 472 Mich at 273. Consequently, the trial court did not err when it granted summary disposition of Chen's claims premised on national origin discrimination, age discrimination, and retaliation. MCR 2.116(C)(10).

IV. CONCLUSION

Because this Court did not have jurisdiction to grant leave to appeal in Docket No. 283575, we dismiss that appeal with prejudice. In Docket No. 283420, we conclude that there were no errors warranting relief. For that reason we affirm in Docket No. 283420. Because the University is the prevailing party, it may tax costs under MCR 7.219.

ESSELMAN v GARDEN CITY HOSPITAL

Docket Nos. 280723 and 280816. Submitted January 14, 2009, at Detroit. Decided June 4, 2009, at 9:00 a.m.

Bruce Esselman, as personal representative of the estate of David Esselman, deceased, brought a medical malpractice action in the Wayne Circuit Court against Garden City Hospital, David J. Fertel, D.O., and others. The defendants moved for summary disposition, alleging that the notices of intent to file a claim sent by the plaintiff failed to comply with MCL 600.2912b because the notice sent to each defendant did not specifically state a particularized standard of care for that individual defendant and further alleging that the affidavits of merit filed with the complaint failed to comply with MCL 600.2912d because they did not explain how the defendants' conduct caused the decedent's death. The court, Gershwin A. Drain, J., denied the motions. The Court of Appeals granted the defendants' applications for leave to appeal and consolidated the appeals.

The Court of Appeals *held*:

1. MCL 600.2912b(4), which sets forth a number of requirements with which a notice of intent must comply, does not require multiple statements or state that plaintiffs must explicitly line up particularized standards of care with individual defendants.

2. The statement of the standard of care does not need to contain any explicit statement of whether a corporate defendant is directly or vicariously liable. It only needs to serve as adequate notice to the defendants whether the plaintiff intends to proceed against them on a vicarious liability theory. Although all the information required by the statute must be specifically identified in an ascertainable manner within the notice, it does not need to be set forth in any particular method or format. If multiple defendants are involved, the notice of intent needs to provide enough information for each of the defendants to discern the general nature of what theory he, she, or it may expect to defend against, nothing more. Each defendant must be reasonably able to discern the general nature of the cause of action to be alleged against them.

3. Although a notice of intent must contain a statement describing all the items of information enumerated in MCL

600.2912b(4), those statements need not be any more specific than would be required of allegations in a complaint or other pleading: they must only give fair notice to the other party. A plaintiff must only provide a good-faith statement of what is being claimed against each defendant.

4. It is insufficient if a notice of intent only provides notice or only provides a statement. It must do both. The plaintiff did provide the requisite statement and unambiguously alleged a collective failure by all the defendants, in both supervisory and direct roles, to take fairly specific actions on the basis of fairly specific information. The trial court properly determined that the notice of intent satisfied MCL 600.2912b.

5. The purposes of the affidavits of merit, as with the notices of intent, would not be furthered by examining individual components in isolation from the whole. Even if a given section of an affidavit does not adequately address proximate cause, the dispositive question is whether the affidavit as a whole nevertheless explains how the alleged malpractice proximately caused the injury. Each of the affidavits in this case was not lacking in detail or difficult to decipher with regard to proximate cause. The trial court properly determined that the affidavits of merit satisfied MCL 600.2912d.

Affirmed.

SAAD, C.J., dissenting, stated that the plaintiff was required by MCL 600.2912b(4) and Supreme Court precedent to state the specific standard of practice or care with respect to each health professional or health facility named in the notice. The plaintiff did not meet the statutory requirement. This failure prevents the defendants from having the information necessary for the performance of their reciprocal obligations under the medical malpractice statutory scheme. The trial court should have granted the defendants' motions for summary disposition.

1. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE SUIT.

The statute that sets forth the requirements with which a notice of intent to bring a medical malpractice action must comply does not require multiple statements or state that the plaintiff must explicitly line up particularized standards of care with individual defendants (MCL 600.2912b[4]).

2. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE SUIT.

Although all the information required to be contained in a notice of intent to bring a medical malpractice action must be specifically identified in an ascertainable manner within the notice, it need not be set forth in any particular method or format; the statements

need not be any more specific than would be required of allegations in a complaint or other pleading and must provide a good-faith statement that gives each defendant fair notice of what is being claimed against the defendant.

3. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE SUIT — MULTIPLE MEDICAL MALPRACTICE DEFENDANTS.

A notice of intent to bring a medical malpractice action involving multiple defendants must provide each defendant enough information to discern the general nature of what theory he, she, or it may expect to defend against; each defendant must be reasonably able to discern the general nature of the cause of action to be alleged against the defendant (MCL 600.2912b[4]).

4. NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT.

The individual components of an affidavit of merit in a medical malpractice action are not examined in isolation from the whole to determine whether the affidavit as a whole explains how the alleged malpractice proximately caused the injury (MCL 600.2912d).

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Heather A. Jefferson* and *Vernon R. Johnson*), for the plaintiff.

Feikens, Stevens, Kennedy & Galbraith, P.C. (by *Jon Feikens*), for Garden City Hospital.

Rutledge, Manion, Rabaut, Terry & Thomas, P.C. (by *Matthew J. Thomas* and *Paul J. Manion*), for David J. Fertel, D.O., and others.

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

DAVIS, J. In these consolidated appeals, the defendants appeal orders that denied their respective motions for summary disposition. This medical malpractice case arises out of David Esselman's death, while in the care of defendants, from gangrenous cholecystitis[1]

[1] Cholecystitis is inflammation of the gallbladder.

and sepsis, each of which he apparently had for at least 24 hours before his death. Defendants contend that plaintiff's notice of intent and affidavits of merit were insufficient. The trial court disagreed. We affirm.

The decedent was admitted to Garden City Hospital on September 26, 2003. He was experiencing pain in his abdomen, back, and chest, and he was nauseous and vomiting. Initial testing revealed a small obstruction in the decedent's bowel. The next day, he continued to have the same symptoms, but additionally had a body temperature of 101 degrees Fahrenheit. Antibiotics and further testing were ordered, but no computerized tomography (CT) scan. On the next day, his temperature rose to 102 degrees. A CT scan and a dimethyl iminodiacetic acid (HIDA) scan were performed, from which it was concluded that his common bile duct was obstructed and that there were indications that the decedent suffered from acute cholecystitis. A second HIDA scan was ordered, though it appears it was not completed. Treating physicians ordered the attending nurses to report any rises in body temperature.

On September 29, 2003, the decedent's body temperature was recorded as being 102.7 degrees at 3:00 a.m., 102.6 degrees at 6:30 a.m., and 103 degrees by 8:00 a.m. At 1:30 p.m. that day, the decedent underwent surgery and died during the procedure. The certificate of death stated that he had died as a result of gangrenous cholecystitis and sepsis, each of which he had for at least 24 hours before his death.

On June 7, 2005, plaintiff received his letter of authority appointing him as personal representative of the decedent's estate. On September 26, 2005, plaintiff sent his notice of intent to file a claim (NOI) to the

various defendants.[2] The NOI was 14 pages long and included a lengthy factual recitation of the decedent's stay at Garden City Hospital, including detailed discussions of the treatment provided by various individuals, as well as the acts and errors of the individual defendants. Furthermore, it contained the following statement of the "applicable standard of practice or care alleged":

> Pursuant to MCL 333.21513 entitled: "Duties and Responsibilities of Owner, Operator or Governing Body of Hospitals", the owner, operator and governing body of a hospital licensed under this Article (A) are responsible for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital.
>
> The standard of care required from the above-named physicians, residents, nurses, etc., and entities include the following but are not limited to:
>
> a. To timely diagnose and treat (an[d]/or refer to treat) gallbladder disease including but not limited to performance of timely ultrasound, HIDA scan, CT scan and/or MRI [magnetic resonance imaging] of the abdomen;
>
> b. To fully and completely investigate and work up the patient for these disease processes including but not limited to appreciating the increasing laboratory values and deteriorating clinic[al] picture which began no later than Saturday, September 27, 2003; on Saturday, September 27, 2003 perform the above diagnostic testing so as to work up gallbladder disease which was clearly suggested by not only the clinical picture but also the laboratory results. To timely order and obtain a gastroenterological consultation and participation in the care of this patient so as to determine whether this was in fact gallbladder disease versus some other GI [gastrointestinal] problem; and to timely determine whether a pre-operative ERCP [endo-

[2] Plaintiff's NOI included allegations against defendants, as well as against individuals who agreed to settle with plaintiff and are no longer parties to this matter.

scopic retrograde cholangiopancreatography] and/or cholangiogram was necessary as well as to work up the blood in the stool and declining hemoglobin levels;

c. To timely perform a cholecystectomy on Saturday, September 27, 2003 or, at the very latest Sunday, September 28, 2003;

d. Failure to obtain serial abdomen films and exams as well as serial labs including arterial lactate as ordered on September 27, 2003 by the physicians and nursing staff;

e. On Sunday, September 28, 2003 failure by the physicians and nurses involved with Mr. Esselman's care to appreciate the findings as evidenced by the CT scan and HIDA scan that in fact this was acute cholecystitis and that Mr. Esselman had a deteriorating clinical picture including high fever, markedly abnormal laboratory values but especially significantly increased liver studies and white blood count, and that his abdominal examination revealed tympany necessitating an emergent operation on his gallbladder;

f. Not to unnecessarily delay Mr. Esselman's surgery such that it would be performed on either Saturday, September 27, 2003 or Sunday, September 28, 2003 at the very latest;

g. To order and obtain a timely gastroenterology consultation for a preoperative ERCP and in the event that one was unavailable, obtain those services from another GI [gastroenterologist] or alternatively proceed with the surgery without an ERCP;

h. Throughout the remainder of Sunday, September 28, 2003 that the nursing staff timely and immediately report signs of clinical deterioration such as increasing temperature and increasing abdominal symptoms to the attending physician after it was evident that the house officer would or did nothing with such information as well as failure by the nursing staff to record vital signs once every hour;

i. On September 29, 2003 failure by the nursing staff to immediate[ly] report markedly abnormal laboratory values

> and increasing temperature to either the house officer and/or the attending physicians;
>
> j. Failure by the physicians and nursing staff to assure that an immediately and emergent operation was performed on Monday, September 29, 2003 instead of same occurring in the afternoon hours;
>
> k. Failure by the anesthesiologist and/or CRNA [certified registered nurse anesthetist] to closely monitor end tidals C02 such that once they began to rise the anesthesiologist should have been immediately notified and timely interaction should have occurred including, but not limited to[,] hyperventilating the patient, provide bicarbonate, etc.;
>
> l. Failure to timely prevent and otherwise identify and treat the signs and symptoms of sepsis; and,
>
> m. Any and all other breaches of the standard of care found to be violated through the course of discovery. [Underlining in original.]

On March 28, 2006, plaintiff filed his complaint, accompanied by four affidavits of merit.

Defendants moved for summary disposition; their motions made generally the same assertions that (1) the NOI failed to comply with MCL 600.2912b because it did not specifically state a particularized standard of care for each individual defendant and that (2) the affidavits of merit failed to comply with MCL 600.2912d because they did not explain how defendants' conduct caused the decedent's death. The trial court denied those motions, and this Court granted defendants' applications for leave to appeal.

This Court reviews a trial court's decision regarding summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court's review is limited to the evidence that was presented to the trial court. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Further-

more, this case presents an issue of statutory interpretation, which is also subject to review de novo. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

Pursuant to MCL 600.2912b(1), a person must send an NOI to a health care facility or professional at least 182 days before he or she commences any action for medical malpractice against the facility or professional. Furthermore, MCL 600.2912b(4) sets forth a number of requirements with which the NOI must comply. Specifically, it states:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

The plain language of the statute therefore does not require multiple statements, nor does it state that plaintiffs must explicitly line up particularized standards with individual defendants.

We are first urged to conclude that the Legislature *did* intend to require plaintiffs to explicitly provide such an analysis in NOIs on the basis that the Legislature

used singular words in the above statute. However, that argument is entirely contrary to the dictates of MCL 8.3b, which states that in construing statutes, singular and plural words "extend to and embrace" or "may be applied and limited to" each other.

Defendants also rely on *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679; 684 NW2d 711 (2004). In that case, the plaintiff provided NOIs to the defendants, and each of those NOIs contained an identical (other than the name of each defendant) recitation of the applicable standard of care or practice. Our Supreme Court found this unacceptable, in *part* because the statements did not contain anything specifically and explicitly advising the corporate-entity defendants whether the plaintiff intended to proceed against them on a theory of direct liability or vicarious liability. *Id.* at 692-693. But our Supreme Court also explained more fully that the recitations in the NOIs were simply tautologies: in effect, they merely stated that the defendants violated the standard of care by violating the standard of care. *Id*. at 693-694. In contrast, the statement of standard of care in this case is clearly not a tautology, even when read in isolation from the recitation of facts.

Moreover, defendants' argument misconstrues what *Roberts* requires in the way of specifying vicarious or direct liability. The *Roberts* holding was that the statement therein "fails to *indicate* whether plaintiff was alleging" vicarious or direct liability, mostly because there was a confusing ambiguity between the complaint's apparent allegation of vicarious liability for the negligence of the hospital's agents, whereas the NOI "implied that plaintiff alleged direct negligence against these defendants for negligently hiring or negligently granting staff privileges to the individual defendants."

Id. at 693 (emphasis added). In other words, the statement of the standard of care does not need to contain any explicit statement of whether a corporate defendant is directly or vicariously liable; rather, it only needs to "serve as adequate notice" to the defendants whether plaintiff intends to proceed against them on a vicarious liability theory. *Id.* Although all the information required by the statute must be "specifically identified in an ascertainable manner within the notice," it does not need to be set forth in any particular "method or format." *Id.* at 701.

Defendants further rely on this Court's recent decision in *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309; 760 NW2d 699 (2008). We find *Shember* inapplicable for two significant reasons, either of which would be sufficient by itself. First, the NOI in this case was crafted in 2005, and *Shember* was decided three years later. Even if *Shember* imposed additional specificity requirements, which it did not, it would be unjust and unfair to evaluate the sufficiency of plaintiff's NOI under a standard more stringent than what existed *at the time* the NOI was drafted.

In any event, *Shember* involved a medical malpractice suit against a number of defendants, and it was alleged that the NOI failed to identify the applicable standard of practice or care with regard to some of those defendants. *Id.* at 319-320. This Court only recited what *Roberts* had already explained: (1) that the standard of care must be described as something more specific than literally "the standard of care," (2) that all named defendants must be able to discern from the NOI generally what theory they are expected to defend against, and (3) that different defendants might be expected to comply with different standards of care. *Shember* does not expand on *Roberts*; rather, it holds

the same principle that if multiple defendants are involved, the NOI needs to provide enough information for each of those defendants to discern the general nature of what theory he, she, or it may expect to defend against, nothing more.

As discussed, *Roberts* did not hold that the NOI must explicitly state whether a plaintiff intends to proceed against a corporate defendant on a theory of direct or vicarious liability. Rather, plaintiffs should not present defendants with ambiguity regarding the nature of the action of which they are providing notice. In other words, the *Roberts* Court was concerned that each defendant must be reasonably able to discern the general nature of the cause of action that will be alleged against them.

Our Supreme Court has explained that even if an NOI "may conceivably have apprised [a defendant] of the nature and gravamen of [the] plaintiff's allegations," the applicable statutory standard nevertheless requires NOIs to contain "a 'statement' describing" all the items of information enumerated in MCL 600.2912b(4). *Boodt v Borgess Med Ctr*, 481 Mich 558, 560-561; 751 NW2d 44 (2008). However, our Supreme Court did not address, let alone criticize, this Court's prior discussion explaining that, otherwise, those statements did not need to be any more specific than would be required of allegations in a complaint or other pleading: they must only give fair notice to the other party. *Boodt v Borgess Med Ctr*, 272 Mich App 621, 626-628; 728 NW2d 471 (2006). Indeed, our Supreme Court reaffirmed that a plaintiff must only provide a good-faith statement of what is being claimed against each defendant, recognizing that discovery would not yet have begun. *Boodt*, 481 Mich at 561. Along those same lines, this Court observed that medical profession-

als surely keep records, particularly of any "mishaps"; consequently, as long as the technical requirements of the statute are complied with, it "strains credulity to conclude" that the defendants would not understand the nature of the suit plaintiff was planning to commence. See *Boodt*, 272 Mich App at 632-633.

Thus, the issues are whether the NOI contains "a statement" that provides information containing all the enumerated requirements of MCL 600.2912b(4), and whether those statements reasonably communicate to a medical professional or medical facility (which surely has better access to information than the plaintiff) the nature of the claim the plaintiff intends to pursue against the medical professional or medical facility. In other words, *Roberts* and *Boodt*, when read together, hold that it is insufficient if an NOI *only* provides notice or *only* provides "a statement." It must do both. Here, it is clear that plaintiff did provide the requisite statement, and plaintiff unambiguously alleges a collective failure by all defendants, in *both* supervisory and direct roles, to take fairly specific actions on the basis of fairly specific information.

We agree with the trial court that plaintiff's NOI satisfied MCL 600.2912b.

Next, pursuant to MCL 600.2912d, a plaintiff in a medical malpractice cause of action must submit an affidavit of merit with the complaint. The affidavit must be signed by a health care professional that could reasonably qualify as an expert witness. MCL 600.2912d(1). The affidavit must set forth the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted

> by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

Defendants allege that plaintiff's affidavits of merit failed to comply with MCL 600.2912d(1)(d) because they merely concluded that the allegedly negligent acts were the proximate cause of the decedent's death, without specifying exactly how the acts caused the death.

Defendants primarily rely on an unpublished, and therefore nonbinding, case from this Court that nevertheless fails to suggest that the affidavits of merit here were deficient. In *Bond v Cooper (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2008 (Docket No. 273315), this Court observed that the plaintiff's affidavit of merit merely stated, " 'the violations of the standard of care are a proximate cause of the damages claimed by the Plaintiff.' " *Id.* at 3. This Court stated, "The deficiency of this affidavit of merit is apparent. Simply stating that violations of the standard of care 'are a proximate cause of the damages' does not fulfill the statutory requirement that the affidavit state the 'manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.' " *Id.* However, the Court continued to state that the deficiency in that case was "not remedied by an examination of the affidavit as a whole." *Id.* As this Court implied—and we now expressly state—the purpose of the affidavits of merit, as with NOIs, and as with documentary or statutory analysis in general, would not be furthered by examining individual components in isolation from the whole.[3] Thus, even if a given section of the

[3] In *Craig v Oakwood Hosp*, 471 Mich 67, 86-88; 684 NW2d 296 (2004), our Supreme Court explained that a mere correlation between

affidavit does not adequately address proximate cause, the dispositive question is whether the affidavit *as a whole* nevertheless explains how the alleged malpractice proximately caused the injury.

The actual sections of plaintiff's affidavits that address proximate cause are relatively conclusory in nature. Critically, however, the other portions of the affidavits are much more detailed. Each of the affidavits explains that the various health care professionals failed to treat the decedent's symptoms in a timely fashion, that his condition continued to deteriorate, that he developed sepsis and cholecystitis, and that he died. Moreover, defendants are sophisticated parties, knowledgeable in the field of medicine, and presumably in possession of reasonably illuminating records pertaining to the decedent's treatment and death. The affidavits of merit were not lacking in detail or difficult to decipher. They communicated that because of the alleged malpractice, the decedent's condition deteriorated and caused his death. To hold that they were deficient because the sections that addressed proximate cause lacked the specificity that other sections possessed would be to exalt form over substance.

We therefore agree with the trial court that plaintiff's affidavits of merit satisfied MCL 600.2912d.

Affirmed.

SERVITTO, J., concurred.

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alleged malpractice and an injury is insufficient to establish proximate cause; but *Craig* addressed the elements of a medical malpractice cause of action pursuant to MCL 600.2912a, not the sufficiency of an affidavit of merit. Given that an affidavit of merit is attached to a plaintiff's complaint, and is thus produced before the discovery period, it would be inappropriate to hold an affidavit of merit to the same standard.

SAAD, C.J. (*dissenting*).

I. INTRODUCTION

The legislation that comprehensively regulates the prerequisites for and the filing of medical malpractice claims in Michigan places significant obligations on plaintiffs and defendants that are not found in ordinary, garden-variety tort actions. The mutual obligations imposed by the Legislature are designed to streamline and settle medical malpractice disputes, even before they become lawsuits. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997). Indeed, as a predicate to filing the litigation, a claimant must detail the factual basis for the claim, the applicable standard of practice or care, the manner in which the plaintiff claims the health professional breached that standard, what action the health professional should have taken to comply with the standard, and how the alleged breach caused the injury. After an exchange of medical records, the health professional must, in turn, respond to the plaintiff's detailed assertions by providing the factual basis for his or her defense, the standard of care the health professional believes applies, the manner in which the health professional complied with that standard, and the manner in which he or she believes that the claimed negligence did not proximately cause the alleged injury. Because medical malpractice claims may involve more than one health professional, including doctors and nurses in various specialties with different degrees of contact and control over the patient's care, our Supreme Court has, correctly in my view, held that these mutual obligations must be detailed with regard to each health professional. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004). This obligation exists for the obvious reason

that the facts, standards of care, and complex medical questions will vary widely from doctor to nurse and from generalist to specialist. But today, in direct contradiction of the clear statutory mandate and the Supreme Court's ruling in *Roberts*, the majority dispenses with the obligation of a claimant to set forth this important information with regard to each health professional and holds, instead, that a general narrative about the patient's hospital stay suffices.

The majority conveniently ignores how 18 health professionals in this case, including resident doctors, surgeons, and nurses, should respond to this narrative in order to meet their individual statutory obligations to reply with applicable facts, the appropriate standard of care, and causation. Indeed, the majority justified its reasoning with the incorrect and spurious assertion that the health care professionals have the records. But, just as the majority ignores the reciprocal nature of the notice of intent requirements, it similarly ignores the mutual obligations of the claimant and health care providers to produce and exchange all relevant medical records before the litigation is commenced in order to further narrow the issues and the parties and to settle medical malpractice disputes. Moreover, the majority's studied refusal to acknowledge the rest of the statute also ignores another important feature of this legislation. After the detailing of facts, standards, and causation by the claimant and health care professionals and after the exchange of medical records, the claimant and health care professionals must produce affidavits from qualified medical experts swearing to the merits or defenses regarding duty, breach, and causation. Of course, this entire sequential and mutual statutory scheme falls apart if, as here, our Court holds that, at the first step of this multistep process, all a claimant must do is describe a series of events, without articulating what was required of each health care profes-

sional, how the professional breached that standard of care, and how that breach caused the injuries in issue.

II. ANALYSIS

Our Supreme Court specifically held in *Roberts* that a plaintiff's notice of intent must comply with MCL 600.2912b(4)(b) "with respect to *each defendant.*" *Roberts*, *supra* at 695 (emphasis added).[1] Subsequent cases have similarly held that "[t]he alleged standard [of practice or care] must be particularized for each of the professionals and facilities named in the notices." *Bush v Shabahang*, 278 Mich App 703, 711; 753 NW2d 271 (2008). The common sense rule comports with the clear mandate of the statute. The statute, § 2912b(4), sets forth the requirements with which the notice of intent must comply:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

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[1] Though the Court in *Roberts* specifically addressed the notice of intent requirement for the standard of care, its holding clearly applies to the other obligations in MCL 600.2912b(4), which require a claimant to also specify, with regard to each medical professional or facility, how the health professional or facility breached the applicable standard of care, what the professional or facility should have done to comply with the standard of care, and how the particular health professional or facility's alleged breach proximately caused the claimed injury.

> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. [MCL 600.2912b(4).][2]

Plaintiff's notice of intent did not meet these statutory requirements because, although the notice includes some standards of care, it does not state which standards apply to which health professional or facility. As the Court in *Roberts* explained, "what is required is that the claimant make a good-faith effort to aver the specific standard of care that she is claiming to be applicable to each particular professional or facility that is named in the notice." *Roberts*, *supra* at 691-692 (emphasis deleted). In finding the notice of intent inadequate in *Roberts*, the Court further observed:

> Here, several different medical caregivers were alleged to have engaged in medical malpractice. Yet, rather than stating an alleged standard of practice or care for each of the various defendants—a hospital, a professional corporation, an obstetrician, a physician's assistant, and an emergency room physician—plaintiff's notices of intent allege an identical statement applicable to all defendants . . . . [*Id*. at 692.]

Here, the notice of intent merely sets forth a series of names followed by a series of standards and allegations and, contrary to the explicit holding in *Roberts*, plaintiff did not match the names to any of the standards of care, state how each health professional breached the applicable standard, and state how that breach caused harm to plaintiff's decedent.

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[2] By definition, the statute contemplates that the claimant must give all health professionals the names of all other health professionals notified under MCL 600.2912b(4), thus clearly stating that *each* health professional must be individually notified of *each* subcategory under § 2912b(4).

In excusing this deficiency, the majority reasons that the *Roberts* Court merely warned that the standard of care set forth in the notice of intent may not be tautological and unresponsive, and that plaintiff made a good faith effort to set forth the applicable standards to satisfy the statutory requirements. But *Roberts* unequivocally states that a claimant is "required to make a good-faith averment of *some* particularized standard for each of the professionals and facilities named in the notices." *Id*. at 694 (emphasis in original). This rule stems from the plain language of the statute itself, which provides that a party may not commence a malpractice action until he or she has given "*the* health professional or health facility written notice" that includes the applicable standard of care and "[t]he manner in which it is claimed that the applicable standard of practice or care was breached by *the* health professional or health facility," and what the professional should have done differently. MCL 600.2912b(1),[3] and (4)(c) (emphasis added). In other words, each health professional called to defend a medical malpractice claim is entitled to specific notice of the recognized standard of acceptable professional practice or care in the community for his or her area of practice, specialty, or subspecialty, how the conduct of that health professional allegedly breached that standard, and what the plaintiff alleges the health professional should have done to comply with the applicable standard. A health facility is entitled to the same notice and, if vicarious liability is alleged, it stands to reason that the facility is

[3] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

entitled to notice of the specific standards, breaches, and what alleged action should have been taken by each medical professional.

Here, while plaintiff set forth a recitation of facts about the decedent's hospitalization, he made no effort to provide notice of which standard of care applied to or was breached by each named health professional or facility, a list that includes medical practices and professionals of varying types, training, and specialties. Indeed, plaintiff's notice of intent is directed to 18 separate health professionals and entities, including a cardiovascular surgeon, a doctor of internal medicine, two cardiovascular thoracic surgical residents, a gastroenterologist, a coronary vascular thoracic surgical resident, an anesthesiologist, a certified registered nurse anesthetist, four registered nurses, and several private medical entities, including Garden City Hospital and various medical groups. As the *Roberts* Court observed:

> The phrase "standard of practice or care" is a term of art in the malpractice context, and the unique standard applicable to a particular defendant is an element of a medical malpractice claim that must be alleged and proven. *Cox v Flint Bd of Hosp Mgrs,* 467 Mich 1, 10; 651 NW2d 356 (2002). The applicable standard is governed either by statute (see, for example, MCL 600.2912a[1], which sets forth the particular proofs that a malpractice plaintiff must present with respect to a defendant's "standard of practice or care," depending on whether the defendant is a general practitioner or a specialist) or, in the absence of a statutory standard, by the common law. *Cox, supra* at 5, 20. The standard of practice or care that is applicable, for example, to a surgeon would likely differ in a given set of circumstances from the standard applicable to an OB/GYN [obstetrician/gynecologist] or to a nurse. [*Roberts, supra* at 692 n 8.]

Later in the *Roberts* opinion, our Supreme Court further explained:

> The dissent argues that nowhere in § 2912b(4) does the Legislature require that a plaintiff allege a "standard applicable specifically" to each defendant and, therefore, neither should this Court. However, as explained . . . the phrase "standard of practice or care" is a term of art. Proof of the standard of care is required in every medical malpractice lawsuit, and the Legislature has chosen to require a plaintiff to address standard of care issues in the notice of intent. Under a proper understanding of this term, the standard applicable to one defendant is not necessarily the same standard applicable to another defendant. Thus, we are attempting to do nothing more than interpret the Legislature's requirement in § 2912b(4)(b)—that a plaintiff provide a "statement" regarding the applicable "standard of practice or care" alleged. [*Roberts*, *supra* at 694 n 11 (citations omitted).]

Again, *Roberts* makes clear that a plaintiff's notice must comply with § 2912b(4)(b) "with respect to *each defendant*." *Roberts*, *supra* at 695 (emphasis added). Here, plaintiff's notice of intent contains assertions regarding what, as a group, the "physicians, residents, nurses, etc. and entities" did or failed to do for Mr. Esselman, but contains no particularization of which listed actions or what alleged standards of care for health care providers apply to any one of the listed health professionals. Thus, the notice is insufficient to inform any one of the myriad specialists, interns, or nurses of what they "did not do or should have done to comply with the applicable standard of care." *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 324; 760 NW2d 699 (2008).[4] As noted, different standards

[4] The majority makes the inconsistent assertion that this Court should not apply *Shember* if *Shember* creates any more rigorous requirements than those in *Roberts*, but it then concludes that *Shember* did not expand on the requirements set forth in *Roberts*. The latter statement is correct. *Shember* simply applied the law as it has been promulgated by our courts since *Roberts*. Moreover, to the extent the majority implies that *Shember* is distinguishable because it involved "a medical malpractice suit against

apply to different classes of health professionals and, without some specific indication of the standards applicable to each named health professional or facility, even a lengthy factual narrative like plaintiff's simply fails to reasonably communicate to each professional or facility the nature of the claim plaintiff intends to pursue.

Importantly, "[t]he purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims . . . ." *Neal, supra* at 705, citing Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993. For this reason, the allegations in the notice must be sufficiently specific to allow the health professional or facility to determine the basis of the plaintiff's claim against him, her, or it and decide whether to negotiate a settlement. Here, the lack of particularized information about what standard applies and what each health professional or facility did to breach the applicable standard prevents each from ascertaining the nature, scope, and substance of the allegations against him, her, or it and from engaging in any meaningful analysis or discussion about settling the case. Despite clear differences in their occupations, practices, and specialties, plaintiff's notice asserts that the various doctors and nurses were equally required to take certain actions and equally at fault for certain aspects of Mr. Esselman's care. This does not allow any of the health professionals or facilities to understand the specific contentions about their allegedly negligent

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a number of defendants," *ante* at 218, this case, too, involves a large number of defendants—18 health professionals and entities—and plaintiff's failure to articulate the appropriate standards of care applicable to each. Accordingly, pursuant to both *Roberts* and *Shember*, plaintiff's notice of intent was insufficient.

conduct and it clearly does not advance the important policy objective of promoting a fruitful settlement process.

The majority's decision advocates a buckshot approach to asserting a medical malpractice claim, which further ignores that the notice of intent provision is interconnected with the other statutory sections addressing the commencement of a claim. By minimizing the complainant's responsibilities under § 2912b(4)(b), it undermines the mutual obligations imposed by the remainder of the statutory scheme. Not only must the health professional specifically respond to the claimant's allegations with regard to the applicable duty, breach, and causation elements, he or she must provide the claimant with access to all medical records. MCL 600.2912b(5),[5] (7).[6] Thereafter, on the basis of all the

[5] MCL 600.2912b(5) states:

> Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to [MCL 600.6013(9)], within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in [MCL 600.2912f]. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law.

[6] MCL 600.2912b(7) states:

> Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

foregoing documentation, a plaintiff must file an affidavit of merit from an appropriate medical professional to further narrow the issues by setting forth the applicable standard of care, an opinion about how that standard of care was breached, what actions should have been taken to comply with the standard of care, and how the alleged breach proximately caused the injury. MCL 600.2912d.[7] In turn, the health care defendant must file an affidavit of

(a) The factual basis for the defense to the claim.

(b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.

(d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

[7] MCL 600.2912d provides:

(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

meritorious defense from a qualified medical professional and include specific facts and medical information to refute the plaintiff's claim. MCL 600.2912e. Without a fair understanding of the specific allegations against the health professional or entity, it defies explanation how an expert could properly assess the merits of the claims or how any of the individual medical caregivers could adequately respond, let alone weigh whether the claims should prompt serious settlement negotiations. Thus, it also does a serious disservice to the claimant to fail to comply with the statute and the well-established caselaw.

Moreover, while the majority states that the health professionals are in a better position to sort out who must have engaged in negligent conduct, this is not an ordinary negligence case and the statute contains specific requirements reflecting the difference. The statutory scheme is clearly intended to require more rigor in the litigation of medical malpractice cases in order to narrow the issues and to encourage settlement. The majority's reasoning ignores the plaintiff's obligations under the statutes and presumes the existence of a negligent act that will reveal itself once the health professional reviews his or her own records. This is

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(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(6)], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

entirely at odds with the comprehensive legislative scheme and ignores that—in addition to the plaintiff's obligation to provide specific assertions about a health professional's duty, how the duty was breached, and how the breach caused the injury—medical malpractice defendants have the equal and corresponding obligation to provide the very records the majority implies are entirely within the defendants' control.

III. CONCLUSION

For the above reasons, I would hold that, under the statute and our caselaw, plaintiff's notice of intent is simply insufficient "[b]ecause the notice examined in its entirety does not comport with plaintiff's responsibility to make a good-faith averment of all the requirements of the statute pertaining to" each health care provider. *Shember, supra* at 324. Accordingly, I would hold that the trial court should have granted defendants' motions for summary disposition.

STATE TREASURER v SPRAGUE

Docket No. 281961. Submitted April 8, 2009, at Lansing. Decided June 4, 2009, at 9:05 a.m.

The State Treasurer brought an action in the Bay Circuit Court against Timothy Sprague, Dow Chemical Employees Credit Union, and John Gilman, seeking reimbursement for the cost of Sprague's incarceration pursuant to the State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 *et seq*. The court, William J. Caprathe, J., entered an order requiring Sprague to notify Dow Chemical Company, his former employer, that his pension benefits should be mailed to his prison address rather than deposited directly into his pension account at the credit union and requiring the credit union to transfer 90 percent of the pension account funds to the plaintiff. Sprague appealed.

The Court of Appeals *held*:

The trial court's order does not violate the anti-alienation provision of the Employee Retirement Income Security Act (ERISA), 29 USC 1056(d)(1). ERISA forbids the alienation or assignment of retirement plan benefits. As decided in *State Treasurer v Abbott*, 468 Mich 143 (2003), directing a pension fund to send pension payments to a prisoner's prison account, where they can be accessed for SCFRA reimbursement purposes, does not violate ERISA's anti-alienation provision. A contrary holding in *DaimlerChrysler Corp v Cox*, 447 F3d 967 (CA 6, 2006), is not binding on this panel of the Court of Appeals given that it is not a United States Supreme Court decision. *Abbott* binds the panel until the Michigan Supreme Court overrules or modifies it.

Affirmed.

SHAPIRO, J., concurring in part and dissenting in part, agreed that under *Abbott*, the plaintiff had the authority to require Sprague to notify his former employer that his pension benefits should be mailed to his prison address rather than deposited into his credit union account. He also agreed that once pension funds have been deposited into a prisoner's account at prison or a financial institution outside prison, the plaintiff may obtain an order directing disbursement to the state. However, Judge SHAPIRO disagreed that the state itself may direct a pension plan where to

disburse the prisoner's pension benefits. As decided in *Daimler-Chrysler*, the ERISA anti-alienation provision obligates a pension plan to protect benefits from alienation at least up to the point of payment.

PRISONS AND PRISONERS — STATE CORRECTIONAL FACILITY REIMBURSEMENT ACT — PENSIONS — EMPLOYEE RETIREMENT INCOME SECURITY ACT.

A trial court may order a prisoner to direct the prisoner's former employer to send the prisoner's pension benefits to prison and may order a financial institution of the prisoner to transfer pension monies in an account to the State Treasurer, both for purposes of reimbursing the state for the cost of the prisoner's incarceration, without violating the anti-alienation provision of the Employee Retirement Income Security Act (29 USC 1056[d][1]; MCL 800.401 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Kathleen A. Gardiner*, Assistant Attorney General, for the State Treasurer.

Timothy Sprague, *in propria persona*.

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

BANDSTRA, P.J. Defendant Timothy Sprague, acting *in propria persona*, appeals as of right the circuit court's order enforcing the state's right to seek reimbursement for the cost of his incarceration. Specifically, the order (1) required Sprague to notify his former employer, Dow Chemical Company, that his pension benefits should be mailed to his prison address rather than deposited directly into his account at defendant Dow Chemical Employees Credit Union (hereafter referred to as the pension account) and (2) required the credit union to transfer assets held in the pension account to the State Treasurer (plaintiff). We conclude that neither of these two provisions violates the anti-alienation provision of the Employee Retirement Income Security Act (ERISA), 29 USC 1056(d)(1), and affirm.

Under the State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 *et seq*., the state is entitled to attach prisoners' assets to reimburse the state for the cost of imprisonment. See MCL 800.403. Plaintiff brought this action against Sprague and the credit union, seeking SCFRA reimbursement from Sprague's pension benefits. The trial court entered an order directing Sprague to notify Dow Chemical that all future pension benefits should be mailed directly to him at his prison address, apparently for deposit into his prison account, and further ordered the warden of the prison to make monthly distributions equal to 90 percent of the assets received, from the pension account to plaintiff, as reimbursement of costs under the SCFRA. Further, the order directed defendant credit union to disburse 90 percent of the funds already held in Sprague's pension account to plaintiff, with the remainder distributed to Sprague, and then to close the pension account.

Sprague claims that the order violates ERISA's anti-alienation provision, which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 USC 1056(d)(1). In making this argument, Sprague primarily relies on *DaimlerChrysler Corp v Cox*, 447 F3d 967 (CA 6, 2006); in response, plaintiff primarily relies on *State Treasurer v Abbott*, 468 Mich 143, 152, 158-159; 660 NW2d 714 (2003). See generally *Selflube, Inc v JJMT, Inc*, 278 Mich App 298; 750 NW2d 245 (2008).

In *Abbott*, the earlier of these decisions, our Supreme Court reinstated the trial court's order that the defendant prisoner direct his monthly pension proceeds to his prison address. *Abbott, supra* at 145. As is the case here, the order applied against both the prisoner and the pension fund: "the pension fund itself was directed to send the benefit payments to defendant's prison

address in the event that defendant did not ask the fund to do so." *Id*. at 152. The Court reasoned that this did not constitute assignment or alienation in violation of ERISA because "[a] property interest is assigned or alienated when it has been transferred *to another person*. The trial court here did not order defendant to have his pension proceeds sent to *another person's* address[, but rather] the court ordered defendant to receive the benefits *at his own address*." *Id.* at 151 (emphasis in original). The Court also concluded that the prison warden's access to the defendant's prison account did not constitute a transfer of legal title or interest in the defendant's funds. *Abbott*, *supra* at 151. Moreover, the Court found that an involuntary deposit "does not establish an assignment unless a person other than the beneficiary acquires a right or interest enforceable against the plan." *Id.*

In *DaimlerChrysler*, *supra* at 968-969, DaimlerChrysler Corporation, as fiduciary of its pension plan, brought a declaratory action in the United States District Court for the Eastern District of Michigan asking the federal court to decide whether state court orders issued pursuant to the SCFRA violated ERISA's anti-alienation provision. The contested orders required four former DaimlerChrysler employees, who were inmates in Michigan correctional facilities, to notify DaimlerChrysler that their pension benefit payments should be mailed to them at their prison addresses. *Id.* at 969. Only one of the inmates complied, so the defendant, the Michigan Attorney General, sent notices to DaimlerChrysler informing it that future benefit checks should be mailed to the inmates at their institutional addresses. *Id.* at 970. DaimlerChrysler did not comply with the notices and instead brought a declaratory action to determine whether the SCFRA was preempted by ERISA and whether state officials were

precluded from enforcing the orders against the prisoners to the extent that they violated ERISA. *Id*.

The Sixth Circuit, affirming the federal district court, noted that "ERISA's anti-alienation provision obligates a plan to protect benefits from alienation 'at least up to the point of payment' "; thus, "once a pension plan has sent benefit payments to a beneficiary[,] . . . the attachment of those funds by a creditor does not constitute an alienation." *DaimlerChrysler*, *supra* at 974. However, the SCFRA notices sent by the defendant to the pension plan operated on plan benefits before they were sent to their beneficiaries. *Id.* The court therefore determined that the SCFRA notices and orders were "void to the extent that they direct[ed] DaimlerChrysler to send benefits to an address not designated by a beneficiary. The state may still send the notices, but DaimlerChrysler is not obligated to comply with them." *Id*. at 975.

The Sixth Circuit further held that states were not precluded from seeking reimbursement from a prisoner through his or her pension benefits, stating that a "state can take action against the prisoner by placing a constructive trust on" pension funds after benefits have been received by the prisoner. *DaimlerChrysler*, *supra* at 976. However, the court expressly declined to decide whether the state could order a prisoner to direct a pension plan to send the prisoner's assets to a prison account, which could be accessed by the state for SCFRA reimbursement: "We are not passing, however, on the question of whether state officials can compel prisoners to send their address changes to the Pension Plan because that issue is not before us." *Id*.[1]

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[1] The Sixth Circuit Court found that *Abbott* was unpersuasive, stating that although the pension payments had been sent directly to the prisoners, this was

Comparing *Abbott* and *DaimlerChrysler*, we conclude that they are not in conflict with respect to the question whether the order requiring Sprague to direct Dow Chemical to send pension payments to his prison account, where they can be accessed for SCFRA reimbursement purposes, violates ERISA's anti-alienation provision. The *Abbott* Court clearly held that such an order does not violate ERISA, and this question was specifically not addressed by the court in *DaimlerChrysler*. Accordingly, following *Abbott*, we conclude that the trial court's order here requiring Sprague to direct Dow Chemical to send pension payments to his prison account, rather than depositing them into his pension account, must be upheld.

We note that there is a conflict between *Abbott* and *DaimlerChrysler* on a question that both courts addressed, whether a state court may order a pension plan to send pension payments to a prison account, rather than depositing them into a prisoner's pension account, without the direction of the prisoner.[2] *Abbott* clearly

> irrelevant to the question of alienation, because (1) the prisoners [in *Abbott*] did not want to receive the payments at their institutional addresses, (2) Michigan law strictly controls a prisoner's bank account and how the funds may be used, and (3) the state already effectively owned 90% of the payments even before they were received. The fact that the payments were sent to the prisoner's institutional address is therefore a mere formalism that is not dispositive of whether an alienation has occurred[.] [*Id*. at 976.]

[2] That order is practically more effective than one that merely directs a prisoner to require that payments be sent to a prison account rather than deposited into a pension account. While a prisoner might ignore such an order, the only ramifications would be possible contempt proceedings or negative implications on the parole process, MCL 800.403(a); in contrast, once a pension plan remits payment of a prisoner's pension assets into a prison account pursuant to a court order, they become available for SCFRA reimbursement.

held that orders of this nature are not in violation of ERISA's anti-alienation provision; *DaimlerChrysler* clearly held that they are. Thus, we are faced with determining whether to apply *DaimlerChrysler* or *Abbott* on this question of federal statutory interpretation. We conclude that we are bound by *Abbott*, not *DaimlerChrysler*.

As our Supreme Court explained in *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), and reiterated in *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007), "[a]lthough state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts . . . ."[3] See also *Cowles v Bank West*, 476 Mich 1, 33; 719 NW2d 94 (2006) ("When construing federal statutes and regulations we are governed by authoritative decisions of the federal courts. Where no decision on a particular issue has been rendered by the United States Supreme Court, we are free to adopt decisions of the lower federal courts if we find their analysis and conclusions persuasive and appropriate for our jurisprudence." [Citations and quotations marks omitted.]); *Yellow Freight Sys, Inc v Michigan*, 464 Mich 21, 29 n 10; 627 NW2d 236 (2001) ("Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts upon federal questions, including interpretations of federal statutes. However,

[3] As our Supreme Court explained further in *Abela,* where a Michigan court is "faced with conflicting decisions of lower federal courts" it is,

> of course, . . . "free to choose the view which seems most appropriate one to [it]." However, that statement does not establish the converse—that where there is no such conflict, [Michigan courts] are bound to follow the decisions of even a single lower federal court. Although federal court decisions may be persuasive, they are not binding on state courts. [*Abela, supra* at 606-607.]

where there is no United States Supreme Court decision upon the interpretation in question, the lower federal courts' decisions, while entitled to respectful consideration, are not binding upon this Court." [citations omitted]). Thus, we are not bound by the interpretation of ERISA set forth by the Sixth Circuit in *DaimlerChrysler*.

Rather, this Court remains bound by our Supreme Court's decision in *Abbott* until such time as our Supreme Court instructs otherwise: "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28 (2007). "The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions. Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete." *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). See also *People v Metamora Water Service, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007) ("It is the duty of the Supreme Court to overrule or modify caselaw if and when it becomes obsolete, and the Court of Appeals and the lower courts are bound by the precedent established by the Supreme Court until it takes such action.").

Sprague also argues that the court's order violates his right to freedom of speech under the First Amendment, US Const, Am I. According to Sprague, plaintiff pursued this action against him in retaliation for exercising his First Amendment right to refuse to notify

Dow Chemical of his change of address. Sprague does not explain why his refusal constitutes protected conduct, and we note that this Court has stated, in the context of denying a "void for vagueness" challenge to SCFRA, that "[t]he statute . . . impinges on no First Amendment freedoms, proscribes no conduct, and sets forth no offense which defendant . . . is accused of having committed." *State Treasurer v Wilson (On Remand)*, 150 Mich App 78, 81; 388 NW2d 312 (1986). In any event, "[i]t is not enough for an appellant in his brief 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." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (citation and quotation marks omitted). Failure to brief a question on appeal is tantamount to abandoning it. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). This same conclusion applies equally to vague and conclusory constitutional claims that defendant might otherwise make on appeal.[4]

Sprague argues that MCL 800.403a is unconstitutional because it violates federal law, reasoning we have already concluded to be meritless, and because a defendant's violation of the statute may be considered by the Parole Board in its determinations. MCL 800.403a provides:

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[4] Sprague also argues that the trial court's order was invalid because collateral estoppel barred the court from considering plaintiff's argument. According to Sprague, plaintiff's claims were previously decided in "Case No. 05-3745-CZ." While Sprague does not otherwise identify or discuss that case, plaintiff's brief says it was an earlier action in the trial court resulting in an order similar to that at issue here, but plaintiff does not explain why a second action (and order) was necessary. In any event, Sprague has abandoned any collateral estoppel claim for lack of a proper argument.

> (1) A prisoner shall fully cooperate with the state by providing complete financial information for purposes under this act.
>
> (2) The failure of a prisoner to fully cooperate as provided in subsection (1) may be considered for purposes of a parole determination under . . . [MCL] 791.235 . . . .

Defendant does not specify how this provision renders the SCFRA unconstitutional. Moreover, we note that our Supreme Court has held that the SCFRA does not violate the Equal Protection Clause because it "applies to all prisoners equally in a certain class," and because

> [a]ll persons who have an estate are subject to the act. The amount of the liability can be definitely determined. The provision that the court is empowered to take into consideration the moral and legal obligations of the prisoner applies to all persons with estates. An abuse of discretion by a trial judge may be reviewed. We find no unreasonable classification. [*Auditor General v Hall*, 300 Mich 215, 225; 1 NW2d 516 (1942).]

Defendant has not demonstrated that the SCFRA violates the constitution's equal protection provision. Defendant does not claim that the statute's burden on him is unique, or that the trial court acted arbitrarily by entering the order.

Finally, we reject defendant's claim that the trial court lacked subject-matter jurisdiction to hear the case. Defendant claims that the court was barred from hearing the case by *DaimlerChrysler*. However, while *DaimlerChrysler* addressed the merits of an issue defendant raises on appeal, as discussed above, it has nothing to say regarding the circuit court's jurisdiction to hear this case.

We affirm.

WHITBECK, J., concurred.

SHAPIRO, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that under *State Treasurer v Abbott*, 468 Mich 143; 660 NW2d 714 (2003), the State Treasurer had the authority to require defendant to notify his former employer, Dow Chemical Company, that his pension benefits should be mailed to his prison address rather than deposited directly into his credit union account. I also agree that once pension funds have been deposited into a prisoner's account, whether that is a prison account or an account held in an outside financial institution, the State Treasurer may obtain an order directing that institution to disburse the appropriate portion of those funds to the state. However, I do not agree that the state itself may direct the pension plan where to disburse the prisoner's pension benefits. As set forth in *Daimler-Chrysler Corp v Cox*, 447 F3d 967 (CA 6, 2006), the Employee Retirement Income Security Act, (ERISA), 29 USC 1056(d)(1), contains an anti-alienation provision that "obligates a plan to protect benefits from alienation 'at least up to the point of payment.' " *Id.* at 974, quoting *Guidry v Sheet Metal Workers Nat'l Pension Fund*, 39 F3d 1078, 1082 (CA 10, 1994) (en banc). I believe that the reasoning of *DaimlerChrysler* is persuasive particularly in its conclusion that a state order to the pension fund to deposit the disbursements into a prison account is a "mere formalism that is not dispositive of whether an alienation has occurred." *Id.* at 976.

Accordingly, I respectfully dissent from that portion of the opinion approving an order directing the pension fund to direct the monies to the prison account. I concur in all other respects.

DUNCAN v STATE OF MICHIGAN

Docket Nos. 278652, 278858, and 278860. Submitted December 9, 2008, at Detroit. Decided June 11, 2009, at 9:00 a.m.

Christopher L. Duncan and seven other individuals brought an action in the Ingham Circuit Court against the state of Michigan and the Governor of Michigan, alleging denial of their state and federal constitutional rights to counsel and the effective assistance of counsel as a result of the court-appointed, indigent defense systems currently being employed in Berrien, Genesee, and Muskegon counties. Count I of the complaint, which pertains only to the Governor, alleged a Sixth Amendment violation of the right to effective or adequate representation and sought declaratory and injunctive relief for the constitutional violation under 42 USC 1983. Count II, also pertaining only to the Governor, alleged a Fourteenth Amendment violation of the right to due process and sought declaratory and injunctive relief under 42 USC 1983. Count III, which pertains to the state and the Governor, alleged a violation of the right to the effective assistance of counsel under Const 1963, art 1, § 20, and sought declaratory and injunctive relief. Count IV, which also pertains to the state and the Governor, alleged a violation of due process under Const 1963, art 1, § 17, and sought declaratory and injunctive relief. The plaintiffs moved for class action certification to include all present and future indigent defendants subject to felony prosecutions in the trial courts of the three counties who have been, are being, and will be denied their state and federal constitutional rights to counsel and the effective assistance of counsel as a result of the court-appointed, indigent defense systems currently being employed by the counties. The plaintiffs alleged that the defendants are legally responsible for securing and protecting the constitutional rights at issue and that the constitutionally deficient systems were the result of the defendants' inadequate funding and lack of fiscal and administrative oversight. They further alleged that the systemic constitutional deficiencies in regard to indigent representation continue to infect the judicial process and are directly attributable to the defendants' constitutional failures, which can and must be redressed by court action. The court, Laura Baird, J., granted the motion for class certification and denied the defendants' motions

for summary disposition that were based on the grounds of governmental immunity, justiciability doctrines, and other theories. The defendants appealed as of right the order denying summary disposition based on the asserted ground of governmental immunity and appealed by leave granted the orders denying summary disposition on the other grounds alleged and granting class certification. The appeals were consolidated.

The Court of Appeals *held*:

The defendants are not shielded by governmental immunity and are proper parties to this action. The trial court, not the Court of Claims, has jurisdiction in this case. The trial court has jurisdiction and authority in this action to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which the Court of Appeals need not presently define. It can be stated that on the basis of the pleadings and at this juncture in the lawsuit, the plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. The plaintiffs have alleged facts sufficient to survive a motion for summary disposition. The trial court properly granted the motion for class certification.

1. The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration. A "critical stage of the proceedings" is any stage where the absence of counsel may harm a defendant's right to a fair trial and applies to preliminary proceedings where rights may be sacrificed or defenses lost.

2. The claims against the state are based solely on alleged violations of the Michigan Constitution. The lawsuit against the state is not a tort liability action for money damages. The state is not shielded by immunity granted by law in this suit seeking declaratory and injunctive relief for constitutional violations. The trial court properly concluded that governmental immunity is not available to the state.

3. MCL 691.1407(5) affords no immunity protection for the Governor because it concerns tort liability and this is not a tort liability action for money damages.

4. Any state law (statutory, constitutional, or common law) that can be read to exclude the Governor from being compelled to act, or otherwise subject to any type of injunction, is preempted when a suit for equitable relief is brought against the Governor pursuant to 42 USC 1983 for a violation of the federal constitution, regardless of the fact that the suit is litigated in a state court.

5. The entry of an order simply compelling the defendants to provide indigent defendants representation consistent with the state and federal constitutions would not necessarily mean that the state was being required by the court to appropriate funds to come into compliance. The defendants' arguments regarding who has the authority to appropriate funds from the state treasury are not ripe for review at this time.

6. The Court of Claims has neither exclusive nor concurrent jurisdiction over the claims in this case because there are no contract or tort claims. The trial court did not err in ruling that the case did not belong in the Court of Claims.

7. Even if the action could have been filed against the judiciary and the counties that administer the indigent criminal defense systems, it was not shown that the joinder of those parties was required. The defendants are not relieved of their constitutional duties or entitled to dismissal even if the judiciary and the counties should have been sued.

8. The two-part test in *Strickland v Washington*, 466 US 668 (1984), for a claim of ineffective assistance of counsel in a criminal case, which requires, first, that the defendant show that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense, that is, the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, does not control this civil suit seeking prospective relief.

9. The criminal defendants in this action do not sustain harm, for purposes of justiciability analysis and the constitutional right to the effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing deficiencies. There needs to be an instance of deficient performance or inadequate representation, that is, representation falling below an objective standard of reasonableness. Here, if the plaintiffs are to succeed, they must prove widespread and systemic constitutional violations that are actual or imminent, constituting the harm necessary to establish justiciability. The focus in addressing justiciability at this early stage of this case must be on the allegations in the complaint.

10. The right to any prospective injunctive relief concerns the question whether the harm sought to be avoided in the future is imminent. It can be shown that harm is imminent if the plaintiffs can show widespread and systemic instances of actual harm that

have occurred in the past under the current indigent defense systems employed by the counties, thereby making the action justiciable.

11. Injury or harm is shown in the context of a class action civil suit seeking prospective relief for widespread constitutional violations when court-appointed counsel's representation falls below an objective standard of reasonableness (deficient performance) and results in an unreliable verdict or unfair trial, when a criminal defendant is actually or constructively denied the assistance of counsel altogether at a critical stage in the proceedings, or when counsel's performance is deficient under circumstances in which prejudice would be presumed in a typical criminal case. Injury or harm is shown when court-appointed counsel's performance or representation is deficient relative to a critical stage in the proceedings and, absent a showing that it affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant and meaningful in some fashion, for example, unwarranted pretrial detention. When it is shown that court-appointed counsel's representation falls below an objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and harm occurs. The plaintiffs must additionally show that instances of deficient performance and denial of counsel are widespread and systemic and that they are caused by weaknesses and problems in the court-appointed, indigent defense systems employed by the three counties that are attributable to and ultimately caused by the defendants' constitutional failures. If the aggregate of harm reaches such a level as to be pervasive and persistent (widespread and systemic), the case is justiciable and declaratory relief is appropriate, as well as injunctive relief to preclude future harm and constitutional violations that can reasonably be deemed imminent in light of the existing aggregate harm. The allegations in the plaintiffs' complaint are sufficient to establish the existence of a genuine case or controversy between the parties, reflecting a dispute that is real, not hypothetical.

12. Widespread and systemic instances of deficient performance caused by a poorly equipped appointed-counsel system will not cease and be cured with a case-by-case examination of individual criminal appeals, given that prejudice is generally required and often not established. Even though a criminal appeal may occasionally result in a new trial, it has no bearing on the eradication of continuing systemic constitutional deficiencies. Thus, there is no adequate legal remedy for the harm that the plaintiffs are attempting to prevent.

13. Justiciable harm or injury exists when there is an actual denial of counsel, when there is an overwhelmingly deficient performance by counsel equating to constructive denial of counsel, or when counsel with conflicting interests represents an indigent defendant. The plaintiffs' complaint contains allegations that fit within the categories of actual and constructive denial of counsel, as well as allegations that encompass other situations in which prejudice is presumed.

14. The allegations by the named plaintiffs include instances of representation by counsel that fell below an objective standard of reasonableness in regard to critical stages in the criminal proceedings.

15. The plaintiffs sufficiently alleged with regard to members of the class instances of deficient performance detrimental to indigent defendants. The allegations reflect widespread and systemic instances of violations of the right to counsel and the effective assistance of counsel. The plaintiffs have alleged a nexus or causal connection between the widespread and systemic deficiencies and the defendants. There are sufficient allegations of a causal connection between the injuries and the complained-of conduct, and the plaintiffs have also indicated that the injuries would be redressed by a favorable court decision granting the prayed-for equitable relief. The plaintiffs have alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. The case is presently justiciable because a case or controversy exists.

16. The trial court did not err in determining that the plaintiffs satisfied the five factors that a court must consider in determining under MCR 3.501(A)(1) whether to certify a class. The class is sufficiently numerous to make joinder of each class member impractical. The allegations in the complaint satisfy the commonality requirement in regard to both the factual and the legal questions presented. The allegations in the complaint satisfy the typicality requirement. The allegations show that the representative parties will fairly and adequately assert and protect the interests of the class. The factors listed in MCR 3.501(A)(2), which are considered in determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, weigh in favor of certification of the class.

Affirmed.

WHITBECK, J., dissenting, stated his disagreement with the majority's conclusions, and the rationale supporting those conclu-

sions, with respect to the named plaintiffs' claims and the appropriateness of the declaratory and injunctive relief that they seek. He further disagreed with the majority's conclusions, and the rationale supporting those conclusions, concerning class action certification.

The named plaintiffs cannot plausibly assert that the alleged failures by the state and the Governor have caused the alleged deficient performance at the local level because there is no way that they can possibly prove such causation.

Judge WHITBECK disagreed with the majority's conclusion that the named plaintiffs' claims are justiciable and stated that, in reaching that conclusion, the majority rendered a holding that, standing alone, the named plaintiffs' claims—despite their conjectural and hypothetical nature, despite their lack of showing that the inaction of the state and the Governor has caused the situation they describe, and despite their failure to show that a favorable decision will redress that situation—are sufficient per se to establish standing, ripeness, and, therefore, justiciability.

A finding of prejudice per se cannot be made because there can be no Sixth Amendment violation in the absence of prejudice at a particular trial. Sixth Amendment claims cannot be adjudicated apart from the circumstances of a particular case because prejudice is an essential element of any Sixth Amendment violation.

Injunctive relief may issue only when there is no adequate remedy at law, but a remedy does exist in this case. Under *Strickland*, if the named plaintiffs can show, postconviction, that their counsels' performance at critical stages of the proceeding was so deficient as to cause prejudice to them, they can seek judicial intervention and redress. The sweeping preconviction declaratory and injunctive relief that the named plaintiffs seek is inappropriate, and a proper respect for the basic concept of separation of powers requires that the judiciary decline to issue such relief.

The trial court erred by granting the motion for class certification because the named plaintiffs failed to show that they themselves have suffered or imminently will suffer an actual injury in that they did not establish that the actions or inactions of the state and the Governor have caused or will cause a denial of their Sixth Amendment rights, and because the purported class that they seek to represent—all indigent adult persons who rely or will rely on the counties to provide them with defense services in felony cases—failed to adequately identify a sufficiently numerous class by not identifying class members who have suffered actual injury and therefore have standing to sue.

Although the state and the Governor concede inadequacies in the current indigent criminal defense system, the trial court erred by denying the defendants' motion for summary disposition under MCR 2.116(C)(8) and, consequently, erred when it granted the motion for class certification. The orders of the trial court should be reversed and the case should be remanded for the entry of summary disposition in favor of the state and the Governor.

1. CONSTITUTIONAL LAW — RIGHT TO COUNSEL — APPOINTMENT OF COUNSEL.

The indigent are constitutionally entitled to be represented by counsel when prosecuted for a crime by the state; the state has an obligation to provide such defendants counsel when they lack the financial means to hire an attorney (US Const, Ams VI and XIV; Const 1963, art 1, § 20).

2. CONSTITUTIONAL LAW — RIGHT TO COUNSEL — WORDS AND PHRASES — CRITICAL STAGES.

The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration; a critical stage is any stage where the absence of counsel may harm a defendant's right to a fair trial and applies to preliminary proceedings where rights may be sacrificed or defenses lost (US Const, Am VI).

3. GOVERNMENTAL IMMUNITY — CONSTITUTIONAL LAW — VIOLATIONS OF CONSTITUTION.

Governmental immunity is not available in a nontort action against the state where it is alleged that the state has violated a right conferred by the Michigan Constitution (MCL 691.1407[1]).

4. GOVERNMENTAL IMMUNITY — CONSTITUTIONAL LAW — VIOLATIONS OF CONSTITUTION — GOVERNOR.

Governmental immunity is not available in a nontort action against the Governor where it is alleged that the Governor has violated the Michigan Constitution (MCL 691.1407[5]).

5. ACTIONS — ACTIONS AGAINST GOVERNOR — INJUNCTIONS — EQUITY — CIVIL RIGHTS.

Any state law (statutory, constitutional, or common law) that excludes the Governor from being compelled to act, or otherwise subjected to any type of injunction, is preempted when a suit for equitable relief is brought against the Governor pursuant to 42 USC 1983 for violation of the federal constitution and regardless of the fact that the suit is litigated in a state court.

6. COURTS — COURT OF CLAIMS — JURISDICTION.

The Court of Claims has neither exclusive nor concurrent jurisdic-

tion over claims seeking declaratory relief against the state where there are no contract or tort claims asserted (MCL 600.6419, 600.6419a).

7. CONSTITUTIONAL LAW — EFFECTIVE ASSISTANCE OF COUNSEL — INDIGENT DEFENDANTS.

Criminal defendants do not sustain harm, for purposes of justiciability analysis and the constitutional right to the effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing deficiencies in the system; there needs to be an instance of deficient performance or inadequate representation for harm to occur.

8. ACTIONS — CLASS ACTION — CERTIFICATION OF CLASS.

A trial court, when evaluating a class certification motion, must accept as true the allegations made in support of the request for certification.

American Civil Liberties Union Fund of Michigan (by *Michael J. Steinberg*, *Kary L. Moss*, and *Mark P. Fancher*), *Mark Granzotto, P.C.* (by *Mark R. Granzotto*), *Frank D. Eaman PLLC* (by *Frank D. Eaman*), *Cravath, Swaine & Moore LLP* (by *Julie A. North* and *Elizabeth Kennedy*), and American Civil Liberties Union Foundation (by *Robin Dahlberg* and *Emily Chiang*) for the plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Denise C. Barton*, *Margaret A. Nelson*, *Ann M. Sherman*, and *Jason R. Evans*, Assistant Attorneys General, for the defendants.

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

MURPHY, P.J. At its core, this case involves a claim that the named plaintiffs, along with members of the certified class, i.e., present and future indigent defendants subject to felony prosecutions in the trial courts of Berrien, Genesee, and Muskegon counties, have

been, are being, and will be denied their state and federal constitutional rights to counsel and the effective assistance of counsel, Const 1963, art 1, § 20, and US Const, Am VI, directly as a result of the court-appointed, indigent defense systems currently being employed by those counties. According to plaintiffs, even though the counties and the circuit court chief judges have been statutorily delegated the duties associated with providing representation for indigent criminal defendants, the state of Michigan and the Governor, defendants in this suit, ultimately remain legally responsible for securing and protecting the constitutional rights at issue. And plaintiffs assert that the constitutionally deficient county systems were born out of and created by defendants' inadequate funding and lack of fiscal and administrative oversight. They further allege that the systemic constitutional deficiencies in regard to indigent representation continue to infect the judicial process and are directly attributable to defendants' constitutional failures, which can and must be redressed by court action.

In Docket No. 278652, defendants appeal as of right the trial court's order denying under MCR 2.116(C)(7) their motion for summary disposition based on governmental immunity. In Docket No. 278858, defendants appeal by leave granted the trial court's order denying their motion for summary disposition on numerous theories, including various justiciability doctrines. Finally, in Docket No. 278860, defendants appeal by leave granted the trial court's order granting class certification. The appeals were consolidated.

We affirm, holding that defendants are not shielded by governmental immunity, that defendants are proper parties, that the trial court, not the Court of Claims, has jurisdiction, and that the trial court has jurisdiction and

authority to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which we need not presently define. We further hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification.

We preface our opinion by observing that the role of the judiciary in our tripartite system of government entails, in part, interpreting constitutional language, applying constitutional requirements to the given facts in a case, safeguarding constitutional rights, and halting unconstitutional conduct. For state and federal constitutional provisions to have any meaning, we may and must engage in this role even where litigation encompasses conduct by the executive and legislative branches. We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not by the courts, then by whom? We are not ruling that a constitutional failure has in fact occurred here, but it has been alleged and needs to be judicially addressed. This, however, does not mean that we may set public policy, make political judgments, or demand that more efficient or desirable means be utilized by the political branches in carrying out their constitutional obligations. But if a chosen path taken by the executive and legislative branches in an effort to satisfy their constitutional obligations alleg-

edly fails to meet minimum constitutional requirements, the judiciary must examine the allegations and adjudicate the dispute. The judiciary by so intervening is not acting with a lack of judicial modesty or in violation of the separation of powers; it is acting in accordance with its constitutional obligations, duties, and oaths of office. See *Boumediene v Bush*, 553 US __, __; 128 S Ct 2229, 2259; 171 L Ed 2d 41, 77 (2008); *Marbury v Madison*, 5 US (1 Cranch) 137, 177-180; 2 L Ed 60 (1803). Failing to do so results in the political branches' effectively deciding "what the law is," *Boumediene* and *Marbury*, *supra*, impinging on the judiciary's role in violation of the separation of powers. Judicial modesty does not equate to ignoring constitutional obligations. Constitutional compliance is our only concern; matters regarding the method and the manner by which the executive and legislative branches effectuate constitutional demands are not our concern, nor can they be, as long as the branches abide by the state and federal constitutions. In that same vein, and with respect to the particular issues raised in this action, concerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to prevail over constitutional compliance, despite any visceral reaction to the contrary. We take no position on the validity of plaintiffs' allegations and claims, nor are the underlying motivations of any party relevant. We simply and merely hold that plaintiffs have alleged facts sufficient to survive a motion for summary disposition.

I. THE COMPLAINT

In a highly detailed complaint, plaintiffs allege that the indigent defense systems now in place in Berrien,

Genesee, and Muskegon counties are underfunded, poorly administered, and do not ensure that the participating defense attorneys have the necessary tools, time, and qualifications to adequately represent indigent defendants and to put the cases presented by prosecutors to the crucible of meaningful adversarial testing. Plaintiffs assert that the county systems are wholly lacking with respect to the following: client eligibility standards; attorney hiring, training, and retention programs; written performance and workload standards; the monitoring and supervision of appointed counsel; conflict of interest guidelines; and independence from the judiciary and prosecutorial offices. Plaintiffs claim harm in the form of improperly denied representation, wrongful convictions, unnecessary or prolonged pretrial detentions, factually unwarranted guilty pleas, lengthy pretrial delays, and the introduction of inadmissible evidence that could have been excluded had pretrial motions been filed. Plaintiffs claim further harm in the form of representation by counsel who have conflicts of interest, sentences that are harsher than warranted or legally unsound, and hearing and trial failures due to unprepared counsel and the lack of inquiry, investigation, investigatory tools, and access to expert witnesses. The complaint provides numerous examples in support of these contentions.

The complaint proceeds to provide specific instances of alleged deficient and inadequate performances by various court-appointed attorneys with respect to the eight named indigent plaintiffs. As an overview, these alleged instances include: counsel speaking with plaintiffs, for the first time, in holding cells for mere minutes before scheduled preliminary examinations while in full hearing range of other inmates; counsel advising plaintiffs to waive preliminary examinations without meaningful discussions of case-relevant matters; counsel

failing to provide plaintiffs with police reports; and counsel generally neglecting throughout the entire course of criminal proceedings to discuss with plaintiffs the accuracy and nature of the charges, the circumstances of the purported crimes, and any potential defenses. Further alleged instances include: counsel entering into plea negotiations without client input or approval; counsel perfunctorily advising plaintiffs to plead guilty as charged absent meaningful investigation and inquiry; counsel improperly urging plaintiffs to admit facts when pleas were taken; and counsel neither preparing for hearings and trials nor engaging in any communications with plaintiffs concerning trials. The complaint alleges that other indigent defendants being prosecuted or who will be prosecuted in the future face the same prospects of receiving inadequate and ineffective assistance of counsel as that received by the named plaintiffs.

With respect to all the named plaintiffs, as well as all those persons fitting within the class, the complaint alleges that the inadequacies and ineffectiveness of counsel in handling indigent cases ultimately result from failures by the state and the Governor to adequately provide funding and fiscal and administrative oversight. According to plaintiffs, it is the failures by the state and the Governor that have caused, are causing, and will continue to cause a denial of constitutionally adequate legal representation within the systems employed by the counties. Count I of the complaint, which pertains only to the Governor, alleges a Sixth Amendment violation of the right to effective or adequate representation and seeks declaratory and injunctive relief for the constitutional violation under 42 USC 1983. Count II of the complaint, which also pertains only to the Governor, alleges a Fourteenth Amendment violation of the right to due process and seeks declaratory and injunctive relief for the constitutional

violation under 42 USC 1983. Count III of the complaint, which pertains to the Governor and the state, alleges a violation of the right to the effective assistance of counsel under Const 1963, art 1, § 20, and seeks declaratory and injunctive relief. Count IV of the complaint, which also pertains to the state and the Governor, alleges a violation of due process under Const 1963, art 1, § 17, and seeks declaratory and injunctive relief.

In the prayer for relief, plaintiffs seek a court declaration that defendants' conduct, failure to act, and practices are unconstitutional and unlawful, consistent with the four alleged counts, and plaintiffs seek to enjoin defendants from subjecting class members to continuing unconstitutional practices. Plaintiffs also request an order requiring defendants "to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions."

II. CLASS CERTIFICATION AND SUMMARY DISPOSITION

Pursuant to MCR 3.501(B), plaintiffs moved for class certification, contending that the class was sufficiently numerous to the extent that joinder would be impractical, that factual and legal issues raised by the named plaintiffs were common to, and typical of, prospective class members, that the named plaintiffs and prospective class members share or will share similar harms and constitutional deprivations, and that the named plaintiffs would fairly and adequately protect the interests of the class through maintenance of a class action, which would be superior to any other method of adjudication.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8). Defendants maintained that plaintiffs lacked standing, the case was

not ripe for adjudication, the trial court lacked jurisdiction on a variety of grounds, there was a failure to state a claim upon which declaratory and injunctive relief could be granted, the wrong parties were sued, and governmental immunity shielded defendants from liability. The nature of each particular argument will be discussed below in our analysis, given that defendants' arguments were renewed on appeal.

At a hearing in which the trial court addressed plaintiffs' motion for class certification as well as defendants' motion for summary disposition, the court granted class certification and rejected all the grounds raised by defendants in support of the summary disposition motion. We shall discuss the court's reasoning when we examine each of the appellate issues raised by defendants.

III. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Also reviewed de novo are issues of constitutional law, *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004), statutory interpretation, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), governmental immunity, *Bennett v Detroit Police Chief*, 274 Mich App 307, 310-311; 732 NW2d 164 (2007), jurisdiction, *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003), and matters concerning justiciability, *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006).

"A trial court's ruling regarding certification of a class is reviewed for clear error, meaning that the ruling

will be found clearly erroneous only where there is no evidence to support it or there is evidence but this Court is nevertheless 'left with a definite and firm conviction that a mistake has been made.' " *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007), quoting *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

B. UNDERLYING CONSTITUTIONAL PRINCIPLES

1. THE RIGHT TO COUNSEL GENERALLY

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." US Const, Am VI. The right to counsel under the Sixth Amendment is made applicable to the states pursuant to the Due Process Clause of the Fourteenth Amendment. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004), citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). Under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right to . . . have the assistance of counsel for his or her defense[.]" Const 1963, art 1, § 20. *Gideon* made clear that the indigent are constitutionally entitled to be represented by counsel when prosecuted for a crime by the state, even though they lack the financial means to hire an attorney, and that the state has an obligation to provide them counsel. *Gideon, supra* at 344. We wholeheartedly agree with the following wise sentiments articulated by the United States Supreme Court in *Gideon*:

> The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not . . . be done.

> . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. [*Id.* at 343-344 (parenthesis, citations, and quotation marks omitted; second ellipsis added).]

2. THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

The constitutional right to counsel encompasses the right to the *effective assistance* of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In *United States v Cronic*, 466 US 648, 654-656; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the United States Supreme Court explained:

> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." The text of the Sixth Amendment itself suggests as

much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

* * *

The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." [Citations omitted.]

3. THE RIGHT TO COUNSEL AT CRITICAL STAGES OF THE PROCEEDINGS, INCLUDING PRETRIAL STAGES

"The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration." *Williams*, *supra* at 641. A critical stage of the proceedings is any stage

where the absence of counsel may harm a defendant's right to a fair trial and "applies to preliminary proceedings where rights may be sacrificed or defenses lost." *People v Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004), overruled on other grounds by *People v Anstey*, 476 Mich 436, 447 n 9 (2006). Critical stages include, in part, the preliminary examination, *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970), a pretrial lineup, *People v Frazier*, 478 Mich 231, 249 n 20; 733 NW2d 713 (2007), and the entry of a plea, *People v Pubrat*, 451 Mich 589, 593-594; 548 NW2d 595 (1996). In *Maine v Moulton*, 474 US 159, 170; 106 S Ct 477; 88 L Ed 2d 481 (1985), the United States Supreme Court observed:

> [T]he Court has . . . recognized that the assistance of counsel cannot be limited to participation in a trial; *to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.* Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." This is because, after the initiation of adversary criminal proceedings, " 'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.' " [Citations omitted; emphasis and initial ellipsis added.]

When read together, the authorities cited above make abundantly clear that representation by counsel, and thus effective representation by counsel, is crucial in

serving to protect Sixth Amendment rights not only at trial but also during pretrial proceedings.

4. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN CRIMINAL APPELLATE PROCEEDINGS

In the context of criminal cases and appeals, our Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), enunciated the basic and well-established principles involving a claim of ineffective assistance of counsel:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999).

Counsel's performance is deemed deficient or ineffective when the "representation [falls] below an objective standard of reasonableness." *Strickland*, *supra* at 688;

People v Toma, 462 Mich 281, 302; 613 NW2d 694 (2000). The two-part *Strickland* test, cited in *Carbin*, takes center stage in addressing the justiciability claims, where defendants vigorously argue for its application in this civil suit seeking declaratory and prospective injunctive relief. In our justiciability analysis, we will also explore the circumstances in which the prejudice prong of the *Strickland* test is inapplicable.

C. DISCUSSION

1. GOVERNMENTAL IMMUNITY

Defendants argue that governmental immunity bars plaintiffs' "tort" claims against the state because they do not come within an exception to the broad grant of immunity afforded by MCL 691.1407(1). Defendants also contend that absolute immunity bars plaintiffs' claims against the Governor under MCL 691.1407(5). The trial court ruled that governmental immunity is not available in a state court action alleging constitutional violations.

Under MCR 2.116(C)(7), summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law . . . ." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.*

a. THE STATE

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides a broad grant of immunity

from "tort liability" to governmental agencies, absent the applicability of a statutory exception,[1] when they are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984). The state of Michigan is a "governmental agency" entitled to immunity as granted under the GTLA. MCL 691.1401(c) and (d). An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function for purposes of the GTLA. *Maskery*, *supra* at 613-614, quoting MCL 691.1401(f). This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. *Maskery*, *supra* at 614. The "immunity protects the state not only from liability, but also from the great public expense of having to contest a trial." *Odom*, *supra* at 478. The party that seeks to impose liability on a governmental entity has the burden of pleading in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002).

Here, there can be no reasonable dispute that the state was engaged in a governmental function when it delegated the representation of indigent defendants to the various counties.[2] Moreover, it is the state that is

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[1] The statutory exceptions to governmental immunity consist of the highway exception, MCL 691.1402, the proprietary-function exception, MCL 691.1413, the governmental-hospital exception, MCL 691.1407(4), the motor-vehicle exception, MCL 691.1405, the public-building exception, MCL 691.1406, and the sewage-disposal-system-event exception, MCL 691.1417(2). *Odom*, *supra* at 478 n 62.

[2] MCL 775.16 provides:

> When a person charged with having committed a felony appears before a magistrate without counsel, and who has not waived

ultimately mandated to ensure that indigent defendants are provided their constitutional right to counsel. *Gideon*, *supra*; *Williams*, *supra* at 641.

Our Supreme Court has "observed that nontort causes of action are not barred by immunity *if* a plaintiff successfully pleads and establishes such a cause of action." *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 19; 444 NW2d 786 (1989) (emphasis in original). Further, in *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58 (1989), the Michigan Supreme Court held:

> [] Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.
>
> [] A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.

See also *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000).

State policies are at the forefront of this litigation. " 'Governmental immunity is not available in a state

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examination on the charge upon which the person appears, the person shall be advised of his or her right to have counsel appointed for the examination. If the person states that he or she is unable to procure counsel, the magistrate shall notify the chief judge of the circuit court in the judicial district in which the offense is alleged to have occurred, or the chief judge of the recorder's court of the city of Detroit if the offense is alleged to have occurred in the city of Detroit. Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.

court action where it is alleged that the state has violated a right conferred by the Michigan Constitution.' " *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546-547; 688 NW2d 550 (2004), quoting *Burdette v Michigan*, 166 Mich App 406, 408; 421 NW2d 185 (1988). An action that establishes unconstitutional conduct "may not be limited except as provided by the Constitution because of the preeminence of the Constitution." *Hinojosa*, *supra* at 546, citing *Smith*, *supra* at 641 (opinion by BOYLE, J.). In *Smith*, *id.*, Justice BOYLE observed in her opinion concurring in part and dissenting in part:

> MCL 691.1407; MSA 3.996(107) does not, by its terms, declare immunity for unconstitutional acts by the state. The idea that our Legislature would indirectly seek to "approve" acts by the state which violate the state constitution by cloaking such behavior with statutory immunity is too far-fetched to infer from the language of MCL 691.1407; MSA 3.996(107). We would not ascribe such a result to our Legislature.

The *Burdette* panel reiterated those sentiments from *Smith* in addressing a due process challenge, further reasoning:

> Plaintiffs' claim alleged that defendant violated plaintiffs' due process rights under Const 1963, art 1, § 17. Plaintiffs have stated a prima facie claim. . . . [D]efendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions. [*Burdette*, *supra* at 408-409.]

The instant claims against the state are based solely on alleged violations of the Michigan Constitution and concern custom and policy matters with respect to the representation of indigent defendants. Moreover, plain-

tiffs' lawsuit against the state is not a "tort liability" action. Accordingly, the state is not shielded by immunity granted by law in this suit seeking declaratory and injunctive relief for constitutional violations. The state, however, characterizes plaintiffs' claims as "constitutional tort" claims for money damages and thus claims that governmental immunity bars the action. The state argues that plaintiffs are actually seeking appropriations or money from the state treasury, making plaintiffs' action one for money damages or monetary relief. A cause of action seeking money damages for a violation of state constitutional rights has been coined a "state constitutional tort action." See *Jones v Sherman*, 243 Mich App 611, 612; 625 NW2d 391 (2000). Typically, a constitutional tort claim arises when a governmental employee, exercising discretionary powers, violates constitutional rights personal to a plaintiff. *Reid v Michigan*, 239 Mich App 621, 629; 609 NW2d 215 (2000).

We initially note that, as indicated above, "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, *supra* at 544; see also *Powell*, *supra* at 336. Nevertheless, defendants inaccurately characterize plaintiffs' claims, where the gravamen of the lawsuit concerns the adequacy of representation for indigent defendants and prays for equitable relief; *this is not a tort liability action for money damages, nor do plaintiffs request an appropriation of state funds*. Plaintiffs seek a court declaration that defendants' practices are unconstitutional, seek to enjoin continuing unconstitutional practices, and seek to compel the state and the Governor to provide indigent defendants representation consistent with the state and federal constitutions. Assuming that the state would incur an unfavorable fiscal impact as the ultimate result of the proceedings, it does not magically

transform the case, for purposes of the GTLA, from an equitable action into a tort liability action seeking a money judgment or monetary relief. See, e.g., *Edelman v Jordan*, 415 US 651, 666-668; 94 S Ct 1347; 39 L Ed 2d 662 (1974) (a fiscal consequence to state treasuries resulting from compliance with equitable decrees, which by their terms are prospective in nature, is an ancillary effect and does not mean that a money judgment had been entered). The state has cited no convincing or even relevant authority making the GTLA applicable in this equitable action. Accordingly, the trial court properly concluded that governmental immunity is not available to the state.

b. THE GOVERNOR

With respect to the Governor, MCL 691.1407(5) provides:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from *tort liability* for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority. [Emphasis added.]

"The executive power is vested in the governor," Const 1963, art 5, § 1; therefore, there can be no dispute that the Governor is the highest executive official in state government. Additionally, this lawsuit necessarily relates to duties within the scope of the Governor's executive authority, given that "[t]he governor shall take care that the laws be faithfully executed." Const 1963, art 5, § 8. Further, in regard to the scope of executive authority, this suit *potentially* affects issues of state funding, and Const 1963, art 5, § 18, provides that "[t]he governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period

setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state." However, for the reasons stated earlier in this opinion with respect to the state, this is not a tort liability action seeking money damages. Accordingly, MCL 691.1407(5) provides no immunity for the Governor.

2. JURISDICTION AND AUTHORITY TO ORDER VARIOUS FORMS OF INJUNCTIVE RELIEF

a. MANDAMUS AND THE GOVERNOR

Defendants argue, in cursory fashion, that the trial court lacks jurisdiction to order injunctive relief with respect to the Governor. On this issue, the trial court ruled that Michigan law cannot immunize the Governor from federal claims under preemption principles and that the Governor is not immune from state law claims because the suit does not entail tort liability. As is evident, the trial court somewhat treaded on governmental immunity principles discussed earlier in this opinion.

In support of their contention that injunctive relief cannot issue against the Governor, defendants cite only *Straus v Governor*, 459 Mich 526, 532-533; 592 NW2d 53 (1999), in which the Supreme Court, quoting and adopting this Court's opinion in the case, stated:

> "We would also note that, because a court at all times is required to question sua sponte its own jurisdiction (whether over a person, the subject matter of an action, or the limits on the relief it may afford), we have some doubt with respect to the propriety of injunctive relief against the Governor. It is clear that separation of powers principles, Const 1963, art 3, § 2, preclude mandatory injunctive relief, mandamus, against the Governor. Whether similar reasoning also puts prohibitory injunctive relief beyond the competence of the judiciary appears to be an open question that need not be resolved in this case. We do note that the Supreme Court has recently recognized that declaratory

> relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to constitutional requirements or confine them within constitutional limits. Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations. The need for utmost delicacy on the part of the judiciary, and respect for the unique office of Governor, [has been] recognized [by this Court]." [Citations omitted.]

In part, plaintiffs seek declaratory relief, and the quoted passage from *Straus* makes clear that the courts have the authority to issue a declaratory judgment against the Governor, which should be the first course of action before even contemplating injunctive relief. Plaintiffs also seek to enjoin continuing unconstitutional practices or, stated otherwise, prohibitory injunctive relief. Such a remedy could potentially entail a cessation of criminal prosecutions against indigent defendants absent constitutional compliance with the right to counsel. *Straus* indicated that the Court was not resolving the question whether the judiciary is constrained from ordering prohibitory injunctive relief against the Governor and, given that defendants do not present any additional arguments on the issue, we decline to find that the trial court lacks authority or jurisdiction to enjoin the Governor from continuing unconstitutional practices. In regard to the issue of mandatory injunctive relief (mandamus), plaintiffs do seek to compel the Governor to provide indigent defendants with representation that is consistent with the state and federal constitutions. As will be discussed later in this opinion, we believe that there may exist a basis to subject the Governor to a mandamus order under Michigan law in regard to state constitutional violations if this case reflects the existence of impediments to the ability of the judiciary to carry out its duties in compliance with

constitutional principles relative to indigent defendants being prosecuted in state courtrooms. However, we need not specifically answer the question because the Governor is also being sued for alleged federal constitutional violations under 42 USC 1983, which allows for mandatory injunctive relief.[3] A review of *Straus* reveals that it did not involve a claim brought under 42 USC 1983 alleging a violation of a federal constitutional right. 42 USC 1983 provides, in relevant part:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress, except that in any action brought against a *judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted* unless a declaratory decree was violated or declaratory relief was unavailable. [Emphasis added.]

Even though a state official is a "person" in the literal sense, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office[, and,] [a]s such, it is no different from a suit against the State itself." *Will v Michigan Dep't of State Police*, 491 US 58, 71; 109

[3] "[T]he Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel." *Pickens*, *supra* at 302. Plaintiffs' request for mandamus-type relief encompasses, without distinction, both the alleged state and the alleged federal constitutional deprivations; therefore, considering that the federal constitutional rights parallel those under the Michigan Constitution, if there is a state violation, there would be a federal violation, implicating relief under 42 USC 1983.

S Ct 2304; 105 L Ed 2d 45 (1989) (citations omitted). However, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " *Will*, *supra* at 71 n 10, quoting *Kentucky v Graham*, 473 US 159, 167 n 14; 105 S Ct 3099; 87 L Ed 2d 114 (1985), and citing *Ex parte Young*, 209 US 123, 159-160; 28 S Ct 441; 52 L Ed 714 (1908); see also *Hafer v Melo*, 502 US 21, 27; 112 S Ct 358; 116 L Ed 2d 301 (1991). The suit against the Governor qualifies as an official-capacity suit, *id.* at 24, 27, and the action seeks equitable relief in the form of a declaratory judgment and an injunction, thereby providing prospective relief. The Governor can thus be sued for injunctive relief under 42 USC 1983, which makes clear that equitable relief is available for a federal constitutional violation and that, if there is any limitation on granting injunctive relief, the limitation pertains only to judicial officers. See *Van Orden v Perry*, 545 US 677; 125 S Ct 2854; 162 L Ed 2d 607 (2005) (Texas resident commenced § 1983 action against the governor and other state officials, seeking declaratory relief and an injunction that would require the removal of the Ten Commandments from the capitol on the basis of an Establishment Clause violation). There is no language in 42 USC 1983 suggesting that equitable relief in the form of a mandatory injunction or mandamus is not available against the Governor, or that there is a distinction to be made between prohibitory injunctive relief and mandatory injunctive relief.

In *Felder v Casey*, 487 US 131, 139; 108 S Ct 2302; 101 L Ed 2d 123 (1988), the United States Supreme Court made clear the broad reach of a § 1983 action, stating:

> Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding

> state authority. As we have repeatedly emphasized, "the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." Thus, § 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," and is to be accorded "a sweep as broad as its language."
>
> Any assessment of the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right. This is so whether the question of state-law applicability arises in § 1983 litigation brought in state courts, which possess concurrent jurisdiction over such actions, or in federal-court litigation, where, because the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow state law. Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials. [Citations omitted; ellipses in original.]

Accordingly, any state law (statutory, constitutional, or common law) that can be read to exclude the Governor from being compelled to act, or otherwise subjected to any type of injunction, is preempted when a suit for equitable relief is brought against the Governor pursuant to 42 USC 1983 for violation of the federal constitution, regardless of the fact that the suit is litigated in a state court.

b. APPROPRIATIONS FROM THE STATE TREASURY

Defendants also argue that only the Legislature, as opposed to the trial court or any court, has the author-

ity or jurisdiction to appropriate funds from the state treasury. In support of their position, defendants rely on *Musselman v Governor*, 448 Mich 503; 533 NW2d 237 (1995). In *Musselman*, the plaintiffs, current and retired public school employees who were members of the Michigan Public School Employees' Retirement System, alleged that the state had failed to fund retirement health care benefits being earned by employees, thereby violating Const 1963, art 9, § 24. The plaintiffs sought a "writ of mandamus ordering the appropriate official to transfer funds from the school aid fund to the reserve for health benefits." *Musselman*, *supra* at 521. Our Supreme Court held that the state was constitutionally "obligated to prefund health care benefits under art 9, § 24." *Musselman*, *supra* at 524. The Court, however, denied mandamus, ruling that it had "no authority to order the Governor or the Legislature to appropriate funds[.]" *Id.* The *Musselman* Court reasoned:

> Given that the plaintiffs have failed to show that there is a pool of funds available to be transferred to the reserve for health benefits, the requested relief necessarily involves funds from the state treasury. The only defendant with authority to appropriate funds from the treasury is the Legislature. "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Const 1963, art 9, § 17.
>
> In this context, this Court lacks the power to require the Legislature to appropriate funds. This was the understanding of the drafters of art 9, § 24, who likewise did not contemplate that the prefunding requirement could be enforced by a court. They expected that the decision to comply rested ultimately with the Legislature, whom the people would have to trust[.] [*Musselman*, *supra* at 522.][4]

[4] The Supreme Court subsequently granted rehearing and issued *Musselman v Governor (On Rehearing)*, 450 Mich 574, 576-577; 545 NW2d 346 (1996), wherein the former majority of four in the case lost

It appears to us that equally problematic would be a court order directing the enactment of legislation or administrative rules, or the issuance of executive or administrative orders, in order to correct any constitutional deficiencies in the court-appointed, indigent defense systems. See Const 1963, art 4, § 1 ("The legislative power of the State of Michigan is vested in a senate and a house of representatives."); Const 1963, art 5, § 17 ("The governor shall communicate by message to the legislature at the beginning of each session and may at other times present to the legislature information as to the affairs of the state and recommend measures he considers necessary or desirable.).[5]

Here, again, plaintiffs seek a court declaration that defendants' practices are unconstitutional, seek to enjoin continuing unconstitutional practices, and seek to compel defendants to provide indigent defendants representation consistent with the state and federal constitutions. In the prayer for relief, plaintiffs are not expressly seeking an appropriation or transfer of state funds, nor expressly demanding the enactment of legislation. We acknowledge that plaintiffs allege that the systemic constitutional deficiencies have been caused by inadequate state funding and the lack of fiscal and

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Chief Justice BRICKLEY, who decided that it was unnecessary to construe Const 1963, art 9, § 24, because mandamus could not ultimately issue to order the appropriation or transfer of funds. Thus, while there was no longer a majority regarding interpretation of Const 1963, art 9, § 24, there still remained a majority rejecting a mandamus remedy. See *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 650-659; 698 NW2d 350 (2005) (discussing the *Musselman* cases and resolving the open issue regarding construction of Const 1963, art 9, § 24).

[5] "While strong arguments can be made that state funding would be a more desirable system of court financing, it is for the Legislature to determine whether to adopt such a system." *Grand Traverse Co v Michigan*, 450 Mich 457, 472; 538 NW2d 1 (1995).

administrative oversight. We further recognize that, should plaintiffs prevail, funding and legislation would seemingly appear to be the measures needed to be taken to correct constitutional violations. However, we are not prepared to rule on the issue whether the trial court has the authority to order appropriations, legislation, or comparable steps. It is unnecessary to do so at this juncture in the proceedings.

There is no dispute that declaratory relief is an available remedy falling within the trial court's jurisdiction and authority. As indicated in *Straus*, *supra* at 532, " '[o]nly when declaratory relief has failed should the courts even begin to consider additional forms of relief[.]' " (Citation omitted.) With respect to the state constitutional claims, which are the only claims brought against the state, should plaintiffs prevail, declaratory relief alone needs to be initially contemplated. And if the state takes corrective action without further need for intervention by the trial court, injunctive relief and the authority to issue constitutionally questionable forms of such relief would no longer be at issue. Additionally, while 42 USC 1983 does not place a limit on a court to first attempt resolution through a declaratory judgment alone, it is possible that upon entry of a declaratory judgment, the Governor would take corrective measures to comply with constitutional requirements.[6] Accordingly, the issue of injunctive relief may never come to fruition.

Furthermore, defendants do not argue that the trial court lacks authority or jurisdiction to enjoin them from continuing unconstitutional practices; therefore, there is the potential that constitutional compliance could occur through issuance of prohibitory injunctive relief,

[6] The trial court would necessarily enter a declaratory judgment before, or contemporaneously with, the entry of an order granting injunctive relief.

without reaching questions concerning mandatory injunctive relief or mandamus or compelling defendants to act by way of appropriations or legislation.

Additionally, other than defendants' argument that injunctive relief can never issue against the Governor, which argument we rejected earlier in this opinion, defendants do not contend that the judiciary lacks the authority or jurisdiction to enter an order compelling, in broad and general terms, compliance with constitutional mandates. Defendants' argument merely decries court intervention in the appropriation of funds from the state treasury. However, the entry of an order simply compelling the state and the Governor to provide indigent defendants representation consistent with the state and federal constitutions does not necessarily mean that the state is being required by the court to appropriate funds to come into compliance. Theoretically, there may be creative alternatives available to satisfy constitutional mandates concerning the right to counsel.

We can only speculate at this time regarding the measures ultimately needed to be taken in order to come into compliance with the state and federal constitutions, assuming plaintiffs establish their case.[7] Only

[7] The dissent indicates that this litigation will inevitably superimpose a statewide and state-funded system for the representation of indigent criminal defendants. There is, however, no certainty that this will occur, even if it may be a goal of plaintiffs. The dissent jumps ahead to an envisioned remedy, where plaintiffs have not proven, nor even tried their case yet, where legislative or congressional action on the issue, which has received much attention as of late, could conceivably occur before and regardless of this litigation, and where other avenues of constitutional compliance have not been explored, given the stage of the proceedings. Ultimately, and again assuming plaintiffs are successful, constitutional compliance could come in any variety or combination of forms. Our overriding concern is constitutionality, not the chosen path by which constitutional compliance is achieved.

when all other possibilities are exhausted and explored, as already discussed, do there arise issues regarding appropriations and legislation, the separation of powers, and the full extent of court jurisdiction and authority. Therefore, we find no need at this time for this Court to conclusively address the questions posed. That being said, we wish to make clear that nothing in this opinion should be read as foreclosing entry of an order granting the type of relief so vigorously challenged by defendants. We take that stand for two reasons. First, unlike in *Musselman*, federal constitutional violations are alleged here and brought pursuant to 42 USC 1983. In the context of federal law, and keeping in mind the broad reach of a § 1983 action, we note the following passage from the United States Supreme Court's decision in *Edelman*, *supra* at 667-668:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham* v. *Richardson*, 403 U.S. 365 [91 S Ct 1848; 29 L Ed 2d 534] (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg* v. *Kelly*, 397 U.S. 254 [90 S Ct 1011; 25 L Ed 2d 287] (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. *But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with*

> *decrees which by their terms were prospective in nature*. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, *supra*. [Emphasis added.]

Our second reason for not accepting outright defendants' arguments is the Michigan Supreme Court's decision in *46th Circuit Trial Court v Crawford Co*, 476 Mich 131; 719 NW2d 553 (2006). The case involved "a conflict between the legislative branch's exercise of the 'legislative power' to appropriate and to tax, and the judicial branch's inherent power to compel sufficient appropriations to allow the judiciary to carry out its essential judicial functions." *Id.* at 134. The plaintiff trial court sought to compel "counties to appropriate funding for the enhanced pension and retiree health care plans it deem[ed] necessary to recruit and retain adequate staff to allow it to carry out its essential judicial functions." *Id.*

The Supreme Court indicated that the judiciary has the extraordinary and inherent power to compel funding, which power is derived from the separation of powers set forth in articles 4 through 6 and article 3, § 2, of the 1963 Michigan Constitution. *46th Circuit Trial Court*, *supra* at 140-141. The Court explained:

> [J]ust as it is implicit in the separation of powers that each branch of government is empowered to carry out the entirety of its constitutional powers, and only these powers, it is also implicit that each branch must be allowed adequate resources to carry out its powers. Although the allocation of resources through the appropriations and taxing authorities lies at the heart of the *legislative* power, and thus belongs to the legislative branch, *in those rare instances in which the legislature's allocation of resources*

> *impacts the ability of the judicial branch to carry out its constitutional responsibilities, what is otherwise exclusively a part of the legislative power becomes, to that extent, a part of the judicial power*. . . .
>
> In order for the judicial branch to carry out its constitutional responsibilities as envisioned by Const 1963, art 3, § 2, the judiciary cannot be totally beholden to legislative determinations regarding its budgets. While the people of this state have the right to appropriations and taxing decisions being made by their elected representatives in the legislative branch, *they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities*.
>
> Thus, the judiciary's "inherent power" to compel appropriations *sufficient to enable it to carry out its constitutional responsibilities* is a function of the separation of powers provided for in the Michigan Constitution. The "inherent power" does not constitute an exception to the separation of powers; rather, it is integral to the separation of powers itself. What *is* exceptional about the judiciary's "inherent power" is its distinctiveness from more traditional exercises of the judicial power, involving as it does determinations that directly implicate the appropriations power.
>
> However, in order to accommodate this distinctive, and extraordinary, judicial power with the normal primacy of the legislative branch in determining levels of appropriations, the "inherent power" has always been sharply circumscribed. The "inherent power" contemplates only the power, when an impasse has arisen between the legislative and judicial branches, to determine levels of appropriation that are *"reasonable and necessary" to enable the judiciary to carry out its constitutional responsibilities*. However, levels of appropriation that are *optimally* required for the judiciary remain always determinations within the legislative power. [*46th Circuit Trial Court*, *supra* at 142-144 (emphasis added and in original).]

If indeed there exist systemic constitutional deficiencies in regard to the right to counsel and the right to the effective assistance of counsel, it is certainly arguable

that *46th Circuit Trial Court* lends authority for a court to order defendants to provide funding at a level that is constitutionally satisfactory. The state of Michigan has an obligation under *Gideon* to provide indigent defendants with court-appointed counsel, and the "state" is comprised of three branches, including the judiciary. Const 1963, art 3, § 2. Ultimately, it is the judiciary, on a daily basis, that is integrally involved with ensuring that, before prosecutions go forward, indigent defendants are provided counsel, without which the court could not carry out its constitutional responsibilities. *Musselman* did not entail the constitutional implications that arise here, which include the ability of the judicial branch to carry out its functions in a constitutionally sound manner.

In sum, we reiterate that we decline at this time to define the full extent of the trial court's equitable authority and jurisdiction beyond that recognized and accepted earlier in this opinion.[8]

3. JURISDICTION: COURT OF CLAIMS VERSUS THE CIRCUIT COURT

Defendants contend that the Court of Claims has exclusive jurisdiction over this case. The trial court determined that defendants had relied on cases involving tort claims for money damages in making this jurisdictional argument and, because plaintiffs are

[8] We have ruled that declaratory relief is available, and we have ruled that prohibitory injunctive relief is available, assuming establishment of plaintiffs' case, both remedies being requested by plaintiffs. It is true that we have not set boundaries with respect to mandatory injunctive relief; however, as already indicated, *Straus* dictates that restraint be exercised if and until declaratory relief fails to accomplish constitutional compliance. Moreover, our decision not to set the parameters relative to mandatory injunctive relief cannot serve as a basis to dismiss the action, given that other relief is available.

seeking prospective relief that is purely equitable, the case did not belong in the Court of Claims.

MCL 600.6419 provides in pertinent part:

> (1) Except as provided in [MCL 600.6419a] and [MCL 600.6440], the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. . . . The court has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.
>
> * * *
>
> (4) This chapter shall not deprive the circuit court of this state of jurisdiction over . . . proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . .

To interpret MCL 600.6419 correctly, it must be read in conjunction with MCL 600.6419a, which provides, in full:

> In addition to the powers and jurisdiction conferred upon the court of claims by section 6419, the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to section 6419. The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by [MCL 600.605].

In *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 775; 664 NW2d 185 (2003), our Supreme Court construed these provisions and held:

> Today we hold that pursuant to the plain language of § 6419(1)(a), the Court of Claims has exclusive jurisdiction over complaints based on contract or tort that seek solely declaratory relief against the state or any state agency. We disavow any contrary statements found in our prior case law that have seemingly interpreted § 6419(1)(a) as granting the Court of Claims jurisdiction over claims for money damages only.

As we observed earlier in this opinion, plaintiffs' complaint is not based on tort, and it is indisputable that it is not based on contract. The *Parkwood* Court interpreted MCL 600.6419(4) "as maintaining the jurisdiction of the circuit court over those declaratory claims against the state *that do not involve contract or tort*." *Parkwood*, *supra* at 774 (emphasis added). The Court further stated:

> This jurisdiction of the circuit court is concurrent with the jurisdiction of the Court of Claims over such claims in the circumstances set out in § 6419a, see n 7. That is, when such a declaratory action is ancillary to another claim within the Court of Claims exclusive jurisdiction under § 6419, the circuit court and the Court of Claims have concurrent jurisdiction over the declaratory action. [*Parkwood*, *supra* at 774 n 10.]

Footnote 7 in *Parkwood*, *supra* at 772, referenced in the preceding quotation, provides:

> We construe the enactment of § 6419a as having *added to* this jurisdiction by clarifying that the Court of Claims also has jurisdiction over *other* declaratory and equitable claims, specifically, those that relate neither to contract nor tort—over which the circuit court would otherwise have exclusive jurisdiction—when those claims are ancillary to a claim within the court's exclusive jurisdiction under § 6419. [Emphasis in original.]

Thus, the Court of Claims, while having exclusive jurisdiction over complaints based on contract or tort

that seek solely declaratory relief against the state, also has concurrent jurisdiction over complaints seeking declaratory and equitable relief not based on tort or contract if ancillary to a contract or tort claim. Because there is no contract or tort claim whatsoever here, the Court of Claims has neither exclusive nor concurrent jurisdiction. The trial court did not err by ruling that the instant case does not belong in the Court of Claims.

4. PROPER PARTIES TO THE LITIGATION

Defendants argue that the action should have been filed against the judiciary and the counties that administer the indigent criminal defense systems. The trial court found that even though defendants have essentially delegated their constitutional duties to the counties, it does not ultimately relieve defendants of their constitutional responsibilities.

Under MCL 775.16, a circuit court's chief judge is responsible for procuring representation for indigent defendants and county treasurers are obligated to pay reasonable compensation to appointed attorneys. *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 122; 503 NW2d 885 (1993). However, it would be erroneous to assume "that the statutory purpose underlying assigned counsels' right to reasonable compensation was to assure that indigent criminal defendants received effective assistance of counsel." *Id.* at 123. "Appointed counsel had a statutory right to reasonable compensation for services provided to criminal indigent defendants long before indigent criminal defendants had a right, statutory or otherwise, to appointed counsel." *Id.* at 123-124.

In *Frederick v Presque Isle Co Circuit Judge*, 439 Mich 1, 15; 476 NW2d 142 (1991), our Supreme Court stated that all courts are part of Michigan's one court of

justice under Const 1963, art 6, § 1; however, "the Legislature retains power over the county and may delegate to the local governments certain powers," which it did by enacting a statute that directs certain actions of chief judges and county treasurers, MCL 775.16. Thus, the counties do not have any independent constitutional obligation, apart from the state, to pay for the representation of indigent defendants. Rather, their obligations arise solely out of state statute and, as indicated in *In re Recorder's Court*, *supra* at 123-124, the purpose of the statute was not to secure the constitutional right to counsel. The counties could be sued for failure to comply with MCL 775.16; however, that is not the basis or thrust of the instant suit, nor do defendants cite any joinder rules or law requiring plaintiffs to include the counties as parties. Indeed, defendants themselves have not sought to join the counties as parties to the suit under the court rules, MCR 2.204 to 2.206. Regardless, we agree with the trial court's assessment that, even though the counties have been given responsibility for the operation and funding of trial courts through the Legislature's delegation powers, including payment of court-appointed counsel for indigent defendants, it does not relieve defendants of their constitutional duties under *Gideon*. Even were we to assume that the counties are necessary parties, it does not form a basis to dismiss the suit against defendants.

With respect to the judiciary, a circuit court's chief judge plays the main role in obtaining legal services for indigent defendants, as reflected in MCL 775.16. Additionally, MCR 8.123(B), which applies to all trial courts,[9] provides that the courts "must adopt a local administrative order that describes the court's procedures for

[9] MCR 8.123(A).

selecting, appointing, and compensating counsel who represent indigent parties in that court." An order must be submitted to the State Court Administrator for review, and the State Court Administrator must approve the plan "if its provisions will protect the integrity of the judiciary." MCR 8.123(C). Moreover, the judiciary is of course a branch of state government. See *Grand Traverse Co v Michigan*, 450 Mich 457, 473; 538 NW2d 1 (1995) ("courts have always been regarded as part of state government" despite county funding). Accordingly, the judiciary or the courts in the three counties could have been named as defendants in this action. However, again, defendants cite no joinder rules or laws that required plaintiffs to include the courts in the suit; it was a matter of choice for plaintiffs. And, once again, defendants are not somehow relieved of their constitutional duties and entitled to dismissal even if the courts were or should have been sued.

5. JUSTICIABILITY AND STATEMENT OF A CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants argue that plaintiffs lack standing and that their claims are not ripe for adjudication because the preconviction ineffectiveness claims are too remote, speculative, and abstract to warrant the issuance of declaratory and injunctive relief. Defendants also contend that plaintiffs failed to state a claim on which relief may be granted, considering that they have an adequate remedy at law in the form of individual criminal appeals. Defendants rely chiefly on *Strickland* and its two-part test relative to claims of ineffective assistance of counsel. Defendants posit that the need to show injury or harm, relative to justiciability, necessarily equates to establishing deficient performance of counsel *and* satisfying the prejudice prong of an ineffective assistance claim typically applicable in criminal ap-

peals, which prejudice, and therefore justiciable harm, can *only* be based on the rendering of an unreliable verdict, compromising the right to a fair trial. Preconviction ineffectiveness, standing alone, is simply insufficient to establish a case. Stated differently, defendants assert that a Sixth Amendment violation does not occur until there is a deficient performance by counsel *and* prejudice arising out of an unfair trial. Therefore, in the context of this civil suit claiming a Sixth Amendment infringement, the injury or harm needed to make the case justiciable requires satisfaction of the same two elements, and that has not been shown.

The trial court found that plaintiffs had standing and that their claims were ripe for adjudication, rejecting the argument that convictions or the complete denial of counsel were necessary to litigate the case. With respect to *Strickland*, the court indicated that it was unsure whether *Strickland* had any application to plaintiffs' pretrial claims of inadequate representation; however, the court was of the opinion that it would not have to delve into the circumstances of each particular criminal case. Thus, the trial court concluded that plaintiffs had stated a claim on which relief could be granted.

a. JUSTICIABILITY GENERALLY

Both the state and federal constitutions confer only "judicial power" on the courts, US Const, art III, § 1, and Const 1963, art 3, § 2, and the United States Constitution expressly provides that judicial power is limited to cases and controversies, US Const, art III, § 2. *Michigan Chiropractic*, *supra* at 369. In order to prevent the judiciary from usurping the power of coordinate branches of government, our Supreme Court and the federal courts have developed justiciability doctrines to ensure that lawsuits filed in the courts are

appropriate for judicial action, and these "include the doctrines of standing, ripeness, and mootness." *Id.* at 370-371. Federal courts have held that standing and mootness are constitutionally derived doctrines and jurisdictional in nature, given that failure to satisfy the elements of these doctrines implicates the constitutional authority of the courts to only exercise judicial power and to solely adjudicate actual cases or controversies. *Id.* at 371. Michigan caselaw has similarly viewed the justiciability doctrines as affecting judicial power, "the absence of which renders the judiciary constitutionally powerless to adjudicate [a] claim." *Id.* at 372.

In *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004), our Supreme Court explained the concept of "judicial power," stating:

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.

With respect to the proper exercise of the "judicial power," the most critical element is the mandate that there exist a genuine case or controversy between the parties, meaning that the dispute between the parties is real, not hypothetical. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 293; 737 NW2d 447 (2007).

b. STANDING PRINCIPLES

On the doctrine of standing, the Supreme Court in *Michigan Citizens*, *supra* at 294-295, quoting *Nat'l Wildlife*, *supra* at 628-629, quoting *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992), stated that the following three elements must be proven:

> 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. [Quotation marks and ellipses omitted.]

c. RIPENESS PRINCIPLES

With regard to the doctrine of ripeness, it precludes the adjudication of hypothetical or contingent claims before an actual injury has been sustained, and an action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all. *Michigan Chiropractic*, *supra* at 371 n 14. Although standing and ripeness are both justiciability doctrines that assess pending claims to discern whether an actual or imminent injury in fact is present, they address different underlying concerns. *Id.* at 378-379. The standing doctrine "is designed to determine whether a particular party may properly litigate the asserted claim for relief." *Id.* at 379. On the other hand, the ripeness doctrine "does not focus on the suitability of

the party; rather, ripeness focuses on the *timing* of the action." *Id.* (emphasis in original).

d. DECLARATORY RELIEF

With respect to declaratory judgment actions, MCR 2.605(A)(1), (C), and (F) respectively provide as follows:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> * * *
>
> The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case.
>
> * * *
>
> Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment.

The "actual controversy" requirement found in MCR 2.605(A)(1) has been described as " 'a summary of justiciability as the necessary condition for judicial relief.' " *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 125; 693 NW2d 374 (2005), quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993). A court cannot declare the obligations and rights of parties regarding an issue if the issue is not justiciable, meaning that it does not entail a genuine, live controversy between interested persons who are asserting adverse claims, which, if decided, can

affect existing legal relations. *Associated Builders*, *supra* at 125, quoting *Allstate Ins*, *supra* at 66.

e. INJUNCTIVE RELIEF

Finally, in regard to injunctive relief, an injunction constitutes an extraordinary remedy that may be issued only when justice requires it, there is an absence of an adequate remedy at law, and there exists the danger of irreparable injury that is real and imminent. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

f. JUSTICIABILITY FRAMEWORK

In constructing the broad analytical framework for addressing the justiciability issues in connection with the particular allegations made by plaintiffs, we find guidance in *Lewis v Casey*, 518 US 343; 116 S Ct 2174; 135 L Ed 2d 606 (1996). In *Lewis*, the respondents were 22 inmates imprisoned in various facilities operated by the Arizona Department of Corrections (ADOC), and they filed a class action on behalf of all adult prisoners who were currently or will be incarcerated by the ADOC, alleging deprivations of their fundamental constitutional right of access to the courts. *Id.* at 346. The action was brought in reliance on *Bounds v Smith*, 430 US 817, 828; 97 S Ct 1491; 52 L Ed 2d 72 (1977), in which it was held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." See *Lewis*, *supra* at 346. Following a three-month bench trial in *Lewis*, the federal district court ruled in favor of the respondents, concluding that the respondents had a constitutional

right of access to the courts that is meaningful, adequate, and effective, and that the ADOC's system failed to comply with these constitutional standards. The district court tailored an injunctive remedy that was sweeping in scope, ensuring that the ADOC would provide meaningful court access. The United States Court of Appeals for the Ninth Circuit affirmed, with minor exceptions related to the terms of the injunction. *Id.* at 346-348.

On certiorari granted, the petitioners argued that, in order to establish a *Bounds* violation, an inmate needed to show that any alleged inadequacy of a prison's law library facilities or legal assistance programs caused an actual injury, or in other words, " 'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.' " *Id.* at 348. The petitioners further argued that the district court failed to find sufficient instances of actual injury that would warrant systemwide relief. *Id.* The Supreme Court held:

> We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid. [*Id.* at 349.]

The United States Supreme Court then proceeded to provide the underlying rationale and reasoning for its holding:

> The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, 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. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur. Of course, the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. If—to take another example from prison life—a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons. [*Id.* at 349-350 (citations omitted).]

We derive much from this passage. It indicates that inmates do not sustain harm, for purposes of justiciability analysis and the constitutional right of access to the courts, simply because of their status as inmates in the prison system and their exposure to the possibility of being denied meaningful court access because of the institution's lack of proper management and organization. There needs to be interference with the presentation of a claim to the court, just as inmates must first be ill and in need of prison medical treatment before being able to claim deprivation of a constitutional right to

medical care. By analogy, here criminal defendants do not sustain harm, for purposes of justiciability analysis and the constitutional right to the effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing deficiencies. There needs to be an instance of deficient performance or inadequate representation, i.e., "representation [falling] below an objective standard of reasonableness." *Strickland*, *supra* at 688; *Toma*, *supra* at 302. *Lewis* does not indicate that the harm must include, besides interference with the right of access to the courts, a showing that the inmate would have been successful in court had access been made available. This proposition is further reflected in the *Lewis* Court's subsequent observations with respect to actual harm:

> Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone," and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint. [*Lewis*, *supra* at 351 (citation omitted).]

There is no suggestion in the two examples that the hypothetical inmate had to show that the dismissed or unfiled complaint would likely have resulted in a favorable court outcome following litigation; interference, by itself, with a person's attempt to access the court, if access is not sought frivolously, suffices to establish harm. See *id.* at 353.[10]

The *Lewis* Court went on to find that the district court had identified only two instances of actual injury, and the Court then turned to the issue whether those two injuries justified the remedy ordered by the district court. *Id.* at 357. The Court noted that the remedy has to be "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* The Court further explained that this principle is just as applicable with respect to class actions. *Id.* According to *Lewis*, standing is necessary in class actions and named plaintiffs representing the class must allege and show personal injury. *Id.* The *Lewis* Court concluded that there was a failure to show that the constitutional violations were systemwide; therefore, granting a remedy beyond what was necessary to provide relief to the two injured inmates was improper. *Id.* at 360. Nevertheless, the message that flows from *Lewis* is that in cases where systemwide constitutional violations are proven, prospective equitable relief to prevent further violations is a proper remedy.

The absence of widespread and systemic harm in *Lewis* was the downfall of the case presented by the inmate respondents. Here, if plaintiffs are to succeed,

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[10] While we examine *Lewis* to provide a general framework, we are examining a different constitutional right and one that is expressly provided for in the state and federal constitutions. Our harm analysis later in this opinion is additionally shaped by caselaw directly addressing the same constitutional right at stake here.

they must prove widespread and systemic constitutional violations that are actual or imminent, constituting the harm necessary to establish justiciability. In addressing this appeal and the justiciability issues, we find that, on the basis of the posture of the lower court proceedings, our attention needs to be directed solely at the allegations in plaintiffs' complaint. In *Lewis*, *supra* at 357-358, the Supreme Court, quoting *Lujan*, *supra* at 561, made the following observations:

> The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation, with respect to various alleged inadequacies in the prison system, including failure to provide adequate legal assistance to non-English-speaking inmates and lockdown prisoners. That point is irrelevant now, however, for we are beyond the pleading stage.
>
> "Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial." [Alteration in original; citation and internal quotation marks omitted.]

Here, the justiciability and *Strickland* issues were raised under both MCR 2.116(C)(4) (summary disposition for lack of subject-matter jurisdiction) and MCR

2.116(C)(8) (summary disposition for failure to state a claim). "In reviewing a motion under MCR 2.116(C)(4), it is proper to consider the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008); see also *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000) (Under MCR 2.116[C][4], "this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact."). MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997).

As opposed to the circumstances in *Lewis*, we are addressing matters of justiciability at a very early stage in the proceedings and not in the context of completed trial proceedings or a summary disposition motion involving the submission of documentary evidence. The lower court record reveals that defendants' justiciability-related arguments were set forth without reliance on documentary evidence. And the argument that plaintiffs failed to state a claim for declaratory and injunctive relief, which only implicated MCR 2.116(C)(8), couched defendants' entire *Strickland* analysis. Defendants did not engage in an effort to show an absence of a genuine factual dispute with respect to

whether plaintiffs' claims were justiciable; their argument was purely legal in nature and attacked the alleged inadequacy of the pleadings. Even though defendants could have taken a "documentary evidence" approach for purposes of MCR 2.116(C)(4), as indicated in *Toaz* and *Cork*, they chose not to do so, attempting instead to dispose of the case in quick fashion without being buried in the discovery process. Accordingly, the focus in addressing the justiciability issues under the principles articulated earlier in this opinion must be on the allegations in plaintiffs' highly detailed complaint.[11]

g. DEFINING JUSTICIABLE HARM FOR PURPOSES OF THIS SUIT

Plaintiffs seek a declaratory judgment and prohibitory and mandatory injunctions, which remedies are prospective in nature, in an effort to stop alleged ongoing constitutional violations and to prevent future violations. As we view it, plaintiffs would be entitled to declaratory relief, in the context of this case and assuming establishment of causation, if they can show widespread and systemic instances of actual harm. The right to any prospective injunctive relief tends to concern the question whether the harm sought to be avoided in the future is *imminent*, and we conclude that harm is

[11] In *Nat'l Wildlife*, *supra* at 631, our Supreme Court stated:

> [A] plaintiff must include in the pleadings "general factual allegations" that injury will result from the defendant's conduct. If the defendant brings a motion for summary disposition, the plaintiff must further support the allegations of injury with documentation, just as he has to support the other allegations that make up his claim. Finally, when the matter comes to trial, the plaintiff must sufficiently support his claim, including allegations of injury, to meet his burden of proof.

While here there was a motion for summary disposition, it was confined by the parties to the pleadings and the allegations, and it was entertained by the trial court shortly after the filing of the complaint. The case was truly at a pleading-assessment level.

imminent if plaintiffs can show widespread and systemic instances of actual harm that have occurred in the past under the current indigent defense systems being employed by the counties. Accordingly, regardless of whether the focus is on declaratory relief or on injunctive relief, the proofs will require a showing of widespread and systemic instances of actual harm, thereby making the action justiciable.[12] The next step, therefore, is for us to define "harm" for purposes of this action.

We hold that, in the context of this class action civil suit seeking prospective relief for alleged widespread constitutional violations, injury or harm is shown when court-appointed counsel's representation falls below an objective standard of reasonableness (deficient performance) and results in an unreliable verdict or unfair trial, when a criminal defendant is actually or constructively denied the assistance of counsel altogether at a critical stage in the proceedings, or when counsel's performance is deficient under circumstances in which prejudice would be presumed in a typical criminal case. We further hold that injury or harm is shown when court-appointed counsel's performance or representation is deficient relative to a critical stage in the proceedings and, absent a showing that it affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant and meaningful in some fashion, e.g., unwarranted pretrial detention. Finally, we hold that, when it is shown that court-appointed counsel's representation falls below an objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and

[12] Of course, plaintiffs are not precluded from introducing other evidence that has a tendency to show that future harm is imminent.

harm occurs. Plaintiffs must additionally show that instances of deficient performance and denial of counsel are widespread and systemic and that they are caused by weaknesses and problems in the court-appointed, indigent defense systems employed by the three counties, which are attributable to and ultimately caused by defendants' constitutional failures.[13] If the aggregate of harm reaches such a level as to be pervasive and persistent (widespread and systemic), the case is justiciable and declaratory relief is appropriate, as well as injunctive relief to preclude future harm and constitutional violations that can reasonably be deemed imminent in light of the existing aggregate of harm. See *Milliken v Bradley*, 433 US 267, 282; 97 S Ct 2749; 53 L Ed 2d 745 (1977) (remedies ordered by court, while usually not the province of the judiciary, were proper where designed to counter pervasive and persistent constitutional violations within the school system).

Plaintiffs will no doubt have a heavy burden to prove and establish their case, but for now we are only concerned with whether plaintiffs have sufficiently alleged supportive facts. While we leave it to the trial court to determine the parameters of what constitutes

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[13] In its discussion of class action certification, the dissent states, "Unlike the majority, I am unwilling to presume that every alleged deficiency in every indigent criminal defendant's case is the result of the alleged deficiencies in the county indigent defense systems." *Post* at 394. We agree with the dissent that no presumption should exist, but are at a loss in regard to why the dissent concludes that we are making such a presumption. Throughout this opinion, we indicate that plaintiffs will have to establish a causal connection between the deficient performance and the indigent defense systems being employed. There will likely be occasions in which counsel for an indigent defendant acted below an objective standard of reasonableness, yet the deficient performance cannot be attributed to problems in an indigent defense system; some attorneys may be lacking in skills, and no amount of money, time, and resources will make a difference. Again, proving their case will be a monumental undertaking for plaintiffs.

"widespread," "systemic," or "pervasive" constitutional violations or harm, the court must take into consideration the level or degree of any shown harm, giving more weight to instances of deficient performance that resulted in unreliable verdicts and instances where the right to counsel was denied, with less weight being given where there is mere deficient performance. We find that the allegations in plaintiffs' complaint are sufficient to establish the existence of a genuine case or controversy between the parties, reflecting a dispute that is real, not hypothetical.

To summarize the approach to be taken on remand, plaintiffs must show the existence of widespread and systemic instances of actual or constructive denial of counsel and instances of deficient performance by counsel, which instances may have varied and relevant levels of egregiousness, all causally connected to defendants' conduct. Furthermore, because the proofs could be so wide ranging, it would reflect poor judgment on our part to set a numerical threshold with respect to the court's determination of whether the instances of harm, if shown, are sufficiently "widespread and systemic" to justify relief. The trial court is in a better position to first address this issue, subject of course to appellate review.

We glean from the dissenting opinion that our colleague is of the position that the only avenue, judiciary-wise, to address problems in the indigent defense systems employed by the three counties is through a standard criminal appeal as reflected in *Strickland*. The dissent also contends that a claim of ineffective assistance of counsel requires a conviction and deprival of a fair trial as reflected in an unreliable verdict, even in this civil class action suit, given the holding in *Strickland*. Because of the dissent's position, it is concluding

that we are necessarily making a finding of prejudice per se, and thereby a finding of justiciability per se, relative to the claims of preconviction ineffectiveness. Stated differently, the dissent finds that we are assuming that the individual plaintiffs and class members will be convicted, that defendants' actions caused the convictions, that the courts addressing the criminal cases will not correct any constitutional deficiencies, and that this action will redress their injuries. We are not making any such assumptions, and we respectfully conclude that the dissent simply fails to appreciate the nature and character of this civil action brought by a fluid class of plaintiffs that seeks a declaration of unconstitutionality and prospective, systemwide relief to prevent ongoing and future constitutional violations.

It is our view that *Strickland* and its many progeny, which demand deficient performance by counsel and, generally speaking, prejudice in order to entitle a criminal defendant to relief under the Sixth Amendment, have to be understood and viewed in context. The fundamental flaw in defendants' and the dissent's position on the justiciability issues is that the argument is grounded on principles intended to be applied in the context of postconviction criminal appeals that are not workable or appropriate to apply when addressing standing, ripeness, and related justiciability principles in this type of civil rights lawsuit. We cannot properly foist the framework of the criminal appellate process upon the justiciability analysis that governs this civil case simply because state and federal constitutional rights related to the right to counsel are implicated. We reject the argument that the need to show that this case is justiciable necessarily and solely equates to showing widespread instances of deficient performance accompanied by resulting prejudice in the form of an unreliable verdict that compromises the right to a fair trial.

It is entirely logical to generally place the decisive emphasis in a court opinion on the fairness of a trial and the reliability of a verdict when addressing a criminal appeal alleging ineffective assistance *because the appellant is seeking a remedy that vacates the verdict and remands the case for a new trial*. Indeed, it can instantly be gleaned from the opening paragraph in *Strickland* that it has little relevance here:

> This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective. [*Strickland*, *supra* at 671.]

In the case sub judice seeking prospective relief to prevent future harm, we are not judging whether a conviction or sentence should be set aside because of the ineffective assistance of counsel. Applying the two-part test from *Strickland* here as an absolute requirement defies logic, where the allegations concern widespread, systemic instances of constitutionally inadequate representation and where the requested remedy in the form of prospective relief seeks to curb and halt continuing acts of deficient performance. What is essentially harmless-error analysis[14] is being confused with justiciability analysis in a case involving an altogether different remedy. The right to counsel must mean more than just the right to an outcome.

A simple hypothetical illustrates the inappropriateness of applying, solely, the two-part *Strickland* test and in taking a position that the only avenue of relief is a criminal appeal. Imagine that, in 100 percent of indi-

[14] Harmless-error analysis mirrors the analysis governing review of the prejudice prong of an ineffective assistance claim and also implicates a new trial remedy. See MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

gent criminal cases being handled by court-appointed counsel, it could be proven that the proceedings were continuously infected with instances of deficient performance by counsel, yet the trial verdicts were all deemed reliable, assuming all cases went to trial. As is often the case, appellate courts affirm guilty verdicts despite inadequate representation and deficient performance because there existed strong and untainted evidence of guilt. In our scenario, under defendants' and the dissent's reasoning, court intervention in a class action suit such as the one filed here would not be permitted on justiciability grounds despite the constitutionally egregious circumstances. This is akin to taking a position that indigent defendants who are ostensibly guilty are unworthy or not deserving of counsel who will perform at or above an objective standard of reasonableness. The holding set forth in *Gideon* becomes empty and meaningless under such a rationale. Widespread and systemic instances of deficient performance caused by a poorly equipped appointed-counsel system will not cease and be cured with a case-by-case examination of individual criminal appeals, given that prejudice is generally required and often not established. Even though a criminal appeal may occasionally result in a new trial, it has no bearing on eradication of continuing systemic constitutional deficiencies. Thus, contrary to defendants' argument and the dissent's position, there is no adequate legal remedy for the harm that plaintiffs are attempting to prevent.[15]

Contrary to the dissent's contention, we are not engaging in any findings of prejudice, standing, or

[15] We are assuming, for purposes of this issue and in contemplation of the elements necessary to merit injunctive relief, that a criminal appeal constitutes a "legal remedy." Generally, "[a]ctual damages is a legal, rather than an equitable, remedy[.]" *Anzaldua v Band*, 457 Mich 530, 541; 578 NW2d 306 (1998).

justiciability per se. Rather, we are merely indicating that *if it is proven*, as alleged, that there have been widespread and systemic instances of deficient performance and denial of counsel, along with proof of the requisite causation, unconstitutionality can be declared and harm in ongoing and future criminal prosecutions of indigent defendants can be deemed imminent, thereby giving rise to a right to an equitable remedy. Concluding that an invasion of a legally protected interest is imminent will always carry with it some modicum of speculation; however, there is no caselaw of which we are aware that suggests that a showing of imminent harm is insufficient to permit judicial intervention. Indeed, the caselaw is to the contrary. See, e.g., *Michigan Citizens*, *supra* at 294-295. The dissent also fails to acknowledge that plaintiffs have alleged wrongful convictions.

We additionally find that defendants' and the dissent's position ignores the reality that harm can take many shapes and forms. Consistently with the concept of prejudice as employed in criminal appeals, we would agree that justiciable injury or harm is certainly indicated by a showing that there existed a reasonable probability that, but for an error by counsel, the result of a criminal proceeding would have been different. See *Carbin*, *supra* at 599-600. But injury or harm also occurs when there are instances of deficient performance by counsel at critical stages in the criminal proceedings that are detrimental to an indigent defendant in some relevant and meaningful fashion, even without neatly wrapping the justiciable harm around a verdict and trial. Such harm arises, for example, when there is an unnecessarily prolonged pretrial detention, a failure to file a dispositive motion, entry of a factually unwarranted guilty plea, or a legally unacceptable pre-

trial delay.[16] And as indicated earlier in this opinion, simply being deprived of the constitutional right to effective representation at a critical stage in the proceedings, in and of itself, gives rise to harm.

Further, even in criminal appeals there are situations in which the prejudice prong need not be satisfied. In *Strickland*, *supra* at 692, the United States Supreme Court stated that "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to

[16] It is not difficult to conceive of scenarios in which a criminal defendant suffers a detriment or "harm" as a result of an attorney's deficient performance, absent consideration of any trial. Effective assistance of counsel at a preliminary examination potentially can result in a dismissal of the prosecutor's case, as opposed to the case's being bound over to the circuit court if counsel's performance was instead deficient. Effective assistance of counsel at a pretrial hearing potentially can result in the exclusion of a confession or an identification, leading to a *nolle prosequi* or dismissal, whereas a deficient performance by counsel, including a failure to even file a motion challenging the confession or identification, could leave the prosecution's case intact and strong. Effective assistance of counsel in plea negotiations potentially can produce a guilty plea on a warranted charge much less serious than the one initially brought by the prosecution that was factually unwarranted, but an ineffective attorney in comparable circumstances might have his or her client plead guilty of the more serious and overcharged offense. Effective assistance of counsel at a bail hearing might result in a defendant's being able to be released on bond before trial, whereas ineffective assistance at the same hearing could leave the defendant sitting in a jail cell pending trial. An effective attorney may win a dismissal of a prosecutor's case for failure by the state to provide a speedy trial to a defendant, as opposed to a situation involving ineffective representation, where the lawyer fails to recognize a speedy trial issue. These are but a few examples in which the effective assistance of counsel would either end the case before trial and conviction or otherwise benefit a defendant in some favorable fashion; deficient performance, on the other hand, results in a detriment to the defendant. Under a scenario in which an unfiled pretrial motion would have precluded a trial from taking place, a criminal defendant still suffers some level of harm or injury by having his or her life unnecessarily put on hold by the trial process even in a situation where the defendant proceeds to trial and is acquitted. Plaintiffs' complaint encompasses performance deficiencies during the pretrial stages mentioned in this footnote.

result in prejudice." The Court similarly observed in *Cronic* that constitutional error exists without a showing of prejudice when counsel is "prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, *supra* at 659 n 25. The concept of constructive denial of counsel was explored in *Cronic*, wherein the Court stated that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. The *Strickland* Court made clear that where there is actual or constructive denial of counsel, "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, *supra* at 692. *Strickland* also provided "that prejudice is presumed when counsel is burdened by an actual conflict of interest." *Id.* Taking into consideration this precedent for the purpose of analyzing justiciability, it is reasonable to conclude that justiciable harm or injury exists when there is an actual denial of counsel, there is an overwhelmingly deficient performance by counsel equating to constructive denial of counsel, or when counsel with conflicting interests represents an indigent defendant. As will be detailed later in this opinion, plaintiffs' complaint contains allegations that fit within the categories of actual and constructive denial of counsel, as well as allegations that encompass other situations in which prejudice is presumed.

Our conclusion that the two-part test in *Strickland* should not control this litigation is generally consistent with caselaw from other jurisdictions addressing comparable suits.[17]

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[17] In summarizing our position regarding the applicability and relevance of *Strickland*, we note the following points. We reject the

A case heavily cited on the topic at hand is *Luckey v Harris*, 860 F2d 1012 (CA 11, 1988). *Luckey* was an action commenced "on behalf of a bilateral class consisting of all indigent persons presently charged or who will be charged in the future with criminal offenses in the courts of Georgia and of all attorneys who represent or will represent indigent defendants in the Georgia courts[.]" *Id.* at 1013. The plaintiffs alleged systemic deficiencies with respect to the appointment of counsel for indigent defendants that resulted in deprivations of various constitutional rights, including the Sixth Amendment right to counsel. The alleged deficiencies included delays in the appointment of counsel, pressure on attorneys to enter guilty pleas or to hurry cases to trial, and inadequate resources. Relying on *Strickland*, the federal district court dismissed the action for, in part, failure to state a claim. *Id.* at 1013, 1016. The United States Court of Appeals for the Eleventh Circuit reversed, ruling:

> [The *Strickland*] standard is inappropriate for a civil suit seeking prospective relief. The [S]ixth [A]mendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the [S]ixth [A]mendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has

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conclusion that *Strickland* only allows for judicial intervention by way of a criminal appeal, and not the type of action pursued here, to address issues concerning the right to counsel and the effective assistance of counsel. We reject the conclusion that *Strickland* requires us to find that justiciability, for purposes of this action, can only be established by showing deficient performances, coupled with convictions that are unreliable or resulting from unfair trials. However, with respect to general underlying principles espoused in *Strickland*, and repeated in hundreds if not thousands of cases across the country, e.g., deficient performance equates to representation falling below an objective standard of reasonableness, we have no qualms.

> been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively. . . .
>
> Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only where that defendant has been prejudiced. The *Strickland* [C]ourt noted the following factors in favor of deferential scrutiny of a counsel's performance in the post-trial context: concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel. These considerations do not apply when only prospective relief is sought.
>
> Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial. [*Id.* at 1017 (citations omitted).]

We fully agree with the statements and observations made in this passage, and they mirror our thoughts voiced earlier in this opinion. Petitions for rehearing and suggestions of rehearing en banc were denied. *Luckey v Harris*, 896 F2d 479 (CA 11, 1989), cert den 495 US 957 (1990). Eventually, the plaintiffs' case was dismissed on unrelated abstention grounds. *Luckey v Miller*, 976 F2d 673 (CA 11, 1992).[18] Defendants and the

[18] The court, citing *Younger v Harris*, 401 US 37; 91 S Ct 746; 27 L Ed 2d 669 (1971), stated that "abstention from interference in state criminal proceedings served the vital consideration of comity between the state and national governments." *Luckey*, 976 F2d at 676. "Comity" is defined as "[c]ourtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." Black's Law Dictionary (7th ed). The *Luckey* Court invoked abstention because of concerns regarding the possibility that, if relief were granted to the plaintiffs, the federal court would have to force the state to promulgate uniform standards related to prosecutions and that the federal court would have to review and interrupt

dissent here favor the approach twice rejected in the *Luckey* cases. We choose not to give weight to a dissenting judge's analysis that failed to convince a majority of judges on the Eleventh Circuit of its correctness.

In *Platt v State*, 664 NE2d 357, 362 (Ind App, 1996), a civil suit was brought seeking injunctive relief premised on the contention "that the system for providing legal counsel for indigents in Marion County lacks sufficient funds for pretrial investigation and preparation which inherently causes ineffective assistance of counsel at trial." The plaintiffs alleged that the public defender system violated the fundamental right to effective pretrial assistance of counsel under the Sixth Amendment. *Id.* The appellate court first cited principles from *Strickland* and *Cronic* and then ruled:

> Here, Platt seeks to enjoin the Marion County public defender system because it effectively denies indigents the effective assistance of counsel. However, a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial. This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis. [*Id*. at 363 (citation omitted).]

This cursory analysis is flawed for all the reasons that we expressed earlier in this opinion. Moreover, the opinion is essentially silent with respect to any particular allegations of deficient performance and harm, and it indicates that the court was not presented with any criminal proceedings and outcomes. In the instant case,

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ongoing state proceedings. *Luckey*, 976 F2d at 678-679. Thus, it was the potential of a federal court's intermeddling in state prosecution practices that served as the basis of the abstention ruling. Here, abstention issues have no relevance.

plaintiffs allege wrongful trial convictions, instances wherein prejudice would be presumed, and situations in which counsel was actually or constructively denied. We find *Platt* wholly unpersuasive.

There is also the case of *Kennedy v Carlson*, 544 NW2d 1 (Minn, 1996), in which a chief public defender brought suit. The Minnesota Supreme Court noted that the public defender claimed "that his clients have been exposed to the *possibility* of substandard legal representation[.]" *Id*. at 6 (emphasis added). The court, without any reference whatsoever to *Strickland* and its two-part test, stated:

> We note that appellants cite a number of decisions by other courts addressing the issue of public defense funding. In those cases where courts have found a constitutional violation due to systemic underfunding, the plaintiffs showed substantial evidence of serious problems throughout the indigent defense system. By comparison, Kennedy has shown no evidence that his clients actually have been prejudiced due to ineffective assistance of counsel. To the contrary, the evidence establishes that Kennedy's office is well-respected by trial judges, it is well-funded when compared to other public defender offices, and its attorneys have faced no claims of professional misconduct or malpractice. [*Id.* at 6-7.]

The Minnesota court then proceeded to cite several cases in which courts from other jurisdictions have adjudicated matters related to systemic constitutional deficiencies arising out of the right to effective counsel. *Id.* at 7-8. The court then ruled:

> The majority of the cases discussed above cite evidence of substandard representation by court appointed defense counsel, generally supplied by a particular defendant, as contributing to the court's decision to intervene. Kennedy, however, has not shown that his attorneys provide substandard assistance of counsel to their clients. . . .

> In short, Kennedy's claims of constitutional violations are too speculative and hypothetical to support jurisdiction in this court. The district court did not find that Kennedy's staff had provided ineffective assistance to any particular client, nor did it find that Kennedy faced professional liability as a result of his office's substandard services. Nor do any of Kennedy's clients join him in attacking the statutory funding scheme at issue here by presenting evidence of inadequate assistance in particular cases. In light of Kennedy's failure to provide more substantial evidence of an "injury in fact" to himself or his clients, we hold that the district court erred in granting Kennedy's summary judgment motion. [*Id.* at 8.]

Here, we have a class of plaintiffs who have been, are being, or will be subjected to the court-appointed, indigent defense systems employed in Berrien, Muskegon, and Genesee counties. Further, we have extensive allegations of substandard representation and ineffective assistance of counsel. Thus, given the distinctions between *Kennedy* and the instant action, the ultimate holding in *Kennedy* is simply inapposite and its underlying discussion tends to support our ruling.

In *New York Co Lawyers' Ass'n v State*, 192 Misc 2d 424, 430-431; 745 NYS2d 376 (2002), the New York court rejected a *Strickland* approach, reasoning:

> Prejudice, as an aspect of the *Strickland* test, is examined more generally under the State Constitution in the context of whether defendant received meaningful representation. (*See, People v. Hobot*, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1102, 1103, 622 N.Y.S.2d 675, 676 (1995) (the test is whether counsel's errors seriously compromise a defendant's right to a fair trial). . . . The purpose is to ensure that a defendant has the assistance necessary to justify society's reliance on the outcome of the proceedings. Notably, New York is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence,

> and therefore this court finds the more taxing two-prong *Strickland* standard used to vacate criminal convictions inappropriate in a civil action that seeks prospective relief premised on evidence that the statutory monetary cap provisions and compensation rates currently subject children and indigent adults to a severe and unacceptable risk of ineffective assistance of counsel. This court further finds *Strickland*'s reliance on post-conviction review provides no guarantee that the indigent will receive adequate assistance of counsel under the New York Constitution in the context of this action. Accordingly, because the right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain prospective injunctive relief to prevent further harm. [Citation omitted.]

In *Quitman Co v State*, 910 So 2d 1032 (Miss, 2005), the county itself commenced a civil action for declaratory and injunctive relief, alleging that by imposing an obligation on the county to fund the representation of indigent defendants, the state of Mississippi breached its constitutional duties to provide adequate representation for indigent criminal defendants. Consistent with our opinion, the Mississippi Supreme Court stated:

> In [the first appeal], this Court held that the County would be entitled to the prospective statewide relief it seeks *if* it established the cost of an effective system of indigent criminal defense, the county's inability to fund such a system, and the failure of the existing system to provide indigent defendants in Quitman County with the tools of an adequate defense. The circuit judge ruled that the County failed to establish these facts . . . . The County asserts that "[t]he evidence at trial established each of these elements."
>
> The State correctly points out that "[c]ommon sense suggests that if Quitman County claims there is widespread and pervasive ineffectiveness, the most probative evidence to support that claim would be testimony about

> specific instances when the public defenders' performance fell below 'an objective standard of reasonableness' as measured by the professional norms." [Citing *Strickland*.] The State also asserts that the circuit judge expected to hear such testimony at trial since the County alleged in its complaint that requiring each county to pay for its own public defenders did not satisfy the constitutional requirements for effective assistance of counsel. The record reflects that no such evidence was presented at trial. . . . .
>
> The County did not present any evidence on any one of the central factual allegations in its complaint, and the County did not try to show specific examples of when the public defenders' legal representation fell below the objective standard of professional reasonableness. [*Id*. at 1037 (emphasis in original).]

The Mississippi Supreme Court had allowed the case to go forward on the basis of the allegations in the complaint, *State v Quitman Co*, 807 So 2d 401 (Miss, 2001), which is all that we are doing, and our plaintiffs must ultimately prove their case to obtain relief, which the county in *Quitman* failed to accomplish.

We finally note *Benjamin v Fraser*, 264 F3d 175 (CA 2, 2001), which was a suit that involved the question whether pretrial detainees had demonstrated the existence of current and ongoing constitutional violations and the need for the continuation of prospective relief with respect to impediments to attorney-client jail visitations. The United States Court of Appeals for the Second Circuit stated that "[i]n considering burdens on the Sixth Amendment right to counsel, we have not previously required that an incarcerated plaintiff demonstrate 'actual injury' in order to have standing." *Id.* at 186. The court further asserted that "[i]t is not clear to us what 'actual injury' would even mean as applied to a pretrial detainee's right to counsel." *Id.* Read in context, the *Benjamin* court was simply indicating, consistently with our position, that a *Strickland*-like

prejudice requirement, arising out of a trial and conviction, is not applicable if the right to counsel has been violated.

Having set the analytical framework, including the appropriate standard for justiciable harm, we now move on to applying the allegations in plaintiffs' complaint to the framework.

h. APPLICATION OF COMPLAINT ALLEGATIONS TO JUSTICIABILTY PRINCIPLES

(i) HARM AND THE NAMED PLAINTIFFS

Plaintiff Christopher L. Duncan alleges that he pleaded guilty of an overcharged crime that was factually unwarranted because of his attorney's inadequate representation. Plaintiff Billy Joe Burr, Jr., alleges that he had to endure a delay before an acceptable misdemeanor plea was offered to him, which only occurred after counsel advised him to plead guilty of the charged felony and after Burr demanded that counsel speak further to the prosecutor. Plaintiff Steven Connor alleges that there was a basis to suppress a search without a warrant that was ignored by counsel. Plaintiff Antonio Taylor alleges that there existed a valid defense predicated on forensic evidence and witness accounts had counsel bothered conducting an investigation and inquiry. Plaintiff Jose Davila alleges that counsel failed to discuss the charges with Davila, lied to the court about it, and failed to challenge a revision of the charges. Plaintiffs Jennifer O'Sullivan, Christopher Manies, and Brian Secrest allege that counsel had effectively gone missing in action, despite the fact that they faced serious charges and that hearings and trials were pending. A common thread that runs through all the allegations concerning the named

plaintiffs is the failure of counsel to converse with plaintiffs in a meaningful manner. The named plaintiffs allegedly experienced conduct that included: counsel speaking with plaintiffs, for the first time, in holding cells for mere minutes before scheduled preliminary examinations while in full hearing range of other inmates; counsel advising plaintiffs to waive preliminary examinations without meaningful discussions on case-relevant matters; counsel failing to provide plaintiffs with police reports; and counsel generally neglecting throughout the entire course of criminal proceedings to discuss with plaintiffs the accuracy and nature of the charges, the circumstances of the purported crimes, and any potential defenses. They further complain of the following: counsel entering into plea negotiations without client input or approval; counsel perfunctorily advising plaintiffs to plead guilty as charged absent meaningful investigation and inquiry; counsel improperly urging plaintiffs to admit facts when pleas were taken; and, counsel neither preparing for hearings and trials nor engaging in any communications with plaintiffs concerning trials. In sum, the allegations by the named plaintiffs include instances of representation by counsel that fell below an objective standard of reasonableness in regard to critical stages in the criminal proceedings.[19]

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[19] We recognize that much has transpired in the criminal prosecutions related to the named plaintiffs since the filing of the instant complaint. In class actions, while there must be a case or controversy with respect to a named plaintiff at the time the complaint was filed in a case, the controversy may continue to exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Sosna v Iowa*, 419 US 393, 402; 95 S Ct 553; 42 L Ed 2d 532 (1975). The overall case, however, must still present a case or controversy at the time of court review. *Id.* In

(ii) HARM AND CLASS MEMBERS GENERALLY

Plaintiffs devote an entire section of the complaint to allegations of harm suffered by class members. Plaintiffs allege that class members "are detained unnecessarily or for prolonged periods of time before trial." As examples, they refer to contract defenders and counsel for indigents who rarely seek bail reductions, despite circumstances calling for reductions, and who fail to appear at court proceedings, resulting in frequent postponements and rescheduling. Plaintiffs refer to one class member who "was forced to sit in the county jail for months because an attorney he never met missed several consecutive court dates, including three scheduled circuit court hearings." These allegations include instances of deficient performance, which also resulted in the harm of unwarranted, unnecessary, and prolonged delays and detentions.

Plaintiffs next allege that class members are compelled into taking inappropriate pleas, often to the highest charged crimes, even "when they have meritorious defenses." Plaintiffs assert that counsel routinely encourage guilty pleas "without a proper factual basis for guilt" and absent "even a cursory investigation into potentially meritorious defenses." They further complain of counsel pressuring class members to take "open pleas," which promise no particular sentence and which "often result in punishment that is disproportionate to the facts of the case." Plaintiffs refer to one case in which counsel permitted a client to plead guilty of failure to pay restitution even though he had already paid restitution. Plaintiffs indicate that class members are so fearful that counsel will not adequately prepare

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our discussion regarding class certification, we return to the issue of mootness and explain why the doctrine compels a conclusion that certification was proper.

for trial that they forgo their right to trial and plead guilty of factually unwarranted offenses. These allegations regarding pleas include instances of deficient performance that inflicted a detriment to indigent defendants.

Plaintiffs allege that indigent defendants who insist on going to trial are subjected to punitive charges or lengthy pretrial delays. As an example, plaintiffs refer to an indigent defendant who sat in the Muskegon County jail for 10 months before he finally pleaded guilty of various charges. Plaintiffs allege that the indigent defendant's court-appointed counsel "refused to enforce his right to a speedy trial and instead told the client that if he did not plead, the prosecutor would drop the charges against him before the speedy trial period ran and re-arraign him on the same charges." Plaintiffs contend that there had been no evidence connecting the defendant to the crime and that the defendant "had three alibi witnesses who would have testified that he was nowhere near the crime scene." Justiciable harm could be found from these allegations.

Plaintiffs additionally allege that class members face harsher sentences than warranted by the facts. They refer to a case in which a criminal defendant received a sentence of 12 to 24 months' imprisonment despite the fact that the plea agreement recommended no incarceration. Plaintiffs note that "[w]hen the sentence was imposed, [the defendant's] attorney said nothing. Instead, it was the prosecutor who reminded the court of its obligation to allow the client to withdraw her plea if the court did not intend to follow the plea agreement." Plaintiffs allege that "[a]n attorney in Genesee County told a client trying to decide whether to plead guilty to tampering with a parking meter that if he were convicted at trial, he would face a sentence of 15 years.

According to Michigan's sentencing guidelines, however, the sentencing range for the crime with which the client was charged was 0 to 34 months." Plaintiffs point to a Berrien County incident where a defendant was sentenced to 37 days in jail for an offense that had a 30-day statutory maximum; counsel said nothing, but the court clerk noticed the error. Plaintiffs also assert that "[c]ounsel . . . often fail to provide meaningful representation at sentencings," with "[s]ome attorneys offer[ing] information during sentencing proceedings that is detrimental to their clients' cases." Other attorneys, according to plaintiffs, "often fail to catch sentencing errors and do not read the pre-sentencing reports prior to the sentencing hearings." Plaintiffs further allege that inadequate representation results in indigent defendants' being improperly assessed fees, which they have no ability to pay, and they assert that failures by counsel to explore otherwise available alternatives to incarceration result in access being denied to alternatives such as drug treatment programs. These allegations include instances of deficient performance detrimental to indigent defendants.

Plaintiffs next maintain that "[c]ounsel are unable to file necessary motions for pre-trial suppression, discovery, [and] speedy trial, motions to quash circuit court bind-over, or motions in limine[, and] [t]hey often fail to challenge illegal identifications, illegal searches and seizures, or illegally obtained confessions." Plaintiffs complain that "some attorneys refuse to provide their clients with copies of court files and police records." These allegations include instances of deficient performance detrimental to indigent defendants.

With respect to trials, plaintiffs allege:

> Counsel cannot prepare adequately for court hearings and trial. Many do not call witnesses to testify on their

> clients' behalf, do not call experts to challenge the prosecution, and do not perform meaningful cross-examinations. Others do not make opening or closing statements at trial. In fact, many do not put on any meaningful defense case at all.

Plaintiffs do allege that wrongful convictions have occurred, which suggests satisfaction of the *Strickland* prejudice requirement typically applicable in criminal appeals.

(iii) PRESUMED PREJUDICE AND HARM

Plaintiffs allege that the three challenged court-appointed, indigent defense systems "fail[] to provide counsel to all eligible indigent defendants." Plaintiffs claim that "[s]ome members . . . must represent themselves because they are wrongfully denied defender services." In that same vein, plaintiffs allege that "indigent defendants who are constitutionally eligible for state-appointed counsel are denied counsel." As an example, plaintiffs contend that "[o]ne Berrien County judge . . . routinely refuses to appoint counsel to defendants who have made bail[.]" On this same topic, plaintiffs maintain that "[t]he Muskegon law firm holding the indigent defense contract advises its lawyers to move to be discharged from representing clients who have full-time jobs, regardless of how little those jobs pay." And "[o]ne attorney in Genesee County refuses to represent indigent defendants assigned to him if he considers them to be financially ineligible. Instead, he offers to represent them as a private attorney, at a discount from his normal rate." Plaintiffs further contend that, as a result of a failure to abide by national performance standards, class members are "constructively denied, or threatened with the constructive denial of counsel." These allegations concern the actual or

constructive denial of counsel, which would ordinarily give rise to a presumption of prejudice in a criminal appeal and which would constitute justiciable harm. *Strickland*, *supra* at 692; *Cronic*, *supra* at 659.

Plaintiffs also allege that "attorneys routinely represent clients in situations in which conflicts of interest exist." According to plaintiffs, "[m]any indigent defense counsel also serve as prosecutors, often in the same courtrooms before the same judges. Some are assigned to defend individuals they previously prosecuted." As an example, plaintiffs allege that "a Berrien County attorney does both felony defense work and abuse and neglect work. He has no system for screening conflicts despite the possibility of defending a parent under the felony contract who is also the subject of an abuse and neglect proceeding under the other contract." Prejudice is presumed when an attorney is burdened by an actual conflict of interest. *Strickland*, *supra* at 692.

(iv) WIDESPREAD HARM, CAUSATION, AND REDRESS OF INJURY

We first find that the allegations discussed in the preceding sections reflect widespread and systemic instances of violations of the constitutional right to counsel and the effective assistance of counsel.

Plaintiffs allege that an absence of standards, training,[20] programs, supervision, monitoring, guidelines, and independence from the judicial and prosecutorial functions has resulted in indigent counsel having too many cases,[21] insufficient support staff, insufficient or

[20] According to plaintiffs, "many indigent defense counsel are unable adequately to advise their clients because they are unaware of key aspects of criminal law and procedure, such as the notice requirement for the use of an alibi defense or appropriate objections."

[21] Plaintiffs claim:

no resources to hire experts and investigators,[22] and a lack of skills and experience to properly handle assigned cases. Plaintiffs further maintain that these problems have created severe obstacles in putting cases presented by the prosecution to the crucible of meaningful adversarial testing. They additionally contend:

> As a result of the[] systemic deficiencies, indigent defense counsel do not meet with clients prior to critical stages in their criminal proceedings;[23] investigate adequately the charges against their clients or hire investigators who can assist with case preparation and testify at trial; file necessary pre-trial motions; prepare properly for court appearances; provide meaningful representation at sentencings; or employ and consult with experts when necessary. In addition, the systemic deficiencies provide no method for ensuring that attorneys are representing clients free from conflicts of interest.

> [I]n Berrien County, 6 of the 12 contract holders in 2004 received a collective total of 4,479 felony and misdemeanor cases, for an average of over 746 cases per attorney. One attorney doing contract work regularly had a caseload of 1,000 cases a year (700 misdemeanors and 300 felonies) in addition to 200 private cases. One attorney in Muskegon County handled 700 felony cases per year; another routinely handled 15 felonies per week.

[22] Plaintiffs allege that "[i]ndigent defense counsel are unable adequately to investigate the charges against their clients or to hire investigators who can assist with case preparation and testify at trial." They note that "[i]n 2004, the trial court administrator in Berrien County did not receive *a single request* for an expert or an investigator." (Emphasis added.)

[23] Plaintiffs allege:

> Most indigent defense counsel do not speak with their clients before they arrive at the courthouse for the probable cause hearing. Attorneys in the Counties routinely enter into plea negotiations without clients' permission and before initial client interviews. One Genesee County attorney has stated that he only meets with incarcerated clients prior to a preliminary examination if they are charged with felonies punishable by more than five to ten years of imprisonment.

We have recited above the numerous harms claimed by plaintiffs and, ultimately, plaintiffs allege a nexus or causal connection between the widespread and systemic deficiencies and defendants, asserting:

> As a direct result of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense in the three Counties, indigent defense services in the Counties, and elsewhere in the State, are operated at the lowest cost possible and without regard to the constitutional adequacy of the services provided. The result is that the indigent defense provided in each of the three Counties does not meet — and does not attempt to meet — the [American Bar Association's] Ten Principles, Michigan's Eleven Principles, or commensurate safeguards; and does not meet or even attempt to meet the constitutional minimums required by the United States and Michigan Constitutions.[24]

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[24] We note that the complaint contains numerous additional paragraphs alleging the necessary causal connection. The dissent, citing *Ashcroft v Iqbal*, 556 US __; 129 S Ct 1937; 173 L Ed 2d 868 (2009), argues that the causation allegations in plaintiffs' complaint fail because they constitute mere legal conclusions and because the allegations implausibly assert causation and are incapable of being proven or disproven. The dissent contends that it is impossible for plaintiffs to prove that the alleged inaction and failures by defendants caused the asserted constitutional violations. To the extent that *Ashcroft*, a case interpreting the Federal Rules of Civil Procedure and cases construing those rules, even has application to the case at bar, which is controlled by the Michigan Court Rules, it does not support summary dismissal of plaintiffs' complaint. With respect to the argument that the allegations of causation are legal conclusions, we first note that any allegation of causation, whatever the context, carries with it some tinge of a legal conclusion. Additionally, the extensive complaint sets forth numerous factual allegations that bear on the issue of causation, including those cited by us in this opinion. We initially reiterate the principle so long ago announced in *Gideon* that it is the state that ultimately has the affirmative constitutional obligation to implement a system that safeguards the right to counsel for indigent defendants, which right, under *Strickland* and *Cronic*, includes the right to the effective assistance of

This case involves indigent criminal defendants who

counsel. If a county system is constitutionally inadequate under the standards we have set today, i.e., a finding of widespread and systemic instances of deprivation of counsel and deficient performance resulting from a flawed county system of providing indigent representation, but the county is in full compliance with existing state law and mandates, the cause of the constitutional deficiencies will necessarily flow from failures by the state. The complaint alleges that the state has provided little or no funding or fiscal or administrative oversight, opting to continue a centuries-old practice of delegating to the counties the responsibility for funding and administering indigent defense services. It is alleged that defendants have done nothing to ensure that the counties have in place the necessary funding, policies, standards, qualifications, programs, training, guidelines, and other resources that would enable attorneys to provide constitutionally adequate representation. The complaint goes into particularized factual detail on each of these matters, e.g., "Neither the Berrien nor Muskegon County programs have written job descriptions or qualifications." It is further alleged that the lack of fiscal oversight, administrative oversight, funding, policies, standards, programs, qualifications, training, guidelines, and other resources results in defense providers who have too many cases, lack sufficient support staff, are unable to obtain investigators and experts, lack the tools necessary to do their jobs, are wanting in skills and experience to handle assigned cases, and essentially cannot put a prosecutor's case to the crucible of meaningful adversarial testing. As an example, plaintiffs allege that, as a result of inadequate training, "many indigent defense counsel are unable adequately to advise their clients because they are unaware of key aspects of criminal law and procedure, such as the notice requirement for the use of an alibi defense or appropriate objections." Plaintiffs then allege that these systemic problems result in the wrongful denial of counsel, deficient performance, wrongful convictions, unnecessary or prolonged pretrial detentions, inappropriate guilty pleas, and unwarranted harsh sentences. In other words, defendants have violated plaintiffs' constitutional rights. Well-pleaded factual allegations relative to causation have been presented and not solely mere legal conclusions. The paragraphs in the complaint that are conclusory form the framework of the complaint and are more than sufficiently supported by factual allegations. See *Ashcroft*, 556 US at ___; 129 S Ct at 1950; 173 L Ed 2d at 884 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity[.]"). Further, the allegations plausibly suggest unconstitutional conduct and practices by defendants and entitlement to relief, and while the causation allegations may be difficult to prove and establish, we cannot conclude that it is

were, are, and will be subjected to the court-appointed, indigent defense systems employed by the relevant counties. And there are extensive allegations concerning detrimental and harmful effects on these criminal defendants, as they pass through the systems, caused by ineffective attorneys, which, in turn, is allegedly the result of the state's and the Governor's failure to protect the constitutional rights of indigent defendants. Accordingly, there are sufficient allegations of a causal connection between the injuries and the complained-of conduct, and plaintiffs have also indicated that the injuries would be redressed by a favorable court decision granting the prayed-for equitable relief. See *Michigan Citizens*, *supra* at 294-295. We hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Stated differently, the case is presently justiciable, because a case or controversy exists. Whether plaintiffs can ultimately prove their allegations and establish their case is a matter for another day.

6. CLASS CERTIFICATION

Defendants maintain that the trial court erred in granting plaintiffs' motion to certify the class. Defendants contend that plaintiffs failed to show that a class action is the superior way to litigate the claims. In support of the superiority argument, defendants assert that a "class action serves no useful purpose because the requested relief may be obtained from an individual action and would automatically accrue to the benefit of

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impossible to prove causation. We, as an appellate court, should not engage in trying the case or deny plaintiffs the opportunity to present their proofs.

others similarly situated." As part of the superiority argument, defendants also argue that a class action suit is inconvenient, impractical, and unmanageable under the applicable *Strickland* standard, which requires examination of individual proofs. In further support of the superiority argument, defendants argue that the class is unmanageable because the three counties are too factually disparate, that the class creates practical problems in litigating the claims, that indigent criminal defendants will suffer no adverse effect if this Court decertifies the class, and that plaintiffs have adequate remedies at law. Finally, defendants maintain that plaintiffs failed to demonstrate commonality, where the alleged systemic violations will require individualized proof and the relief would not be the same for all class members. The trial court, on the basis of the pleadings, ruled contrary to each one of defendants' arguments, finding that plaintiffs established commonality, superiority, and typicality.

In *Neal v James*, 252 Mich App 12, 15-16; 651 NW2d 181 (2002), this Court articulated some general principles applicable in determining whether a class should be certified:

> Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification. When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true. The merits of the case are not examined. The burden is on the plaintiff to show that the requirements for class certification exist. [Citations omitted.]

"The five factors a court must consider when deciding whether to certify a class are found in MCR 3.501(A)(1), and a plaintiff seeking to certify a class must show that *all* five enumerated requirements are

satisfied." *Hill*, *supra* at 310, citing *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002) (emphasis in original). MCR 3.501(A)(1) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

a. NUMBER OF CLASS MEMBERS AND PRACTICALITY OF JOINDER

The first requirement for class certification is that the class must be "so numerous that joinder of all members is impracticable[.]" MCR 3.501(A)(1)(a). In the complaint, plaintiffs indicate:

> The Class is defined as all indigent adult persons who have been charged with or will be charged with felonies in the District and Circuit Courts of Berrien, Genesee, and Muskegon Counties and who rely or will rely on the Counties to provide them with defense services. The Class includes all indigent adults against whom felony criminal charges will be brought in Berrien, Genesee, and Muskegon Counties during the pendency of this action.

We agree with plaintiffs that the class, as defined in the complaint, is sufficiently numerous to make joinder

of each class member impractical. We also reject the dissent's argument challenging this ruling under *Zine*, *supra*. In *Zine*, this Court was concerned with lemon-law booklets issued by Chrysler that were distributed to purchasers of new vehicles and that were allegedly misleading. We find *Zine* distinguishable because it did not entail the type of prospective, systemwide relief sought here, it did not involve a fluid class of plaintiffs such as exists in the case at bar, and because it did not present allegations of widespread and systemic instances of harm, as we have defined the term "harm" in this opinion.

b. COMMONALITY OF LEGAL AND FACTUAL QUESTIONS

The second requirement for class certification is that there must be "questions of law or fact common to the members of the class that predominate over questions affecting only individual members[.]" MCR 3.501(A)(1)(b). While this action will require contemplation of specific instances of deficient performance and instances of the actual or constructive denial of counsel, the ultimate broad factual questions common to all members in the class, given the type of relief sought, are whether there have been widespread and systemic constitutional violations, whether the violations were and are being caused by deficiencies in the county indigent defense systems, and whether the systemic deficiencies were and are attributable to or resulted from the action or inaction of defendants. Any evidence concerning individual prosecutions has no bearing on those particular criminal cases and the available appellate remedies, except to the extent of any effect on a pending case caused by a systemwide remedy resulting from an order or judgment rendered in this action. The evi-

dence pertaining to individual prosecutions merely constitutes a piece in the larger puzzle relative to establishing a basis for prospective, systemwide relief. In the context of this type of civil rights action, unlike the situation in *Zine*, the factual question *that will be of any relevance to all class members* revolves around the establishment of widespread and systemic instances of deficient performance and denial of counsel; the case's viability with regard to all members depends on an aggregation of harm that is pervasive and persistent.

The dissent's reliance on *Neal* is equally misplaced. That case involved claims of racial discrimination brought by a class of African-Americans who held or had sought employment with the city of Detroit's law department. The trial court certified the class, and this Court reversed for failure to satisfy the commonality requirement. The *Neal* panel reached its holding because "individual factual circumstances pertinent to each plaintiff will need to be reviewed, and individual, fact-specific inquiries will need to be made in evaluating why certain individuals were not hired or promoted, or why other individuals were discharged or not retained." *Neal*, *supra* at 20. Importantly, the Court thereafter stated that the plaintiffs had "simply not shown that there was any specific policy or practice followed by defendants to satisfy the 'commonality' requirement[.]" *Id.* Here, plaintiffs' case is built on defendants' and the counties' policies and practices, it requires proof of widespread and systemic constitutional violations before any relief is available, and it focuses on systemwide, prospective relief. *Neal* is simply inapposite.

Next, there is also commonality with respect to the legal questions, which all concern state and federal constitutional rights to due process and to counsel. We conclude that the allegations in the complaint satisfy the commonality requirement in regard to both the factual and legal questions presented.

c. TYPICALITY OF CLAIMS

The third requirement for class certification is that there must be "claims . . . of the representative parties [that] are typical of the claims . . . of the class[.]" MCR 3.501(A)(1)(c). As reflected in our earlier review of the allegations in the complaint, the claims of the named plaintiffs, which pertained mostly to deficient performance of counsel at critical pretrial stages of the criminal proceedings, are typical of the allegations of the class members. We conclude that the allegations in the complaint satisfy the typicality requirement.

d. PROTECTION OF INTERESTS BY REPRESENTATIVE PARTIES

The fourth requirement for class certification is that "the representative parties [must] fairly and adequately assert and protect the interests of the class[.]" MCR 3.501(A)(1)(d). Plaintiffs allege:

> [The] Class representatives will fairly and adequately protect the interests of the Plaintiffs. Plaintiffs' counsel know of no conflicts of interest between the class representatives and absent class members with respect to the matters at issue in this litigation; the class representatives will vigorously prosecute the suit on behalf of the Class; and the class representatives are represented by experienced counsel.

Given that "the trial court is required to accept the allegations made in support of the request for certification as true" when evaluating a class certification motion, *Neal*, *supra* at 15, and considering the quoted allegations, we conclude that MCR 3.501(A)(1)(d) has been satisfied.

e. SUPERIORITY

With respect to the fifth factor, whether "the maintenance of the action as a class action will be superior to

other available methods of adjudication in promoting the convenient administration of justice," MCR 3.501(A)(1)(e), MCR 3.501(A)(2) provides:

> In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:
>
> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

In *Edgcumbe v Cessna Aircraft Co*, 171 Mich App 573, 575; 430 NW2d 788 (1988), this Court explained

that "[t]he requirement of MCR 3.501(A)(1)(e), that the class action be superior to other methods of adjudication in promoting the convenient administration of justice, is an outgrowth of the equitable heritage of class actions and a recognition of the practical limitations on the judiciary's capability to resolve disputes." The relevant concern in determining the convenient administration of justice is whether the issues are so disparate as to make a class action suit unmanageable. *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 419; 415 NW2d 206 (1987). "Matters such as diversity of defenses, counterclaims, et cetera may bear upon the determination of whether a class action suit will promote the convenient administration of justice." *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 505; 459 NW2d 1 (1989).

On examination and consideration of the enumerated factors relative to superiority, MCR 3.501(A)(2), we conclude that they weigh in favor of certification of the class. It is vital to keep in mind the nature of plaintiffs' complaint in analyzing the class certification issue. Plaintiffs will need to establish widespread instances of ineffective assistance of counsel and denial of counsel. Because criminal prosecutions in the three counties are not being stayed during the pendency of this litigation, class members constitute a fluid class and the attendant criminal proceedings will continually be in flux. Indeed, the prosecutions of the named plaintiffs, to our knowledge, have been mostly resolved. Promoting the convenient administration of justice necessarily demands that this case proceed as a class action. In *Reynolds v Giuliani*, 118 F Supp 2d 352, 391-392 (SD NY, 2000), the federal district court commented:

> [C]lass certification is not a mere formality because it will insure against the danger of this action becoming

> moot. This case involves a fluid class where the claims of the named plaintiffs may become moot prior to completion of this litigation. The danger of mootness is magnified by the fact that defendants have the ability to moot the claims of the named plaintiffs, thereby evading judicial review of their conduct. Thus, this Court, like other courts under these circumstances, believes that class certification is necessary. *See Greklek v. Toia*, 565 F.2d 1259, 1261 (2d Cir. 1977) (affirming district court's grant of class certification in action requesting declaratory and injunctive relief "since only class certification could avert the substantial possibility of the litigation becoming moot prior to the decision"); *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D. N.Y. 1986) ("[t]he plaintiff's interest in averting the possibility of the action becoming moot, with the concomitant interest in judicial economy, makes class certification in this case more than an empty formality"); *Jane B.* [*v New York City Dep't of Social Services*] 117 F.R.D. [64, 72 (SD NY, 1987)] ("[a]n additional reason for granting the motion for certification lies in avoiding problems of mootness"); *Ashe* [*v Bd of Elections*] 124 F.R.D. [45, 51 (ED NY, 1989)] ("[a] further ground for finding class certification to be more than a 'formality' here is to avoid the danger of the individual plaintiffs' claims becoming moot before a final adjudication"); *Koster v. Perales*, 108 F.R.D. 46, 54 (E.D. N.Y. 1985) (class certification is necessary when "absent certification, there is a substantial danger of mootness"). Accordingly, plaintiffs' motion for class certification is granted.

We have the same mootness dangers if this case is not pursued through the vehicle of a class action lawsuit. This fact alone defeats most of defendants' arguments on the issue of class certification, e.g., the argument that a class action serves no useful purpose. Absent class certification, and even assuming that no mootness issue exists, the prosecution of separate actions would create a risk of inconsistent or varying adjudications. MCR 3.501(A)(2)(a). Furthermore, equitable and declaratory relief would not only be appropriate for the class on establishing its case, it is the only relief being

sought. MCR 3.501(A)(2)(b). Additionally, we find that the action would be manageable as a class action, that any claims by individual class members would be insufficient to support separate actions in view of the complexity of the issues or the expense in litigation, that recoverable dollar amounts are not at issue, and that individual class members do not have a significant interest in controlling separate actions. MCR 3.501(A)(2)(c) through (f). Defendants' arguments to the contrary, including those hinging on the now rejected two-part *Strickland* test, are unavailing.

IV. SUMMARY

We respectfully disagree with our dissenting colleague's criticisms of this opinion and, to the extent not already addressed above, feel compelled to respond. This case certainly presents difficult issues, requiring us, in part, to tread in unchartered legal waters. There are, however, some fundamental principles at play here.

It is well accepted that part of the judiciary's role and function in our tripartite system of government is to interpret constitutional provisions, apply constitutional requirements to the facts at hand, and safeguard and protect constitutional rights, all through entry of orders and judgments as guided by stare decisis. That the judiciary can declare executive and legislative conduct unconstitutional, can prohibit continuing unconstitutional conduct by the two other branches of government, and can demand constitutional compliance, hardly seem to be foreign principles in the jurisprudence of this state and the country. For support, we need not look any further than the historic landmark case of *Marbury*, *supra* at 177-180, in which Chief Justice John Marshall so eloquently stated:

The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the

constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.

That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey? There are many other parts of the constitution which serve to illustrate this subject.

* * *

[I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government

> of *courts*, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to *the constitution*, and laws of the United States." Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime. [Paragraphs reconfigured; emphasis added.]

Moving forward more than 200 years, the United States Supreme Court in *Boumediene*, *supra*, reiterated the principles from *Marbury*. The Court stated that abstaining from questions requiring political judgments reflects recognition that such matters are best left to the political branches and not the judiciary. *Boumediene*, 553 US at ___; 128 S Ct at 2259; 171 L Ed 2d at 77. *However*, "[t]o hold [that] the political branches have the power to switch the Constitution on or off at will is quite another [matter]." *Id.* This would unacceptably "permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.' " *Id.*, quoting *Marbury*, *supra* at 177.

Political judgments are involved in determining the manner and method by which a state proceeds in

providing representation for indigent criminal defendants, including, as in Michigan, delegation of representation matters to local counties and chief judges. But if the state has allegedly failed to satisfy its constitutional obligations with its chosen approach, i.e., switching off state and federal constitutions, it is up to the judiciary to judge whether the state has indeed acted consistently with constitutional requirements. From *Marbury* to *Boumediene*, this field has been defined as including the interpretation of constitutional language, the application of constitutional principles, the judging of constitutional compliance, and the safeguarding of constitutional rights. This is all that is occurring in this case. Without allowing for court examination and possible intervention, the Governor and the Legislature effectively determine "what the law is" with respect to the right to counsel and the right to the effective assistance of counsel.

We are not setting public policy. Rather, we are simply indicating that the judiciary can evaluate the constitutional compliance of policies implemented by the two political branches of government. We are not suggesting that the judiciary can dictate to the other branches of government the type of system to employ in providing representation for indigent defendants. The judiciary, however, can and must have a say with respect to whether a chosen system is constitutionally sound. The judiciary clearly cannot require the political branches to use a "better" system than a system currently in place, where the existing system sufficiently safeguards constitutional rights. See *Grand Traverse Co*, *supra* at 472 (it is for the Legislature to decide whether to implement a more desirable system).

Concerns have been expressed about expenses that may be incurred by state taxpayers and the state to

operate an indigent defense system. Assuming this were to occur, we first note that the taxpayers of this state are already bearing the burden of paying for the representation of indigent defendants; it is just being accomplished through different taxing authorities. Importantly, economic concerns did not dissuade the Supreme Court in *Gideon* from construing the United States Constitution in a manner that mandates effective assistance of counsel for indigent defendants. Further, during these economically challenging times, the judiciary, in addressing constitutional issues, must be reminded of the words of Chief Justice Warren Berger in *Bowsher v Synar*, 478 US 714, 736; 106 S Ct 3181; 92 L Ed 2d 583 (1986):

> No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." [Citation omitted.]

With respect to the expressed concerns about the possible prospect that the state will have to operate an indigent defense system at the trial level, we care not whether it is the state, administrative agencies, counties, municipalities, courts, or any other bodies, alone or in combination, that operate a system providing representation for indigent criminal defendants. Our *only* concern is that whatever system is adopted, regardless of what entity operates the system, it must safeguard the constitutional rights to counsel and the effective assistance of counsel. Plaintiffs have filed a complaint containing sufficient allegations that those constitutional rights are not currently being protected in the

three counties at issue under the systems employed by those counties, which can ultimately be blamed on defendants' constitutional failures. Plaintiffs are thus entitled to have their day in court.

V. CONCLUSION

We hold that defendants are not shielded by governmental immunity, that defendants are proper parties, that the trial court, not the Court of Claims, has jurisdiction, and that the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which we need not presently define. We further hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification.

Affirmed.

SAWYER, J., concurred.

WHITBECK, J. (*dissenting*). This case involves a sweeping and fundamental challenge to Michigan's system for operating and funding legal services for indigent criminal defendants. For decades, this system has, by statute, operated at the local level. But the indigent criminal defendants who are the plaintiffs here (the Duncan plaintiffs) seek to change that. They seek judicial intervention to require the state of Michigan and the Governor to override that statute and to both operate and fund legal services for indigent criminal defendants in Berrien, Genesee, and Muskegon counties, at the ex-

pense of state taxpayers and in violation of basic principles of separation of powers.

It is reasonably foreseeable that the final result of such judicial intervention inevitably will be state operation and funding of such legal services throughout Michigan. Indeed, the Duncan plaintiffs give us a preview of things to come when, in their complaint, they assert that the problems they describe "are by no means limited or unique to the three Counties." The Duncan plaintiffs go on to state that the alleged failures of the state and the Governor "have caused similar problems throughout the State." Rather obviously, then, the Duncan plaintiffs regard Berrien, Genesee, and Muskegon counties as simply staging areas in their overall effort to superimpose a centralized statewide state-funded[1] regime of legal services for indigent crimi-

[1] See, for example, Complaint, ¶ 10 ("Defendants' failure to take any steps to ensure that the indigent defense services in the Counties are *adequately funded* and administered, and that as a result, indigent defense providers have the resources and tools necessary to do their jobs, is an abdication of Defendants' constitutional obligations, and the result is the denial of constitutionally adequate defense to indigent criminal defendants.") (emphasis added); Complaint, ¶ 11 ("This Complaint focuses on how the Defendants failures to provide *funding* and fiscal and administrative oversight have created a broken indigent defense system in Berrien, Genesee, and Muskegon Counties; but the failings in those counties, and the types of harms suffered by these Plaintiffs, are by no means limited or unique to the three Counties. Defendants failure to provide *funding* or oversight to any of the State's counties have caused similar problems throughout the State.") (emphasis added); Complaint, ¶ 88 ("Michigan provides no *funding* specifically for the provision of indigent defense services in felony criminal actions at the trial stage in the three Counties or any other county in the State. To the extent that state *funding* is used by the Counties to pay for indigent defense services, Defendants do not ensure that such *funding* is spent appropriately. And to the extent that the Counties provide *funding* of their own, Defendants do not provide the Counties with any oversight or guidance to ensure that such *funding* produces an indigent defense system capable of providing constitutionally adequate indigent defense services.") (emphasis added); Complaint, ¶ 89 ("On an annual basis, Michigan allocates monies to

nal defendants upon the existing statutorily created and locally funded and operated system.

Moreover, the Duncan plaintiffs seek this relief *preconviction*: that is, at the time they filed their complaint, none of the Duncan plaintiffs had gone to trial or otherwise had their cases adjudicated. This peculiar procedural posture invites the judiciary to gaze into a preconviction crystal ball that the Duncan plaintiffs have devised and to speculate on the effect of events that have yet to occur. Unfortunately, the gift of clairvoyance is not one that routinely accompanies our judicial commissions, and I would decline the invitation.

The majority, however, is not deterred. It finds the Duncan plaintiffs' claims to be justiciable, and it gives the Ingham Circuit Court the widest latitude in granting both declaratory and injunctive relief. As the majority's opinion candidly admits, such relief could potentially entail a cessation of criminal prosecutions against indigent defendants in Berrien, Genesee, and Muskegon counties, absent constitutional compliance with the right to counsel.[2]

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a Court Equity Fund, administered by the State Court Administrative Office, to help the Counties, and the other counties in Michigan, pay for trial court operations expenses [which include indigent defense expenses]. *The amount allocated is grossly insufficient*.") (emphasis added); Complaint, ¶ 103 ("[A]s a result of Defendants' failure to provide *funding* and to exercise fiscal and administrative oversight, the provision of indigent defense services at the trial court level in the three Counties is *inadequately funded* . . . .") (emphasis added); Complaint, ¶ 104 ("Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, defense services in each of the three Counties *are not adequately financed*.") (emphasis added); Complaint, ¶ 141 ("Plaintiffs suffer irreparable harm or are at imminent and serious risk of suffering such harm because of Defendants' failure *to adequately fund* and oversee the Michigan's [sic] indigent defense system.") (emphasis added); see also similar allegations in the Complaint, ¶¶ 156, 157, 160, 163, 164, 167, 170, 171, 174, 177, 178, and 181.

[2] *Ante* at 273.

Obviously, such an approach implicates public policy and fiscal matters of the highest jurisprudential and fiscal importance. Because I believe that under basic separation of powers principles—and under the proper application of the concept of judicial modesty—the executive and legislative branches can and should address such matters, I respectfully dissent from the majority's holdings with respect to the justiciability of the Duncan plaintiffs' claims, the appropriateness of the relief that the Duncan plaintiffs have sought, and the necessity of certifying this matter as a class action.

I. INTRODUCTION

A. THE MICHIGAN APPROACH TO OPERATING AND FUNDING AN INDIGENT CRIMINAL DEFENSE SYSTEM AT THE LOCAL LEVEL

The Michigan system for providing counsel for indigent criminal defendants has been in effect for some time and, from its inception, it has been local in nature. Indeed, the Michigan Supreme Court over 100 years ago recognized that the procedure for compensating such counsel under a statute reasonably similar to the one currently in effect was "competent" under then-existing precedent.[3] The current statute (the indigent criminal defense act), as did its predecessor versions, divides the system for providing counsel to indigent criminal defendants who are unable to procure counsel into two categories:

> Upon proper showing [of indigency], the chief judge [of the circuit court] shall appoint . . . an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.[4]

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[3] *Withey v Osceola Circuit Judge*, 108 Mich 168, 169; 65 NW 668 (1895).

[4] MCL 775.16.

Thus, the duty to appoint counsel and to determine reasonable compensation for defense of the indigent at the local level rests with the judicial branch, in the person of the chief judge of the circuit court. The duty to fund such counsel, by way of reasonable compensation, rests with the executive branch, in the person of the county treasurer. And the responsibility of providing such funding lies with the legislative branch, usually the county board of commissioners.

Effective January 1, 2004, the Michigan Supreme Court established the procedure and record-keeping requirements at the local level for selecting, appointing, and compensating counsel who represent indigent parties in all trial courts (the indigent criminal defense court rule).[5] Subsection B of the indigent criminal defense court rule provides that each such trial court must adopt a local administrative order that describes its procedure for such selection, appointment, and compensation. Subsection C requires each such trial court to submit the local administrative order for review to the State Court Administrator who "shall approve a plan if its provisions will protect the integrity of the judiciary." Thus, the court rule adds a level of state judicial branch responsibility by requiring the State Court Administrator to approve local plans if they will "protect the integrity of the judiciary."

But even taking the indigent criminal defense court rule into account, there is no question that the primary responsibility for both operating and funding indigent criminal defense in Michigan remains local. The seminal case in this area is *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*.[6] In that case, the

[5] MCR 8.123.

[6] *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110; 503 NW2d 885 (1993).

plaintiff challenged the "fixed fee" system for indigent defense in place in Wayne County.[7] There, the Michigan Supreme Court held that the Wayne County fixed fee system systematically failed to provide " 'reasonable compensation' " within the meaning of the indigent criminal defense act.[8] The Court, however, declined to direct the implementation of any specific system or method of compensating counsel.[9] The Court elected instead "to leave that determination to the sound discretion of the chief judges of the respective courts."[10] The Court went on to observe that, at the time of its decision in 1993, there were

> fifty-six circuits plus the Detroit Recorder's Court in our state spread throughout eighty-three counties of varying financial means. Attorney population likewise varies from county to county. Indeed, there is a potential myriad of local considerations that will necessarily enter into the chief judge's determination of "reasonable compensation." Thus, what constitutes reasonable compensation may necessarily vary among circuits.[11]

The decision in *Recorder's Court Bar Ass'n* dealt primarily with the *operation* of the fixed fee system for indigent defense in Wayne County. The Court, both in its direction to the affected chief judges to develop and file with the Court a plan for a payment system "that reasonably compensates assigned counsel for services performed consistent with this opinion"[12] and its decli-

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[7] *Id*. at 112-113.

[8] *Id*. at 116; see also *id*. at 131 ("We simply hold that, whatever the system or method of compensation utilized, the compensation *actually* paid must be reasonably related to the representational services that the individual attorneys *actually* perform.") (emphasis in original).

[9] *Id*. at 116.

[10] *Id*.

[11] *Id*. at 129.

[12] *Id*. at 136.

nation to adopt any specific system or method, recognized the local, and varying, character of such payment systems.

The Supreme Court revisited this subject in 2003 in *Wayne Co Criminal Defense Bar Ass'n v Chief Judges of Wayne Circuit Court*.[13] In summary fashion, the Court declared:

> We are not persuaded by plaintiffs' complaints and supporting papers that the Chief Judges of the Wayne Circuit Court have adopted a fee schedule which, at this time, fails to provide assigned counsel reasonable compensation within the meaning of [the indigent criminal defense act].[14]

Then Chief Justice CORRIGAN concurred in the denial order, commenting:

> There have been increased efficiencies and new cost-saving technologies over the years, as well as increases in costs; and the overhead costs for attorneys assigned to indigent criminal defendants are sometimes lower than similar costs for attorneys performing other types of work. Nor have plaintiffs shown that the fees paid for an entire case or fees that an attorney receives over time are generally so low as to be unreasonable. Although plaintiffs have shown that fees paid under the Wayne Circuit Court fee schedule are frequently low, plaintiffs have not shown that the fee schedule generally results in unreasonable compensation. According to national compensation figures prepared by the Spangenberg Group for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, the average compensation paid to plaintiffs falls near the middle of the range of compensation nationwide.[15]

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[13] *Wayne Co Criminal Defense Bar Ass'n v Chief Judges of Wayne Circuit Court*, 468 Mich 1244 (2003).

[14] *Id*.

[15] *Id*. (CORRIGAN, J., concurring) (citations omitted).

It is true that the state is involved in the funding of trial court operations to some extent. In 1996, for example, the Legislature established the Court Equity Fund, which provides limited funding for trial court operations.[16] But both the operational responsibility and the funding responsibility for providing for the defense of indigent criminal defendants remain primarily local. As the Michigan Supreme Court explained in *Frederick v Presque Isle Co Circuit Judge*:

> Traditionally, the county has been the primary unit in directing Michigan's criminal justice system.
>
> "[J]udicial circuits are drawn along county lines and counties are required by statute to bear the expenses of certain courtroom facilities, circuit court commissioner salaries, stenographer's salaries, juror's compensation, and *fees for attorneys appointed by the court to defend persons who cannot procure counsel for themselves*."[17]

The Court in *Frederick* went on to find that, although all courts in the state are part of Michigan's one court of justice,[18] the "Legislature retains power over the county and may delegate to the local governments certain powers."[19] The Court held that in the indigent criminal defense act, the Legislature "did just that": "[i]t directed the chief judge of the circuit court to appoint an attorney to represent an indigent defendant's defense, and directed the county to pay for such services."[20] This is the system that remains in effect today. And this is the system that the Duncan plaintiffs challenge in this case.

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[16] See MCL 600.151b.

[17] *Frederick v Presque Isle Co Circuit Judge*, 439 Mich 1, 6; 476 NW2d 142 (1991), quoting OAG, 1967-1968, No 4,588, pp 49-50 (June 12, 1967) (emphasis added; citations omitted).

[18] Const 1963, art 6, § 1.

[19] *Frederick*, *supra* at 15.

[20] *Id*.

B. RIGHT TO COUNSEL

As the majority correctly notes, the Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[21] The Michigan Constitution articulates the same right.[22] In its landmark decision in *Gideon v Wainwright*,[23] the United States Supreme Court held that the Sixth Amendment right to counsel was "obligatory" with regard to the states through the operation of the Fourteenth Amendment. In that case, Gideon was charged in a Florida state court with breaking and entering a poolroom with intent to commit a misdemeanor.[24] This offense was a felony under Florida law.[25] Appearing in the trial court without funds and without a lawyer, Gideon asked the court to appoint counsel for him.[26] The trial court refused that request, and Gideon was ultimately convicted.[27] The Florida Supreme Court denied habeas corpus relief.[28] The United States Supreme Court then granted certiorari and overturned the Florida Supreme Court's decision.

In rendering its decision in *Gideon*, the United States Supreme Court explained the importance of providing counsel for indigent defendants:

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[21] US Const, Am VI.

[22] Const 1963, art 1, § 20.

[23] *Gideon v Wainwright*, 372 US 335, 342; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[24] *Id*. at 336.

[25] *Id*. at 336-337.

[26] *Id*. at 337.

[27] *Id*.

[28] *Id*.

> [A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[29]

Thus, in our country and in our state, we deem the right to counsel as being both fundamental and necessary to a fair trial. And we accept the proposition that, just as the public pays for prosecutors to prosecute criminal defendants, the public should also pay for counsel to represent such defendants who are too poor to "hire the best lawyers they can get to prepare and present their defenses."[30] But *Gideon* did not address, or even allude to, the question of the *effectiveness* of counsel who represent criminal defendants. The United States Supreme Court did not directly address that

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[29] *Id*. at 344.

[30] *Id*.

question until 20 years later, in *Strickland v Washington*.[31]

C. EFFECTIVENESS OF COUNSEL

In *Strickland*, the United States Supreme Court determined that it was not enough that a person accused of a crime have a lawyer standing by his or her side.[32] Rather, the Court said that the accused is entitled to a lawyer who "plays the role necessary to ensure that the trial is fair":[33]

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[34]

The facts of the *Strickland* case were particularly egregious. As the Court indicated, during a 10-day period in 1976, Strickland planned and committed three sets of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft.[35] At trial, Strickland waived his right to a jury trial, against his counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.[36] Thus, the

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[31] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[32] *Id*. at 684.

[33] *Id*. at 685.

[34] *Id*.

[35] *Id*. at 671-672.

[36] *Id*. at 672.

case revolved around the performance of Strickland's counsel at the sentencing phase of the case, a phase that culminated in the trial court's imposition of the death penalty. The Florida Supreme Court upheld the convictions.[37] Strickland sought postjudgment collateral relief on the basis, among other things, that his counsel had rendered ineffective assistance at the sentencing proceeding.[38] The trial court denied relief,[39] and the Florida Supreme Court affirmed the denial.[40] The case reached the United States Supreme Court through the habeas corpus process.[41]

The United States Supreme Court initially determined that, although Strickland challenged the effectiveness of counsel at the sentencing phase, in a capital case the sentencing phase was "sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial . . . ."[42] Making it doubly sure that there would be no misunderstanding, the Court said that "[f]or purposes of describing counsel's duties, . . . Florida's capital sentencing proceeding need not be distinguished from an ordinary trial."[43]

The Court went on to state that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[44] It enunciated a two-part standard for assessing counsel's assistance to a convicted defendant who claims that such assistance

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[37] *Id*. at 675.

[38] *Id*.

[39] *Id*. at 676.

[40] *Id*. at 678.

[41] *Id*. at 678-683.

[42] *Id*. at 686-687 (citation omitted).

[43] *Id*. at 687.

[44] *Id*. at 688.

was "so defective as to require reversal of a conviction or death sentence . . . ."[45] The first component required a showing that counsel's performance was "deficient"; that is, that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[46] The second component required a showing that the deficient performance prejudiced the defense; that is, that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[47] Applying these standards to the performance of Strickland's counsel, the Court held:

> Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, [Strickland] has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. [Strickland's] sentencing proceeding was not fundamentally unfair.[48]

Of considerable importance, when dealing with the prejudice component, the Court set out several situations in which to presume prejudice. Those situations are "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance."[49] In such circumstances, "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost."[50] Other decisions have delineated those contexts in which prejudice can be presumed, including the right to have

[45] *Id*. at 687.

[46] *Id*.

[47] *Id*.

[48] *Id*. at 700.

[49] *Id*. at 692.

[50] *Id*.

counsel present for a pretrial lineup,[51] the right to a pretrial hearing,[52] and the right of those who do not require appointed counsel to secure counsel of their own choice.[53]

In *People v Pickens*,[54] the Michigan Supreme Court adopted the ineffective assistance standards that *Strickland* articulated. The Court held that the Michigan Constitution offers the same level of protection as the United States Constitution.[55] The United States Supreme Court has recognized that the right to counsel encompasses " 'every step in the proceeding against [a defendant].' "[56] That Court has also acknowledged that "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution," the accused must be guaranteed the presence of counsel at all "critical confrontations."[57]

D. THE DUNCAN PLAINTIFFS' CLAIMS AND THE REQUESTED RELIEF

Neither the United States Supreme Court nor the Michigan Supreme Court has addressed the threshold

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[51] *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 L Ed 2d 387 (1970).

[52] See *Pugh v Rainwater*, 483 F2d 778, 787 (CA 5, 1973), aff'd in part, rev'd in part, and remanded on other grounds *sub nom Gerstein v Pugh*, 420 US 103 (1975).

[53] *Moss v United States*, 323 F3d 445, 456 (CA 6, 2003).

[54] *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

[55] *Id*. at 302.

[56] *Coleman*, *supra* at 7 (citation omitted).

[57] *United States v Wade*, 388 US 218, 227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); see also *Rothgery v Gillespie Co*, *Texas*, 554 US ___, ___; 128 S Ct 2578, 2592; 171 L Ed 2d 366, 383 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.").

question of how courts should approach a Sixth Amendment right to the effective assistance of counsel claim for declaratory and prospective injunctive relief concerning claimed *preconviction* systemic injuries resulting from the representation that indigent criminal defendants are receiving, or would receive, from their court-appointed attorneys. The United States Supreme Court in *Gideon* and *Strickland* was concerned with results, not process. It did not presume to tell the states *how* to ensure that indigent criminal defendants receive effective assistance of counsel.

But that is exactly what the indigent criminal defendants who are the plaintiffs in this case seek to have the judiciary do. In their complaint, the Duncan plaintiffs asserted that under *Gideon* and the Michigan Constitution the named defendants, the state of Michigan and the Governor, have a duty to ensure that indigent defense counsel have the tools necessary to mount a proper defense and to ensure that indigent defendants are not deprived of their right to constitutionally adequate representation. The Duncan plaintiffs further asserted that the defendants "have done essentially nothing to address the problems [of the current system of county responsibility for providing counsel to indigent criminal defendants] or their constitutional obligations."

Notably, at the time of the complaint, appointed attorneys represented each of the Duncan plaintiffs and criminal charges were pending. As the state and the Governor point out, at the time of the complaint none of the Duncan plaintiffs had gone to trial or otherwise had their cases adjudicated. Further, the state and the Governor assert that at the time of the complaint, none of the Duncan plaintiffs had attempted to have their assigned attorneys replaced. Finally, according to the

state and the Governor, since the filing of the complaint, seven of the eight Duncan plaintiffs have been sentenced. (The record is silent regarding whether any of these individuals have made postconviction claims of ineffective assistance of counsel.)

Despite the fact that none of the Duncan plaintiffs had been convicted of anything at the time they filed their complaint, in their prayer for relief, as the majority notes, the Duncan plaintiffs sought a court declaration that the defendants' conduct, failure to act, and practices are unconstitutional and unlawful and sought to enjoin the defendants from subjecting class members to continuing unconstitutional practices.[58] As the majority states, the Duncan plaintiffs requested an order requiring the defendants " 'to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions.' "[59]

In essence, then, the Duncan plaintiffs sought in their complaint to have the judiciary override the Michigan system of local control and funding of legal services for indigent criminal defendants. Clearly, if the judiciary orders the state and the Governor to provide for "indigent defense programs and representation," then the provisions of the indigent criminal defense act will, for all intents and purposes, become a dead letter. Without even the predicate of finding the indigent criminal defense act unconstitutional under *Gideon* and *Strickland*, the judiciary will, if it grants the relief that the Duncan plaintiffs sought in their complaint, inevitably superimpose a statewide and state-funded system for legal services to indigent criminal defendants upon

[58] *Ante* at 259.

[59] *Ante* at 259.

the provisions of that statute. And the people of the state of Michigan will, of course, be called upon the fund such a statewide system.

Of necessity, the judiciary will therefore have substituted its view of proper public policy for that of the Legislature in enacting and amending the indigent criminal defense act. While the majority consistently refuses to directly address the issue of the relief that the Duncan plaintiffs sought in this case,[60] in my view this issue cannot be ignored, and I will return to it again later in this opinion.

II. *CLAIMS* UPON WHICH *RELIEF* CAN BE GRANTED

A. OVERVIEW

On appeal, the state and the Governor defend against the Duncan plaintiffs' claims on a number of grounds, including three that are closely related. First, they assert that the Duncan plaintiffs do not have *standing*. Second, they assert that the Duncan plaintiffs' claims are not *ripe for adjudication* because these claims are too remote and abstract to warrant the issuance of

[60] See, for example, *ante* at 254-255 ("We affirm, holding that . . . the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, *and some level of mandatory injunctive relief, the full extent of which we need not presently define*.") (emphasis added); *ante* at 280-281 ("We can only speculate at this time regarding the measures ultimately needed to be taken in order to come into compliance with the state and federal constitutions, assuming plaintiffs establish their case. Only when all other possibilities are exhausted and explored, as already discussed, do there arise issues regarding appropriations and legislation, the separation of powers, and the full extent of court jurisdiction and authority. *Therefore, we find no need at this time for this Court to conclusively address the questions posed*.") (emphasis added); *ante* at 284 ("In sum, we reiterate that *we decline at this time to define the full extent of the trial court's equitable authority and jurisdiction* beyond that recognized and accepted earlier in this opinion.") (emphasis added).

declaratory and injunctive relief. Third, and more generally, they assert that the Duncan plaintiffs fail to state a claim on which relief can be granted because *declaratory judgment and injunctive relief* are inappropriate in this matter. The trial court rejected the standing and ripeness arguments of the state and the Governor, finding that the Duncan plaintiffs did not first have to be convicted or have a request for new counsel denied for standing and ripeness purposes. With respect to *Strickland* and its standards for assessing ineffective performance of counsel, the trial court made the following statement:

> Defendants have argued that the *Strickland* standards should apply to the case at hand. *Strickland* states that a convicted defendant's claim of ineffective assistance of counsel must show that counsel's performance was deficient, and that the deficient performance did prejudice the defense.
>
> It's not clear to the Court if the *Strickland* standard applies to the plaintiff's [sic] pre-conviction claims of inadequate representation, but the Court does—the Court does not believe that it would have to delve into the circumstances of each particular case as the defendant [sic] claims.

Here, the trial court was wrestling with a conceptual problem that plagues this case and others like it throughout the country. Rather obviously, this case differs from *Strickland* in two important respects. First, it is an appeal involving a civil case, not a criminal one, as was the case in *Strickland*. Second, *Strickland* involved a *post*conviction appeal, while the Duncan plaintiffs filed their complaint in this matter *pre*conviction. The trial court here dealt with this problem by indicating that it was not clear whether *Strickland* applied but, in any event, it did not believe it would have to go into the circumstances of each particular case.

In my view, without explicitly saying so, the trial court here was making a determination that the Duncan plaintiffs' allegations were sufficient to warrant a *presumption* of prejudice. Under such circumstances, according to *Strickland* and its progeny, prejudice is so likely that case-by-case inquiry is not worth the cost.[61]

Rather neatly, then, the trial court's approach avoids the conceptually impossible process in a preconviction case of assessing the performance of the indigent criminal defendant's counsel when, for the most part, that performance has yet to occur. And making something like a finding of prejudice per se and thereby forgoing a case-by-case inquiry would mean, in this case, that if the Duncan plaintiffs could substantiate their claims, then the sweeping declaratory and injunctive relief that they seek would be appropriate under the circumstances.

Thus, the trial court, if somewhat elliptically, but in essence, first found that the Duncan plaintiffs' *claims* were sufficient to create a presumption of prejudice. Then it found that those claims, if proved, would warrant both declaratory and injunctive *relief*. Of course, these are the exact elements with which MCR 2.116(C)(8) deals. That court rule succinctly states that a trial court may grant summary disposition if "[t]he opposing party has failed to state a *claim* on which *relief* can be granted."[62]

On appeal here, the majority cites[63] the patron saint of constitutional interpretation, Chief Justice John Marshall, writing for the Court in *Marbury v Madison*.[64] But Chief Justice Marshall never conceived of the idea of a mandatory injunction to compel legislative appro-

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[61] *Strickland*, *supra* at 692.

[62] Emphasis added.

[63] *Ante* at 337-340.

[64] *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803).

priation of funds. *Marbury v Madison* involved the constitutionality of executive branch *action*. Here, under the approach the Duncan plaintiffs assert and the majority implicitly accepts, the challenge is to legislative and executive branch *inaction*, through the alleged failure to properly fund and administer the system for providing legal services to indigent criminal defendants.

So, within what framework are we to analyze the Duncan plaintiffs' challenge? My basic premise is that we must first determine whether the Duncan plaintiffs' *claims* amount to a violation per se of the Sixth Amendment right to counsel. If so, we must then determine whether the judiciary can grant the *relief* they seek within existing standards for declaratory and injunctive relief. And we must make these determinations with a proper regard for the basic concept of separation of powers.

B. STANDARD OF REVIEW UNDER MCR 2.116(C)(8)

Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone.[65] All factual allegations are taken as true and any reasonable inferences or conclusions that can be drawn from the acts are construed in the light most favorable to the nonmoving party.[66] The motion should be denied unless the claims are so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover.[67] This Court reviews de novo a trial court's ruling on a motion for summary disposition.[68] This Court also reviews de novo constitutional issues such as standing and ripeness.[69]

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[65] *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

[66] *Id*. at 119.

[67] *Id*.

[68] *Id*. at 118.

[69] *Michigan Chiropractic Council v Comm'r of the Office of Financial and Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006).

Accordingly, under the standard of review for a motion under MCR 2.116(C)(8), this Court must take all the Duncan plaintiffs' allegations as true and this Court must construe any reasonable inferences and conclusions that this Court can draw from the acts in a light most favorable to the Duncan plaintiffs. The state, however, in something of an understatement, has conceded both at the trial level and the appellate level that the public defense systems in Michigan can be "improved." Therefore, as required, I accept the Duncan plaintiffs' allegations as true. The question, again, is twofold: did the Duncan plaintiffs assert justiciable *claims* and, if so, are they claims upon which *relief* can be granted? These inquiries, of necessity, require a consideration of standing, ripeness, and the appropriateness of declaratory and injunctive relief.

C. STANDING

To have standing, a plaintiff must first have suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, rather than conjectural or hypothetical.[70] Second, there must be a causal connection between the injury and the complained-of conduct.[71] And third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[72]

D. RIPENESS

The doctrine of ripeness is closely related to the doctrine of standing, as both justiciability doctrines assess pending claims for the presence of an actual or imminent injury in

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[70] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001).

[71] *Id*.

[72] *Id*.

> fact. However, standing and ripeness address different underlying concerns. The doctrine of standing is designed to determine whether a particular party may properly litigate the asserted claim for relief. The doctrine of ripeness, on the other hand, does not focus on the suitability of the party; rather, ripeness focuses on the *timing* of the action.[73]

A claim is not ripe, and there is no justiciable controversy, if " 'the harm asserted has [not] matured sufficiently to warrant judicial intervention,' " for instance, where the claim rests on contingent future events that may not occur.[74] A constitutional issue is not ripe for adjudication unless and until there is an encroachment upon a constitutional right.[75]

E. MCR 2.605

By requiring that there be "a case of actual controversy" and that a party seeking a declaratory judgment be an "interested party," MCR 2.605, the court rule addressing declaratory judgments, incorporates traditional restrictions on justiciability, such as standing, ripeness, and mootness.[76] "The existence of an actual controversy is a condition precedent to invocation of declaratory relief and this requirement prevents a court from deciding hypothetical issues."[77]

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[73] *Michigan Chiropractic Council*, *supra* at 378-379 (emphasis in original).

[74] *Id*. at 371 n 14, 381, quoting *Warth v Seldin*, 422 US 490, 499 n 10; 95 S Ct 2197; 45 L Ed 2d 343 (1975).

[75] *Straus v Governor*, 459 Mich 526, 544; 592 NW2d 53 (1999).

[76] *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 125; 693 NW2d 374 (2005); *Moses, Inc v Southeast Michigan Council of Governments*, 270 Mich App 401, 416; 716 NW2d 278 (2006).

[77] *Huntington Woods v Detroit*, 279 Mich App 603, 616; 761 NW2d 127 (2008) (quotation marks and citation omitted).

F. INJUNCTIVE RELIEF

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury."[78] It is a longstanding principle that " 'a particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction.' "[79] "The mere apprehension of future injury or damage cannot be the basis for injunctive relief."[80]

G. THE DUNCAN PLAINTIFFS' *CLAIMS*

(1) STANDING AND RIPENESS

The majority discusses standing principles to some extent.[81] And toward the end of its opinion it holds, "[O]n the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing . . . ."[82] In the body of its opinion and apparently in support of this and other determinations relating to justiciability, the majority engages in an extended discussion[83] of *Lewis v Casey*.[84] Ironically, *Lewis* was a case in which the United States Supreme Court found that the prison inmate plaintiffs *lacked* standing, although it did so not in the context of the federal counterpart to an MCR 2.116(C)(8) motion

[78] *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008) (quotation marks and citations omitted).

[79] *Id*. at 9, quoting *Michigan Coalition of State Employees Unions v Civil Service Comm*, 465 Mich 212, 225-226; 634 NW2d 692 (2001).

[80] *Pontiac Fire Fighters*, *supra* at 9.

[81] *Ante* at 292.

[82] *Ante* at 328.

[83] *Ante* at 294-301.

[84] *Lewis v Casey*, 518 US 343; 116 S Ct 2174; 135 L Ed 2d 606 (1996).

(failure to state a claim upon which relief can be granted), but rather in the context of an MCR 2.116(C)(10) motion (no genuine issue of material fact and the moving party is entitled to judgment as a matter of law).[85] In the course of its discussion, the majority makes the following statement:

> By analogy, here criminal defendants do not sustain harm, for purposes of justiciability analysis and the constitutional right to the effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing deficiencies. *There needs to be an instance of deficient performance or inadequate representation, i.e., "representation [falling] below an objective standard of reasonableness." Strickland*, *supra* at 688; [*People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000)].[86]

Here, the majority appears to accept the proposition that *Strickland* applies in this matter, at least to an extent that there must be "an instance of deficient performance or inadequate representation." Elsewhere it its opinion, the majority elaborates on this concept:

> We hold that, in the context of this class action civil suit seeking *prospective relief* for alleged widespread constitutional violations, injury or harm is shown when court-appointed counsel's representation *falls below an objective standard of reasonableness (deficient performance)* and *results in an unreliable verdict or unfair trial*, when a criminal defendant is *actually or constructively denied the assistance of counsel altogether at a critical stage in the proceedings*, or when *counsel's performance is deficient under circumstances in which prejudice would be presumed in a typical criminal case*. We further hold that injury or harm is shown when court-appointed counsel's performance or representation is *deficient relative to a critical*

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[85] *Id*. at 357-358.

[86] *Ante* at 297 (emphasis added).

> *stage in the proceedings and, absent a showing that it affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant and meaningful in some fashion, e.g., unwarranted pretrial detention*. Finally, we hold that, when it is shown that court-appointed counsel's representation falls below an *objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and harm occurs*. Plaintiffs must *additionally* show that instances of *deficient performance* and denial of counsel are *widespread and systemic* and that they are caused by weaknesses and problems in the court-appointed, indigent defense systems employed by the three counties, which are attributable to and ultimately caused by defendants' constitutional failures."[87]

This paragraph is more than a little impenetrable but, breaking it down, there are several remarkable things about it. First, it is clearly a *Strickland* analysis in its reference to both deficient performance and prejudice:[88] these are the two prongs that *Strickland* articulates. I grant that the majority, in this passage, does not explicitly refer to *Strickland*. And elsewhere in the opinion, the majority either completely or partially disavows the applicability of *Strickland*.[89]

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[87] *Ante* at 302-303 (emphasis added).

[88] See *ante* at 323 ("[The Duncan p]laintiffs do allege that wrongful convictions have occurred, which suggests satisfaction of the *Strickland* prejudice requirement typically applicable in criminal appeals.").

[89] See *ante* at 266 ("In our justiciability analysis, we will also explore the circumstances in which the prejudice prong of the *Strickland* test is inapplicable."); *ante* at 305 ("We reject the argument that the need to show that this case is justiciable necessarily and solely equates to showing widespread instances of deficient performance accompanied by resulting prejudice in the form of an unreliable verdict that compromises the right to a fair trial."); *ante* at 306 ("Applying the two-part test from *Strickland* here as an absolute requirement defies logic, where the allegations concern widespread, systemic instances of constitutionally inadequate representation and where the requested remedy in the form of prospective relief seeks to curb and halt continuing acts of deficient

But even when viewed in the most forgiving light, there is no discernable difference between the majority's formulation, requiring a showing of "representation [that] falls below an objective standard of reasonableness," and the *Strickland* standard, requiring a showing that counsel's performance was "deficient," that is, that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[90] particularly when "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[91] Nor is there any discernable difference between the majority's formulation of a showing of "a detriment to a criminal that is relevant and meaningful in some fashion" and the *Strickland* standard, which requires a showing that the deficient performance prejudiced the defense; that is, that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[92] Much as the majority may disavow it elsewhere, in its central holding it is applying a *Strickland* analysis. Simply using different words, with essentially the same meaning, does not change the structure underlying the analysis.

But the majority's analysis is *Strickland* with a twist. Even though its entire analysis of justiciability relates to the Duncan plaintiffs' *claims*, the majority takes *Strickland* and applies it to those things that the Duncan plaintiffs must show *at a proceeding on the merits*, presumably before the trial court. Thus, the

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performance."); *ante* at 310 ("Our conclusion that the two-part test in *Strickland* should not control this litigation is generally consistent with caselaw from other jurisdictions addressing comparable suits.").

[90] *Strickland*, *supra* at 687.

[91] *Id*. at 688.

[92] *Id*. at 687.

majority artfully avoids articulating a standard, whether it be *Strickland* or otherwise, by which this Court can evaluate the Duncan plaintiffs' *claims* in this case. Rather, it simply finds that "the allegations in [the Duncan] plaintiffs' complaint are sufficient to establish the existence of a genuine case or controversy between the parties, reflecting a dispute that is real, not hypothetical."[93] This, apparently, is a reference to the requirement that to have standing, a plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, rather than conjectural or hypothetical.[94]

The majority does outline the Duncan plaintiffs' claims,[95] and I contend that any fair and objective review of these claims requires the conclusion that the vast majority of those that involve a concrete, particularized interest can, and should, be resolved in *post*- rather than *pre*conviction proceedings. For these claims to be resolved *pre*conviction requires at least four basic assumptions:

• That the Duncan plaintiffs, and the class members they purport to represent, will in fact be convicted of the crimes with which they are charged or of some lesser offense;

• That inactions of the state and the Governor will have caused such convictions; that is, these inactions will have so prejudiced the defense that the Duncan plaintiffs and the class they purport to represent will have been denied their Sixth Amendment right to a fair trial;

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[93] *Ante* at 304.

[94] *Lee*, *supra* at 739.

[95] *Ante* at 256-259.

• That the trial courts in the three named counties will be unable or unwilling to correct such results by ordering new trials on the basis of a finding of deficient performance and prejudice to the individual defendants; and

• That it is likely that if the Duncan plaintiffs are granted the preconviction declaratory and injunctive relief they seek, this will redress the situation for them and for the class they purport to represent.

The majority is obviously willing to make each of these assumptions, *preconviction*, in order to find a justiciable controversy in this case. I am not. Clearly, these assumptions are conjectural and hypothetical in nature. The Duncan plaintiffs' claims do not, and cannot, show that the inactions of the state and the Governor have caused or will cause a denial of their Sixth Amendment rights. They have not, and cannot, make a showing that the trial courts in the named counties are unwilling or unable to act upon postconviction claims of ineffective assistance of counsel. And, while the relief that the Duncan plaintiffs seek would certainly change, and perhaps even improve, the current system of providing legal services to indigent criminal defendants, they have not, and cannot, show that such relief, even if it were to be granted in its entirety, will bring that system to the level of constitutional adequacy that they deem necessary.

Equally clearly, there is no binding precedent that guarantees an indigent defendant a particular attorney, an attorney of a particular level of skill, or that a predetermined amount of outside resources be available to an attorney. Likewise, there is no Sixth Amendment right to a meaningful relationship with counsel.[96] Ab-

[96] *Morris v Slappy*, 461 US 1, 13; 103 S Ct 1610; 75 L Ed 2d 610 (1983).

sent certain blatant instances amounting to the denial of counsel, appointed counsel is presumed competent unless a defendant can meet his or her burden to demonstrate a constitutional violation.[97]

In this regard, I note that "[c]laims of ineffective assistance are generally to be resolved through an inquiry into the fairness of a particular prosecution, and not by per se rulemaking."[98] But in effect that is what the majority grants in this matter: a holding per se that, standing alone, the Duncan plaintiffs' claims—despite their conjectural and hypothetical nature, despite their lack of a showing of causation, despite their failure to show that a favorable decision will redress the situation they describe—are sufficient to establish standing and, therefore, justiciability. By contrast, I would find that the Duncan plaintiffs, because of the peculiar preconviction posture of this case, lack standing.

The majority takes much the same approach to the question of ripeness. After some discussion of the principles of ripeness,[99] toward the end of its opinion the majority holds that "on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, . . . establish that the case is ripe for adjudication . . . ."[100]

Again, the underlying premises for such a holding, of necessity, are that the Duncan plaintiffs will be convicted; that the inactions of the state and the Governor will have caused such convictions; that the trial courts

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[97] *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[98] *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F2d 637, 647 (CA 4, 1988).

[99] *Ante* at 292-293.

[100] *Ante* at 328.

in the affected counties will be unable or unwilling to correct such results by ordering new trials on the basis of a finding of deficient performance and prejudice to the individual defendants; and that it is likely that granting the Duncan plaintiffs the preconviction declaratory and injunctive relief they seek will redress the situation for them and for the class they purport to represent.

While each of these premises is important, the one concerning causation is critical. The majority states that throughout its opinion it has indicated that the Duncan plaintiffs will have to establish a "causal connection between the deficient performance and the indigent defense systems being employed."[101] That is simply not the causal connection that is relevant in this case. The Duncan plaintiffs have sued the state and the Governor. Therefore, the relevant causal connection must be between the alleged inaction of the state and the Governor and the alleged deficient performance at the local level.

Now, as if repeating a mantra, the Duncan plaintiffs repeatedly aver that there is such a causal connection.[102] But there is not a single fact that they allege in

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[101] *Ante* at 303 n 13.

[102] See, for example, Complaint, ¶ 11 ("This Complaint focuses on how the Defendants' failures to provide funding and fiscal and administrative oversight have *created* a broken indigent defense system in Berrien, Genesee, and Muskegon Counties . . . . Defendants' failure to provide funding or oversight to any of the State's counties have *caused* similar problems throughout the State.") (emphasis added); Complaint, ¶ 28 ("As a *result* of Defendants' failures, [plaintiff Billy Joe Burr's] attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing.") (emphasis added); see also similar generalized allegations in Complaint, ¶¶ 35, 44, 51, 56, 63, and 67; Complaint, ¶ 99 ("As a direct *result* of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense in the three Counties, indigent defense services in the Counties, and elsewhere in the State, are operated at the lowest cost possible and without regard to the constitutional adequacy of the services provided.") (emphasis added); see also similar generalized allegations in Complaint,

their complaint that supports their generalized assertions that the alleged inaction of the state and the Governor has *caused* the deficient performance that the Duncan plaintiffs outline. Moreover, simply repeating the same words again and again does not change their character.

Undoubtedly, the complaint alleges causation. But it does not allege the *necessary* causation. Unsupported generalized allegations are just that, unsupported and generalized. With all due respect to the Duncan plaintiffs and the majority, there is no way it can possibly be proven that the failure of the state and the Governor to do an undefined something specifically *caused* the deficiencies they allege. Intuitively, one might guess that the something is correlated with the alleged deficiencies, even though that something remains undefined beyond mere generalized assertions of inaction. But correlation is not causation, and a hunch is not a basis upon which a court can grant declaratory or injunctive relief.

Indeed, in this regard, the recent opinion of the United States Supreme Court in *Ashcroft v Iqbal*[103] has considerable applicability. That case involved a *Biv-*

¶¶ 103, 104, 109, 113, 118, 120, 123, 125, 126, 130, and 141; Complaint, ¶ 156 ("As set forth herein, Defendant Granholm *fails* to provide funding and oversight to the County programs, and therefore *does nothing* to ensure that the State provides the necessary tools to indigent defense counsel in the Counties.") (emphasis added); Complaint, ¶ 157 ("*As a result* of [the Governor's] *failures* to provide funding and exercise guidance, Michigan's indigent defense system is under funded, poorly administered, and does not provide mandated constitutional protections.") (emphasis added); Complaint, ¶ 160 ("[The Governor's] *failure* to provide the funding and to exercise the oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Sixth Amendment to the United States Constitution, including, but not limited to, their right to effect assistance of counsel.") (emphasis added); see also similar generalized allegations in Complaint, ¶¶ 163, 164, 167, 170, 171, 174, 177, 178, and 181.

[103] *Ashcroft v Iqbal*, 556 US ___; 129 S Ct 1937; 173 L Ed 2d 868 (2009).

ens[104] action that Javaid Iqbal, a Pakistani Muslim arrested on criminal charges and detained by federal officials following the September 11, 2001, terrorist attacks, brought against former United States Attorney General John Ashcroft and Federal Bureau of Investigation Director Robert Mueller.[105] In *Ashcroft*, the majority of the Court held that, under the federal rules of pleading, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[106] The majority also held that "only a complaint that states a *plausible* claim for relief survives a motion to dismiss."[107]

Admittedly, *Ashcroft* is different from this case in a number of significant respects. First, the aspect of Iqbal's complaint that the United States Supreme Court reviewed was his claim for damages, not declaratory or injunctive relief. Second, there is no precise analog in the Michigan Court Rules to FR Civ P 8(a)(2), which requires that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief[.]"[108] Third, the decision in *Ashcroft* was supported only by a bare majority of the Court.

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[104] See *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971), in which the United States Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp v Malesko*, 534 US 61, 66; 122 S Ct 515; 151 L Ed 2d 456 (2001).

[105] *Ashcroft*, 556 US at ___; 129 S Ct at 1942; 173 L Ed 2d at 876.

[106] *Id.*, 556 US at ___; 129 S Ct at 1949; 173 L Ed 2d at 884.

[107] *Id*., 556 US at ___; 129 S Ct at 1950; 173 L Ed 2d at 884 (emphasis added).

[108] But see MCR 2.111(A)(1), which requires that a pleading must be "clear, concise, and direct"; MCR 2.111(B)(1), which requires a "statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend"; and MCR 2.111(B)(2), which requires "[a] demand for judgment for

Nevertheless, it is instructive to consider the element of causation within the framework of the *Ashcroft* analysis. Consider the allegation in ¶ 160 of the complaint that "[d]efendant's failure to provide the funding and to exercise the oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Sixth Amendment to the United States Constitution, including, but not limited to, their right to effective assistance of counsel." Rather obviously, this is a legal conclusion wrapped within a factual allegation. As such, under *Ashcroft*, the requirement that a court must accept this allegation as true would be inapplicable.[109] This is not to say that the assertion of causation is fanciful. Rather, "[i]t is the conclusory nature of [the] allegations . . . that disentitles them to the presumption of truth."[110]

And, secondly, if such allegations regarding causation were not entitled to the presumption of truth, then, under *Ashcroft*, we would examine them for plausibility. And it is here that the Duncan plaintiffs run into an absolute dead end. They cannot plausibly assert that the alleged failures by the state and the Governor have *caused* the alleged deficient performance at the local level for the simple reason, among others, that there is no way they can possibly *prove* such causation. It is conceivable that increased oversight and funding at the state level might improve the current system for providing legal services to indigent criminal defendants. But then again, it is equally conceivable that it might not. And just as I can conjure up no way by which the

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the relief that the pleaders seeks" and that the "pleading must include allegations that show that the claim is within the jurisdiction of the court."

[109] *Ashcroft*, 556 US at ___; 129 S Ct at 1949; 173 L Ed 2d at 884.

[110] *Id.*, 556 US at ___; 129 S Ct at 1951; 173 L Ed 2d at 886.

Duncan plaintiffs can prove their assertion that *inaction* by the state and the Governor has caused the current situation, neither can I conceive of a way by which these defendants can *disprove* that assertion. Thus, we are left with legal conclusions that do not carry the presumption of truth and that are incapable of being proved or disproved. As in *Ashcroft*, there is nothing that nudges the Duncan plaintiffs' complaint " 'across the line from conceivable to plausible.' "[111]

In addition, all the allegations regarding causation in the Duncan plaintiffs' complaint are contingent on future events that may not occur.[112] And, given their contingent nature, I contend that the harm asserted has not matured sufficiently to warrant judicial intervention.[113] I would therefore find that the Duncan plaintiffs' claims are not ripe for adjudication.

(2) THE *LUCKEY* CASES

The majority, in its justiciability discussion, refers to and relies on one of a series of cases familiarly known as the *Luckey* cases.[114] In *Luckey v Harris*,[115] the plaintiffs, preconviction indigent defendants, alleged deficiencies in the Georgia indigent defense system and sought an order requiring the state defendants to meet minimum constitutional standards in the provision of criminal defense services. As the state notes, but the majority fails to recognize, the underlying controversy in *Luckey* actually spawned five different appellate opinions.

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[111] *Id.*, 556 US at ___; 129 S Ct at 1951; 173 L Ed 2d at 885, quoting *Bell Atlantic Corp v Twombly*, 550 US 544, 570; 127 S Ct 1955; 167 L Ed 2d 929 (2007).

[112] *Michigan Chiropractic Council*, *supra* at 371 n 14, 381.

[113] *Id.*

[114] *Ante* at 311-313.

[115] *Luckey v Harris*, 860 F2d 1012, 1013 (CA 11, 1988) (*Luckey I*).

In *Luckey I*, the plaintiffs claimed deficiencies that included inadequate resources, delays in the appointment of counsel, pressure on attorneys to hurry their clients to trial or to enter a guilty plea, and inadequate supervision.[116] The district court dismissed the suit, stating that the plaintiffs were inappropriately seeking an across-the-board ruling that the Georgia criminal defense scheme systematically denied or would inevitably deny effective assistance of counsel to the indigent accused, and holding that the plaintiffs' allegations were insufficient to meet the *Strickland* standard.[117]

But the United States Court of Appeals for the Eleventh Circuit reversed, holding that the plaintiffs' pretrial Sixth Amendment claims did state claims upon which systemic prospective relief could be granted.[118] According to the Eleventh Circuit, the *Strickland* standard was inapplicable to a civil suit seeking prospective relief, observing that "[p]rospective relief is designed to avoid future harm" and concluding that such relief "can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial."[119] The Eleventh Circuit stated that plaintiffs bringing such prospective claims satisfy their pleading burden when they show " 'the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.' "[120] The Eleventh Circuit concluded that "the sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do

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[116] *Id*.

[117] *Id*. at 1016.

[118] *Id*. at 1017-1018.

[119] *Id*. at 1017.

[120] *Id*., quoting *O'Shea v Littleton*, 414 US 488, 502; 94 S Ct 669; 38 L Ed 2d 674 (1974).

not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment."[121]

It is upon this holding that the majority here relies, stating that the opinion of the Eleventh Circuit in *Luckey I* "mirror[s] our thoughts."[122]

However, in the denial of the defendants' petition for rehearing en banc, several judges dissented.[123] According to the dissent, the original *Luckey I* panel's view of the Sixth Amendment was completely inconsistent with the language and rationale of *Strickland*.[124] Quoting *Strickland* and *Cronic*,[125] the dissent in *Luckey II* explained:

> The sixth amendment is inextricably bound up with the fairness of a defendant's trial: "The right to the effective assistance of counsel is recognized *not for its own sake*, but because of the effect it has on the ability of the accused to receive a *fair trial*." "The Sixth Amendment['s purpose] is not to improve the quality of legal representation . . . ." "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, *any deficiencies* in counsel's performance *must be prejudicial* to the defense in order *to constitute ineffective assistance* under the Constitution." Thus, the sixth amendment right to counsel is not an abstract right to a particular level of representation; it is the right to the representation necessary for a fair trial. There can be no sixth amendment violation in the absence of prejudice at a particular trial. Put differently, if there is no prejudice, the alleged sixth amendment violation is not merely harmless; there is no violation at all.

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[121] *Luckey I*, *supra* at 1017.

[122] *Ante* at 312.

[123] *Luckey v Harris*, 896 F2d 479 (CA 11, 1989) (*Luckey II*).

[124] *Id*. at 480 (Edmondson, J., dissenting).

[125] *United States v Cronic*, *supra*.

> Because prejudice is an essential element of any sixth amendment violation, sixth amendment claims cannot be adjudicated apart from the circumstances of a particular case. Put differently, no claim for relief can be stated in general terms as was attempted here.[126]

On remand from the decision in *Luckey II*, the federal district court determined that, but for its belief that the law of the case bound the court, abstention would be appropriate.[127] (Under the abstention doctrine, "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[128] Abstention from interference in state criminal proceedings serves the vital consideration of comity between the state and national governments.[129]) The district court certified the question for appellate review and in *Luckey III*,[130] the Eleventh Circuit granted the defendants' petition for permission to appeal. In *Luckey IV*,[131] the Eleventh Circuit held that the law of the case did not preclude the district court on remand from dismissing the complaint on the basis of the abstention doctrine. Finally, in *Luckey V*,[132] the Eleventh Circuit affirmed the district court's order, which granted dismissal on abstention grounds and cited with approval the dissent in *Luckey II*. In dismissing the case on abstention grounds, the district court stated that "plaintiff's [sic]

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[126] *Luckey II*, *supra* at 480 (Edmondson, J., dissenting) (citations omitted; emphasis added by *Luckey II*).

[127] See *Harris v Luckey*, 918 F2d 888, 891 (CA 11, 1990) (*Luckey III*).

[128] *Younger v Harris*, 401 US 37, 43-44; 91 S Ct 746; 27 L Ed 2d 669 (1971); see 28 USC 2283.

[129] *Younger*, *supra* at 44.

[130] *Luckey III*, *supra* at 894.

[131] *Luckey v Miller*, 929 F2d 618, 622 (CA 11, 1991) (*Luckey IV*).

[132] *Luckey v Miller*, 976 F2d 673, 678-679 (CA 11, 1992) (*Luckey V*).

intend to restrain every indigent prosecution and contest every indigent conviction until the systemic improvements they seek are in place."[133]

The majority basically ignores the dissent in *Luckey II*. But I find that dissent to be both persuasive and applicable here. As in *Luckey*, absent a showing here that their attorneys' claimed deficiencies prejudicially affected their right to receive a fair trial as opposed to merely claiming violation of an abstract right to a particular level of representation, the Duncan plaintiffs cannot show that the state has violated their Sixth Amendment right to a fair trial.[134] In my view and using the language of *Luckey II*, there can be no Sixth Amendment violation in the absence of prejudice at a particular trial. And because prejudice is an essential element of any Sixth Amendment violation, Sixth Amendment claims cannot be adjudicated apart from the circumstances of a particular case. In a nutshell, the Duncan plaintiffs have not stated justiciable claims and neither the trial court nor this Court can appropriately make a finding of prejudice per se. For this reason, as I elaborated earlier in this opinion, the Duncan plaintiffs' Sixth Amendment claims should fail because they are not justiciable as a matter of law.

H. THE *RELIEF* THAT THE DUNCAN PLAINTIFFS SEEK

As I have already noted, the Duncan plaintiffs' complaint sought extensive declaratory and injunctive relief in this case. But, again as I have noted, the majority ostensibly declines throughout its opinion to address the issue of that relief. Rather, the majority holds that "on the basis of the pleadings and at this juncture in the

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[133] *Id*. at 677.

[134] See *Luckey II*, *supra* at 480 (Edmondson, J., dissenting).

lawsuit, plaintiffs have sufficiently alleged facts that, if true, . . . establish that the case . . . state[s] claims upon which declaratory and injunctive relief can be awarded."[135] Beyond that, the majority simply leaves it—perhaps a better phraseology would be, issues an open invitation—to the trial court to "determine the parameters of what constitutes 'widespread', 'systemic,' or 'pervasive' constitutional violations or harm [actual or imminent][.]"[136]

This is not to say, however, that the majority does not give some very overt indications of the type of relief that might be appropriate. Early in its opinion, noting that the Duncan plaintiffs seek prohibitory injunctive relief, the majority observes, "Such a remedy could potentially entail a cessation of criminal prosecutions against indigent defendants absent constitutional compliance with the right to counsel."[137] Having dropped this bombshell, the majority later states:

> We acknowledge that [the Duncan] plaintiffs allege that the systemic constitutional deficiencies have been caused by inadequate state funding and the lack of fiscal and administrative oversight. We further recognize that, should plaintiffs prevail, funding and legislation would seemingly appear to be the measures needed to be taken to correct constitutional violations. However, we are not prepared to rule on the issue whether the trial court has the authority to order appropriations, legislation, or comparable steps. It is unnecessary to do so at this juncture in the proceedings.[138]

But the majority then begins to disclaim its disclaimers. It states:

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[135] *Ante* at 255.

[136] *Ante* at 303-304.

[137] *Ante* at 273.

[138] *Ante* at 278-279.

> We can only speculate at this time regarding the measures ultimately needed to be taken in order to come into compliance with the state and federal constitutions, assuming [the Duncan] plaintiffs establish their case. Only when all other possibilities are exhausted and explored, as already discussed, do there arise issues regarding appropriations and legislation, the separation of powers, and the full extent of court jurisdiction and authority. Therefore, we find no need at this time for this Court to conclusively address the questions posed. *That being said, we wish to make clear that nothing in this opinion should be read as foreclosing entry of an order granting the type of relief so vigorously challenged by defendants*.[139]

The majority then elaborates. First, in the context of federal law and an action under 42 USC 1983, it observes[140] that under *Edelman v Jordan*:

> But the fiscal consequences to state treasuries in these cases [in which officials were enjoined from taking certain actions under circumstances that might lead to impacts on such state treasuries] were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, [209 US 123; 28 S Ct 441; 52 L Ed 714 (1908)].[141]

And, as if that were not sufficient, the majority goes on to discuss *46th Circuit Trial Court v Crawford Co*[142] and concludes:

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[139] *Ante* at 280-281 (emphasis added).

[140] *Ante* at 281.

[141] *Edelman v Jordan*, 415 US 651, 667-668; 94 S Ct 1347; 39 L Ed 2d 662 (1974).

[142] *46th Circuit Trial Court v Crawford Co*, 476 Mich 131; 719 NW2d 553 (2006).

> If indeed there exist systemic constitutional deficiencies in regard to the right to counsel and the right to the effective assistance of counsel, it is certainly arguable that *46th Circuit Trial Court* lends authority for a court to order defendants to provide funding at a level that is constitutionally satisfactory. The state of Michigan has an obligation under *Gideon* to provide indigent defendants with court-appointed counsel, and the "state" is comprised of three branches, including the judiciary. Const 1963, art 3, § 2. Ultimately, it is the judiciary, on a daily basis, that is integrally involved with ensuring that, before prosecutions go forward, indigent defendants are provided counsel, without which the court could not carry out its constitutional responsibilities. *Musselman*[143] did not entail the constitutional implications that arise here, which include the ability of the judicial branch to carry out its functions in a constitutionally sound manner.[144]

And there, at the risk of being colloquial, you have it. In the starkest terms possible, the majority has issued an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties. And with that invitation comes a blank check, to force sufficient state level legislative appropriations and executive branch acquiescence to bring those operations to a point—if such a point could ever be achieved—that satisfies the trial court's determination of the judiciary's responsibilities to carry out its functions in a "constitutionally sound manner."

The policy implications of such an approach are staggering. First, such operational control would override the explicit provisions of the indigent criminal defense act. Second, such operational control would give

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[143] *Musselman v Governor*, 448 Mich 503; 533 NW2d 237 (1995).

[144] *Ante* at 283-284.

the trial court the opportunity, and perhaps even the obligation, to nullify the provisions of the indigent criminal defense court rule, thereby superseding the authority of the Supreme Court and the State Court Administrator. Third, vesting such operational control in one circuit court creates the anomaly of giving that circuit court the power to direct some of the operations of three other, theoretically coequal, circuit courts. Fourth, the record of judicial operational control of executive branch operations, such as prisons[145] and schools,[146] has been, to be charitable, decidedly mixed. Fifth, and finally, such operational control is in direct contravention of the basic concept of separation of powers.

Moreover, as I have noted earlier in this opinion, injunctive relief may issue only when there is no adequate remedy at law. In their complaint, the Duncan plaintiffs baldly asserted that no such remedy exists[147] and the majority scarcely touches upon the adequacy of existing legal remedies other than to disclaim the effectiveness of postconviction review. But, self-evidently, such a remedy does exist. Under *Strickland*, a criminal defendant whose counsel's performance at critical stages of the proceeding was so deficient as to cause prejudice to that criminal defendant can, postconviction, seek judicial intervention and, upon a proper showing, redress. The Duncan plaintiffs, however, seek preconviction intervention and redress without a particularized showing of irreparable harm, based upon the apprehension of future injury or damage. Under such circumstances, declaratory and injunctive relief is not only unwise as a

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[145] *Cain v Dep't of Corrections No 1*, 468 Mich 866 (2003); *Cain v Dep't of Corrections*, 254 Mich App 600; 657 NW2d 799 (2002).

[146] *Milliken v Bradley*, 433 US 267; 97 S Ct 2749; 53 L Ed 2d 745 (1977); *Milliken v Bradley*, 418 US 717; 94 S Ct 3112; 41 L Ed 2d 1069 (1974).

[147] See Complaint, ¶ 153 ("Plaintiffs have no adequate remedy at law.").

policy matter, it is inappropriate as a matter of law. Thus, the Duncan plaintiffs' claims are not justiciable, and the judiciary cannot and should not grant the relief they seek.

III. SEPARATION OF POWERS

The majority invokes a sweeping judicial power to intervene in and determine matters of public policy.[148] It asserts that, lacking such intervention, the Legislature and the Governor would have the power to switch the constitution on and off at will[149] and that this would usher in a regime in which the Legislature and the Governor, not the judiciary, say "what the law is."[150]

There is no question that under separation of powers principles, it is the ultimate responsibility of the judiciary to "say what the law is."[151] But first, those seeking judicial intervention must establish that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.[152] As Chief Justice Rehnquist said in *Raines v Byrd*:

> In the light of th[e] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.[153]

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[148] *Ante* at 255-256.

[149] *Ante* at 255-256, citing *Boumediene v Bush*, 553 US___; 128 S Ct 2229, 2259; 171 L Ed 2d 41, 77 (2008).

[150] *Ante* at 256.

[151] *Marbury*, *supra* at 177.

[152] *Raines v Byrd*, 521 US 811, 820; 117 S Ct 2312; 138 L Ed 2d 849 (1997).

[153] *Id*.

Here, the Duncan plaintiffs would have the judiciary rush in and "settle" their claims using the swift swords of declaratory and injunctive relief, without a particularized showing of irreparable harm and without *any* showing that there is no adequate remedy at law. And they would have the judiciary grant such relief despite their failure to show that they have standing. In *Lee v Macomb Co Bd of Comm'rs*,[154] the Michigan Supreme Court discussed at length the magnitude of the relationship between the standing doctrine and the separation of powers principles:

> [I]n Michigan, as in the federal system, standing is of great consequence so that neglect of it would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government.
>
> Standing, as a requirement to enter the courts, is a venerable doctrine in the federal system that derives from US Const, art III, § 1, which confers only "judicial power" on the courts and from US Const, art III, § 2's limitation of the judicial power to "Cases" and "Controversies." In several recent cases, the United States Supreme Court has discussed the close relationship between standing and separation of powers. In *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996), Justice Scalia, writing for the majority, said:
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> "The doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, 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*. [Citations omitted.]"[155]

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[154] *Lee*, *supra* at 735-741.

[155] *Lee*, *supra* at 735-736 (emphasis added).

The indigent criminal defense act indisputably "shape[s] the institutions of government." But the Duncan plaintiffs do not challenge the constitutionality of that act, either facially or "as applied."[156] Rather, they simply seek to override it, to "switch it off" as it were. The Duncan plaintiffs do not ask the judiciary to "say what the law is" with respect to the indigent criminal defense act. Nor do they challenge the Legislature's enactment of that statute. Rather, they seek to reshape the indigent criminal defense act in a way that they find more desirable. In essence, they seek to have the judiciary *make* the law rather than say what the law is.

It is precisely to such an approach that the doctrine of separation of powers directly applies. Early on, the great constitutional scholar Justice THOMAS M. COOLEY discussed the concept of separation of powers in the context of declining to issue a mandamus against the Governor:

> Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.[157]

Thus, it is the Legislature—where matters of public policy are openly debated and openly decided—whose responsibility it is to make the law. And, by enactment

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[156] See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 n 20; 740 NW2d 444 (2007).

[157] *Sutherland v Governor*, 29 Mich 320, 324 (1874).

of the indigent criminal defense act, the Legislature has done just that, it has made the law. It may now be advisable to change the law. Indeed, the majority recognizes that there are efforts underway to do so.[158] But, to date, those efforts—whether for good reasons or bad—have been unsuccessful. The Duncan plaintiffs invite the judiciary to impose changes that, to date, their advocates have been unable to secure through the legislative process. Again, I would decline the invitation.

But does this mean that there is no role for the judiciary within the framework of the indigent criminal defense act? Of course not. The Michigan Supreme Court has set out that role in the indigent criminal defense court rule: the State Court Administrator is to review local plans to provide legal services to indigent criminal defendants. That review is to "protect the integrity of the judiciary." I grant that such a role is clearly less glamorous, considerably more circumspect, certainly more modest, and conceivably less noble in expression than the role the majority espouses. But within the context of the indigent criminal defense act and applying the principle of separation of powers, it is the judiciary's proper role nonetheless.

IV. CLASS CERTIFICATION

I also disagree with the majority's conclusion that the Duncan plaintiffs have properly pleaded a class action suit.

A member of a class may maintain a suit as a representative of all purported members of the class only if each of the following five requirements is met:

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[158] *Ante* at 280 n 7.

(a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.[159]

The party requesting class certification bears the initial burden of demonstrating that the criteria for certifying a class action are satisfied.[160]

A. NUMEROSITY

The numerosity factor—that the class is so numerous that joinder of all members is impracticable—does not require a specific minimum number of members, "and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large."[161] But the plaintiff must at least "present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members."[162]

In *Zine v Chrysler Corp*, the plaintiffs, purchasers of new Chrysler vehicles, filed proposed class action suits,

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[159] MCR 3.501(A)(1); see *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007); *Zine v Chrysler Corp*, 236 Mich App 261, 286-287; 600 NW2d 384 (1999).

[160] *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 562; 692 NW2d 58 (2004); *Zine*, *supra* at 287 n 12.

[161] *Zine*, *supra* at 287-288.

[162] *Id*. at 288.

alleging that Chrysler violated the Michigan Consumer Protection Act (MCPA)[163] by providing "misleading" information regarding Michigan vehicle purchasers' rights under the state's lemon laws.[164] In analyzing whether the plaintiffs met the class action certification requirements, this Court noted that, while not identifying a specific number of class members, the plaintiffs indicated that the class potentially included "all 522,658 purchasers of new Chrysler products from February 1, 1990, onward."[165] Although seemingly sufficient to satisfy the minimal requirement of "present-[ing] some evidence of the number of class members or otherwise establish[ing] by reasonable estimate the number of class members," this Court held that the plaintiffs failed to satisfy the numerosity requirement because in order to be a class member, the new car buyers must have suffered actual injury to have standing to sue.[166] Accordingly, the plaintiffs were required, but failed, to show that "there [was] a sizable number of new car buyers who had seriously defective vehicles and lost their right to recovery under Michigan's lemon law because they were misled by the documents supplied by Chrysler."[167]

Here, as stated by the majority, the Duncan plaintiffs allege that the purported class that they seek to represent is

> all indigent adult persons who have been charged with or will be charged with felonies in the District and Circuit Courts of Berrien, Genesee, and Muskegon Counties and who rely or will rely on the Counties to provide them with

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[163] MCL 445.901 *et seq*.

[164] *Zine*, *supra* at 263, 265.

[165] *Id*. at 288.

[166] *Id*.

[167] *Id*. at 288-289.

> defense services. The Class includes all indigent adults against whom felony criminal charges will be brought in Berrien, Genesee, and Muskegon Counties during the pendency of this action.[168]

The majority summarily concludes that this purported class "is sufficiently numerous to make joinder of each class member impractical."[169] But, in keeping with the *Zine* analysis, I disagree. As I have concluded earlier in this opinion, the Duncan plaintiffs have failed to show that they themselves have suffered or imminently will suffer an actual injury, by failing to show that the actions or inactions of the state and the Governor have caused or will cause a denial of their Sixth Amendment rights. Therefore, concomitantly, the purported class that they seek to represent—all indigent adult persons who rely or will rely on the counties to provide them with defense services in felony cases—also fails to adequately identify a sufficiently numerous class, by failing to identify class members who have suffered actual injury and therefore have standing to sue. Accordingly, I would conclude that the trial court erred in granting the Duncan plaintiffs' motion for class certification.

B. COMMONALITY AND SUPERIORITY

Because a plaintiff must satisfy each factor of the class action certification analysis, and failure on one factor mandates overall failure of certification, I need not continue to address the remaining factors. However, I comment on these factors to stress the impropriety and impracticality of allowing a class action for the claims alleged.

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[168] See *ante* at 330.

[169] *Ante* at 330-331.

The commonality factor—that there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members—"requires that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.' "[170] Notably, the commonality factor ties in with the superiority factor—the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice—"in that if individual questions of fact predominate over common questions, the case will be unmanageable as a class action."[171]

In *Zine*, the common question was whether Chrysler's new car documents violated the MCPA.[172] However, this Court explained that, even assuming that the plaintiffs prevailed on that question, "the trial court would have to determine for each class member who had purchased a new vehicle whether the vehicle was bought primarily for personal, family, or household use[;] whether the plaintiff had a defective vehicle and reported the defect to the manufacturer or dealer, had the vehicle in for a reasonable number or repairs, was unaware of Michigan's lemon law, read the documents supplied by Chrysler, and was led to believe that Michigan did not have a lemon law, and chose not to pursue

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[170] *Zine*, *supra* at 289, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989).

[171] *Zine*, *supra* at 289 n 14, citing MCR 3.501(A)(2)(c) (stating that to determine whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court must consider "whether the action will be manageable as a class action").

[172] *Zine*, *supra* at 289.

a remedy under the lemon law because of that belief."[173] According to the *Zine* panel, "[t]hese factual inquiries, all of which were subject to only individualized proof, predominate over the one common question and would render the case unmanageable as a class action."[174]

Here, as the majority presents it, the common questions are "whether there have been widespread and systemic constitutional violations, whether the violations were and are being caused by deficiencies in the county indigent defense systems, and whether the systemic deficiencies were and are attributable to or resulted from the action or inaction of defendants."[175] And the majority concedes that "this action will require contemplation of specific instances of deficient performance and instances of the actual or constructive denial of counsel . . . ."[176] The majority then inexplicably goes on to conclude that "[a]ny evidence concerning individual prosecutions has no bearing on those particular criminal cases and the available appellate remedies, except to the extent of any effect on a pending case caused by a systemwide remedy resulting from an order or judgment rendered in this action. The evidence pertaining to individual prosecutions merely constitutes a piece in the larger puzzle relative to establishing a basis for prospective, systemwide relief."[177] Candidly, I do not follow this line of logic.

Nevertheless, in attempting to understand the majority's reasoning, I note that I agree the common question here is "whether the systemic deficiencies were and are attributable to or resulted from the action or

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[173] *Id*. at 290 (citations omitted).

[174] *Id*.

[175] *Ante* at 331.

[176] *Ante* at 331.

[177] *Ante* at 331-332.

inaction of defendants." However, unlike the majority, I do not see the question "whether there have been widespread and systemic constitutional violations" as being a "broad factual question[] common to all members in the class."[178] To the contrary, the determination whether there have been such widespread and systemic constitutional violations will necessarily require the trial court to look at countless cases from each of the three counties to examine whether and how individual indigent defendants have suffered violations of their constitutional rights. Likewise, determining "whether the violations were and are being caused by deficiencies in the county indigent defense systems" will require the trial court to look at untold numbers of individual cases to examine the cause for the purported violations. Unlike the majority, I am unwilling to presume that every alleged deficiency in every indigent criminal defendant's case is the result of the alleged deficiencies in the county indigent defense systems. Indeed, it is conceivable that even attorneys with the best available resources could, for a myriad of reasons, fail to provide adequate representation. Moreover, unlike the majority, I cannot overlook the significance of the fact that this action will require consideration of potentially thousands of specific instances of deficient performance and actual or constructive denial of counsel.[179]

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[178] *Ante* at 331.

[179] See also, for example, *Neal v James*, 252 Mich App 12, 20; 651 NW2d 181 (2002):

> In reviewing the claims of each of the class representatives in the present case, it is apparent that the only common question presented is whether the individuals involved were discriminated against because of their race. How these individuals may have been discriminated against does not involve common issues of fact or law, but highly individualized questions. The individual factual circumstances pertinent to each plaintiff will need to be reviewed, and individual, fact-specific inquires will need to be made in

In sum, as in *Zine*, the potentially necessary individual factual inquiries here predominate over the common question and render the case unmanageable as a class action. And, as in *Neal*, the Duncan plaintiffs have not shown, and cannot conceivably show, a "*specific*" policy or practice that the state and the Governor follow in order to satisfy the commonality requirement. Again, this is so because the Duncan plaintiffs based their entire case against the state and the Governor on generalized assertions of *inaction*. By definition, such inaction cannot be an actionable, specific policy or practice. I would therefore conclude that the trial court erred in determining that the Duncan plaintiffs satisfied the requirements of MCR 3.501 for the certification of a class action.

V. CONCLUSION

I fundamentally disagree with the majority's conclusions, and the rationale supporting those conclusions, with respect to the justiciability of the Duncan plaintiffs' claims and the appropriateness of the declaratory and injunctive relief that the Duncan plaintiffs seek. I further disagree with the majority's conclusions, and the rationale supporting those conclusions, concerning class action certification.

The majority concludes that the Duncan plaintiffs' claims are justiciable. To reach that conclusion, the majority, while ostensibly disavowing *Strickland*, implicitly adopts the square peg of the *Strickland* postconviction analytical framework and then twists it sufficiently to force it into the round hole of the Duncan

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evaluating why certain individuals were not hired or promoted, or why other individuals were discharged or not retained. Plaintiffs have simply not shown that there was any specific policy or practice followed by defendants to satisfy the "commonality" requirement under MCR 3.501.

plaintiffs' preconviction claims of ineffective assistance of counsel. In essence, and without using the word, the majority renders a holding that, standing alone, the Duncan plaintiffs' claims—despite their conjectural and hypothetical nature, despite their lack of a showing that the inaction of the state and the Governor has caused the situation they describe, and despite their failure to show that a favorable decision will redress that situation—are sufficient per se to establish standing, ripeness, and, therefore, justiciability. I disagree. As I noted earlier in this opinion, the Duncan plaintiffs cannot plausibly assert that the alleged failures by the state and the Governor have *caused* the alleged deficient performance at the local level because there is no way they can possibly *prove* such causation. In sum, we are left solely with generalized legal conclusions regarding causation that should not carry the presumption of truth and that are incapable of being proved or disproved.

And, as the *Luckey II* dissent stated, there can be no Sixth Amendment violation in the absence of prejudice at a particular trial. And because prejudice is an essential element of any Sixth Amendment violation, Sixth Amendment claims cannot be adjudicated apart from the circumstances of a particular case. Here, the Duncan plaintiffs have not stated justiciable claims and neither the trial court nor this Court can appropriately make a finding of prejudice per se.

With respect to the relief that the Duncan plaintiffs seek, the majority repeatedly declines to address this issue directly. But the broad implications of the majority's opinion are clear. The majority's opinion admits that such relief could potentially entail a cessation of criminal prosecutions against indigent defendants in Berrien, Genesee, and Muskegon counties, absent con-

stitutional compliance with the right to counsel. The majority's opinion invites the trial court to assume ongoing operational control over the current systems for providing counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties and, if necessary, to force sufficient state level legislative appropriations and executive branch acquiescence to bring those operations to a point—if such a point could ever be achieved—that satisfies the trial court's determination of the judiciary's responsibilities to carry out its functions in a "constitutionally sound manner."

And we should not be deceived. State operation and funding of legal services in Berrien, Genesee, and Muskegon counties will inevitably lead to the operation and funding of such services throughout the state, overriding the provisions of the indigent criminal defense act and the indigent criminal defense court rule. Indeed, this is the ultimate relief that the Duncan plaintiffs seek.

Not only are the policy and fiscal implications of such a situation staggering, it is blackletter law that injunctive relief may issue only when there is no adequate remedy at law. Self-evidently, such a remedy exists here. Under *Strickland*, if the Duncan plaintiffs can show, postconviction, that their counsel's performance at critical stages of the proceeding was so deficient as to cause prejudice to them, they can seek judicial intervention and redress. The sweeping preconviction declaratory and injunctive relief that the Duncan plaintiffs seek is simply inappropriate, and a proper respect for the basic concept of separation of powers requires that the judiciary decline to issue such relief.

I should note that were I a member of the Legislature, I might well vote for a system that would have the state assume some or all of the expense of defending

poor persons accused of crimes. I would do so because I am well aware of the constitutional right to counsel that *Gideon* enunciated in 1963 and the constitutional right to effective counsel that *Strickland* enunciated in 1984. There is little question in my mind that our state has not fully met its obligations under these landmark decisions. I have so stated publicly, as have other members of the judiciary.[180]

But I am not a member of the Legislature. I am a member of an intermediate error-correcting court, not a policy-setting one. And I firmly believe that the reach of the judiciary should not exceed its grasp; that is, the concept of judicial modesty requires us to refrain from assuming functions that the legislative and executive branches are best equipped, and constitutionally required, to undertake. I conclude that—even though the

[180] In 1986, Chief Justice G. MENNEN WILLIAMS, in his State of the Judiciary speech, called for a statewide system of equal justice, saying that such a system "remains to be fully implemented . . . and it only can be fully implemented through state financing." National Legal Aid & Defender Association, Evaluation of Trial Level Indigent Defense Systems in Michigan: A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis (June 2008), p 11. Similarly, Chief Justice DOROTHY COMSTOCK RILEY urged the state to "step in and relieve the counties of a burden they could not afford to meet," a point she made again in her 1988 and 1990 State of the Judiciary speeches. *Id*. In 1992, Chief Justice MICHAEL CAVANAGH in his forward to the Michigan Bar Journal's edition on Michigan's indigent defense system, stated, "[I]t is unfortunate that as we mark the 200th Anniversary of the *Bill of Rights* and extol its important guarantees, we at the same time witness the failure to secure those guarantees, adequately or at all, to significant segments of society." *Id*. at 12. And in 1995, Chief Justice JAMES BRICKLEY released the Supreme Court's report entitled *Justice in Michigan: A Report to the People of Michigan from the Justices of the Michigan Supreme Court*, in which the Court declared, among other things: "The state should assume the core costs of the court system, including judicial salaries and benefits, the salaries and benefits of court staff, due process costs *including the cost of indigent representation*, and the cost of statewide information technology." *Id*. at 11-12 (emphasis added).

state and the Governor virtually concede the inadequacies of the current Michigan system for indigent criminal defense—the trial court erred when it denied the state and the Governor's motion for summary disposition under MCR 2.116(C)(8) and, consequently, when it granted the Duncan plaintiffs' motion for class certification. I would therefore reverse and remand for the entry of summary disposition in favor of the state and the Governor.

DUSKIN v DEPARTMENT OF HUMAN SERVICES

Docket No. 279151. Submitted December 3, 2008, at Detroit. Decided June 11, 2009, at 9:05 a.m.

Rodney Duskin and 15 other racial and ethnic minority males employed by the Department of Human Services (DHS) brought a disparate treatment, employment discrimination action against the DHS in the Ingham Circuit Court, alleging discrimination based on race, ethnicity, and gender with respect to promotions to supervisory and managerial positions. The court, Beverley Nettles-Nickerson, J., granted the plaintiffs' motion for certification of a class of plaintiffs comprised of all minority male employees of the DHS, including 616 African-American, Hispanic, Arab, and Asian males in various departments and offices throughout the state. The plaintiffs sought a permanent injunction to stop discrimination against minority male employees, an order requiring the DHS to promote minority male employees to positions that were denied to them, and an award of monetary compensation for opportunities for promotions that were withheld from the class members. The Court of Appeals, OWENS, P.J., and O'CONNELL and SCHUETTE, JJ., granted the defendant's application for leave to appeal the order granting class certification in an unpublished order entered March 3, 2008 (Docket No. 279151).

The Court of Appeals *held*:

The trial court erred by concluding that the plaintiffs satisfied the requirements for class certification stated in MCR 3.501. The order granting class certification must be reversed.

1. The plaintiff failed to identify a policy or practice of the DHS that affects the job opportunities of only ethnic and minority males.

2. The plaintiffs failed to satisfy the numerosity requirement of MCR 3.501(A)(1)(a). The plaintiffs submitted inadequate information for the trial court to perform the rigorous analysis necessary to reasonably estimate the true number of African-American, Hispanic, Arab, and Asian male employees who might have suffered a compensable injury. Absent factual assertions about the plaintiffs' specific circumstances related to denial of advancement opportunities, the plaintiffs were required to demonstrate a pat-

tern and practice of discrimination throughout the department. Alternatively, the plaintiffs could have shown that the class representatives were denied promotional opportunities for which they were qualified under circumstances giving rise to an inference of discrimination, and then establish a factual and legal nexus between their claims and those of the proposed class. The plaintiffs failed to make such a showing.

3. The plaintiffs failed to satisfy the commonality requirement of MCR 3.501(A)(1)(b) because the predominant factual and legal inquiries involved are too individualized for class treatment.

4. The plaintiffs failed to satisfy the typicality requirement of MCR 3.501(A)(1)(c). The plaintiffs did not articulate a factual basis to confirm their individual disparate treatment claims and failed to connect their allegations to the other members of the class. Individualized questions clearly predominate over any questions common to the proposed class, and the plaintiffs failed to show that the representative plaintiffs' claims are typical of the class.

5. The record is devoid of information regarding whether the plaintiffs' counsel is qualified to pursue the class action. Therefore, the trial court erred by concluding that the plaintiffs satisfied the requirement of MCR 3.501(A)(1)(d) that the representative parties will fairly and adequately assert and protect the interests of the class. The nature of the plaintiffs' claims make it a virtual certainty that the interests of the individual class members will conflict.

6. The maintenance of this action as a class action fails to meet the superiority requirement of MCR 3.501(A)(1)(e) because in this case individualized inquiries clearly predominate over any common questions.

Reversed.

1. ACTIONS — CLASS ACTIONS — CERTIFICATION OF CLASS — BURDEN OF PROOF.

The burden is on the plaintiff to show that the requirements for class certification exist; the plaintiff must be reasonably specific in demonstrating that the conditions for certification have been met; a class may be certified only if the trial court is satisfied, after a rigorous analysis, that the prerequisites stated in MCR 3.501 have be satisfied.

2. ACTIONS — CLASS ACTIONS — CERTIFICATION OF CLASS — NUMEROSITY REQUIREMENT.

A representative plaintiff in a class action may not simply allege a large number of class members to meet the numerosity requirement for class certification; such plaintiff must have suffered an actual injury and show that the class members also suffered the

injury for which the lawsuit seeks redress; the numerosity requirement is not met if only a portion of the class would have viable claims (MCR 3.501[A][1][a]).

3. ACTIONS — CLASS ACTIONS — CERTIFICATION OF CLASS — COMMONALITY REQUIREMENT.

A plaintiff seeking class certification must be able to demonstrate that all members of the class had a common injury that could be demonstrated with generalized proof rather than evidence unique to each class member; the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof to meet the commonality requirement for class certification (MCR 3.501[A][1][b]).

4. ACTIONS — CLASS ACTIONS — TYPICALITY OF CLAIMS.

The claims of representative plaintiffs in a class action and unnamed class members are not typical where the defendant may have genuine defenses with regard to the claims of some plaintiffs that are not applicable to unnamed class members.

5. ACTIONS — CLASS ACTIONS — CERTIFICATION OF CLASS — ADEQUACY REQUIREMENT.

A two-step inquiry is applicable in determining whether representative parties can fairly and adequately represent the interests of the class as a whole: first, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action and, second, the members of the advanced class must not have antagonistic or conflicting interests (MCR 3.501[A][1][d]).

Daryle Salisbury for the plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Cynthia A. Arcaro* and *Ann M. Sherman*, Assistant Attorneys General, for the defendant.

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

SAAD, C.J. Defendant, the Department of Human Services, appeals the trial court's order granting plain-

tiffs' motion for class certification. For the reasons set forth in this opinion, we reverse.

I. NATURE OF THE CASE

In this employment discrimination case, plaintiffs sought and received class certification for their claims that Michigan's Department of Human Services (DHS) discriminatorily denies male, but not female, racial and ethnic minorities a sufficient number of promotions to supervisory and management positions. We hold that the trial court clearly erred by certifying this matter as a class action because plaintiffs plainly did not meet their burden of satisfying the rigorous requirements of MCR 3.501, especially the commonality and typicality requirements. The commonality and typicality requirements address the key inquiry in purported class actions—are there common questions of law and fact that are susceptible to generalized proofs, or, do individualized questions and proofs predominate, thus making class treatment inappropriate. And, it is the very nature of plaintiffs' claims that answers this dispositive inquiry. Importantly, plaintiffs fail to identify any policy or practice of the DHS that affects the job opportunities of only ethnic minority males. Instead, plaintiffs make the general allegation that there are insufficient numbers of minority males in management or supervisory positions and they attribute this to what they characterize as a "culture" of discrimination. This contention, of course, is a broad, conclusory allegation that the DHS has a bias against racial and ethnic minority males because there are fewer minority males in higher positions. Yet, a numerical disparity standing alone means nothing, and is simply a number compared to a different number. A statewide organization like the DHS has a great diversity of jobs and job requirements,

and the determination whether there has been discrimination in awarding promotions will be very fact-intensive and highly individualized and, thus, entirely inappropriate for class treatment.

Further, the question of who among many candidates is "best qualified" for a particular job opening is a complex question even when a single promotion is examined. Indeed, for each promotion, during the six years at issue here, the fact-finder must examine the number of applicants, the relevant DHS and pre-DHS work experience and performance reviews of each candidate, the educational requirements and qualifications of the successful and unsuccessful applicants, and the identity of various decision makers in a variety of positions and locations throughout the state. It simply strains credulity to suppose that a jury can render an across-the-board judgment concerning hundreds or thousands of promotional opportunities over many years, in various locations throughout the state, by a variety of decision makers, and involving hundreds or thousands of candidates of varying races, ethnicities, and genders, and each with different experience, education, and performance reviews.

Plaintiffs' case is particularly not conducive to class treatment because it also encompasses claims involving various racial or ethnic groups and both male and female job candidates. Specific allegations would potentially include a claim by a man of Arab descent who was denied a promotion that was given to a woman of Arab descent, or an African-American man who was denied a promotion that was given to a Hispanic woman or to a Caucasian man. Such questions demand individual treatment, particularly where successful candidates are also part of a protected class or share some of the characteristics that plaintiffs claim constituted dis-

criminatory reasons to deny them promotional opportunities. Moreover, it is a virtual certainty that the interests of the individual plaintiffs will conflict because it is likely that more than one plaintiff is seeking appointment to and compensation for the same position that was allegedly wrongfully denied.

Therefore, after reviewing the allegations, the applicable law, and the briefs and arguments of the parties, we hold that plaintiffs' claims are not appropriate for class action litigation and that the trial court clearly erred by so finding.

II. FACTS AND PROCEDURAL HISTORY

In this disparate treatment, employment discrimination suit, plaintiffs allege discrimination based on race, ethnicity, and gender in promotions to supervisory and management positions. The proposed class is comprised of all "minority" male employees of the DHS, including 616 African-American, Hispanic, Arab, and Asian males in various departments and offices throughout the state.[1] Plaintiffs maintain that, since 2003, fewer minority males have been promoted within the DHS to the positions of program manager, district manager, county director, and first line supervisor because of "department wide cultural deficiencies regarding minority males." According to plaintiffs, these deficiencies include: ineffective communication with minority males; a failure to neutrally and consistently apply promotional policies, criteria, and procedures; a real or perceived preference for the promotion of nonminority male or female candidates; a failure to recruit or ap-

[1] Since the filing of this appeal, the parties agree that a small percentage of potential plaintiffs have opted out of the class. However, because our analysis focuses on plaintiffs' 2007 motion for class certification in the trial court, we need not address this issue in this opinion.

point minority males to the DHS leadership academy[2] and supervisory positions; and a failure to hold accountable and train managers about promoting and working with minority males. Plaintiffs assert that some of the plaintiffs applied for and were denied promotions or training opportunities for which they were qualified and some of the plaintiffs were "too discouraged to apply" for promotions "due to [their] frustration with some of [the DHS's] supervisory and management employees' discriminatory attitudes and practices involving racial and gender bias directed against minority males . . . ."

On the basis of the above grounds, plaintiffs allege that the DHS violated the equal protection and antidiscrimination clause of Const 1963, art 1, § 2, and the Civil Rights Act, MCL 37.2101 *et seq*. Plaintiffs asked the trial court to enter a permanent injunction to stop discrimination against minority male employees, to order the DHS to promote minority male employees to positions that were denied them, and to provide monetary compensation for promotional opportunities withheld from class members.

In support of their claims, plaintiffs largely rely on an internal memo authored by DHS Chief Deputy Director Laura Champagne, dated January 5, 2006. The memo provides, in part:

> The Office of Equal Opportunity and Diversity Programs (EODP) is currently undertaking a series of case studies. These case studies will look at identifying barriers that specific groups of employees may have in either

[2] According to a memo authored by DHS Chief Deputy Director Laura Champagne, the DHS leadership academy trains employees with leadership potential for senior level positions "through a variety of learning opportunities including assessment of personal strengths and areas needing development, developmental planning, mentoring, action learning, developmental assignments and learning forums."

> applying for or being successful in being promoted into District Manager, County Director, Section Manager, and first line FIM or Services supervisor positions. The first part of the study will focus on the impact on minority males in the department for the above named positions.

On the basis of data collected from the DHS leadership academy, hiring data, and information gathered through a focus group, the memo cites its "major finding" as follows: "A disparity exists in minority males being promoted into upper management positions, more specifically program manager, district manager, county director and first line supervisory positions throughout the Department." The recommendations to correct the problem include: providing applicants with more information about screening criteria and job requirements; facilitating access to position postings; expanding interview training; requiring department-wide consistency in application submission requirements, screening criteria, and hiring policies; preventing "working out of class" candidates from competing for positions; requiring diversity on interviewing panels; and implementing targeted recruiting for the leadership academy.

Plaintiffs filed their complaint on May 24, 2006, and moved to certify the class on January 8, 2007. The DHS opposed the motion and argued that plaintiffs failed to satisfy the requirements for class certification under MCR 3.501(A)(1). Citing *Neal v James*, 252 Mich App 12; 651 NW2d 181 (2002), and *Zine v Chrysler Corp*, 236 Mich App 261; 600 NW2d 384 (1999), the DHS further asserted that plaintiffs' claims are not appropriate for class treatment. The trial court granted plaintiffs' motion for certification and ruled that plaintiffs' proposed class satisfies the requirements under MCR 3.501(A)(1). With regard to the DHS's case citations, the court simply opined:

> The case at bar, unlike *Neal* or *Zine*, alleges that [the DHS's] studies identified barriers that specific groups of employees may have in either applying for or being considered for promotion into upper level supervisory positions. In *Neal* and *Zine*, there were no such studies performed. The issues in this case deal with broader, state-wide departmental disparate treatment relating to the lack of minority males in upper management positions. Incumbent in that issue is the allegation of bias and employment discrimination based on culture, race, and gender.

Thereafter, the trial court denied the DHS's motion for reconsideration, the DHS filed an application for leave to appeal, and this Court granted the application.

III. ANALYSIS

A. STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's ruling on class certification under the "clearly erroneous" standard. *Zine*, *supra* at 270. "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Neal*, *supra* at 15. As the Court in *Neal* explained at 15:

> Pursuant to [MCR 3.501(A)(1)], one or more members of a specific class may bring suit on behalf of other members of the class only if the following elements are shown to exist:
>
> "(a) the class is so numerous that joinder of all members is impracticable;
>
> "(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> "(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

> "(d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> "(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice."

"The burden is on the plaintiff to show that the requirements for class certification exist." *Neal*, *supra* at 16. With regard to that burden, a plaintiff must provide reasonable specificity in the pleadings to demonstrate that the conditions for certification have been met. *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982).[3] As the United States Supreme Court further explained in *Falcon*:

> As we noted in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 [98 S Ct 2454; 57 L Ed 2d 351 (1978)], "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Id*., at 469 (quoting *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 558 [83 S Ct 520; 9 L Ed 2d 523 (1963)]. Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. [*Falcon*, *supra* at 160.]

Most importantly, a class "may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of [the court rule] have been satisfied." *Id*. at 161 (emphasis added).

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[3] Though our Court is not bound by federal decisions interpreting Michigan law, *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 604; 673 NW2d 111 (2003), because there is limited caselaw in Michigan addressing class certification, we may refer for guidance to federal cases construing the federal rules on class certification, *Neal*, *supra* at 15.

B. NUMEROSITY

The first requirement for class certification is that "the class is so numerous that joinder of all members is impracticable[.]" MCR 3.501(A)(1)(a). In *Zine*, *supra* at 287-288, this Court opined:

> There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. [Citations omitted.]

It is not enough for a plaintiff to assert the existence of a large number of class members. To maintain a lawsuit, the plaintiffs must have suffered an actual injury and, therefore, a plaintiff must show that the class members suffered the injury for which the lawsuit seeks redress. *Id*. at 289. In other words, the numerosity requirement is not met if only a portion of the class would have viable claims.

Here, the trial court ruled that plaintiffs met the numerosity requirement because the assertion with regard to the 616-member class is the same, "that [DHS's] promotional departmental deficiencies creat[ed] an upper-level management disparity . . . ."[4] However, the crux of plaintiffs' complaint is that plain-

[4] We note that most of the arguments on class certification were conducted off the record by the trial court. The record further indicates that the parties discussed certain evidence and statistical information in chambers. It is not apparent from the record what evidence the trial court relied on in granting plaintiffs' motion for class certification.

tiffs were denied promotions and, as a remedy, plaintiffs ask the trial court to promote minority male employees to positions denied to them because of discrimination and to compensate them for promotional opportunities they lost. *Zine* illustrates how the trial court clearly erred by ruling that the numerosity requirement is satisfied here. In *Zine*, the named plaintiffs alleged that booklets provided to purchasers of Chrysler vehicles contained misleading information about car buyers' remedies if they received a defective vehicle. *Zine*, *supra* at 265. While the plaintiffs claimed that the class would include more than half a million people who bought Chrysler vehicles, this Court ruled that the plaintiffs failed to satisfy the numerosity requirement. *Id*. at 289. As the Court explained:

> Neither Zine nor the Terrys[5] identified a specific number of class members, but indicated that the class potentially included all 522,658 purchasers of new Chrysler products from February 1, 1990, onward. However, class members must have suffered actual injury to have standing to sue, *Sandlin* [*v Shapiro & Fishman*, 168 FRD 662, 666 (MD Fla, 1996)], so plaintiffs must show that there is a sizable number of new car buyers who had seriously defective vehicles and lost their right to recovery under Michigan's lemon law because they were misled by the documents supplied by Chrysler. Neither Zine nor the Terrys indicated even approximately how many people might come within this group, nor did they indicate a basis for reasonably estimating the size of the group. Therefore, both Zine and the Terrys failed to show that the proposed class is so numerous that joinder of all members is impracticable. [*Zine*, *supra* at 288-289.]

Here, when plaintiffs moved for class certification, they offered the following argument to show that the purported class fulfills the numerosity prerequisite:

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[5] T. Leonard Terry and Lois Terry were the representative plaintiffs in *Zine*'s companion case, *Terry v Chrysler Corp*.

> Defendant currently employs 616 minority males. Joining and trying 616 separate lawsuits involving repetition of evidence and testimony would not only constitute an impracticable process for the court system, but an extremely time consuming process for [the DHS's] management employees. Those crucial management employees would have no time to do their work. Class certification would eliminate that burden.

This does not satisfy the numerosity requirement under MCR 3.501(A)(1)(a). While we do not decide the merits of plaintiffs' claims, the crux of a disparate treatment claim based on a failure to promote is that the defendant allegedly discriminated against the plaintiffs in its promotional decisions on the basis of the plaintiffs' race, ethnicity, and gender. Plaintiffs have made no showing of the approximate number of minority male employees of the DHS who applied for managerial positions for which they were qualified. The record also contains no information suggesting that less qualified female or nonminority male candidates received the promotions under circumstances giving rise to an inference of unlawful discrimination. Furthermore, plaintiffs seek relief in the form of appointments to management positions and monetary compensation for promotions and training opportunities they were allegedly denied because less qualified nonminority or female candidates were promoted or accepted into the leadership academy as a result of the DHS's allegedly discriminatory policies. Though plaintiffs were not required to submit evidence with regard to every promotional opportunity each class member should have received and did not, it was incumbent upon plaintiffs to adequately define the class and to provide sufficient information to discern how many people fall within this group. By simply including in the class every African-American, Arab, Hispanic, and Asian male employed by

the DHS and asserting that the class is large, plaintiffs failed to meet their burden of demonstrating that the numerosity requirement has been met.

To at least raise a presumption that each of the proposed class members suffered a compensable injury, plaintiffs could have shown that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Int'l Brotherhood of Teamsters v United States*, 431 US 324, 336; 97 S Ct 1843; 52 L Ed 2d 396 (1977). In other words, absent factual assertions about the plaintiffs' specific circumstances related to denial of advancement opportunities, plaintiffs were required to demonstrate a pattern and practice of discrimination throughout the department. *Id*. Alternatively, plaintiffs could have shown that the class representatives were denied promotional opportunities for which they were qualified under circumstances giving rise to an inference of discrimination, and then "establish a factual and legal nexus between their claims and those of the proposed class." *Reyes v Walt Disney World Co*, 176 FRD 654, 658 (MD Fla, 1998), citing *Morrison v Booth*, 763 F2d 1366, 1371 (CA 11, 1985). Plaintiffs made no such showing.

Though plaintiffs submitted some evidence that there is a disparity in the number of minority males in management positions at the DHS, and that a focus group of minority males perceived the disparity to be the result of discrimination against minority males, plaintiffs have made no factual showing that the DHS engages in systemic discrimination against minority males in order to raise a presumption that every minority male employee suffered discrimination through the denial of promotions or training opportunities. In other words, the existence of a disparity is not enough to establish that plaintiffs were the victims of discrimina-

tion. Plaintiffs also made no factual showing that the representative plaintiffs were denied promotional opportunities because of discrimination along with evidence that would " 'bridge the gap' between their claims and those of the putative class." *Reyes*, *supra* at 658, citing *Falcon*, *supra* at 157-158.

We find equally unavailing plaintiffs' attempt to expand the number of affected employees by asserting that some class members chose *not* to pursue promotional opportunities because of their *perception* of racism and gender bias. Were we to accept this as a viable legal claim, it nonetheless fails without some showing of a pervasive practice or procedure of discrimination and the estimated number of minority male employees who had promotional opportunities for which they were qualified but decided that, in light of alleged persistent discriminatory practices, pursuing the opportunities would be futile. Simply put, plaintiffs submitted inadequate information for the trial court to perform the "rigorous analysis" necessary to reasonably estimate the true number of African-American, Arab, Hispanic, and Asian male employees who might fit within the parameters of the case. *Falcon*, *supra* at 161. For these reasons, we hold that the trial court clearly erred when it ruled that plaintiffs satisfied the numerosity requirement.

C. COMMONALITY AND TYPICALITY

Plaintiffs also failed to establish that the commonality and typicality requirements under MCR 3.501(A)(1)(b) and (c) are satisfied. As this Court explained in *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599; 654 NW2d 572 (2002), "MCR 3.501(A)(1)(b) prescribes that, to certify a class action, there must be common questions of law or fact that predominate over individual questions." In *Zine*, *supra* at 289, this Court further opined:

> The common question factor is concerned with whether there "is a common issue the resolution of which will advance the litigation." *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998), cert den 524 US 923; 118 S Ct 2312; 141 L Ed 2d 170 (1998). It requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989).

This Court further explained in *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 563-564; 692 NW2d 58 (2004):

> "It is not every common question that will suffice . . . ; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague* [*v Gen Motors Corp*, 133 F3d 388, 397 (CA 6, 1998)]. A plaintiff seeking class-action certification must be able to demonstrate that "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member . . . . [T]he question is . . . whether 'the common issues [that] determine liability predominate.' " *A&M Supply* [*supra* at 600] (citations omitted).

In other words, for a proper class certification, plaintiffs had to do more than assert that a common question exists. Rather, to meet their burden, plaintiffs had to demonstrate that, with regard to the entire class, common factual and legal questions subject to generalized proofs predominate over individualized questions and individualized proofs.

The typicality requirement often merges with the question of commonality. *Falcon*, *supra* at 157 n 13. A showing of typicality ensures that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" MCR 3.501(A)(1)(c).

" 'While factual differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and . . . [be] based on the same legal theory." ' " *Neal*, *supra* at 21, quoting *Allen v Chicago*, 828 F Supp 543, 553 (ND Ill, 1993) (citations omitted). "Both [the commonality and typicality requirements] serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, *supra* at 157 n 13. To that end, it is axiomatic that class certification is improper "where the interests of class representatives and class members are antagonistic." *Bobbitt v Academy of Court Reporting, Inc*, 252 FRD 327, 342 (ED Mich, 2008).

In support of their motion for class certification, plaintiffs asserted that, on the basis of the disparity in the number of racial and ethnic minority male supervisors and managers at DHS, common issues predominate because causes for the disparity include ineffective communication, a non-gender-neutral promotion process, inconsistent policy application, inconsistent application and screening criteria, lack of accountability, and failure to target minority males in recruiting efforts. The trial court ruled that plaintiffs met the commonality requirement for the following reasons: "there are common questions of law and/or facts including, but not limited to, [the DHS's] alleged failure to implement gender neutral criteria for promotion, screening criteria, statistical feedback and accountability." We hold that the trial court clearly erred when it found that plaintiffs satisfied the commonality requirement be-

cause the predominant factual and legal inquiries involved are clearly too individualized for class treatment.

Plaintiffs allege that they applied or were available for promotions or acceptance into the leadership academy and that they were denied one or more advancement and training opportunities. Plaintiffs further allege that some or all of the plaintiffs chose not to apply for one or more promotions because they were discouraged by cultural deficiencies at the DHS. Unlike disparate impact claims involving a challenge to a specific employment practice, a claim of disparate treatment "weighs against finding the commonality and typicality . . . ." *Washington v Brown & Williamson Tobacco Corp*, 959 F2d 1566, 1570 n 10 (CA 11, 1992). "Such claims, by their nature, are highly individualized and are, therefore, not generally susceptible to class treatment." *Reyes*, *supra* at 658.

Plaintiffs attempt to couch their alleged injuries as resulting from a general "culture" of discrimination against racial and ethnic minority males but, again, they have shown no policy or practice of discrimination by the DHS that would suggest that common questions predominate over individual ones. While plaintiffs claim that the internal memo suggests that the DHS acknowledges its own discriminatory practices, the document says no such thing. To the contrary, it merely acknowledges a disparity in the number of minority males in management positions, sets forth complaints by volunteers in the focus group, and recommends that managers generally provide more information about open positions, ensure consistency in application and hiring policies, target more employees for the leadership academy, provide interview training, and ensure diversity on interview panels. This does not, in any sense, suggest the presence of a standardized employ-

ment practice or policy of discrimination. *Neal*, *supra* at 18. Nor does a numeric disparity suggest that any individual discrimination occurred where individual promotional decisions are based on nondiscriminatory reasons such as work experience, education, time on the job, work evaluations, or the superior qualifications of other applicants. Again, these are all based on individual hiring decisions and do not implicate an across-the-board policy.

Indeed, plaintiffs provide no facts with regard to their allegations of gender-biased, ethnically biased, or racist promotional decisions. The memo states that members of the focus group believed that candidates are preselected for positions and they complained about a lack of information and encouragement from managers. They discussed their "perception" that managers hire their friends or relatives of friends and that they have a "perception" that the DHS has a discriminatory culture. But nothing in the memo indicates whether even the complaining focus group members were denied promotions for which they were qualified. Moreover, nothing in the memo suggests that the promotional procedures, even if imperfect, were racially biased, gender-biased, or were applied in a biased manner. Any number of nonminority or female employees might agree, for example, that job postings should be more prominent, that managers should not hire acquaintances, or that the DHS should provide additional interview training and encouragement. And, the alleged "perception" of a bias against minority males simply does not constitute a predominant, common question, particularly because proving such an assertion would require individualized proofs to connect that perception with particular employment decisions. See *Sampleton v Potter*, 271 F Supp 2d 90, 95-96 (D DC, 2003).

If the DHS used "biased testing procedure[s] to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements . . . ." *Falcon*, *supra* at 159 n 15. Alternatively, plaintiffs might satisfy the commonality requirement if they presented "[s]ignificant proof that an employer operated under a general policy of discrimination . . . if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes." *Id*. At most, the evidence presented by plaintiffs suggests that the DHS has *neutral* promotion policies, and there is no suggestion that promotion procedures are entirely subjective. Again, that plaintiffs perceive that the DHS's practices nonetheless unfairly disqualify minority male candidates from promotions and the leadership academy can only be determined by looking at each promotional decision individually.

While plaintiffs *assert* that the class representatives applied for or were available for promotions, but were not chosen for discriminatory reasons, plaintiffs offer no information about the representatives' eligibility and qualifications, what positions they sought, what qualifications the positions required, and whether a less qualified, nonminority, or female candidate was promoted instead. And, importantly, plaintiffs fail to explain how the claims of the representative plaintiffs present a question common to the entire class of every minority male employee of the DHS. Thus, even if the named plaintiffs offered some basis for their claims, "[c]onceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of

discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Falcon*, *supra* at 157.

> For respondent to bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's . . . division, or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices. [*Id*. at 157-158.]

Plaintiffs did not meet the minimum burden to show an agency-wide policy or practice of discrimination or to show that the representative plaintiffs even have viable disparate treatment claims that are also common to the class. As the Court in *Neal* held:

> In reviewing the claims of each of the class representatives in the present case, it is apparent that the only common question presented is whether the individuals involved were discriminated against because of their race. How these individuals may have been discriminated against does not involve common issues of fact or law, but highly individualized questions. The individual factual circumstances pertinent to each plaintiff will need to be reviewed, and individual, fact-specific inquires will need to be made in evaluating why certain individuals were not hired or promoted, or why other individuals were discharged or not retained. Plaintiffs have simply not shown

> that there was any specific policy or practice followed by defendants to satisfy the "commonality" requirement under MCR 3.501. [*Neal*, *supra* at 20.][6]

For the reasons set forth in *Neal*, plaintiffs' claims here are also not appropriate for class treatment.

We further note that the composition of the proposed class itself draws attention to the prospective factual and legal disparities among the individual claims. Plaintiffs' claims include allegations by male job applicants about promotions given to female candidates of the same race or ethnicity or another minority race or ethnicity, and claims by male job applicants about promotions given to Caucasian males, thus raising factual and legal issues relating to allegations of gender discrimination but not racial discrimination or racial discrimination but not gender discrimination, or both. Clearly, the proofs and law necessary to establish that the DHS discriminated against an Hispanic male candidate in favor of an African-American female candidate would differ from those necessary to show that the DHS discriminated against an African-American male candidate in favor of an Arab female candidate. And the proofs and law necessary to establish that the DHS discriminated against an Asian male candidate in favor

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[6] Here, the record also suggests that individual managers or supervisors made promotional decisions about which plaintiffs complain. On this issue, we agree with the following observation by the Court in *Oda v State*, 111 Wash App 79, 100; 44 P3d 8 (2002):

> Where personnel decisions are decentralized, plaintiffs who may be able to prove in an individual lawsuit that they have encountered intentional discrimination in their own departments, are frequently unable to show that the same discriminatory motive is afoot in the institution as a whole. The fact that numerous individual decisions are made by a large number of department heads . . . means that there are "individually tailored justifications" for the alleged discrimination in the case of each [employee]. [Citation omitted.]

of a Caucasian male candidate would differ from those necessary to establish that the DHS discriminated against a male of Arab descent in favor of a Caucasian female. Simply stated, the law and the evidence necessary to prove and defend the myriad claims at issue differ significantly, making class treatment unsound.

In support of the typicality requirement, plaintiffs simply asserted that, because the class representatives include ethnically diverse males who work at various DHS offices, "it would be statistically improbable to present a more diverse and representative group of this proposed class than these proposed representatives." However, "the 'mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.' " *Falcon*, *supra* at 157, quoting *East Texas Motor Freight Sys, Inc v Rodriguez*, 431 US 395, 405-406; 97 S Ct 1891; 52 L Ed 2d 453 (1977). More specifically, that plaintiffs simply share the common characteristics of being male and belonging to a racial or ethnic minority is insufficient to show that the claims of the representative plaintiffs are typical of the class.

As discussed earlier, plaintiffs articulate no factual basis to confirm their individual disparate treatment claims and they fail to connect their allegations to the other members of the class. We further observe that typicality cannot be established when it is foreseeable that a defendant will "raise specific evidence applicable only to each proposed class representative as to why he or she was not promoted or better trained." *Zachery v Texaco Exploration & Production, Inc*, 185 FRD 230, 240 (WD Tex, 1999). Indeed, the claims are not typical where the defendant "might have genuine defenses to

some [p]laintiffs that are not applicable to unnamed class members." *Id*. On this issue, we note that the DHS submitted evidence with its motion for reconsideration that calls into question whether some of the representative plaintiffs were qualified or even eligible for promotion within the DHS during the relevant period. Plaintiffs do not argue that we should ignore the evidence, but characterize it as "simply fodder for cross-examination, discovery and contradiction."

While we decline to assess the substance of the evidence submitted by the DHS with regard to the viability of the representative plaintiffs' disparate treatment claims, plaintiffs' response to the evidence underscores the point articulated above: to defend this action, the DHS will necessarily present evidence for "cross-examination" or "contradiction" with regard to class members' individual allegations that they should have received promotions and did not. That is, to mount a defense to plaintiffs' disparate treatment claims, the DHS must have the opportunity to show the reasons why individual plaintiffs were not or could not be promoted or accepted into the leadership academy. Thus, with regard to the substantive claims and defenses, individualized questions clearly predominate over any questions common to the proposed class and plaintiffs have made no showing that the representative plaintiffs' claims are typical of the class. Such a case is uniquely *not* appropriate for class treatment and the trial court clearly erred by certifying the class.

D. ADEQUACY

MCR 3.501(A)(1)(d) requires that "the representative parties will fairly and adequately assert and protect the interests of the class[.]"

> The above factor focuses on whether the class representatives can fairly and adequately represent the interests of the class as a whole. Under *Allen*, *supra* at 553, this involves a two-step inquiry. "First, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests." (Citations omitted.) [*Neal*, *supra* at 22.]

In their motion for class certification, plaintiffs made no showing that plaintiffs' counsel is qualified to pursue the class action. The trial court also made no ruling with regard to the capability of plaintiffs' counsel. Accordingly, because the record before us is devoid of information on this issue, we can only conclude that it was clear error for the trial court to find that plaintiffs satisfied this factor. The trial court also failed to provide the required "rigorous analysis" to determine whether this prerequisite was satisfied.

More importantly, however, the nature of plaintiffs' claims makes it a virtual certainty that, among the 616 African-American, Arab, Hispanic, and Asian male employees, including the representative plaintiffs, the interests of individual class members will conflict. On this adequacy requirement, the trial court opined:

> Speaking to [a]dequacy, the representative parties are ethnically and culturally related to the class. Further, the issues and promotional allegations regarding state-wide departmental deficiencies are asserted by the class. Thus, the interests of the class are protected by the representative parties.

In essence, the trial court concluded that, because the representative plaintiffs are minority males and the claims involve agency-wide allegations, they "will fairly and adequately assert and protect the interests of the class[.]" MCR 3.501(A)(1)(d). This reasoning is clearly

erroneous because it ignores the requirements for adequacy of representation and also ignores the various conflicts inherent in plaintiffs' claims. The reasoning in *Neal* is again applicable here:

> Because there are claims that some members were denied promotions, there may be conflicts among the class members related to competitions for the same positions. In addition, because of the highly individualized nature of the claims presented, it is unlikely that the named plaintiffs can adequately represent all the interests of the entire class. [*Neal*, *supra* at 23.]

Here, again, plaintiffs seek as a remedy their appointment to supervisory or managerial positions and compensation for promotions they allegedly should have received in the past. Not only will these determinations require highly individualized proofs, it is exceedingly likely that more than one class member will claim that he is entitled to a particular appointment or that he, rather than a fellow class member, should be compensated for an appointment for which they previously competed. While class members need not suffer identical damages, *A&M Supply*, *supra* at 600, their claims must not diverge, *Neal*, *supra* at 23. Because the very nature of the claims of liability and the remedies sought by plaintiffs raise such potential conflicts, and because plaintiffs have not otherwise demonstrated that the representative plaintiffs can fairly and adequately represent the interests of the class, the trial court clearly erred in granting plaintiffs' motion.

E. SUPERIORITY

Plaintiffs were also required to demonstrate that "maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice."

MCR 3.501(A)(1)(e). This is not the case where, as here, individualized inquiries clearly predominate over any common questions. See *Zine*, *supra* at 289 n 14. Further, the defenses to disparate treatment claims involving promotional decisions will be specific to each plaintiff, will require individualized proofs relating to hundreds of claims, and will render the action unmanageable as a class action. Moreover, were we to find a generalized claim here, it would be unfair to bind the entire class of plaintiffs to the judgment reached in this case if some minority male employees have viable individual claims of disparate treatment.

IV. CONCLUSION

Plaintiffs' claims will inevitably involve very fact-specific, individualized assessments of hundreds, if not thousands, of promotional opportunities and decisions that, by definition, implicate numerous applicants, qualifications, positions, locations, and decision makers over many years. The potential proofs mandate individual, not class treatment. The failure of plaintiffs to identify an across-the-board practice or policy that negatively affects male racial and ethnic minorities, for example, in favor of female racial or ethnic minorities, underscores why this case is wholly inappropriate for class action treatment. Indeed, there is no challenged policy or practice that affects all class members that, if discriminatory, and if remedied, could satisfactorily address plaintiffs' generalized complaints. For these and other reasons detailed in this opinion, we hold that the trial court clearly erred by certifying this matter as a class action.

Reversed.

AUTO-OWNERS INSURANCE COMPANY v MARTIN

Docket No. 281482. Submitted May 5, 2009, at Lansing. Decided June 16, 2009, at 9:00 a.m.

Victor Martin had an accident that injured Paula Mapes while Martin was driving a vehicle owned by Grand Greenville, Inc., a used car dealer. The car was insured under a garage liability policy issued by Auto-Owners Insurance Company to Grand Greenville, and Martin had an automobile insurance policy from State Farm Mutual Automobile Insurance Company for his personal automobile. Mapes and her husband, Stephen Mapes, brought a negligence action related to the accident against Martin and Grand Greenville. Auto-Owners brought an action in the Kent Circuit Court against Martin, State Farm, and the Mapeses, seeking a declaratory judgment on, among other things, the priority of coverage for the Mapeses' claim under the Auto-Owners and State Farm insurance policies. On competing motions for summary disposition by Auto-Owners and State Farm and Martin, the court, James R. Redford, J., issued a judgment declaring that Auto-Owners is liable for the first $20,000 as primary coverage for Martin, State Farm is liable for the next $100,000 under its policy insuring Martin, and Auto-Owners is liable for the next $980,000 pursuant to its coverage of Grand Greenville. The court also denied State Farm's request that Auto-Owners be ordered to reimburse State Farm for the cost of defending Martin against the Mapeses' action. State Farm and Martin appealed.

The Court of Appeals *held*:

1. The no-fault act, MCL 500.3101 *et seq*., requires that an automobile insurance policy sold to a vehicle owner pursuant to the act must provide coverage for residual liability arising from the use of the insured vehicle. A vehicle owner is required to provide primary coverage for his or her vehicle and all permissive users of the vehicle. In this case, Auto-Owners knew or should have known that a clause in its policy excluding coverage to the extent that a garage customer is covered by other applicable insurance violated the no-fault act and was invalid. When an insurer includes an exclusionary clause in its policy that it knows or should know is invalid under the no-fault act, the policy is considered ambiguous

and must be construed in favor of the insured and against the insurer. Here, Auto-Owners may not rely on the void exclusion to limit primary coverage for Martin, a permissive user, to the statutory minimum. Instead, the Auto-Owners policy must be construed to provide primary coverage to both Grand Greenville and Martin up to the Auto-Owners policy limits.

2. Under general principles of contract law, voiding the invalid clause would leave the remaining terms of the policy intact. Those remaining terms provide liability coverage of up to $1 million to any person using Grand Greenville's automobile with permission.

3. Because Auto-Owners is required to provide primary residual liability coverage for Martin's use of Grand Greenville's vehicle up to its policy limits, it follows that Auto-Owners is obligated to defend Martin against the Mapeses' action and that State Farm is entitled to reimbursement by Auto-Owners for the cost of defending Martin against that action.

Reversed and remanded for a grant of summary disposition for State Farm and Martin and a declaratory judgment that Auto-Owners is primarily liable for Martin's use of Grand Greenville's vehicle (up to its $1 million policy limit), that State Farm is only liable after Auto-Owners' coverage has been exhausted, and that State Farm is entitled to reimbursement for the cost of defending Martin against the Mapeses' action.

1. INSURANCE — NO-FAULT — RESIDUAL LIABILITY — VEHICLE OWNERS.

The no-fault act requires a vehicle owner to provide primary residual liability insurance coverage for permissive users of the owner's vehicle (MCL 500.3101 *et seq*.).

2. INSURANCE — NO-FAULT — RESIDUAL LIABILITY — POLICIES — JUDICIAL CONSTRUCTION.

A clause in an automobile insurance policy that excludes or limits primary residual liability coverage for a permissive user of the insured owner's vehicle in violation of the no-fault act must be deemed by a court to be ambiguous and construed to provide such coverage up to the policy limits for a permissive user of the insured owner's vehicle.

3. INSURANCE — NO-FAULT — RESIDUAL LIABILITY — PERMISSIVE VEHICLE USERS — INSURERS' DUTY TO DEFEND.

A vehicle owner's insurer that provides residual liability coverage to a permissive user of the owner's vehicle has the obligation of defending the permissive user against a negligence action for injury related to the permissive user's operation of the owner's vehicle.

Willingham & Coté, P.C. (by *John A. Yeager* and *Leon J. Letter*), for Auto-Owners Insurance Company.

Bensinger, Cotant & Menkes, PC (by *Dale L. Arndt*), for Victor Martin and State Farm Mutual Automobile Insurance Company.

Amicus Curiae:

Kelley, Casey & Moyer, P.C. (by *Timothy F. Casey*), for Citizens Insurance Company of America.

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

PER CURIAM. In this declaratory judgment action, the issue before us is the priority of liability insurance coverage with respect to a motor vehicle accident that occurred while the allegedly at-fault driver, defendant Victor Martin, was driving a vehicle with the permission of the owner, Grand Greenville, Inc. (Grand Greenville), a used car dealership. Martin and his insurer, defendant State Farm Mutual Automobile Insurance Company (State Farm), appeal as of right the trial court's October 9, 2007, order denying their motion for summary disposition and granting summary disposition to plaintiff Auto-Owners Insurance Company (Auto-Owners), Grand Greenville's insurer. According to State Farm and Martin, the trial court erred by determining that Auto-Owners' primary liability coverage was limited to $20,000 and that Auto-Owners had no obligation to defend Martin in the underlying negligence action. We agree. Accordingly, we reverse and remand to the trial court for a grant of summary disposition in favor of State Farm and Martin and a declaratory judgment that Auto-Owners is primarily liable, up to its $1 million policy limit, for Martin's use of Grand Greenville's vehicle, that State Farm is only liable

on an excess basis after Auto-Owners' coverage has been exhausted, and that State Farm is entitled to reimbursement of defense costs.

I

The pertinent facts of this case are undisputed. On March 22, 2004, Martin was involved in a motor vehicle accident with defendant Paula Mapes. At the time of the accident, Martin was driving a vehicle owned by Grand Greenville. Martin was interested in purchasing the vehicle, and the trial court determined that he was driving it with Grand Greenville's permission. Grand Greenville carried garage liability insurance issued by Auto-Owners. Martin carried automobile insurance issued by State Farm on his personal vehicle, which was not involved in the accident.

Auto-Owners' insurance policy provides garage liability coverage of up to $1 million. Section IV of the policy, entitled "DEFINITIONS," provides, in part:

> A. "INSURED" shall mean, wherever used in Coverages A and B[1] and in other parts of this coverage form when applicable to these coverages, not only the named insured but also . . . any person while using an automobile covered by this coverage form and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured.
>
> * * *
>
> Garage customers[2] are not insureds with respect to the use of automobiles covered by this coverage form except in accordance with the following additional provisions:

[1] Coverages A and B are "BODILY INJURY LIABILITY" and "PROPERTY DAMAGE LIABILITY" under section I of the policy.

[2] The parties agree that Martin was a "garage customer" as defined by the policy.

(1) If there is other valid and collectible insurance, whether primary, excess or contingent, available to the garage customer and the limits of such insurance are sufficient to pay damages up to the applicable limit of the financial responsibility law of the state where the automobile is principally garaged, no damages are collectible under the policy.

(2) If there is other valid and collectible insurance available to the garage customer, whether primary, excess or contingent, and the limits of such insurance are insufficient to pay damages up to the applicable limit of the aforesaid financial responsibility law, then this insurance shall apply to the excess of damages up to such limit.

(3) If there is no other valid and collectible insurance, whether primary, excess or contingent, available to the garage customer, this insurance shall apply but the amount of damages payable under this policy shall not exceed the applicable limit of the aforesaid financial responsibility law.

The section of the policy entitled "CONDITIONS" provides, in part:

5. FINANCIAL RESPONSIBILITY. Such insurance as is afforded by this coverage form under Coverages A and B shall comply with the provision of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of an automobile during the policy period, to the extent of the coverage and limits of liability required by such law.

* * *

9. OTHER INSURANCE. . . . Except when stated to apply in excess of or contingent upon the absence of other insurance, the insurance afforded by this is [sic] coverage form is primary insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the

> amount of the Company's liability under this coverage form shall not be reduced by the existence of such other insurance.

State Farm's insurance policy provides liability limits of $100,000 for each person and $300,000 for each accident. With respect to liability coverage for the use of non-owned cars, the policy provides:

> 3. Temporary Substitute Car, Non-Owned Car, Trailer
>
> If a *temporary substitute car*, a *non-owned car* or a trailer designed for use with a *private passenger car* or *utility vehicle*:
>
> a. has other vehicle liability coverage on it; or
>
> b. is self-insured under any motor vehicle financial responsibility law, a motor carrier law or any similar law,
>
> then these coverages are excess over such insurance or self-insurance.

On February 16, 2006, Mapes and her husband filed a negligence action against Martin and Grand Greenville for injuries she sustained in the accident. On April 2, 2007, Auto-Owners filed a declaratory judgment action seeking a determination of the priority of coverage under Auto-Owners' and State Farm's insurance policies. Thereafter, State Farm and Martin moved for summary disposition pursuant to MCR 2.116(C)(10) and (I), and Auto-Owners moved for summary disposition under MCR 2.116(I)(2).

Following a hearing on the parties' motions for summary disposition, the trial court determined, pursuant to *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225; 531 NW2d 138 (1995) (*Citizens*), that Auto-Owners was responsible for paying $20,000 on behalf of Martin under Michigan's no-fault act, MCL 500.3101 *et seq*., but that it "was permissible for [Auto-Owners] to exclude coverage applicable to [Martin]

above the $20,000/$40,000 limits of liability." The court ordered that "with respect to the payment of the plaintiffs in the underlying [liability] case . . . [Auto-Owners] shall be responsible for paying the first $20,000 on behalf of [Martin]; [State Farm] shall be responsible for paying the next $100,000 under its policy insuring [Martin]; and [Auto-Owners] shall be responsible for paying up to the next $980,000 pursuant to its coverage of [Grand Greenville]." The court denied State Farm's request for defense costs. State Farm and Martin filed a motion for reconsideration, which the trial court denied. State Farm and Martin now appeal as of right.

II

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. Under MCR 2.116(I)(2), summary disposition is properly granted in favor of the nonmoving party if that party, rather than the moving party, is entitled to judgment. *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 245; 760 NW2d 828 (2008).

Insurance policies are interpreted in accordance with the principles of contract interpretation. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d

199 (2003) (*Kurzmann*). Insurance policies are also subject to statutory regulation, and mandatory statutory provisions must be read into them. *Id*. at 417-418; see also *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006). Insurance policy provisions that conflict with statutes are invalid, but the contracting parties are assumed to have intended a valid contract. *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 358-359; 764 NW2d 304 (2009). Therefore, the policy must be interpreted in harmony with statutory requirements when possible. *Id*. at 359. The interpretation of clear contractual language is an issue of law reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The determination whether contractual language is ambiguous is also an issue of law that is reviewed de novo. *Casey*, *supra* at 394. While ambiguities in a contract generally raise questions of fact for a jury, if a contract must be construed according to its terms alone, it is the court's duty to interpret the language. *Klapp*, *supra* at 469; *Kurzmann*, *supra* at 418. When the intent of the parties in an insurance contract cannot be ascertained from the evidence provided, any ambiguities should be construed against the insurer. *Klapp*, *supra* at 472, 474, 477 n 16; *Kurzmann*, *supra* at 418.

In *Citizens*, our Supreme Court considered two consolidated cases, each involving a vehicle insured under an automobile liability policy issued by Federated Insurance Company to the vehicle owner but driven by a nonowner. *Citizens*, *supra* at 227. "In each case, the driver of the vehicle carried insurance for a personal automobile that was not involved in the accident at issue. . . . Following the accident in each case, personal injury actions were initiated by the accident victims against the respective drivers." *Id*. at 228. Initially, the Court determined that "while subject to certain excep-

tions . . . , the no-fault act unambiguously requires that a policy of automobile insurance, sold to a vehicle owner pursuant to the act, must provide coverage for residual liability arising from *use* of the vehicle so insured." *Id*. at 230 (emphasis in original). The Court further determined that Federated's insurance policy violated the no-fault act in that it denied "residual liability coverage to an entire class of persons" who *used* the vehicles that it insured, specifically "customers" who used the vehicles with the owners' permission, unless the customer was uninsured or underinsured. *Id*. at 230-231.

The *Citizens* Court next considered the amount of residual liability coverage that Federated was required to provide, stating:

> We resolve that question in accord with *State Farm Mutual Automobile Ins Co v Shelly*, 394 Mich 448; 231 NW2d 641 (1975), in which this Court held that when an unambiguous insurance policy is void because it is against the policy of the Motor Vehicle Accidents Claims Act, MCL 257.1101 *et seq*. . . . , the reinstated coverage is limited to the amount required by the applicable automobile insurance law. See also MCL 500.3101 . . . , which states that a policy represented or sold as providing security shall be deemed to provide insurance for the payment of the benefits described in § 3101 of the no-fault act.
>
> In this state, the amount of residual liability coverage required by the applicable no-fault law is determined by reference to § 3009(1). See MCL 500.3131(2). Section 3009(1) requires coverage of at least $20,000 for injury or death of one person, and $40,000 for injury or death of two or more persons (20/40 coverage). MCL 500.3009(1) . . . . Therefore, Federated's reinstated coverage must provide the 20/40 statutory minimum.
>
> Moreover, Federated's reinstated coverage is *primary* to any insurance benefits that may be available under policies that the drivers have purchased. Although we acknowledge that the Legislature has remained silent concerning who

> among competing insurers must provide *primary* residual liability benefits, we refuse to construe that silence as expressly authorizing an owner's insurer, such as Federated, to unilaterally dictate the priority of coverage among insurers in a manner that shifts insurance costs to the nonowner of the vehicle. To construe the Legislature's silence in that manner would undermine the dominant principle expressly embodied by the no-fault act: vehicle owners and their insurers are responsible for bearing the costs of injuries caused by the permissive use or operation of the vehicle. Instead, because the obligation to obtain residual liability insurance is triggered by the obligation to register a vehicle, rather than by the operation of the vehicle, we think it reasonable to conclude that the owner or registrant of the vehicle has the primary duty to provide residual liability insurance.
>
> Accordingly, in each of these cases, Federated must provide *primary* 20/40 residual liability coverage. [*Citizens*, *supra* at 234-235 (emphasis in original).]

The Court further concluded that the insurers of the drivers were only obligated to pay residual liability benefits if provided for under the terms of their respective policies. *Id*. at 236.

In this case, Auto-Owners acknowledges that pursuant to the Supreme Court's holding in *Citizens*, the provision in its policy excluding residual liability coverage for "garage customers"—except when the customer is uninsured or underinsured "up to the applicable limit of the financial responsibility law of the state"—is invalid to the extent that it would preclude coverage required by the no-fault act. Thus, the primary question at hand is the amount of residual liability coverage Auto-Owners is required to provide for Martin's use of Grand Greenville's vehicle. As indicated, Auto-Owners argues (and the trial court ruled) that under *Citizens* its primary liability coverage of Martin is limited to the "20/40" coverage requirement of the no-fault act.

Thereafter, State Farm must provide excess liability coverage under the "non-owned car" provision of its policy, up to its policy limit of $100,000, and then Auto-Owners is responsible for up to the next $980,000 pursuant to its coverage of Grand Greenville and Grand Greenville's liability under the owner's liability statute. On the other hand, State Farm and Martin argue that under caselaw issued after *Citizens*, Auto-Owners is primarily liable up to its policy limit of $1 million before State Farm's excess coverage applies.

In *State Farm Mut Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25; 549 NW2d 345 (1996) (*Enterprise*), our Supreme Court considered, in three consolidated cases, "whether Michigan's no-fault insurance act is violated by a car rental agreement purporting to shift the responsibility for providing primary residual liability coverage on the vehicle from the owner to the driver and the driver's insurer." *Id*. at 27. The *Citizens* Court had specifically declined to apply its conclusion to situations involving rental cars, determining that it was not necessary to overrule *State Farm Mut Automobile Ins Co v Snappy Car Rental, Inc*, 196 Mich App 143; 492 NW2d 500 (1992) (*Snappy I*). *Citizens*, *supra* at 233. In *Enterprise*, however, the Court overruled *Snappy I*, stating, in part:

> Our decision to let *Snappy I* stand was the result of an attempt to distinguish the facts of the cases. That is a distinction we no longer feel is sustainable. . . . We now conclude that a rental car contract is no more voluntary or mutual than the dealership's policy at issue in *Citizens*.
>
> . . . The driver is not informed that the rental car company, as the owner, is required by law to carry insurance on the vehicle that covers any permissive user. The owner cannot shift that responsibility to another party. Just as Federated was required to provide insurance coverage for permissive users in *Citizens*, we now hold that a

car rental company, like any other car owner, must obtain insurance coverage for permissive users of its vehicles.

Further, subsequent developments in the case law have convinced us that the effect of leaving *Snappy I* intact, even if the distinction could be sustained, would be to eviscerate the intended effect of *Citizens*. In *Citizens*, we spoke strongly about the importance of placing the burden of providing primary liability coverage on vehicle owners, as intended by the Legislature. . . . The gravamen of our holding in *Citizens* is that the no-fault act requires car owners to be primarily responsible for insurance coverage on their vehicles. However, the car rental companies have been largely successful in avoiding that responsibility, as demonstrated by the Court of Appeals decisions in these cases. Under *Snappy I*, the Court of Appeals found that it was required to permit car owners to shift the primary responsibility for providing coverage for the use of their vehicles to the driver and the driver's insurer. Because this violates the intent of the no-fault act, we overturn *Snappy I* to the extent that it holds that car owners may avoid primary responsibility for vehicle insurance coverage by agreeing to allocate that responsibility to the driver or driver's insurer.

Even if the driver could make a voluntary election to allocate the responsibility for coverage to the driver's insurer, the resulting agreement to allocate would still be void. Enforcing such an agreement would permit the driver to unilaterally dictate the insurance obligations of the parties. Those obligations are a matter of contract, and cannot be unilaterally reassigned. In *Citizens*, we declined to permit an owner's insurer to dictate those obligations. . . . Under the terms of the insurance contracts, the driver cannot bind the insurance company that issued the driver's policy of coverage for a personal automobile to provide coverage for another car.

The driver cannot defeat the provisions of the no-fault act by stating that the owner need not pay insurance. Because the driver cannot bind the driver's insurer, a

> driver who agreed to shift coverage would remain solely liable for damages caused by use of the vehicle. The rental car would be left uninsured under the terms of the rental agreement stating that the owner provides no insurance. This lack of coverage violates the no-fault act. . . . Just as the car rental company cannot shift liability to a driver's insurer, it cannot shift liability to a driver personally. *Either shift of responsibility away from the owner would violate the act because it requires owners to provide primary coverage*. We accordingly hold that the car rental companies and their insurers are required to provide primary residual liability coverage for the permissive use of the rental cars, *up to their policy limits or the minimum required by statute.* [*Enterprise*, *supra* at 33-36 (emphasis added; heading omitted).]

Notably, the Court did not specify whether the "policy limits" or the "minimum required by statute" controls in situations where the owner or owner's insurer attempts to exclude coverage completely. The Court simply concluded that "*any* such shifting provision is void. Vehicle owners, including the car rental companies in these cases, *are required to provide primary coverage* for their vehicles *and all permissive users of their vehicles*." *Id*. at 27-28 (emphasis added). The Court then remanded the cases to the trial court to allocate the liability between the primary insurers (the car rental companies' insurers) and the excess insurers (the drivers' insurers). *Id*. at 41.

On remand, the trial court concluded that Enterprise, which was self-insured with Travelers Insurance Company as an excess carrier for claims over $500,000, could not limit the amount of its liability and rejected Enterprise's indemnity claim against Majid Sako, the driver. *Enterprise Leasing Co of Detroit v Sako*, 233 Mich App 281, 283; 590 NW2d 617 (1998). Plaintiffs Enterprise and Travelers subsequently appealed to this

Court. A panel of this Court stated the plaintiffs' arguments, which are similar to Auto-Owners' arguments in this case, as follows:

> Plaintiffs argue that, because the financial responsibility act only requires insurance with minimum limits of $20,000/$40,000, Enterprise was responsible as a self-insurer only for the first $40,000 of claims by the multiple plaintiffs in the underlying action and that anything over $40,000 is excess and, therefore, State Farm's excess coverage becomes applicable at that point. In other words, Enterprise would be liable for the first $40,000 as a self-insurer, State Farm would be responsible for the next $50,000 (the policy limits) as the excess carrier [the driver's insurer], and then Enterprise would be liable in tort for the amounts over $90,000 as the owner of the vehicle, subject to its indemnity claim against Sako and, of course, the coverage by Travelers for amounts over $500,000. [*Id*. at 283-284.]

In rejecting the plaintiffs' arguments, the panel noted that the arguments were "based on the premise that a self-insurer's responsibility is limited to the minimum coverage required by law." *Id*. at 284. The panel stated that "a certificate of self-insurance issued by the Secretary of State is the functional equivalent of a commercial policy of insurance with respect to the no-fault act and the financial responsibility act. When a company applies for self-insured status, that company represents that it is able and will continue to be able to satisfy judgments obtained against it." *Id*. (citations omitted). Accordingly, the panel held:

> There is nothing in the financial responsibility statute that limits the self-insured's liability to the minimum coverage requirements of the no-fault or financial responsibility acts. A self-insured's liability extends to the full value of its assets. A company that prefers to avoid unlimited risk has the option of purchasing a commercial insurance policy.

> We are convinced that, when a car rental company enjoys the advantages of self-insurance, it cannot attempt to limit its risks by asserting that its responsibility is limited to the minimum coverage requirements of the no-fault or the financial responsibility acts. Consequently, Enterprise is liable for the full amount of the settlement. Moreover, because State Farm's coverage was excess to any other insurance, and because Enterprise's self-insurance was not limited to the statutory minimum, State Farm is not directly liable for any portion of the settlement.
>
> We now turn to the second issue raised, namely, whether Sako is liable for any portion of the settlement under an indemnification claim. However, in light of our resolution of the first issue, and a concession made by plaintiffs in their brief on the second issue, the indemnification issue may now be deemed abandoned. In their brief on appeal, plaintiffs, in footnote 12, concede that indemnity does not apply to the first $40,000 because the Supreme Court's decision in this case makes Enterprise first in priority with respect to the amount of primary residual liability coverage. However, as resolved in the first issue, the limit of Enterprise's primary liability is not $40,000 as Enterprise argues, but is the full value of their assets. Therefore, the import of plaintiffs' concession is that indemnity does not apply to that higher amount of primary liability, i.e., the full value of Enterprise's assets. Accordingly, in light of this discussion, we decline to address the merits of the indemnity issue. [*Id*. at 284-285.]

Thereafter, a panel of this Court ruled in *Kurzmann* that in circumstances where the insurer knows or should know that an exclusionary clause in its policy is invalid, the insurer is primarily liable up to the limits of its policy. *Kurzmann*, *supra* at 419-420, 422. *Kurzmann* involved an automobile liability policy that violated public policy under the no-fault act by purporting to exclude coverage for bodily injury to the insured or a member of the insured's family. *Id*. at 414, 418-419. The exclusion at issue had been declared void as against

public policy in Michigan for over 20 years. *Id*. at 418. The trial court held that "the insurance policy was ambiguous because it specifically stated that it was in compliance with financial-responsibility laws and yet included an invalid limitation on bodily-injury coverage for insureds." *Id*. at 416. Citing *Shelly*, the insurer argued that while its exclusionary provision was void, any reinstated coverage should be limited to the minimum amount required by the statute. *Id*. at 415, 419. The insurer further argued that the language excluding coverage was unambiguous and thus the rule of reasonable expectation was inapplicable. *Id.* at 415. The panel rejected the insurer's arguments and held that because the insurer knew or should have known at the time it issued the policy that the exclusion was void, the insurer was bound by the policy limits. Adopting the rationale set forth in *Detroit Automobile Inter-Ins Exch v Parmelee*, 135 Mich App 567, 570; 355 NW2d 280 (1984), (*Parmelee*), the *Kurzmann* panel explained:

> *Parmelee* . . . held that when an insurance policy contains an exclusion that the insurer knows or should know is void,[3] the insurer may not rely on the void exclusion to reduce the policy coverage to the statutory minimum. This Court declared that the exclusionary clause was *ambiguous* in light of the fact that the [insurer] knew the provision violated public policy and allowed its insured to pay for a policy containing additional residual bodily injury coverage beyond the amount required by law.
>
> * * *
>
> We see no reason why Farmers [the insurer in *Kurzmann*] should benefit from the statutory minimums when they knowingly placed invalid exclusionary provisions in

[3] In context, this reference to a "void" policy provision plainly referred to a policy provision that was void to the extent that it would limit liability coverage required by the no-fault act.

> their policy and then allowed their insureds to purchase increased coverage. Farmers' blatant violation of the long-held public policy in this case is offensive and should not be condoned or rewarded. [*Kurzmann*, *supra* at 419-420, 422 (citations omitted).]

Given the insurer's inclusion of an exclusion it knew to be invalid, the panel held the insurer primarily liable up to the policy limits. *Id*. at 422.

The *Kurzmann* panel also considered *Shelly* and *Citizens*, where the reinstated coverage was limited to the amount required by the applicable automobile insurance law, but effectively concluded that those decisions did not preclude it from following *Parmelee* under the circumstances of the case:

> Notably, Farmers completely fails to cite *any* authority that overrules or even criticizes the decision reached in *Parmelee*. Moreover, a review of the cases cited by Farmers shows that they either predate *Parmelee* or are distinguishable.
>
> For instance, Farmers cites *Shelly* . . . for the proposition that if an unambiguous provision in an insurance contract is void, the reinstated coverage is limited to the minimum amount mandated by law. Not surprisingly, Farmers overlooks the fact that *Shelly* was decided before this Court's decision in *Parmelee*. Indeed, as previously indicated, *Parmelee*, *supra*, actually noted the plaintiff insurance company's reliance on *Shelly* for that same proposition but did not find it persuasive. Farmers' reliance on [*Citizens*] is also without merit. In *Citizens*, *supra* at 227-228, the policy exclusion at issue actually dealt with an insurer's liability when the driver of the vehicle involved in an accident carried an insurance policy for a personal automobile not involved in the accident. As explained in [*Enterprise*], *Citizens, supra* at 227, required the Court "to determine 'the validity of a vehicle owner's policy of liability insurance that denies coverage to any permissive user who is otherwise insured for an amount equal to that specified by the no-fault act.' " We also note that

> *Citizens* relied on *Shelly* when it determined that the reinstated coverage was limited to the statutory minimum. *Citizens*, *supra* at 234. [*Kurzmann, supra* at 420-421.]

It appears that the *Kurzmann* panel followed *Parmelee* over *Shelly* in part because *Parmelee* was decided more recently than *Shelly*; such reliance fails to appropriately consider the greater precedential weight of *Shelly* as a decision of our Supreme Court.[4] However, the *Kurzmann* panel also referred to the fact that *Parmelee* did not find *Shelly* persuasive under the circumstances presented. The *Parmelee* panel stated that the exclusion at issue had been held void as against public policy and that the insurer "should have been aware that the policy at issue contained a clause that, if not totally void, was certainly ambiguous in the instant situation where defendants had paid for a policy containing extra residual bodily injury coverage of $100,000/$300,000 but the law, MCL 500.3009(1) . . . , required limits of $20,000/$40,000." *Parmelee*, *supra* at 570. The panel then applied the principle that ambiguity in a policy "must be liberally construed in favor of the insured and against the insurer who drafted it" to affirm the trial court's holding that the contractual policy limits applied in that case.[5] *Id*.

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[4] Further, the *Kurzmann* Court was not required to follow *Parmelee* under MCR 7.215(J)(1) because *Parmelee* was decided before November 1, 1990, but could find it persuasive and adopt its reasoning.

[5] In *Farm Bureau Gen Ins Co of Michigan v Haller*, 474 Mich 1057 (2006), our Supreme Court denied leave to appeal *Farm Bureau Gen Ins Co of Michigan v Haller*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2005 (Docket No. 250272) (*Haller*), which applied the *Kurzmann* panel's rationale. The *Haller* panel held that the criminal acts exclusion in the insurance policy at issue violated the no-fault act, the exclusion was unenforceable and invalid, and coverage in the amount of the policy limit was applicable. *Haller*, *supra* at 2. In holding that the policy limit rather than the statutory minimum applied, the panel stated that it agreed with the conclusion reached in *Kurzmann*,

Like the insurer in *Kurzmann*, Auto-Owners knew or should have known that the exclusionary clause in the policy at issue was void. The no-fault act clearly directs that a policy sold pursuant to the act must provide residual liability coverage for *use* of the vehicle insured, and, eight years before Auto-Owners issued its policy,[6] our Supreme Court expressly declared the type of exclusion at issue invalid. *Citizens*, *supra*. Consequently, in keeping with this Court's ruling in *Kurzmann*, we find that the exclusionary clause was ambigu-

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noting that the *Kurzmann* panel had distinguished *Shelly* and *Citizens*. *Id*. at 6. Additionally, the *Haller* panel stated:

> Moreover, and aside from *Kurzmann* and the case law discussed therein, a contractual provision of the insurance policy dictates that the $300,000 policy limit controls. The relevant provision provides:
>
> **"COMMON POLICY CONDITIONS**
>
> * * *
>
> "M. CONFORMITY WITH STATUTE
>
> "Terms of this policy which are in conflict with the statutes of the state where the property described in the Declarations is located are amended to conform to such statutes."
>
> Under contract law principles, this self-amending language indicates that the inclusion of an invalid provision, i.e., the "criminal acts" exclusion in this instance, results in the deletion or voiding of the offending language, while leaving intact the remainder of the contractual terms and obligations, including the provisions addressing the extent of the coverage. The insurance policy's liability coverage requires [the insurer] to pay "all sums an 'insured' legally must pay as damages because of 'bodily injury' . . . to which [the] insurance applies, caused by an 'accident' and resulting from the ownership, maintenance, or use of a covered 'auto.' " With regard to the policy's limit regarding liability coverage, the insurance contract provides that $300,000 is the most that [the insurer] "will pay for any one accident or loss." The policy limit of $300,000 remains intact despite the inapplicability of the exclusion for criminal acts. [*Id*.]

[6] The policy was issued on September 10, 2003.

ous in light of the fact that Auto-Owners knew or should have known for at least eight years before its issuance of the policy that its attempt to exclude garage customers (a subset of permissive users) from coverage clearly violated the no-fault act, yet it nevertheless included the exclusion in its policy. Therefore, the policy must be construed in favor of the insured to provide coverage up to the policy limits to both the owner of the vehicle and its permissive users.

In an attempt to distinguish the facts of this case from those in *Kurzmann* and *Parmelee*, Auto-Owners points out that those cases dealt with different exclusionary provisions than the one at issue, provisions "applicable to all the parties and limits of liability." Auto-Owners appears to be referring to the fact that the invalid exclusionary provision in this case only excludes coverage for "garage customers," with certain exceptions; whereas, in *Kurzmann* and *Parmelee*, the exclusionary provisions at issue excluded coverage for the named insured. While Auto-Owners makes a valid distinction, it does not explain why this distinction is material. Because we see no material distinction, we are bound to follow the holding in *Kurzmann* that by knowingly including an invalid exclusionary provision in its policy, an insurer renders the policy ambiguous and the policy must be construed against the insurer.

Auto-Owners also argues that its policy contains a statutory compliance provision that operates to reduce coverage to the statutory minimum in the face of an invalid policy exclusion. The provision states as follows:

> 5. FINANCIAL RESPONSIBILITY. Such insurance as is afforded by this coverage form under Coverages A and B shall comply with the provision of the motor vehicle financial responsibility law of any state or province which

> shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of an automobile during the policy period, to the extent of the coverage and limits of liability required by such law.

Auto-Owners' position lacks merit for several reasons. First, this Court in *Kurzmann* rejected a similar argument by the insurer in that case, and held that the existence of a statutory compliance provision in the face of a known invalid exclusion and policy limits above the statutory minimum rendered the policy ambiguous and therefore the policy limits applied. *Kurzmann*, *supra* at 416, 418, 421. Second, the provision in Auto-Owners' policy addresses compliance with motor vehicle financial responsibility law, which is not the law at issue in this case. Rather, Auto-Owners' policy violates the no-fault act.[7] Third, Auto-Owners' provision contains no amending or conforming language. It merely states that its policy shall comply with motor vehicle financial responsibility law to the extent of the coverage and limits of liability required by such law. Aside from an improper exclusion of garage users, Auto-Owners' policy did comply with financial responsibility law, as it sold a policy that provided coverage in an amount that complied with financial responsibility law in Michigan. The provision contains no language indicating that in the event an exclusion is deemed void, only the statutory minimum applies. We cannot be expected to read into the policy language that it did not provide. Finally, if Auto-Owners wanted to limit its coverage of garage

[7] The distinction between compliance with the financial responsibility act and compliance with the no-fault act was articulated in *Citizens*, *supra* at 228 and 230 n 3. As pointed out in *Citizens*, "[t]he no-fault act, as opposed to the financial responsibility act, is the most recent expression of this state's public policy concerning motor vehicle liability insurance." *Id*. at 232.

customers to the statutory minimum, it could have expressly stated so; it chose not to, creating the ambiguity at issue.[8]

Even if *Kurzmann* were not binding in this case, Auto-Owners is still liable up to its policy limits under the general principles of contract law. Under such principles, the inclusion of an invalid exclusionary provision results in the deletion or voiding of the offending language, while leaving intact the remainder of the policy's terms and obligations, including the provisions addressing the extent of coverage. Here, the terms of the policy require Auto-Owners to pay "all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law" for damages because of bodily injury or property damage caused by "any person while using an automobile covered by" the insurance policy "provided the actual use of the automobile is with the permission of the named insured." Deletion of the void exclusionary language leaves intact the policy language that covers as an insured any person using the automobile with the permission of the named insured. With regard to liability coverage, the insurance contract provides $1 million as the limit for each occurrence. The policy limit of $1 million remains intact despite the invalid exclusion.

Our finding comports with our Supreme Court's finding in *Enterprise*, which affirmed and extended its holding in *Citizens* that an owner is primarily responsible for paying residual liability benefits, that vehicle

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[8] Auto-Owners' reliance on *Cohen v Auto Club Ins Ass'n*, 463 Mich 525; 620 NW2d 840 (2001), is also misplaced. In *Cohen*, the dispute involved uninsured motorist coverage, which is not required by the no-fault act. *Cohen*, *supra* at 530-531. Coverage by vehicle owners for their permissive users, on the other hand, is among those coverages that "are the bedrock of the no-fault system and . . . are not subject to removal by policy language that conflicts with the statute." See *id.* at 531.

owners are required to provide primary coverage for their vehicles and all permissive users of their vehicles, and that any attempt to shift liability away from the owner to the driver violates the no-fault act and is void.[9]

Auto-Owners argued before the trial court that Grand Greenville engaged in a bargained-for commercial transaction, and, consequently, the parties were free to enter into a contract restricting primary coverage to the extent permitted by law. It is noteworthy, however, that Auto-Owners sold Grand Greenville a $1 million policy and acknowledges that the policy covers Grand Greenville, as the owner of the vehicle involved in the accident, up to $1 million. The section of Auto-Owners' policy entitled "OTHER INSURANCE" provides, in pertinent part:

> Except when stated to apply in excess of or contingent upon the absence of other insurance, the insurance afforded by this coverage form is primary insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Company's liability coverage under this coverage form shall not be reduced by the existence of other such insurance.

By seeking to limit its coverage to the statutory minimum of $20,000, and then any remaining amount of damages for which Grand Greenville is held liable only after Martins' insurance coverage is exhausted, Auto-Owners is attempting to unilaterally shift a portion of the residual liability away from the owner of the vehicle to the driver or the driver's insurance company, neither of which is a party to the contract. Our Supreme Court has expressly condemned such shifting as violative of the no-fault act. As stated in *Citizens*, although "the Legislature has remained silent concerning who among

[9] See *Enterprise*, *supra* at 27, 34, and 36.

competing insurers must provide *primary* residual liability benefits, we refuse to construe that silence as expressly authorizing an owner's insurer . . . to unilaterally dictate the priority of coverage among insurers in a manner that shifts insurance costs to the nonowner of the vehicle." *Citizens*, *supra* at 235 (emphasis in original). The Supreme Court extended its analysis of this issue in *Enterprise* and held that "*any* such shifting provision is void. Vehicle owners . . . are required to provide primary coverage for their vehicles and all permissive users of their vehicles." *Enterprise*, *supra* at 27-28 (emphasis added). Pursuant to the owner's liability statute, MCL 257.401, Grand Greenville remains 100 percent liable for damages related to the subject accident. In attempting to distinguish between Grand Greenville as the owner insured and Martin as a permissive user, which Auto-Owners is also statutorily required to include as an insured, Auto-Owners is attempting to unilaterally dictate priority of coverage. This it cannot do. Given our finding that Auto-Owners is primarily liable up to its policy limits of $1 million, we need not address Auto-Owners' argument regarding subrogated indemnification and State Farm's coverage.

III

Finally, we address State Farm's claim that it is entitled to reimbursement of defense costs from Auto-Owners for defending Martin in the underlying action. Auto-Owners asserts that State Farm waived this issue by failing to file a counterclaim seeking reimbursement of its defense costs or request reimbursement in its answer or affirmative defenses. We conclude that this issue was properly preserved for appellate review. Auto-Owners requested a declaratory judgment on the rights and responsibilities of the parties, together with any

other relief to which it was entitled. MCR 2.605, which grants Michigan courts the power to issue declaratory judgments, also grants the courts power to issue further "necessary or proper relief . . . against a party whose rights have been determined by the declaratory judgment." At the hearing on the parties' motions for summary disposition, counsel for State Farm and Martin requested that the trial court consider the issue of defense costs. The court responded, "I find that State Farm is not entitled to the costs of defense from Auto-Owners insofar as State Farm has liability under the policy that Mr. Martin is being required to pay $100,000 for purposes of completeness."

In *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137-138; 610 NW2d 272 (2000), a panel of this Court addressed insurers' duty to defend:

> It is well settled that "if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." Further,
>
> "[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third-party's allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor."
>
> Also, the following fundamental principles of insurance law apply:
>
> "It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify. In order to determine whether an insurer has a duty to defend its insured, this Court must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy." [Citations omitted.]

In this case, section III of Auto-Owners' policy includes a provision regarding its duty to defend, stating that it has "the right and duty to defend . . . any suit against the insured alleging such injury or destruction and seeking damages . . . where the Company is liable to the insured . . . ." The provision further states that Auto-Owners has the obligation to pay certain expenses in addition to the applicable limits of liability. Auto-Owners argues that because Martin is not an "insured" under its policy and it is only obligated to provide liability coverage for Martin under the no-fault act, it has no obligation to defend Martin under the terms of its policy. But, under the holding in *Kurzmann*, Auto-Owners is required to provide primary residual liability coverage for Martin's use of Grand Greenville's vehicle up to its policy limits. Therefore, while *Kurzmann* did not address the issue of defense costs, it follows that Auto-Owners is obligated to defend Martin in the underlying action and that State Farm is entitled to reimbursement for those costs.

Reversed and remanded to the trial court for a grant of summary disposition in favor of State Farm and Martin and a declaratory judgment that Auto-Owners is primarily liable for Martin's use of Grand Greenville's vehicle (up to its $1 million policy limit), that State Farm is only liable on an excess basis after Auto-Owners' coverage has been exhausted, and that State Farm is entitled to reimbursement of defense costs. We do not retain jurisdiction.

RISKO v GRAND HAVEN CHARTER TOWNSHIP
ZONING BOARD OF APPEALS

Docket No. 282701. Submitted June 1, 2009, at Grand Rapids. Decided June 16, 2009, at 9:05 a.m.

Michael P. and Rebecca J. Risko petitioned the Ottawa Circuit Court for judicial review of a decision by the Grand Haven Charter Township Zoning Board of Appeals to deny the Riskos' application for a zoning variance that would allow them to build a residence with a garage that will not meet a setback requirement of the township's zoning ordinance. The court, Jon A. Van Allsburg, J., reversed the board's decision. The board appealed by leave granted.

The Court of Appeals *held*:

1. The township's zoning ordinance requires the board, when faced with an application for a zoning variance, to consider, among other things, whether the variance is necessary for the preservation and enjoyment of a substantial property right similar to that possessed for other properties in the same zoning district. The evidence in this case indicates that a zoning variance is not necessary because a garage that complies with the setback requirement can be built, although its design may be less preferable to the Riskos and additional cost would be incurred. "Substantial property right," as used in the ordinance, means the right to possess, use, and enjoy the valuable and important aspects of one's land, but does not encompass the right to build according to a preferred design. The board appropriately considered whether petitioners' substantial property right in building a garage could be honored without granting a variance and correctly denied a variance.

2. The record evidence does not support the Riskos' claim that they were treated differently from other similarly situated residents who were granted variances. Even if the Riskos were treated differently, they have not shown that the board's consideration of alternative designs was arbitrary and did not advance a legitimate governmental interest grounded in concerns for health, safety, and welfare.

Reversed.

1. ZONING — VARIANCES — SUBSTANTIAL PROPERTY RIGHTS.

"Substantial property right," as used in a zoning ordinance that requires a zoning board of appeals faced with a variance application to consider whether the variance is necessary for the preservation and enjoyment of a substantial property right similar to that possessed for other properties in the same zoning district, includes the right to possess, use, and enjoy the valuable and important aspects of one's land, but subject to land use regulations that advance governmental interests.

2. CONSTITUTIONAL LAW — EQUAL PROTECTION.

State and federal constitutional guarantees of equal protection mandate that persons in similar circumstances be treated similarly; however, unless the dissimilar treatment alleged impinges on the exercise of a fundamental right or targets such protected classifications as those based on race or gender, the challenged regulatory scheme will survive equal protection analysis if it is related to a legitimate governmental interest.

Rhoades McKee PC (by *Gregory G. Timmer*) and *Bolhouse, Vander Hulst, Risko & Baar, PC* (by *Joel W. Barr*), for the petitioners.

Scholten Fant (by *Bruce P. Rissi*) for the respondent.

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

DAVIS, J. Respondent, Grand Haven Charter Township Zoning Board of Appeals (the Board), appeals by leave granted the trial court's order reversing the Board's denial of petitioners' application for a nonuse variance. We reverse.

Petitioners seek to construct a single-family residence on a lot in Grand Haven Charter Township (the Township). The Township zoning ordinance at issue requires a 50-foot setback. The lot is zoned R-1 residential, is 2.46 acres in size, and is 525 feet wide and 189.25 feet deep. However, it is located in a "critical dune zone" and only a portion of it is actually buildable. Petitioners commissioned architectural plans for which they ob-

tained the approval of the Michigan Department of Environmental Quality (MDEQ). Those plans included an attached, two-stall garage that would encroach onto the 50-foot setback area by 9.5 feet. Petitioners applied for a variance from the zoning setback requirement. Petitioners' application stated that the encroachment was necessary because the critical dunes in the rear lot area forced part of the structure to be moved closer to the property line.

Section 26.05 of the Township zoning ordinance provides standards for use by the Board in determining whether an applicant's variance should be granted. The section states:

> 1. Except as otherwise provided, to authorize a non-use or dimensional variances from the strict applications of the provisions of this Ordinance, the Zoning Board of Appeals shall apply the following standards and shall make an affirmative finding as to each of the matters set forth in each of such standards:
>
> A. That there are exceptional or extraordinary circumstances or conditions applying to the property that do not apply generally to other properties in the same zoning classification. . . .
>
> B. That such variance is necessary for the preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district and in the vicinity, provided that possible increased financial return shall not of itself, be deemed sufficient to warrant a variance.
>
> C. That authorization of such variance will not be of substantial detriment to adjacent property, and will not materially impair the intent and purpose of this Ordinance or the public health, safety, and general welfare of the community.
>
> D. That the condition or situation of the specific piece of property or the intended use of said property for which the variance is sought, is not of so general or recurrent a

> nature as to make reasonably practical the formulation of a general regulation for such condition or situation, a part of this Ordinance.

The parties agree that petitioners' application satisfied the third and fourth standards in this section, and those standards are not at issue in this appeal. Petitioners claimed that the first two standards were met because exceptional and extraordinary circumstances were present on the lot at issue because of the protected sand dunes and the need for a special MDEQ permit. Further, petitioners claimed that the variance was necessary to preserve the enjoyment of a substantial property right (use of a two-car garage) that others in the zoning area enjoyed.

Patrick B. Waterman, Grand Haven Township Director of Community Development,[1] wrote a memorandum to the Board recommending approval of petitioners' request for a variance. At the Board meeting to address the variance request, several residents expressed objections to the proposed variance. Petitioners stated that, if the Board rejected the variance, they would have to wait for another MDEQ approval and obtain a new architectural design. The Board reached its decision as described in the minutes:

> After much deliberation, the board determined that although there were in fact unique circumstances applicable to this property (*i.e. the excessive dune slopes in the rear yard and the MDEQ building restrictions*), they felt that the owner had alternate design options which would enable him to construct a new home and attached garage without the need for a variance. Specifically, it was determined that there appeared to be adequate room to construct a side-loading garage, which would eliminate the

[1] Mr. Waterman's title is not apparent from the lower court record, but his title is mentioned in both petitioners' and respondent's briefs on appeal.

> front yard encroachment. The alternate design options were available to the owner because the lot was exceptionally wide when compared to a typical R1 lot, which eliminated the probability of any side yard encroachments. It was on this basis that the board believed the request failed to meet the four variance standards. [Emphasis in original.]

Specifically, the Board voted that petitioners had failed to meet standards 1 and 2 of the zoning ordinance set forth above. However, in the trial court, respondent conceded that its sole basis for ultimately denying the variance application was that petitioners could change their proposed design to relocate the garage so that a variance was unnecessary. It appears from the minutes that respondent found the first standard to be met.

On appeal to the circuit court, petitioners argued that changing their plans would require significant additional expense and delay. Furthermore, petitioners argued that the Board's decision amounted to the imposition of a fifth standard with no support in any law: that no alternative design existed that would not require the variance. Petitioners also pointed out other instances of variance applications being granted with no consideration of the possibility of alternative designs, and they argued that this amounted to an abuse of discretion because standards were not being applied uniformly. Respondent did not dispute that petitioners had a substantial property right to a two-stall garage on property zoned as residential, but argued that petitioners did not have a right to any particular, specific design or location thereof.

The circuit court reversed the Board's decision from the bench and held:

> The evaluation whether these factors were met for purposes of determining whether there exists a practical

> difficulty in complying with the zoning ordinance *does appear to add a requirement by the zoning board to evaluate alternate possibilities or other suitable locations for the portion of the home that extended into the front yard setback. That's not a [proper] consideration* in the cases that involve these issues. [Emphasis added.]

The circuit court continued:

> In this case, the zoning board appeared to specifically rely upon the fact that there was a wider building envelope and that the applicant could go back and redesign the house and resubmit the redesign for MDEQ approval and build within the existing envelope without violating any setback requirements. However, the result of the zoning board's decision here to require potentially a resurvey, redesign by an architect, resubmission to MDEQ with the cost associated with each stage of that process and the delay required by each stage of that process *does impose practical difficulties*. [Emphasis added.]

The circuit court also held that the Board had not reasonably exercised its discretion because it had applied the zoning ordinance unequally to similarly situated variance applicants.

This Court reviews de novo the circuit court's decision in an appeal from a zoning board, "while giving great deference to the trial court and zoning board's findings." *Norman Corp v City of East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). When reviewing a zoning board's denial of a variance "this Court must review the record and . . . [the board's decision] . . . to determine whether it (1) comports with the law, (2) was the product of proper procedure, (3) was supported by competent, material, and substantial evidence on the record, and (4) was a proper exercise of reasonable discretion." *Id*. at 202, citing MCL 125.585(11) (now repealed and replaced by MCL 125.3606[1]). "The interpretation of a zoning ordinance presents a question

of law subject to review de novo." *Brandon Charter Twp v Tippett*, 241 Mich App 417, 427; 616 NW2d 243 (2000). Constitutional questions involving equal protection claims are reviewed de novo by this Court. See *Houdek v Centerville Twp*, 276 Mich App 568, 573; 741 NW2d 587 (2007).

As we alluded to earlier, we reject respondent's argument that its denial was based in part on the first standard, that the petitioners' case did not present exceptional or extraordinary circumstances. The minutes of the Board meeting and respondent's own concessions contradict such an argument. We conclude that the Board's decision to deny the variance request was based on a finding that petitioners could enjoy their right to a home with a two-stall garage on their property without obtaining a variance. We decline to consider any argument by respondent that petitioners' hardship is self-inflicted because, although one Board member did discuss that likelihood, the minutes reflect that self-imposed hardship was not a basis for its denial of the variance. The sole issue is whether, under the circumstances, the 9.5-foot setback "variance is necessary for the preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district."

Significantly, petitioners did not refute the Board's finding that petitioners' property would accommodate an MDEQ-approved home with a two-stall garage without needing the variance. The evidence indicates that doing so would require additional expense, delay, and hassle; furthermore, doing so would result in a less-preferable design. Pursuant to respondent's own admissions, the Board would be required to issue the requested variance if petitioners could prove that it would be impossible without the variance to construct an

MDEQ-approved home with a two-car garage. But on the record before us, it appears that doing so would indeed be possible.

We are unpersuaded that this inquiry imposes an additional requirement: something can only be *necessary* to achieving a goal if there is no realistic or practical alternative way to achieve that goal. Resolution of this matter depends on whether a "substantial property right" includes construction of a particular design. We conclude that it does not.

"[U]nless explicitly defined in a statute, 'every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.' " *Yudashkin v Holden,* 247 Mich App 642, 650; 637 NW2d 257 (2001) (citation omitted). The term "substantial property right" is undefined in the ordinance, and it has not been defined in this context by Michigan caselaw. Because undefined terms must be given their plain and ordinary meanings, it is proper to consult a dictionary to define terms. *Robinson v Ford Motor Co,* 277 Mich App 146, 152; 744 NW2d 363 (2007). Black's Law Dictionary (8th ed) defines "property" as "[t]he right to possess, use, and enjoy a determinate thing (. . . a tract of land . . .); "property right" is defined as "[a] right to specific property, whether tangible or intangible;" and "right" is defined in relevant part as "[s]omething that is due to a person . . . [a] power, privilege, or immunity secured to a person by law." *Random House Webster's College Dictionary* (1997) defines "substantial" in relevant part as "of real worth, value, or effect." Applying these definitions, "substantial property right" is reasonably defined in plain, ordinary language as the right or privilege to possess, use, and enjoy the aspects of one's land that are of considerable value and importance.

Because this analysis remains somewhat nebulous, we find that judicial construction of the phrase "substantial property right" is necessary to resolve the ambiguity. See *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). Several cases in Michigan have discussed what constitutes a "substantial property right" in other contexts. In *Forster v City of Pontiac*, 56 Mich App 415, 417, 420; 224 NW2d 325 (1974), this Court found that property owners were deprived of a "substantial right," warranting eminent domain proceedings, when the city vacated an alley that abutted the property owners' business, explaining that "the vacation of said alley prevents plaintiffs from ingress or egress to the rear portion of their said property and that the vacation of said alley by defendant . . . caused a material diminution in the value of plaintiffs' property." *Id*. at 421 (quotation marks omitted). In *Indian Village Ass'n v Barton*, 312 Mich 541, 549; 20 NW2d 304 (1945), our Supreme Court, quoting *Allen v Detroit*, 167 Mich 464, 469; 133 NW 317 (1911), held that restrictive covenants "upon the use of property by reason of a general plan . . . [constitute] 'a substantial property right which the owners can maintain and enforce.' " Our Supreme Court in *Allen* explained:

> Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and a property right of value, which cannot be taken for the public use without due process of law and compensation therefor; the validity of such restriction not being affected by the character of the parties in interest. [*Allen*, 167 Mich at 473.]

In addition to covenants and restrictions, our Supreme Court has stated that the right to exclude others from one's property is an "essential" protected property right. *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 247; 378 NW2d 337 (1985), citing *Kaiser Aetna v United States*, 444 US 164, 179-180; 100 S Ct 383; 62 L Ed 2d 332 (1979).

In a case outside this jurisdiction, the Wisconsin Supreme Court cited *Allen*, 167 Mich at 473, in holding riparian rights reserved by an agreement constitute substantial property rights. *Bino v City of Hurley*, 273 Wis 10, 19-21; 76 NW2d 571(1956). In another case outside this jurisdiction, the Tennessee Supreme Court described disputes over "boundaries, plats and surveys" as affecting "very substantial" property rights. *Chapdelaine v Tennessee State Bd of Examiners for Land Surveyors*, 541 SW2d 786, 788 (Tenn, 1976). Substantial property rights, in sum, have included the right to use the property without loss of value, the right to access the property, restrictive covenants or building restrictions that run with the land, rights of exclusion, riparian rights, and boundaries, plats, and surveys. All of the above examples involve fundamental rights attendant to the use of the land.

The phrase "substantial property rights" is used in the context of land use regulation in this case. *Yudashkin*, 247 Mich App at 650. A local governmental entity in Michigan has authority to regulate land use pursuant to the police power reserved to the states and delegated to local governments by the Legislature. See *Detroit Edison Co v Richmond Twp,* 150 Mich App 40, 47-49; 388 NW2d 296 (1986); *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000); MCL 125.3101 *et seq*. This authority is extensive, and a regulation will generally surpass constitutional muster if there is a reasonable governmental interest being advanced that is not purely arbitrary, capricious, or unfounded. See *Houdek*, 276 Mich App at 582. See also *Burt Twp v Dept of Natural Resources*, 459 Mich 659; 593 NW2d 534 (1999) (noting that, under the former township enabling legislation, municipalities had extensive authority to regulate the use and development of land). This Court has held that protecting aesthetic

value is a legitimate governmental purpose. *Norman Corp*, 263 Mich App at 201, citing *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 572; 398 NW2d 393 (1986). The language of the current zoning enabling act illustrates this broad authority and authorizes local governments to establish requirements for things such as maximum or minimum square footage, setback, height, and the like. See MCL 125.3201.

Thus, fundamental uses or rights attendant to the land are statutorily subject to regulation. Our Supreme Court has stated that local ordinances ordinarily take full advantage of the broad authority granted by enabling legislation "[t]o accommodate changing needs and expectations, zoning ordinances typically are worded so as to confer broad discretion on zoning boards . . . ." *Macenas v Village of Michiana*, 433 Mich 380, 389; 446 NW2d 102 (1989). The broad authority of a local government to regulate land use through zoning suggests that the phrase "substantial property right" should be construed narrowly. See *Norman Corp*, 263 Mich App at 201; *Houdek*, *supra*; *Burt Twp*, *supra*; *Macenas*, 433 Mich at 389. It should include the right to possess, use, and enjoy the valuable and important aspects of one's land, but subject to land use regulations that advance legitimate governmental interests.

In sum, we conclude that the phrase "substantial property right," as used in the ordinance, encompasses the right to build a garage on property regulated for residential use, but does not encompass the right to build according to a preferred design.

The right to build according to one's preferred design is unlike the "substantial property right" recognized by this Court in *Forster*, *supra*. The right of ingress and egress to one's property is a substantial right in that it was necessary for access to and use of the property

itself, whereas a preferred design does not deny access, use, or the ability to construct a residence in compliance with the zoning requirements. In addition, in contrast to *Forster*, where restricted ingress and egress caused a diminution in value, here the inability to build a preferred design would not result in a similar decline in value because a residential structure and garage can still be built in compliance with the ordinance. Similarly, the right to build to a preferred design is unlike the substantial property right to enforce restrictive covenants as recognized in *Indian Village*, 312 Mich at 549, and *Allen*, *supra*. Unlike a restrictive covenant, the right to a particular design is not similar to an easement; it does not run with the land. See *Allen*, 167 Mich at 473. Furthermore, the right to a preferred design is dissimilar to the right to exclude others from one's property, which is an essential part of land ownership. *Woodland*, *supra*; *Kaiser Aetna*, 444 US at 179-180. Finally, the right to build to a preferred design is unlike riparian rights, which allow for reasonable use of a natural resource, and the right to accurate surveys and boundaries, which are essential to the determination of the extent of land to which a person holds legal title. *Bino*, 273 Wis at 19-21; *Chapdelaine*, 541 SW2d at 788.

We conclude that the right to a preferred design is not a "substantial property right"; therefore, it was proper for the Board to consider whether petitioners had alternative designs available that negated the need for the variance. In other words, it was appropriate to consider whether petitioners' substantial property right in building a garage could be honored without granting the variance.

However, petitioners further argue that the Board applied the zoning ordinance in a discriminatory manner, because it granted setback variances to other

property owners in similar situations. Resolution of this issue requires an analysis of whether petitioners showed on the record that they were treated differently than similarly situated variance applicants. See *Great Lakes Society v Georgetown Charter Township*, 281 Mich App 396, 427; 761 NW2d 371 (2008). Under the federal and Michigan constitutions, similarly situated persons must be treated equally. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 716-717; 575 NW2d 68 (1997). In a zoning context, "the first question has to be whether [the variance applicant] demonstrated on the record that it was treated differently from some similarly situated [applicant]." *Great Lakes Society*, 281 Mich App at 427, citing *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 336-337; 675 NW2d 271 (2003), vacated 480 Mich 1143 (2008), reaffirmed in part 280 Mich App 449 (2008). "However, unless the dissimilar treatment alleged impinges on the exercise of a fundamental right or targets such protected classifications as those based on race or gender, the challenged regulatory scheme will survive equal protection analysis if it is rationally related to a legitimate governmental interest." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 73; 592 NW2d 724 (1998). "[T]he party raising the equal protection challenge has the burden of proving that the challenged law is arbitrary and thus irrational." *Id*., citing *Neal*, 226 Mich App at 719.

We do not find evidence in the record from which we can conclude that petitioners were treated irrationally and differently from other similarly situated residents who had been granted a nonuse variance. The only stipulated example was another resident who, it appears, had an unusually narrow lot and was seeking to construct a new shed to replace an old shed that had been nonconforming and where a concrete pad and

electricity were already in place at the location of the old shed, and there was some indication that the shed really could not be put elsewhere without reducing its size. We do not find sufficient similarity in the situations. In other cases petitioners discussed in the circuit court, we likewise do not find sufficient similarities. One of them involved a lot burdened by a drainage easement and the available alternative design apparently would have necessitated a smaller, rather than a relocated, garage. Another involved "severely limited" buildable area and no suggestion that alternative designs would be available. The third involved a residence that already encroached onto a setback and, again, nothing to indicate that an alternative to the proposed deck addition might have been available. In any event, even if petitioners were treated differently than similarly situated applicants, petitioners have not shown that the Board's consideration of alternative designs when implementing the zoning ordinance is arbitrary and does not advance a legitimate governmental interest grounded in the "ordinary concerns for health, safety, and welfare" and therefore not "rationally related to a legitimate governmental interest." *Dowerk*, 233 Mich App 73.

In sum, we find that the Board's decision to deny petitioners' application for the 9.5 foot setback variance on the ground that the variance was not "necessary for the preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district" comported with the law, was procedurally proper, was supported by the evidence, and was not irrational.

Reversed.

PEOPLE v WALLACE

Docket No. 283079. Submitted June 2, 2009, at Grand Rapids. Decided June 16, 2009, at 9:10 a.m.

Steven C. Wallace pleaded guilty in the Muskegon Circuit Court of receiving stolen property and larceny in a building. In sentencing the defendant, the court, James M. Graves, Jr., J., pursuant to MCL 769.1k(1)(a) and (b), imposed various costs. The defendant appealed by leave granted, claiming that costs were improperly imposed under MCL 769.1k(1)(b) because the trial court failed to consider his ability to pay before imposing them.

The Court of Appeals *held*:

The plain language of MCL 769.1k does not require a trial court to consider a defendant's ability to pay before imposing discretionary costs and fees other than those for the expense for providing a court-appointed attorney to the defendant.

Affirmed.

SENTENCES — COURT COSTS.

A sentencing court need not consider a defendant's ability to pay before imposing on the defendant discretionary costs and fees other than those for the expense of providing a court-appointed attorney to the defendant (MCL 769.1k).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Nina Backon for the defendant.

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

PER CURIAM. Defendant appeals by leave granted his guilty plea conviction of receiving stolen property worth

between $1,000 and $20,000, MCL 750.535(3)(a), and larceny in a building, MCL 750.360. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 28 to 90 months' imprisonment for receiving stolen property, to be served concurrently with 90 days' jail time for larceny in a building, with 158 days' credit. Defendant specifically appeals the trial court's assessment of court fees in the sentencing order, contending that the trial court was not permitted to do so without first considering his ability to pay.[1] We affirm.

"A trial court may require a convicted defendant to pay costs only where such a requirement is expressly authorized by statute." *People v Nance*, 214 Mich App 257, 258-259; 542 NW2d 358 (1995). The trial court imposed the costs at issue pursuant to MCL 769.1k(1), which provides in relevant part as follows:

> If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine.
>
> (*ii*) Any cost in addition to the minimum state cost set forth in subdivision (a).
>
> (*iii*) The expenses of providing legal assistance to the defendant.
>
> (*iv*) Any assessment authorized by law.
>
> (*v*) Reimbursement under [MCL 769.1f].

[1] Defendant concedes that some of the assessments are mandatory, and this appeal only pertains to the imposition of discretionary fees.

Defendant argues that the instant situation parallels that of *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), which requires consideration of a defendant's ability to pay before the imposition of attorney fees.[2] We disagree.[3]

In *Dunbar*, this Court determined the imposition of attorney fees improper because "the record [was] devoid of any indication that the [trial] court recognized that defendant's ability to pay needed to be considered when imposing a reimbursement requirement, unlike fines and costs." *Dunbar*, *supra* at 255. This Court observed that no statutory scheme existed at the time governing payment of fees for court-appointed attorneys. *Id*. at 254 n 12, 256 n 15. The Legislature then enacted MCL 769.1k, which "[did] not eliminate the requirement set forth in *Dunbar* that the trial court consider a defendant's ability to pay before ordering reimbursement of appointed counsel costs." *People v Trapp*, 280 Mich App 598, 601; 760 NW2d 791 (2008). By extension, MCL 769.1k likewise did not *impose* any requirement upon trial courts to consider a defendant's ability to pay before imposing other costs. However, the Legislature certainly could have done so: see MCL 771.3(6). "The omission of a provision in one statute that is included in another statute should be construed

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[2] On January 28, 2009, our Supreme Court granted leave to appeal in *People v Jackson*, 483 Mich 884 (2009). Among the issues our Supreme Court directed the parties to brief was whether *Dunbar* was correctly decided and whether trial courts are required to consider a defendant's ability to pay attorney fees as held in *Dunbar* before imposing such fees under MCL 769.1k. Because *Dunbar* distinguished attorney fees from other costs or fines, and because *Jackson* appears to be concerned only with attorney fees, we think that the Supreme Court's grant of leave in *Jackson* has no bearing on this case.

[3] Again, defendant does not contest the imposition of mandatory costs under MCL 769.1k(1)(a). Rather, defendant contends that impositions under MCL 769.1k(1)(b) implicate *Dunbar*.

as intentional, and provisions not included by the Legislature may not be included by the courts." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007).

The plain language of MCL 769.1k does not require the trial court to consider a defendant's ability to pay before imposing discretionary costs and fees other than those for the expense for a court-appointed attorney. Defendant relies on two unpublished opinions of this Court, neither of which has any precedential effect even if we were to construe them as impliedly imposing such a requirement. See MCR 7.215(J)(1). Defendant further raises several arguments that pertain to the wisdom of permitting such impositions without consideration of his ability to pay, but "[t]he wisdom of [a] policy is a political question to be resolved in the political forum." *People v Morris*, 450 Mich 316, 336; 537 NW2d 842 (1995). We decline to read this requirement into the statute.

Affirmed.

PEOPLE v BREEDING

Docket No. 280708. Submitted January 7, 2009, at Detroit. Decided June 16, 2009, at 9:15 a.m.

David C. Breeding pleaded no contest in the Wayne Circuit Court to a charge of second-degree criminal sexual conduct and was sentenced to five years' probation. The court, Patricia S. Fresard, J., thereafter determined that the defendant violated a condition of his probation prohibiting contact with children less than 16 years of age, revoked his probation, and sentenced the defendant to 38 months to 15 years in prison. The Court of Appeals, CAVANAGH, P.J., and JANSEN and DONOFRIO, JJ., denied the defendant's delayed application for leave to appeal in an unpublished order, entered October 23, 2007 (Docket No. 280708). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration, as on leave granted, whether the defendant's constitutional right to confront the witnesses against him was violated at his probation revocation hearing as a result of the admission of certain out-of-court statements. 481 Mich 884 (2008).

The Court of Appeals *held*:

The federal circuit court of appeals cases that have held that *Crawford v Washington*, 541 US 36 (2004), which held that the Sixth Amendment generally forbids the introduction of out-of-court testimonial statements in a criminal prosecution, does not apply to probation revocation hearings are correct. The Sixth Amendment specifically applies only to criminal prosecutions. A probation revocation hearing is not equivalent to a criminal prosecution and the full panoply of rights due a defendant in a criminal prosecution does not apply to parole revocations. The Sixth Amendment right to confrontation articulated in *Crawford* did not apply to the defendant's probation revocation hearing. Rather, a due process standard applies in determining the admissibility of statements made by out-of-court declarants at probation revocations hearings regardless of whether the statements are testimonial or nontestimonial in nature. Although there is a limited due process right to confront witnesses at a probation revocation hearing, the defendant neither objected to the intro-

duction of the out-of-court statements nor requested the appearance of the declarants and failed to establish plain error affecting his substantial rights under a due process analysis. Hearsay was not the sole evidence relied on by the trial court, and the in-court testimony of the defendant's probation officer was sufficient by itself to enable the trial court to determine that a probation violation was proved by a preponderance of the evidence. The defendant did not establish an error affecting the trial court's decision that he violated a condition of probation.

Affirmed.

CRIMINAL LAW — CONSTITUTIONAL LAW — RIGHT TO CONFRONTATION — DUE PROCESS — PROBATION REVOCATION HEARINGS.

The Sixth Amendment right to confrontation articulated in *Crawford v Washington*, 541 US 36 (2004), which held that the Sixth Amendment generally forbids the introduction of out-of-court testimonial statements in a criminal prosecution, does not apply to probation revocation hearings; a due process standard applies in determining the admissibility of statements made by out-of-court declarants at probation revocation hearings regardless of whether the statements are testimonial or nontestimonial in nature.

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 *Janet A. Napp*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann* and *Kim M. McGinnis*) for the defendant.

Before: FORT HOOD, P.J., and WILDER and BORRELLO, JJ.

BORRELLO, J. Defendant pleaded no contest to a charge of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), for engaging in sexual penetration with a person under the age of 13, and was sentenced to five years' probation. The trial court subsequently determined that defendant violated a condition of his probation prohibiting contact with children less than 16

years of age, revoked his probation, and sentenced him to 38 months to 15 years' imprisonment. This Court denied defendant's delayed application for leave to appeal. *People v Breeding*, unpublished order of the Court of Appeals, entered October 23, 2007 (Docket No. 280708). In lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration

> as on leave granted, of the defendant's claim that his constitutional right to confront the witnesses against him was violated by the trial court's admission, at the probation revocation hearing, of certain statements by out-of-court declarants. See *Crawford v Washington*, 541 US 36 (2004). In considering this claim, the Court of Appeals shall address whether the federal circuit Court of Appeals decisions addressing this issue are correct that *Crawford* does not apply to probation revocation hearings. See, e.g., *United States v Kelley*, 446 F3d 688 (CA 7, 2006); *United States v Rondeau*, 430 F3d 44 (CA 1, 2005); *United States v Hall*, 419 F3d 980 (CA 9, 2005); *United States v Kirby*, 418 F3d 621 (CA 6, 2005); *United States v Martin*, 382 F3d 840 (CA 8, 2004); and *United States v Aspinall*, 389 F3d 332 (CA 2, 2004). [*People v Breeding*, 481 Mich 884 (2008).]

We agree with the federal courts of appeals that have held that *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), which held that the Sixth Amendment generally forbids the introduction of out-of-court testimonial statements in a criminal prosecution, does not apply to probation revocation hearings. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant was charged with first-degree CSC for engaging in fellatio with a person under 13 years of age, MCL 750.520b(1)(a), and two counts of distributing sexually explicit materials to a minor, MCL 722.675.

The victim was the son of defendant's former girlfriend. On November 30, 2004, defendant pleaded no contest to a single charge of second-degree CSC pursuant to a plea agreement. On December 21, 2004, the trial court sentenced defendant to five years' probation. One of defendant's probation terms was that he have no contact with children under 16 years of age and no unsupervised contact with his own children.[1]

In June 2005, defendant pleaded guilty of violating the curfew conditions of his tether. Defendant admitted that he received a call from a friend who told him that she was taking her children swimming at a local hotel and that he took his children to the hotel and met the friend and her children there. According to defendant, his friend was aware of his conviction. The trial court continued defendant's probation but ordered him to serve one year in jail. Thereafter, the trial court amended defendant's probation order. The amendment precluded defendant from having overnight visits with his children or any other children under the age of 16 years. Further, defendant's contact with his own children was required to be supervised by an adult approved by defendant's probation officer.

On August 18, 2006, the trial court authorized a bench warrant for defendant's arrest after a petition was filed alleging that defendant violated the condition that he not have contact with children under the age of 16 by having contact with his friend, Lisa Plummer, who had two small children. At a probation violation hearing on August 31, 2006, defendant's probation officer, Linda Hines, testified that on August 17, 2006, she investigated a complaint that defendant was having continuous contact with Lisa and her children. According to Hines:

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[1] There were several other conditions to defendant's probation, but these conditions are not relevant to the issues presented in this appeal.

> Upon approach to [Lisa Plummer's] residence, I witnessed [defendant] coming out of the residence, and I pulled up behind some vehicles, so I couldn't really see whether he got in a car and left, either.
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> So I called my supervisor and we discussed it and he decided to join me. . . . When he came, we approached the residence and knocked on the door. Miss Plummer came out and spoke with us, and we told her who we were, and that I had just witnessed [defendant] leaving her residence.
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> When we approached the residence, there were two small children in the window waving and smiling . . . and Miss [Plummer] came out and we informed, like I said, why we were there. She admitted [defendant] had been there. She was unaware that he was not supposed to have any contact with children.
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> I informed her, because of this, I would be contacting protective serves [sic], which I did, and they went over and investigated, and I spoke with a protective services worker on Tuesday, who indicated this was a relationship. He was having contact with the children, but the mother said he was never unsupervised with the children.

On cross-examination, Hines admitted that she did not see defendant actually leave the residence and that she did not see defendant near the children and did not observe if defendant spoke with, contacted, or touched the children. Hines also testified that Lisa admitted that defendant had been having contact with her children, but that defendant had never been with the children without supervision. It is unclear from the record if Lisa relayed this information to Hines or if Hines learned this information from the protective services worker. According to Hines, Lisa had told the protective services worker that she and defendant were beginning a romantic relationship. Lisa's mother, Wilma Plummer, also testified at the probation revocation hearing. Wilma Plummer testified that she knew that defendant was not allowed to have any contact

with children and that Lisa never let defendant around her children and that when she (Wilma) was with Lisa's children, defendant did not have contact with the children.

Following Wilma Plummer's testimony, the trial court asked if Lisa was present in court. Wilma replied, "No, she has got M.S. [multiple sclerosis]." According to defense counsel, Lisa had been in contact with child protective services and was concerned about coming to court. Defense counsel did not object to any of the testimony offered by Hines and did not ask the trial court to compel Lisa Plummer or the protective services worker to testify.

The trial court then issued its findings from the bench:

> The defendant has a condition of probation that he is to have no contact, not supervised, but no contact with children aged 16 or under, because of his status as a sexual offender of young children. He chooses to enter into, as stated by Lisa, stated by the probation officer that Lisa stated a beginning of a romantic relationship with a woman who by her mother's statement has M.S. and has two young children in the household. That is a clear violation of the conditions of the probation department and [the] court finds him guilty.

Following defense counsel's request for clarification of the trial court's ruling, the trial court stated:

> First of all, findings of the court are not based on what the mother [Wilma Plummer] said, whether the mother was present. She admitted the relationship isn't with her, it's with Lisa her daughter, and there is no—this mother, she's not there all the time. She is not there with the children all the time or with her daughter all the time. It is the beginnings [sic] of a relationship with a woman with two young children and his leaving from that house indicates he is in violation.

Defendant moved for reconsideration, arguing that there was no evidence to support the conclusion that he violated a condition of his probation by having contact with Lisa's children. At the sentencing hearing on September 18, 2006, the trial court denied the motion, observing that Hines had testified under oath that Lisa Plummer stated that defendant had been at her house and that she did not know that defendant was prohibited from having contact with children.

At the same sentencing hearing, Hines informed the trial court that she had received information from the child protective services worker that Lisa was now claiming that her relationship with defendant was purely platonic. The trial court was also made aware, for the first time, that Lisa and her children were involved in defendant's earlier probation violation. The court determined that this information made Wilma's testimony incredible. The trial court commented that "the court has additional information that she [Lisa] is a handicapped woman who has never come here to testify, and you [defense counsel] have had every opportunity to have her present, and that obviously puts it into issue here." Defense counsel asked the court to consider letters written by Lisa and Wilma.[2] Defendant stated during his allocution that he had not had contact with children and that he and Lisa are friends. The trial court revoked defendant's probation and sentenced him to a prison term of 38 months to 15 years under the sentencing guidelines.

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[2] In a September 13, 2006, letter, Lisa Plummer wrote that she met defendant through their employment at Johnson Control and were strictly friends. She claimed that defendant provided transportation for her to medical appointments after she was diagnosed with M.S. and that "[defendant] has been honest with me since I meet [sic] him and always followed the rules of having no contact with my children."

The prosecutor and defendant's counsel later stipulated that the sentencing guidelines range should have been zero to 17 months. On April 16, 2007, the trial court granted defendant's motion for resentencing based on the stipulation. At the resentencing hearing on April 30, 2007, the prosecutor argued that the sentencing guidelines had been incorrectly scored for purposes of the stipulation, but that the trial court could avoid this issue by finding substantial and compelling reasons for a departure. Defendant's counsel proposed that defendant be continued on probation, expressing her belief that defendant was starting a romantic relationship with Lisa at the time of his second probation violation, and that defendant should have asked the court for permission to have supervised contact with Lisa's children. She asserted that while defendant did not do that, he "didn't have unsupervised contact with them. . . . We are talking about him being with them in the company of other adults who are responsible for them." The trial court did not change the guidelines range that had been stipulated, but found substantial and compelling reasons to depart from the guidelines range and reimposed the sentence of 38 months to 15 years, with credit for 617 days served. This appeal ensued.

II. ANALYSIS

Defendant argues that the admission of out-of-court, testimonial hearsay statements at his probation revocation hearing violated his Sixth Amendment right to confrontation and urges this Court to apply *Crawford* to a probation revocation hearing. Defendant also argues that the admission of the hearsay evidence violated his due process rights.

A. STANDARD OF REVIEW

"The decision to revoke probation is a matter within the sentencing court's discretion." *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

Whether defendant was denied his Sixth Amendment right to confrontation is a constitutional question that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A trial court's discretionary authority regarding the admission of evidence at a probation revocation hearing is broad. MCR 6.445(E)(1); MRE 1101(b)(3). Except for the rules of evidence pertaining to privileges, a trial court "need not apply the rules of evidence" in a probation revocation hearing. MCR 6.445(E)(1). This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). The abuse of discretion standard recognizes that " 'there will be circumstances in which . . . there will be more than one reasonable and principled outcome.' " *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

B. *CRAWFORD* DOES NOT APPLY TO PROBATION REVOCATION PROCEEDINGS

Before addressing the applicability of *Crawford* to probation revocation proceedings, we first make some observations about probation. Probation is a matter of grace, not of right, and the trial court has broad

discretion in determining the conditions to impose as part of probation. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995); see also MCL 771.4. Therefore, when a judge imposes probation, it is "revocable on the basis of a judge's findings of fact at an informal hearing, and largely at the judge's discretion." *People v Harper*, 479 Mich 599, 626; 739 NW2d 523 (2007). This Court has recognized that the scope of a probation violation hearing is limited and that a probationer's rights at a probation violation hearing are not as broad as the rights afforded to a defendant in a criminal trial. "Probation violation hearings are summary and informal and are not subject to the rules of evidence or of pleading applicable in a criminal trial. The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach." *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). See also *Ritter*, *supra* at 705-706.

In *Crawford*, the Court held that in a criminal prosecution, the introduction of an out-of-court testimonial statement is precluded unless the witness is unavailable and the defendant has previously had an opportunity to cross-examine the witness. *Crawford*, *supra* at 68. The preclusion of such statements is derived from the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI; *Crawford*, *supra* at 61. The question before us is whether the same Sixth Amendment rights extended to a defendant in a criminal trial under *Crawford* are also applicable to a probationer at a probation revocation hearing.

While the Sixth Amendment right to confrontation, like the right to counsel, is a fundamental right made applicable to states through the Fourteenth Amend-

ment, *Pointer v Texas*, 380 US 400, 403; 85 S Ct 1065; 13 L Ed 2d 923 (1965), the Sixth Amendment specifically applies only to "criminal prosecutions . . . ." US Const, Am VI. The United States Supreme Court has long recognized that a parole revocation hearing, which is analogous to the probation revocation hearing at issue in the present case, is not equivalent to "a criminal prosecution[.]" *Morrissey v Brewer*, 408 US 471, 480; 92 S Ct 2593; 33 L Ed 2d 484 (1972). See also *Ritter*, *supra* at 705 ("Revocation of probation is not a part of a criminal prosecution."). In *Morrissey*, the Supreme Court stated: "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey*, *supra* at 480. The reason that the full protection for defendants in criminal proceedings does not apply to such a revocation is that the "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."[3] *Id.* *Morrissey* clearly set forth the principle that parole or probation revocations are separate and distinct legal proceedings from criminal prosecutions. Therefore, for defendant to prevail on this issue, he must demonstrate that the Sixth Amendment protections articulated in *Crawford* apply beyond the context of criminal prosecutions and specifically to a probation revocation hearing.

Several federal circuits have addressed this issue and concluded that *Crawford* does not apply to parole or

[3] In *Ritter*, *supra* at 705-706, this Court similarly concluded that probation revocation deprives a probationer of the conditional liberty that is properly dependent on observance of the terms of the probation order, rather than the absolute liberty to which every citizen is entitled, and that a probationer in a probation revocation hearing is not entitled to the full range of due process rights associated with a criminal trial.

probation revocation hearings. The rationale for these decisions is that the Sixth Amendment only applies to criminal prosecutions, and postconviction proceedings for violations of a condition of release is not part of a criminal prosecution. *United States v Kelley*, 446 F3d 688, 691 (CA 7, 2006) ("Because revocation proceedings are not criminal prosecutions, Sixth Amendment rights are not implicated."); *United States v Rondeau*, 430 F3d 44, 47 (CA 1, 2005) ("Given that the Confrontation Clause focuses on 'criminal prosecutions,' we have not found the Clause to be applicable to post-conviction proceedings."); *United States v Hall*, 419 F3d 980, 985-986 (CA 9, 2005); *United States v Kirby*, 418 F3d 621, 627 (CA 6, 2005); *United States v Aspinall*, 389 F3d 332, 342-343 (CA 2, 2004); *United States v Martin*, 382 F3d 840, 844 n 4 (CA 8, 2004). We agree with the federal courts that have concluded that the Sixth Amendment right to confrontation, as defined and applied in *Crawford*, does not apply to probation revocation proceedings. Because probation occurs after the end of a criminal prosecution, probation revocation proceedings are not a stage of a criminal prosecution. *Morrissey*, *supra* at 480; *Gagnon v Scarpelli*, 411 US 778, 782; 93 S Ct 1756; 36 L Ed 2d 656 (1973). See also *Ritter*, *supra* at 705. Therefore, we reject defendant's claim that the Sixth Amendment right to confrontation articulated in *Crawford* applied at his probation violation proceeding.[4] Rather, a due process standard applies in determining the admissibility of statements made by out-of-court declarants at probation violation proceedings, regardless of whether the statements are testimonial or nontestimonial in nature. *Morrissey*, *supra* at 481-489; see also *Hall*, *supra* at 986.

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[4] Defendant conceded during oral argument that no state or federal court that has examined this issue has applied *Crawford* to probation or parole revocation hearings.

C. DUE PROCESS AND THE RIGHT TO CONFRONTATION AT PROBATION REVOCATION HEARINGS

Defendant next argues that even if *Crawford* is inapplicable to probation revocation hearings, he still has a due process right to confront witnesses against him in a probation revocation proceeding. Because defendant failed to object to the alleged hearsay testimony at the probation revocation hearing, we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error is an error that is clear or obvious. *Id.* To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings. *Id.*

Probationers in Michigan have a right to confront witnesses in a probation revocation hearing pursuant to MCR 6.445(E)(1), which states:

> Conduct of the Hearing. The evidence against the probationer must be disclosed to the probationer. *The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges.* The state has the burden of proving a violation by a preponderance of the evidence. [Emphasis added.]

In addition, probationers also have certain due process rights at such a hearing because of the potential loss of liberty. *Pillar*, *supra* at 269, citing *Gagnon* and *Morrissey*. The liberty interest brings the probationer within the protection of the Fourteenth Amendment, even though revocation is not a stage of a criminal prosecution. *Morrissey*, *supra* at 482. Furthermore, the due process rights applicable to a probation revocation

hearing allow for procedures that are more flexible than those required during a criminal prosecution. "[T]he process [of admitting evidence at a probation revocation hearing] should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* at 489.

In *Morrissey*, the Supreme Court articulated the "minimum requirements of due process" in a parole revocation hearing, which include

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) *the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)*; (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. [*Id.* at 489 (emphasis added).]

In *Gagnon*, the Supreme Court held that the due process requirements in parole revocation proceedings also apply to probation revocation proceedings. *Gagnon*, *supra* at 782.

Federal and state courts that have ruled that *Crawford* does not apply to probation or parole revocation hearings have nevertheless recognized that probationers or parolees in such proceedings must still be afforded a limited due process right to confrontation. See *Rondeau*, *supra* at 48; *Hall*, *supra* at 986 ("[Defendant] nevertheless enjoys a due process right to confront witnesses against him during his supervised release proceedings, as the Supreme Court held over thirty years ago in *Morrissey*."); *Martin*, *supra* at 844; *Reyes v State*, 868 NE2d 438, 440 (Ind, 2007).

On the basis of *Morrissey*'s holding that the right to confrontation could only be denied for "good cause," courts have adopted two principal methods for establishing whether evidence has been admitted at a probation revocation hearing in violation of the limited due process right to confrontation and cross-examination. In *Reyes*, the Indiana Supreme Court explained the two methods:

> In one, the trial court employs a balancing test that weighs the probationer's interest in confronting a witness against the interests of the State in not producing the witness. *E.g.*, *United States v. Martin*, 382 F.3d 840, 844-45 (8th Cir. 2004). In the balancing test, the State is required to show good cause for denying confrontation. *United States v. Rondeau*, 430 F.3d 44, 48 (1st Cir. 2005). In another test, the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness. *E.g.*, *United States v. Kelley*, 446 F.3d 688, 692 (7th Cir. 2006). The requirement, found in *Morrissey*, 408 U.S. at 489, that the trial court find "good cause" before denying the right to confrontation plays an explicit role when a trial court performs a balancing test; however this does not mean that *Morrissey*'s good cause requirement is not addressed in the substantial trustworthiness test. . . . [T]he substantial trustworthiness test implicitly incorporates good cause into its calculus. [*Reyes*, *supra* at 441.]

Defendant urges this Court to adopt the balancing test set forth in *Martin* and *Rondeau* and reject the substantial trustworthiness test adopted by the Indiana Supreme Court in *Reyes* and by the Seventh Circuit Court of Appeals in *Kelley.* We decline defendant's invitation to adopt either method for establishing the admissibility of hearsay evidence in this matter for two reasons. First, defendant failed to make a request to cross-examine Lisa Plummer or the protective services worker and, second, defendant failed to object to any of

the alleged hearsay evidence that was admitted at the probation revocation hearing.

Before the application of a balancing test, the defendant must have objected to the introduction of hearsay evidence or made a request to cross-examine an adverse witness. See *United States v Stanfield*, 360 US App DC 305, 319; 360 F3d 1346 (2004). During defendant's probation revocation hearing, defense counsel did not object to any of the alleged hearsay evidence and did not request the appearance of either Lisa Plummer or the protective services worker. To the contrary, the record indicates that defense counsel responded to the trial court's inquiry regarding whether Lisa Plummer was present by attempting to explain and justify her nonappearance. Even when defendant moved for reconsideration of the trial court's finding of a probation violation, defense counsel failed to argue that Lisa Plummer should have been produced for cross-examination under oath. Rather, defense counsel offered a letter written by Lisa for the trial court's consideration at the hearing. Defendant's failure to object to any of the alleged hearsay statements also precludes this Court from deciding which method we would adopt in determining the admissibility of hearsay evidence in a probation revocation hearing because there was no objection or evidentiary ruling below. Thus, the record is insufficient for this Court to determine whether the balancing test or the substantial trustworthiness test was satisfied. As already stated, rather than request the attendance of the individual from whom most of the alleged hearsay statements were elicited, defense counsel explained and justified her absence, stating that "she was concerned about coming to court." A defendant should not be allowed to assign error to something that his own counsel deemed proper. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.*

In the present case, defendant failed to object to any alleged hearsay testimony at the probation revocation hearing, and he did not request that the declarants be produced for purposes of cross-examination. In the absence of an objection or request for cross-examination, the trial court was not obligated to engage in either a balancing test or a substantial trustworthiness inquiry to determine the admissibility of hearsay testimony. Thus, on these facts, we decline defendant's invitation to adopt a method for establishing the admissibility of hearsay testimony in a probation revocation hearing.

We further hold that defendant has failed to establish a plain error affecting his substantial rights under a due process analysis. To establish that his substantial rights were affected, defendant must establish an error affecting the trial court's decision that defendant violated his probation. *Carines*, *supra* at 763. We find no such error in this case.

A trial court must base its decision that a probation violation was proven on verified facts in the record. *Pillar*, *supra* at 270. The evidence, viewed in a light most favorable to the prosecution, must be sufficient to enable a rational trier of fact to find a probation violation by a preponderance of the evidence. *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984). Where resolution of a factual issue turns on the credibility of witnesses or the weight of evidence, deference is given to the trial court's resolution of these issues. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Hearsay is generally defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted. See MRE 801(c). A statement is an oral or written assertion, or nonverbal conduct intended as

an assertion. MRE 801(a). In this case, Lisa Plummer did not testify at the probation violation hearing. Her statements were not offered to establish the truth of the matters asserted with respect to whether she knew that defendant was not to have contact with children under 16 years of age, or whether she knew if such contact was required to be supervised; rather, her statements were offered to demonstrate a state of mind that attempted to justify or explain contact between defendant and her children. Under traditional hearsay rules, a statement offered into evidence to demonstrate a person's state of mind is not hearsay. *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995).

However, Hines testified that Lisa Plummer "admitted [defendant] had been there." This testimony was clearly offered for the truth of the matter asserted, and it went to the heart of whether defendant violated the condition of his probation that he not have contact with children under 16 years of age. Unsworn verbal allegations are generally the least reliable type of hearsay to establish a probation violation. *United States v Comito*, 177 F3d 1166, 1171 (CA 9, 1999). But corroboration may give credence to hearsay evidence. See *Hall*, *supra* at 987-988. In this case, unlike in *Pillar*, *supra* at 269, where the only evidence of a probation violation was information in a police report regarding the defendant's arrest, there was nonhearsay evidence to support the trial court's finding that defendant violated his probation. Specifically, Hines testified that she personally witnessed defendant leaving Lisa Plummer's residence when two small children were present in the residence. Hines did acknowledge on cross-examination, when asked if she knew if defendant came out of Lisa Plummer's house, came from the backyard, or came from the driveway, that she did not actually see defendant leave the house. However, it is for the trial court to determine

the credibility of witnesses and weigh conflicting evidence. *Sexton*, *supra* at 752. Furthermore, it was undisputed that defendant and the children's mother were involved in some type of relationship. In addition, the trial court was informed, before revoking defendant's probation, that Lisa Plummer's children were also involved in defendant's first probation violation.

Contrary to defendant's argument on appeal, hearsay evidence was not the sole evidence relied on by the trial court in finding that defendant violated his probation. Because Hines testified that she witnessed defendant leaving Lisa Plummer's residence while two small children were inside, and the trial court must determine matters of credibility and the weight to give the evidence, we find that Hines's testimony alone was sufficient to enable the trial court to find a probation violation by a preponderance of the evidence. *Ison*, *supra* at 66. Accordingly, we conclude that defendant has not established an error affecting the trial court's decision that he violated his probation. *Carines*, *supra* at 763.

Affirmed.

DETROIT MEDICAL CENTER v TITAN INSURANCE COMPANY

Docket No. 283815. Submitted March 10, 2009, at Lansing. Decided March 31, 2009. Approved for publication June 16, 2009, at 9:20 a.m.

The Detroit Medical Center brought an action in the Wayne Circuit Court against Titan Insurance Company, seeking no-fault personal protection insurance benefits for the cost of medical care provided to Maria Jimenez after she was injured in an automobile accident. The defendant, who had been assigned the claim because the car Jimenez was driving was uninsured, moved for summary disposition, arguing that she was an owner of the uninsured car for purposes of the no-fault act, MCL 500.3101, and, as such, was not entitled to personal protection insurance benefits under MCL 500.3113. The court, Robert L. Ziolkowski, J., denied the motion, ruling that Jimenez was not an owner of the car. The court also denied an award of attorney fees to the plaintiff, ruling that the benefits were not overdue and that the defendant did not unreasonably refuse to pay the claim or unreasonably delay in making proper payment. The plaintiff appealed, and the defendant cross-appealed.

The Court of Appeals *held*:

1. MCL 500.3101(2)(h)(*i*) defines "owner" as "[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." "[H]aving the use" of a motor vehicle means using the vehicle in ways that comport with concepts of ownership. Ownership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another. In this case, Jimenez did not have the use of the vehicle for a period that was greater than 30 days. There was no transfer of a right to use, but simply an agreement to periodically lend. The permission was not for a continuous 30 days, but sporadic. Jimenez did not have regular use of the car, did not believe that she had any right of ownership, and did not have unfettered use. The trial court correctly ruled that Jimenez was not an owner of the car for purposes of the no-fault act.

2. The trial court did not abuse its discretion by refusing to award attorney fees to the plaintiff. Benefits were not overdue and the defendant did not unreasonably refuse to pay the claim or unreasonably delay in making proper payment in light of a legitimate question concerning whether Jimenez was an owner of the car.

Affirmed.

Miller & Tischler, P.C. (by *Milea M. Vislosky*), for the plaintiff.

Law Offices of Ronald M. Sangster, PLLC (by *Daniel T. Rizzo*), for the defendant.

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

PER CURIAM. In this first-party case under the no-fault act, MCL 500.3101 *et seq*., defendant appeals as of right an order denying its motion for summary disposition and granting plaintiff's counter-motion for summary disposition. Plaintiff cross-appeals, challenging the denial of an award of attorney fees. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff provided medical services to Maria Jimenez after she was injured in an automobile accident. Jimenez was driving an uninsured vehicle. Defendant, who was assigned the claim by the Assigned Claims Facility, maintained that Jimenez was an "owner" of the vehicle, and that plaintiff was therefore not entitled to recover for Jimenez's medical expenses. See MCL 500.3113. MCL 500.3101(2)(h)(i) defines the term "owner" for purposes of the no-fault act to include "[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."

Taking facts discerned from interviews of Jimenez and Jose Gonzalez in the light most favorable to defendant, it was established that Gonzalez had title to the

car and canceled the insurance; he was the father of Jimenez's two children and may have lived with her; the car was kept at Jimenez's residence; she used the vehicle, primarily for grocery shopping, approximately seven times over the course of about a month; she had to get permission and the keys from Gonzalez to use the vehicle, although permission may never have been denied; she fueled the car, but Gonzalez was otherwise responsible for maintenance; and he had stopped using the vehicle, as he had use of another. In granting summary disposition to plaintiff, the trial court determined that the permissive use and lack of keys precluded any finding of a right of ownership.

We review the ruling on the motion for summary disposition de novo. *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

In *Twichel v MIC Gen Ins Corp*, 469 Mich 524; 676 NW2d 616 (2004), the decedent had purchased the uninsured vehicle five days before the accident, but had not paid for it in full or acquired title. However, the *Twichel* Court concluded that the decedent was an owner of the vehicle because, by virtue of the terms of the agreement with the seller, he had taken possession with the intent to use it for more than 30 days even though he had only used it for five days.

In *Ardt v Titan Ins Co*, 233 Mich App 685, 690-691; 593 NW2d 215 (1999), this Court stated:

> [W]e hold that "having the use" of a motor vehicle for purposes of defining "owner," MCL 500.3101(2)(g)(i); MSA 24.13101(2)(g)(i), means using the vehicle in ways that comport with concepts of ownership. The provision does not equate ownership with any and all uses for thirty days, but rather equates ownership with "having the use" of a vehicle for that period. Further, we observe that the phrase "having the use thereof" appears in tandem with references to renting or leasing. These indications imply that

> *ownership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another*. [Emphasis added.]

In *Ardt*, the driver, who lived with his mother, was using his mother's uninsured vehicle at the time of the accident. A witness said that the driver regularly used the car for more than 30 days, whereas his mother said he used it only a few times, usually for minor purposes like having it washed. The *Ardt* Court concluded that conflicting evidence of sporadic versus regular, unsupervised usage created a genuine issue of material fact for resolution at trial.

In *Chop v Zielinski*, 244 Mich App 677; 624 NW2d 539 (2001), the injured person and driver was the ex-wife of the titleholder. She believed, albeit mistakenly, that she was to be awarded the car in the divorce, kept the car at her apartment complex, and used it daily and exclusively for work and errands for at least six weeks. The *Chop* Court rejected her argument that she could not be the owner because she did not hold title and was merely a borrower. Citing *Ardt*, the *Chop* Court held that "[p]laintiff's use of the car in such a manner was possessory use that comports with the concepts of ownership." *Id*. at 681.

Here, Jimenez did not "hav[e] the use" of the vehicle "for a period that is greater than 30 days." There was no transfer of a right of use, but simply an agreement to periodically lend. The permission was not for a continuous 30 days, but sporadic. Similar to the vehicle in *Chop*, the car was kept at Jimenez's residence. Moreover, she clearly had a significant relationship with Gonzalez such that permission to use the vehicle apparently was never denied. However, unlike the driver in *Ardt*, there was no evidence that Jimenez had "regular" use of the car. Also, contrary to the plaintiff in *Chop*,

Jimenez did not believe that she had any right of ownership and she did not have unfettered use. She had to ask permission and had to be given the keys. While there are facts in common with *Chop* and *Ardt*, these facts, by themselves, do not establish ownership. The need for permission distinguishes this case from *Chop* and *Twichel*, and the lack of any evidence of regular use distinguishes this case from *Ardt*. Accordingly, the trial court did not err when it concluded that Jimenez was not an owner of Gonzalez's vehicle.

Regarding attorney fees, MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are *overdue*. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, *if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment*. [Emphasis added.]

In *Moore v Secura Ins*, 482 Mich 507, 519; 759 NW2d 833 (2008), our Supreme Court stated that this statute did not permit "the recovery of attorney fees for actions in which a court awarded plaintiff benefits that were reasonably in dispute, or, stated slightly differently, benefits not yet overdue." The Court concluded that "whether a claimant's benefits qualify as overdue and whether an insurer unreasonably refused to pay or unreasonably delayed in making payment determine if a claimant's attorney may receive attorney fees." *Id*. at 511. The Supreme Court further determined that what constitutes reasonableness is a question of law that is reviewed de novo, but whether the defendant's denial of benefits was reasonable under the particular facts of the case is a question of fact that is reviewed for clear error. *Id*. at 516. In addition, we review a trial court's award of attorney fees and costs for an abuse of discretion. *Id*.

In denying attorney fees in this case, the trial court concluded that the initial denial of benefits was not unreasonable given some indicia of ownership, and that the question of statutory construction was legitimate. We find no clear error in this determination. Although we have concluded that Jimenez's need for permission to use the vehicle and her sporadic use thereof contraindicated ownership, facts in *Ardt* and *Chop* gave rise to a justifiable contrary argument. Thus, the benefits were *reasonably in dispute* and therefore not overdue. Accordingly, the trial court properly declined to award attorney fees to plaintiff.

Affirmed.

PRICE v KROGER COMPANY OF MICHIGAN

Docket No. 281934. Submitted January 6, 2009, at Lansing. Decided June 18, 2009, at 9:00 a.m.

Terri and Douglas Price brought a premises liability action in the Ingham Circuit Court against the Kroger Company of Michigan after Terri Price fell on the floor of the defendant's grocery store. Just before she fell, Terri took several bags of candy from a waist-high, four-foot wide metal bin. After falling, she saw a one-inch wire protruding from the bin at ankle level and concluded that the protruding wire had snagged her pants and caused the fall. The court, Thomas L. Brown, J., granted summary disposition for the defendant, ruling that there were no genuine issues of material fact and the defendant was entitled to judgment because the danger posed by the protruding wire was open and obvious. The plaintiffs appealed.

The Court of Appeals *held*:

A business invitor owes an invitee a duty to inspect the premises for hazards that might cause injury. The duty encompasses not only warning an invitee of any known dangers, but the additional obligation to make the premises safe, which requires the invitor to inspect the premises and, depending on the circumstances, make any necessary repairs or warn of discovered hazards. However, where the dangers are known to the invitee or are so obvious that they would be discovered by an average person of ordinary intelligence upon casual observation, the invitor owes no duty to protect or warn the invitee unless the invitor should anticipate the harm despite knowledge of it by the invitee. In this case, summary disposition should not have been granted because the plaintiffs produced sufficient evidence to create a genuine issue of material fact concerning whether the danger posed by the wire was open and obvious. That factual question must be decided by the jury.

Reversed and remanded for further proceedings.

GLEICHER, J., concurring, stated that genuine issues of material fact existed with regard to whether the protruding wire created an unreasonable risk of harm and was sufficiently visible to qualify as posing an open and obvious danger. She stated that an unreason-

able risk of harm could be inferred from the fact that the bin was discarded after plaintiff Terri Price's fall. Judge GLEICHER disagreed with the dissent's contention that slight imperfections cannot qualify as unreasonably dangerous conditions and cannot supply a basis for liability. The reasonableness of a risk depends on whether its magnitude is outweighed by its utility. There is no utility inherent to a bin with a protruding wire that may snag clothing that can outweigh the risk of injury from the wire. Finally, the dissent turned premises liability on its head by imposing a duty on a business invitee to inspect an invitor's premises when it stated that the plaintiff should have inspected the bin.

BANDSTRA, J., dissenting, agreed that a business invitor has the duty to inspect the premises for hazards that might cause injury, not just to take precautions against the risks of dangers already known. However, a dangerous condition must involve an unreasonable risk of harm to an invitee and premises liability does not extend to conditions, like the one-inch protruding wire in this case, from which an unreasonable harm cannot be anticipated. Judge BANDSTRA further concluded that the danger posed by the protruding wire would have been open and obvious to a person of ordinary intelligence upon casual inspection. Accordingly, the trial court's grant of summary disposition for the defendant should be affirmed.

Murphy's Law Office, P.C. (by *James D. Murphy, Jr.*), for the plaintiffs.

Maloney, McHugh & Kolodgy, Ltd. (by *Sarah A. McHugh*), for the defendant.

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

GLEICHER, J. In this premises liability action, plaintiffs appeal as of right from a circuit court order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand, and decide this appeal without oral argument under MCR 7.214(E).[1]

[1] We publish this case pursuant to MCR 7.215(A). The majority did not request publication.

Plaintiff Terri Price visited a Kroger store while en route to work on the morning of February 6, 2004. Several hours before plaintiff arrived, Josephine Ridge, a Kroger employee, obtained a large wire bin from a back storage area and placed it in front of a checkout aisle. Ridge filled the bin with sale candy. Ridge admitted at her deposition that although she had inspected the bin before placing it on the shopping floor, she failed to notice any protruding wires.

Plaintiff described in deposition testimony that as she walked toward a checkout aisle, she noticed a square, waist-high metal basket, approximately four-feet wide, containing sale candy. Plaintiff approached the bin, reached into it, retrieved several bags of candy, and turned to walk away. While taking a first step toward the checkout aisle, plaintiff fell to the floor. From plaintiff's vantage point on the floor, she observed a one-inch-long broken wire or "barb" protruding from the bin at ankle level. Plaintiff testified that the candy-filled bin had blocked her view of the protruding wire before she fell. Plaintiff described her discovery of the protruding prong as follows:

> *Q*. When you were on the floor, you were able to see the part of the wire basket that protruded into the aisle approximately an inch?
>
> *A*. Yes, yes.
>
> *Q*. You were able to see its dimensions while you were on the floor?
>
> *A*. No, not really. I didn't actually know what caught me.
>
> *Q*. You removed it from your pant leg?
>
> *A*. When I scooted over, because I thought what, you know how you fall, you go what, and that's when I says [sic], oh, caught me, you know like that, yeah.
>
> *Q*. So when you realized what it was that caught your pant leg, you say that it was part of the wire basket?

A. Yeah, I wasn't sure. So I went over and I went, because I couldn't see it, I mean, I wouldn't have been able to see it—just walking up to it, you wouldn't see it.

Q. Why is that?

A. Because it was so low to the ground. It was probably this far from the ground.

Q. Would you say two or three inches from the ground?

A. Yeah, just at your ankles, or not your ankles, just tops of your shoes.

Ridge recalled that she "threw [the bin] in the trash compactor" after plaintiff's fall.

The circuit court granted defendant's motion for summary disposition under MCR 2.116(C)(10), ruling as a matter of law "that the condition complained of by Plaintiff was open and obvious." The court emphasized that plaintiff had conceded "that there was nothing blocking her view of the metal prong" and that "it is reasonable to conclude that Plaintiff would have not been caught on the metal prong had she been watching where she was going." The court additionally noted that plaintiff had "failed to produce evidence to create an issue of fact concerning whether an average person with ordinary intelligence would have discovered the condition upon casual inspection." The court further rejected "that the metal prong was unavoidable or posed an unreasonably high risk of severe injury."

This Court reviews de novo the circuit court's summary disposition ruling. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may grant summary disposition under subrule C(10) if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the

light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West*, *supra* at 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

As the property owner in control of the premises, defendant owed plaintiff, a business invitee, a duty to inspect the premises for hazards that might cause injury. Plaintiff was entitled to "the highest level of protection" imposed under premises liability law. *James v Alberts*, 464 Mich 12, 20; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The landowner's duty encompasses not only warning an invitee of any known dangers, " 'but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards.' " *James*, *supra* at 19-20; quoting *Stitt*, *supra* at 597.

"However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. *Novotney v*

Burger King Corp (*On Remand*), 198 Mich App 470, 474; 499 NW2d 379 (1993). This is so because "an obvious danger is no danger to a reasonably careful person." *Id.* at 474. The test for an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection? *Id.* at 475.

Our Supreme Court has explicitly cautioned that when applying this test, "it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001). The proper question is not whether *this plaintiff* could or should have discovered the protruding wire, but whether the wire was observable to the average, casual observer. *Novotney*, *supra* at 475. See also *Lugo*, *supra* at 523:

> The trial court's remarks indicate that it may have granted summary disposition in favor of defendant because the plaintiff "was walking along without paying proper attention to the circumstances where she was walking." However, in resolving an issue regarding the open and obvious doctrine, the question is whether the *condition of the premises* at issue was open and obvious . . . . [Emphasis in original.]

We conclude that plaintiffs produced "sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the one-inch-long, ankle-level wire. *Novotney*, *supra* at 475. The evidence of record establishes that neither plaintiff Terri Price nor defendant knew that a wire protruded from the bin until after plaintiff fell. Given the extremely small size of the offending barb and its location immediately adjacent to the wire bin at ankle level, we reject the

circuit court's conclusion that, as a matter of law, plaintiff should have discovered it "upon casual inspection" of the bin. A jury could reasonably infer that a casual inspection of the premises in which plaintiff shopped would not have revealed the barb, in light of its small size, its location at close to floor level, the impediment to visibility posed by the bulk of the candy-filled bin, and Ridge's failure to detect the anomaly, notwithstanding her greater ability and opportunity to examine the bin before placing it in an area of the store accessible to shoppers like plaintiff.

In conclusion, because the record gives rise to a material question of fact regarding whether the danger posed by the protruding wire qualified as open and obvious, a jury must make this factual determination.

We reverse the circuit court's order granting summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

TALBOT, P.J., concurred.

GLEICHER, J. (*concurring*). I write separately to respectfully respond to the legal arguments advanced by the dissent.

The dissent posits that the small wire prong that caused plaintiff's fall constituted a defect so inconsequential that its presence cannot create a legal basis for defendant's liability to plaintiff. According to the dissent, "no reasonable fact-finder could find that . . . the one-inch wire was a dangerous condition presenting an unreasonable risk of harm." *Post* at 510. But this contention is readily refuted by the fact that Josephine Ridge, defendant's employee, discarded the bin immediately after learning that the barb caused plaintiff's

fall. The only rational inference to arise from this action is that Ridge believed the bin presented an unreasonable risk of harm to other customers. Furthermore, the question whether the barb constituted an unreasonable danger despite its small size is properly for the jury to decide. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995), our Supreme Court held that "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." Ridge's conduct, without more, creates a genuine issue of fact regarding the reasonableness of the danger.

I also respectfully disagree with the basic premise of the dissent that "slight imperfections" cannot qualify as unreasonably dangerous conditions and cannot supply a basis for liability "in the legal course of things." *Post* at 507-508. In *Moning v Alfono*, 400 Mich 425, 450; 254 NW2d 759 (1977), our Supreme Court explained that "[t]he reasonableness of the risk depends on whether its magnitude is outweighed by its utility." The Supreme Court derived the risk-utility analysis from the 2 Restatement of Torts, 2d, § 291, which provides:

> "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." [*Moning*, *supra* at 450, quoting Restatement Torts, 2d, § 291.]

The Supreme Court emphasized in *Moning* that

> [t]he balancing of the magnitude of the risk and the utility of the actor's conduct requires a consideration by the *court and jury* of the societal interests involved. The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public

> policy require that a particular view be adopted and applied in all cases. [*Id*. (emphasis in original).]

Here, I discern no utility inherent to a bin with a protruding wire at its bottom that may snag clothing or skin. The risk that many shoppers would fall or suffer serious injury because of the barb may be relatively small. Nevertheless, the law attaches a significant social value to providing business invitees with safe premises. See *Bertrand*, *supra* at 609:

> Essentially, social policy imposes on possessors of land a legal duty to protect their invitees on the basis of the special relationship that exists between them. The rationale for imposing liability is that the invitor is in a better position to control the safety aspects of his property when his invitees entrust their own protection to him while entering his property.

The cost of preventing harm from the bin was apparently negligible, as reflected by Ridge's decision to promptly consign the bin to the trash. Because the risk-utility equation slants convincingly toward risk with no countervailing utility, I disagree with the dissent's contention that the small barb, as a matter of law, did not create an unreasonable risk of harm. At trial, the defense remains at liberty to adopt the dissent's view, and to argue that the prong is simply too small and too inconsequential to have created an unreasonable risk of harm.[1] But because reasonable people can differ regarding the risk presented by the protruding prong compared with its utility, and because no relevant

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[1] If defendant pursues this argument, Ridge's deposition testimony is admissible under MRE 407 as impeachment to rebut that the prong did not present an unreasonable risk of injury. Furthermore, "[w]hen a party deliberately destroys evidence, a presumption arises that if the evidence were produced at trial, it would operate against the party who deliberately destroyed it." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

social policy exists exempting defective bins from the reach of tort law, a jury should decide whether to impose liability on defendant for plaintiff's fall.

The dissent embodies a second misapprehension of tort law. According to the dissent, in a premises liability case

> the standard is whether an average person with ordinary intelligence, having casually inspected the premises, *in this case the bin with its protruding wire*, would have noticed the danger presented by the wire. . . . Plaintiffs admit in their brief that Terri "had no reason to casually inspect" the basket, apparently conceding that she did not do so. Further, she admits that "if she had made such an inspection, she would have, or may have seen the wire protruding slightly from the side of the bin." [*Post* at 511 (citation omitted; emphasis added).]

No caselaw supports the existence of a duty by plaintiff to inspect the bin. Were that the test, every aspect of an invitor's premises harboring a latent danger would automatically qualify as open and obvious. That plaintiff failed to discern a need to inspect the bin is entirely irrelevant to the question whether the danger posed by the protruding wire was open and obvious to the casual observer. Furthermore, the dissent's assertion that plaintiff bore a duty to inspect the bin turns the law of premises liability on its head. The property owner in control of the premises, and not the invitee, owes a duty to inspect the premises for hazards that might cause injury. As a business invitee, plaintiff was entitled to "the highest level of protection" imposed under premises liability law. *James v Alberts*, 464 Mich 12, 20; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The landowner's duty encompasses not only warning an invitee of any known dangers, " 'but the additional obligation to also make the premises safe,

which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs . . . .' " *James*, *supra* at 19-20; quoting *Stitt*, *supra* at 597. Ridge claimed to have inspected the bin, but admitted that she failed to notice the wire. The dissent entirely excuses Ridge's negligence by asserting that the barb was too small to create any duty on the part of defendant, but imposes on *plaintiff* the duty to have spotted the barb's presence before reaching into the bin. As the dissent would have it, a landowner's duty to make its premises safe for an invitee simply evaporates if the invitee fails to perform a more careful inspection of the premises than that accomplished by the landowner.

Once again, defendant remains entitled to adopt the dissent's position at trial and to argue to a jury that plaintiff's failure to closely inspect the contours of the bin before reaching into or walking away from it constitutes comparative negligence. But no caselaw suggests that in the absence of an open and obvious danger, plaintiff's negligence in not inspecting the bin eliminates her premises liability claim. In an action based on tort, "a plaintiff's contributory fault does not bar that plaintiff's recovery of damages." MCL 600.2958.

Because genuine issues of material fact exist with regard to whether the protruding wire created an unreasonable risk of harm and was sufficiently visible to qualify as open and obvious, the majority properly concludes that the circuit court improperly granted summary disposition to defendant.

BANDSTRA, J. (*dissenting*). I respectfully dissent and would affirm.

Anyone confronted with the physical world knows that accidents happen. As a result, people sometimes

get hurt. In the natural course of things, the injured person bears the cost of the accident. In the legal course of things, an injured person may become a plaintiff and seek to impose the cost of an injury upon someone else.

Generally, our tort law is designed to fairly determine when an injured person may succeed in that quest. In other words, an injured person may not do so in every case; not every accident results from the action of a culpable party. Instead, a plaintiff must meet the burden of proof that our law has established for whatever theory of liability is advanced.

The theory plaintiffs advance here is one of premises liability and, more specifically, premises liability with respect to an invitee. As the lead opinion correctly points out, in this context our law imposes the highest obligation on a possessor of property, the duty to inspect the premises for hazards that might cause injury, not just to take precautions against the risks of any dangers that are already known.

Nonetheless, there must be some significant danger or hazard which, upon inspection, the possessor should have detected. Our law in this area stems from the Second Restatement of Torts and its provisions regarding "dangerous conditions" that involve "an unreasonable risk of harm" to invitees. See, e.g., *Bertrand v Allen Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting 2 Restatement Torts, 2d, § 343, pp 215-216. Ever since *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), according to our Supreme Court, a possessor's duty is "to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land." See *Bertrand*, *supra* at 609; *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 n

2; 751 NW2d 8 (2008). As emphasized by Justice CAVANAGH, the dangerous condition must involve "an *unreasonable* risk of harm" to an invitee, *Bertrand*, *supra* at 609 (emphasis in original). Accordingly, as Justice CAVANAGH stated in *Williams*, *supra* at 500, a premises possessor's obligation is not "absolute"; invitee premises liability "does not extend to conditions from which an unreasonable risk cannot be anticipated." So, to impose liability on a possessor, an invitee must show not only that there was a risk, but also that the risk was unreasonable.

As suggested earlier, our physical world is filled with a myriad variety of slight imperfections (e.g., misaligned joints, sharp corners, misshapen surfaces, etc.) that may cause bruises, abrasions, or other accidental injuries. The question here, under the Supreme Court cases just discussed, is simple: did the one-inch wire, protruding from the bin about half the length of an average adult pinky finger, constitute a "dangerous condition" presenting "an unreasonable risk of harm"? Or, instead, was it a "condition from which an unreasonable risk (could not) be anticipated"? As suggested by Justice CAVANAGH in his use of the word "anticipated," we cannot determine that question retrospectively, i.e., taking into account the fact that a harm has allegedly occurred because of the one-inch wire. Instead, the question is whether defendant here could have anticipated in advance that the one-inch wire was a "dangerous condition" presenting an "unreasonable risk" to customers like plaintiff.

It is on this point that the concurring opinion goes awry. My colleague does not offer any evidence upon which the fact-finder might reasonably conclude that, before the accident occurred, defendant should have realized that the one-inch wire was a dangerous condi-

tion presenting an unreasonable risk of harm. Instead, the concurring opinion only points to evidence that one of defendant's employees removed the bin after the accident occurred. That evidence is simply irrelevant to the real question here, whether an unreasonable risk should have been anticipated beforehand. Further, this irrelevant evidence could not be presented to the fact-finder for any consideration whatsoever under the subsequent remedial measure proscription of MRE 407.

Similarly, the concurring opinion misplaces the "risk-utility analysis" that precedents suggest is useful to determine whether the risk of the one-inch wire was unreasonable. I agree that, following the accident, the then-known risk of the one-inch wire outweighed the utility of removing it. But, that has nothing to do with what defendant should have anticipated before the accident occurred, under Justice CAVANAGH's formulation. *Williams*, *supra* at 500.

Certainly, as suggested in the concurring opinion, the arguments I am making here could be presented to the fact-finder, and I would hope that they would be persuasive. Still, I see no need to foist upon defendant the costs of further litigation under the facts presented here and the law applicable to them. Neither should defendant have to risk the possibility of liability being imposed at trial and the costs that would no doubt result in trying to undo such an unfounded result. Although some might disagree, not every personal injury lawsuit that is filed deserves to go to the fact-finder; that is why we have a well-developed body of rules and caselaw allowing summary dispositions.

Finally, as I write this opinion, our state leads the nation in its unemployment rate. I cannot avoid commenting on how the result here will further discourage employers from locating in Michigan. Most employers

have premises frequented by invitees of one kind or another. The decision rendered by my colleagues today strips away the minimal protection previously afforded by the Supreme Court precedents already discussed. It foists potential liability upon business invitors for miniscule risks that are only reasonably discoverable after, and because of, an alleged accident.

I would initially conclude that no reasonable fact-finder could find that, before plaintiff Terri Price's alleged accident, the one-inch wire was a dangerous condition presenting an unreasonable risk of harm. Therefore, defendant had no duty to remove that one-inch wire.[1]

Regarding the issue discussed in the lead opinion, I further conclude that the open and obvious danger doctrine would apply to absolve defendant of any liability, even if the one-inch wire were a dangerous condition presenting an unreasonable risk of harm. Photographic

[1] Courts that, like Michigan courts, apply the Restatement approach regularly adopt this analysis with this result. See, e.g., *Campisi v Acme Markets, Inc*, 915 A2d 117, 119-120 (Pa Super, 2006) (affirming a judgment notwithstanding a verdict in favor of a plaintiff, the court reasoned that a blind person, whose cane the plaintiff allegedly tripped over, was not a "harmful condition" on the defendant's premises sufficient to establish any legal duty); *Fredrickson v Bertolino's Tacoma, Inc*, 131 Wash App 183, 188-191; 127 P3d 5 (2006) (affirming a summary judgment granted to a defendant, the court reasoned that the evidence was insufficient to show that the defendant's coffee shop chair, which allegedly broke beneath the plaintiff, posed an unreasonable risk of harm to customers); *CMH Homes, Inc v Daenen*, 15 SW3d 97, 99-103 (Tex, 2000) (overturning a judgment for a plaintiff, the court reasoned that there was insufficient evidence showing that the alleged instability of steps upon which the plaintiff was injured was a danger that the defendant should have known created an unreasonable risk of harm); *Hartung v Maple Investment & Dev Corp*, 243 Ill App 3d 811, 815-817; 612 NE2d 885 (1993) (the court reasoned that a small defect in a privately owned sidewalk did not present an unreasonable risk of harm to invitees and that, therefore, the possessor of the sidewalk could not be liable for an injury resulting from that defect).

evidence of bins similar to the bin that allegedly caused injury to Terri Price shows that the wire composition of the bins is obvious. Terri admitted at her deposition that there was more than one wire sticking out of the bin into which she reached. She testified, in part, "it had these little prongs, and these little prong things were sticking out toward the—you know, like if you were going to the flow of the traffic here, they were sticking out of this corner." Terri testified that the particular wire that caught her pant leg was located at ankle level, about two or three inches above the floor. She claimed that she did not see that wire before she fell, but she did not identify anything that could have blocked her view.

Terri's testimony that she did not see the wire before the alleged accident is irrelevant to whether the danger was open and obvious. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Instead, the standard is whether an average person with ordinary intelligence, having casually inspected the premises, in this case the bin with its protruding wire, would have noticed the danger presented by the wire. *Id*.[2] In other words, Terri was obligated to watch where she was going and be generally aware of her physical environment, to avoid injuries like the one she claims resulted from the one-inch wire. Plaintiffs admit in their brief that Terri "had no reason to casually inspect" the basket, apparently conceding that she did not do so. Further, she admits that "if she had made such an inspection, she would have, or may have seen the wire protruding slightly from the side of the bin."

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[2] *Novotney* and numerous other open and obvious danger precedents are themselves the "caselaw [that] supports the existence of a duty by plaintiff to inspect the bin." See *ante* at 505. (GLEICHER, J., concurring).

Viewed in a light most favorable to plaintiffs, the evidence did not create a genuine issue of material fact regarding whether an average person of ordinary intelligence would have been able to discover the danger posed by the protruding wire upon casual inspection of the bin. Because reasonable minds could not differ in finding that the danger was open and obvious, I would conclude that the trial court properly granted summary disposition in favor of defendant with respect to this issue.

VUSHAJ v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 283243. Submitted March 3, 2009, at Detroit. Decided March 17, 2009. Approved for publication June 18, 2009, at 9:05 a.m.

Edmond Vushaj brought an action in the Wayne Circuit Court against Farm Bureau General Insurance Company of Michigan, his homeowner's insurer, after the defendant rejected a claim for fire loss. The court, Michael F. Sapala, J., granted summary disposition for the defendant, ruling that there existed no genuine issues of material fact and the defendant was entitled to judgment as a matter of law because a policy exclusion for loss that occurs "while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 30 consecutive days" applied. The plaintiff appealed.

The Court of Appeals *held*:

1. The terms "vacant" and "unoccupied," as used in the policy in question, mean not routinely characterized by the presence of human beings. The evidence in this case, when viewed in a light most favorable to the plaintiff, indicated that the plaintiff was present at the house one night every other week for two years, that his father slept at the house sporadically for a total of 52 nights during the same two-year period, and that there were no beds in the house. Such evidence does not lead to a conclusion that the house was routinely characterized by the presence of humans. Therefore, the house was vacant or unoccupied for purposes of the policy.

2. No genuine issues of material fact precluded a grant of summary disposition. The trial court correctly determined that the plaintiff's father's occasional stays at the house did not constitute occupancy. Mail deliveries and sparse furnishing were not highly relevant in determining whether the house was occupied for purposes of the policy. The intent of the plaintiff and his father with respect to occupancy was not material to the determination whether a person actually occupied the house. The policy exclusion and a policy provision requiring reasonable precautions against frozen pipes in the house (regardless of

whether it was occupied or unoccupied) were not contradictory. Taken as a whole, the policy provided that if a structure is left vacant or unoccupied, certain precautions have to be taken to prevent frozen pipes. However, even if those precautions were taken, no coverage would be provided if the structure remained vacant or unoccupied for more than 30 consecutive days.

Affirmed.

Henry A. Sachs for the plaintiff.

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

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

PER CURIAM. Plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition. Plaintiff filed suit after defendant denied a claim arising out of a fire at a house owned by plaintiff. The trial court granted defendant's motion for summary disposition after determining that plaintiff was not entitled to coverage because the house in question was vacant before the fire. We affirm.

I. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) when, upon examining the affidavits, depositions, pleadings, admissions, and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

II. THE TRIAL COURT PROPERLY DETERMINED THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED AND THAT THE HOUSE WAS VACANT AND UNOCCUPIED BEFORE THE FIRE

Plaintiff contends that defendant was not entitled to summary disposition because the terms "vacant" and "unoccupied" were ambiguous. We disagree.

As our Supreme Court explained in *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982):

> A contract is said to be ambiguous when its words may reasonably be understood in different ways.
>
> If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.
>
> Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear.

The mere fact that a term is not defined in a policy does not render that term ambiguous. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). "Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings." *Id*. "When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate." *Stanton v City of Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002). The terms "vacant" and "unoccupied" have commonly used meanings and are easily understood. According to Black's Law Dictionary, the term "vacant" means "[e]mpty; unoccupied." Black's Law Dictionary (8th ed). Black's further notes that "[c]ourts have sometimes distinguished *vacant* from *unoccupied*, holding

that *vacant* means completely empty while *unoccupied* means not routinely characterized by the presence of human beings." *Id.* Similarly, Random House Webster's College Dictionary defines "unoccupied" as "without occupants" and "occupant" as "a tenant of a house, estate, office, etc.; resident." *Random House Webster's College Dictionary* (1995). When read in the context of the contract, the terms "vacant" and "unoccupied" are not ambiguous because a fair reading of the entire contract leads only to the conclusion that coverage is not available in the present case.

Any reading of the contract results in the conclusion that the purpose of the provision in question is to protect the insurance company from the increased risk that accompanies insuring a house that does not have an occupant. Plaintiff's assertion that a structure must be wholly empty for the provision to take effect is therefore unpersuasive. When plaintiff's definitions of the terms are accepted, absurdity results. For example, a fully furnished house would never be considered to be vacant, even if no person entered the house for years, simply because the furniture in the house prevented the structure from being "completely empty." Because terms must be interpreted in the context of the contract in which they appear, we conclude that the terms "vacant" and "unoccupied" mean "not routinely characterized by the presence of human beings."

In applying the commonly understood meanings of "vacant" and "unoccupied" to the present dispute, it becomes clear that defendant was entitled to summary disposition. When viewing the evidence in the light most favorable to plaintiff, this Court must accept that no one had resided in the house from January 2004 until the house was damaged by fire in January 2006. Mr. Nikoll Vushaj would generally spend a night at the

home every other week when he would have an appointment with his doctor. He occasionally cooked food when he was at the house, but also relied on McDonald's for his meals. There were no beds in the house and the elder Vushaj, when he stayed overnight, slept in a sleeping bag that he kept in his car. He completed light maintenance tasks, such as mowing the lawn and shoveling the snow. These facts do not result in a conclusion that the house was routinely characterized by the presence of human beings. Rather, the absence of humans at the house is striking when one considers the facts. If Mr. Nikoll Vushaj's testimony is accepted as true, he stayed at the house one night every other week for two years. Put differently, the elder Vushaj slept at the house approximately 52 times and slept elsewhere 678 times. Therefore, the trial court properly granted summary disposition because the contractual language was clear and the application of that language to the undisputed facts results in the conclusion that defendant was entitled to judgment as a matter of law.

Plaintiff, also contends that summary disposition was improper under MCR 2.116(C)(10) because various issues of material fact remain unresolved as to whether the house was neither vacant nor unoccupied for more than 30 days before the fire. We disagree.

Plaintiff cites five alleged genuine issues of material fact that remain unresolved; the first of which is whether Nikoll Vushaj was an occupant of the home. The court examined the deposition testimony of plaintiff and his father, the insurance policy, the adjuster's reports, and other properly admitted documentary evidence. After the parties agreed (for the purposes of the motion) that the elder Vushaj occasionally slept at the house when he had an appointment with a physician and did some maintenance when he was there, the court

determined that it could find neither evidence of occupancy nor evidence to counter vacancy, as defined in the precedential cases of *Richards v Continental Ins Co of the City of New York*, 83 Mich 508; 47 NW 350 (1890). The court also concluded that the offered exception to coverage for unoccupied and vacant property articulated in *Hidalgo v Mason Ins Agency, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 2, 2005 (Docket No. 260662), was inapplicable because the elder Vushaj's visits were not primarily for the purpose of maintaining the home. The finding on intent related to a policy stipulation in *Hidalgo*, which was not included in the Farm Bureau policy before the court. Therefore, while the intent of the elder Vushaj may well raise a question of fact, that question is not material to this policy. The court properly resolved an issue of law after accepting as true the facts in the light most favorable to plaintiff. It did not improperly invade the purview of the finder of fact at trial.

Plaintiff next alleges that genuine issues of material fact exist regarding whether the house was furnished and was receiving regular mail deliveries. Contrary to plaintiff's assertions, the trial court did not make any factual findings regarding whether the house was furnished or whether mail was delivered there. There is no reason to believe that the trial court failed to view these facts in the light most favorable to plaintiff. After doing so, the trial court still determined that the house was vacant or unoccupied. The trial court's holding reflects the conclusion that mail deliveries and sparse furnishings are not highly relevant in determining whether a home is occupied for the purposes of this insurance policy. As discussed earlier, we agree and conclude that the proper inquiry is whether the home was regularly characterized by human presence. The trial court's grant of summary disposition was therefore appropriate.

Plaintiff also contends that there was a genuine issue of material fact regarding whether defendant was aware that the home was unoccupied at the time that it renewed the insurance policy. This issue was not raised until plaintiff filed his motion for reconsideration. Where an issue is first presented in a motion for reconsideration, it is not properly preserved. See *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002). This Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). In the present case, there are no facts on the record regarding defendant's knowledge of the home's occupancy at the time of the policy renewal. Therefore, it would be improper to address this claim on appeal.

Finally, plaintiff contends that there was a genuine issue of material fact regarding whether plaintiff and the elder Vushaj intended to occupy the house. Again, while there may be a question regarding this issue based upon a view of the documents in the light most favorable to the appellant, the question is not material. The language of the policy indicates that a policyholder is not entitled to coverage for any loss that occurs "while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 30 consecutive days." Availability of coverage under the policy is not based on whether a party *intended* to occupy the structure. Coverage is based on whether a party *actually* occupied a structure. Therefore, the issue of intent is not material and the trial court properly ruled on the summary disposition motion before the issue of intent was resolved.

III. THE INSURANCE POLICY DOES NOT CONTAIN CONTRADICTORY PROVISIONS REGARDING OCCUPANCY

Defendant next contends that summary disposition was improper because the insurance policy contained contradictory language regarding unoccupied structures. We disagree.

Paragraph 26 of the insurance policy provides that coverage is not available for any loss that occurs "while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 30 consecutive days." Plaintiff contends that this provision is ineffective because it contradicts language in his renewal documents. Specifically, plaintiff cites language in the renewal documents that provides, "The provisions requiring reasonable care to either maintain heat in the building or shut off the water supply and drain all systems and appliances to prevent freezing will now apply to ALL dwellings, even those dwellings that are vacant, unoccupied, or being constructed."

"This Court reads contracts as a whole, giving harmonious effect to each word and phrase." *Holmes v Holmes*, 281 Mich App 575, 596; 760 NW2d 300 (2008). The two provisions cited by plaintiff can be read in harmony with one another. Paragraph 26 provides that coverage is not available if a structure has been vacant or unoccupied more than 30 days immediately before a loss. The provision included with the renewal documents provides that certain precautions must be taken to prevent the pipes from freezing in a vacant or unoccupied structure. The provision in the renewal documents does not refer to any specific period. Therefore, it does not contradict paragraph 26. Taken as a whole, the policy provides that if a structure is left vacant or unoccupied, certain precautions have to be

taken to prevent the freezing of pipes. However, even if those precautions are taken, no coverage is provided if the structure remains vacant or unoccupied for a period beyond 30 days.

IV. PLAINTIFF FAILED TO PROPERLY PRESERVE THE ISSUE RELATING TO WAIVER AND THIS COURT WILL NOT CONSIDER IT ON APPEAL

Finally, plaintiff contends that defendant waived paragraph 26 of the insurance policy when it renewed the policy after discovering that the house was unoccupied. As stated above, where an issue is first presented in a motion for reconsideration, it is not properly preserved. See *Pro-Staffers, Inc*, *supra* at 328-329. This Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available. *Brown, supra* at 599. In the present case, there are no facts on the record regarding defendant's knowledge of the home's occupancy at the time of the policy renewal. Therefore, it would be improper to address this claim on appeal.

Affirmed.

1300 LAFAYETTE EAST COOPERATIVE, INC v SAVOY

Docket Nos. 281577 and 282128. Submitted April 8, 2009, at Detroit. Decided April 16, 2009. Approved for publication June 18, 2009, at 9:10 a.m.

1300 Lafayette East Cooperative, Inc., brought an action in the Wayne Circuit Court against Steven and Jacalyn Savoy, alleging breach of an occupancy agreement and seeking past-due rent. The action was preceded by consent judgments in summary eviction proceedings in the 36th District Court. The plaintiff dismissed its claims against Jacalyn Savoy after case evaluation. On competing motions for summary disposition, the circuit court, Prentis Edwards, J., denied the plaintiff's motion and granted summary disposition for Steven Savoy, ruling that the claims against that defendant had been resolved in the summary eviction proceedings in the district court. The circuit court subsequently denied the defendants' motion for sanctions against the plaintiff for filing a frivolous action. The plaintiff appealed the denial of its summary disposition motion, the defendants appealed the denial of their motion for sanctions, and the appeals were consolidated.

The Court of Appeals *held*:

1. The circuit court erred by ruling that the plaintiff's action was precluded by the summary eviction proceedings in the district court. The consent judgments in the district court stated the amount the defendants had to pay to keep occupying the leased premises, but did not include an award of damages. MCL 600.5739(1) and MCR 4.201(G)(1)(a)(i) allow, but do not require, parties to a summary eviction proceeding to join a claim or counterclaim for money to the claims or counterclaims in the summary proceeding. A summary eviction judgment must state the amount of past-due rent that, if timely paid, will allow the defendant to remain in possession of the premises. The amount of past-due rent is not a judgment for damages enforceable by a writ of execution. Finally, MCL 600.5750 provides that the remedy provided by summary proceedings is in addition to, and not exclusive of other legal, equitable, or statutory remedies.

2. A summary eviction judgment is conclusive on the narrow issue whether eviction is proper where, as in this case, no claim for damages is made in the summary eviction proceeding.

3. The case must be remanded for further proceedings because a question remains with regard to whether the plaintiff terminated the occupancy agreement under an article in the parties' agreement and whether there is liability for occupancy fees.

4. The circuit court did not clearly err by finding that the plaintiff's action was not frivolous for purposes of MCL 600.2591, which governs sanctions for frivolous actions. The action did not meet the statutory definitions of "frivolous." The plaintiff's primary purpose in initiating the action was not to harass, embarrass, or injure the defendants. MCL 600.2591(3)(a). Most of the underlying facts were undisputed, so the plaintiff had a reasonable basis to believe that the facts underlying its legal position were true. MCL 600.2591(3)(a)(ii). The plaintiff's legal position was not devoid of arguable legal merit. MCL 600.2591(3)(a)(iii).

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

Pentiuk, Couvreur & Kobiljak, P.C. (by *April E. Knoch*, *Randall A. Pentiuk*, and *Creighton D. Gallup*), for the plaintiff.

Lawrence R. Walker, P.C. (by *Lawrence R. Walker*), for the defendants.

Before: ZAHRA, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM. In Docket No. 281577, plaintiff, 1300 LaFayette East Cooperative, Inc., appeals as of right the circuit court's order denying its motion for summary disposition and granting summary disposition in favor of defendant Steven Savoy.[1] In Docket No. 282128, defendants appeal the circuit court's postjudgment or-

[1] Plaintiff voluntarily dismissed its claims against defendant Jacalyn Savoy with prejudice following the case evaluation. Therefore, for purposes of this opinion, the term "defendant" refers to defendant Steven Savoy only.

der denying their motion for sanctions. We affirm in part, reverse in part, and remand for further proceedings.

This case arises from defendant's breach of his occupancy agreement with plaintiff for Unit 2707-C at the 1300 LaFayette East Cooperative. Plaintiff brought this action in circuit court to recover unpaid rent allegedly due under the agreement. The circuit court determined that the issues in the case were resolved in prior summary proceedings in district court and, therefore, denied plaintiff's motion for summary disposition and granted summary disposition in favor of defendant.

I. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Plaintiff moved for summary disposition under MCR 2.116(C)(7), (9), and (10). Defendant moved for summary disposition under MCR 2.116(C)(10) and (I)(2).

MCR 2.116(C)(7) allows a trial court to grant summary disposition when a *claim* is barred by a prior judgment or disposition. In this case, plaintiff was the only party asserting a claim; it did not seek, nor could it logically argue for, dismissal of its own claims. Therefore, subrule C(7) is not applicable.

MCR 2.116(C)(9) allows a court to grant summary disposition when a party fails to state a valid defense to a claim. A motion under this subrule tests the sufficiency of the pleadings, and all well-pleaded allegations must be accepted as true. *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). In this case, however, both parties relied on documentary evidence to support their arguments. Therefore, subrule C(9) also is not applicable.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id*. A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries* (*On Rehearing*), 441 Mich 379, 398-399; 491 NW2d 208 (1992). Only "the substantively admissible evidence actually proffered" may be considered. *Maiden*, *supra* at 121; see also MCR 2.116(G)(6). If there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, summary disposition is properly granted. *Maiden*, *supra* at 120.

Summary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law.

II. DOCKET NO. 281577

A. PRELIMINARY MATTERS

Initially, defendant argues, as he did below, that plaintiff was not entitled to summary disposition under MCR 2.116(C)(10), irrespective of the merits of its motion, because its motion was not properly supported. We disagree.

A motion under subrule C(10) must be supported by affidavits, depositions, admissions, or other documentary

evidence. See MCR 2.116(G)(4) and (6). Under subrule G(6), the submitted evidence may be considered in a C(10) motion only to the extent that it would be substantively admissible. However, the *Maiden* Court noted:

> "The evidence *need not be in admissible form*; affidavits are ordinarily not admissible evidence at a trial. But it must be admissible in content . . . . Occasional statements in cases that the party opposing summary disposition must present admissible evidence . . . should be understood in this light, as referring to the content or substance, rather than the form, of the submission." [*Maiden*, *supra* at 124 n 6 (emphasis added), quoting *Winskunas v Birnbaum*, 23 F3d 1264, 1267-1268 (CA 7, 1994).]

Thus, documentary evidence that would be "plausibly admissible" at trial if a proper foundation is laid is sufficient to survive a C(10) motion. See *id*. at 124-125. Defendant is incorrect in arguing that documents cannot be used to establish a question of fact unless they are supported by affidavits, depositions, or admissions.

Next, plaintiff argues that the circuit court's decision was improperly based on a superseded local court rule. We disagree.

MCR 4.201(G)(1)(c) provides, "A court with a territorial jurisdiction which has a population of more than 1,000,000 may provide, by local rule, that a money claim or counterclaim must be tried separately from a claim for possession unless joinder is allowed by leave of the court pursuant to subrule (G)(1)(e)." In 1985, the 36th District Court adopted such a rule, LCR 4.201(G)(1)(c), but that rule was later rescinded effective June 9, 2004. See 470 Mich lxxvii (2004). Thus, as plaintiff argues, it would have been improper for the circuit court to rely on a superseded local rule. However, as will be discussed later, plaintiff did not assert a claim for money damages in the earlier district court proceedings. Thus, even if the local rule had been in effect, it would not have

applied to this case. Further, there is no indication that the circuit court relied on this local rule. Therefore, we need not consider this issue further.

B. SUMMARY EVICTION PROCEEDINGS

Chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq*., allows for summary eviction proceedings to be brought in district court to recover possession of a rented or leased residence and to obtain ancillary relief. In this case, Article 13 of the parties' occupancy agreement provides that these summary procedures apply.

1. JOINDER OF DAMAGES CLAIMS

Plaintiff argues that the circuit court erred by ruling that its action for damages was precluded by the prior summary eviction proceedings in the district court. We agree.

With regard to joinder of claims in summary eviction proceedings, MCL 600.5739(1) provides:

> Except as provided by court rules, a party to summary proceedings may join claims and counterclaims for money judgment for damages attributable to wrongful entry, detainer, or possession, for breach of the lease or contract under which the premises were held, or for waste or malicious destruction to the premises. The court may order separate summary disposition of the claim for possession, without prejudice to any other claims or counterclaims. A claim or counterclaim for money judgment shall not exceed the amount in controversy that otherwise limits the jurisdiction of the court.

See also MCR 4.201(G)(1)(a)(i). Thus, a party *may* join a claim for damages in a summary eviction proceeding up to the district court's jurisdictional limits, but it is not required to do so.

We agree with plaintiff that the circuit court erred by seemingly concluding that the district court's actions included a claim for damages that was conclusively settled when the trial court issued the two consent judgments. Regarding a judgment in a summary eviction proceeding, MCL 600.5741 provides:

> If the jury or the judge finds that the plaintiff is entitled to possession of the premises, or any part thereof, judgment may be entered in accordance with the finding and may be enforced by a writ of restitution as provided in this chapter. *If it is found that the plaintiff is entitled to possession of the premises, in consequence of the nonpayment of any money due under a tenancy*, or the nonpayment of moneys required to be paid under an executory contract for purchase of the premises, *the jury or judge making the finding shall determine the amount due or in arrears at the time of trial which amount shall be stated in the judgment for possession*. In determining the amount due under a tenancy the jury or judge shall deduct any portion of the rent which the jury or judge finds to be excused by the plaintiff's breach of the lease or by his breach of 1 or more statutory covenants imposed by section 39 of chapter 66 of the Revised Statutes of 1846, as added, being section 554.139 of the Compiled Laws of 1948. *The statement in the judgment for possession shall be only for the purpose of prescribing the amount which, together with taxed costs, shall be paid to preclude issuance of the writ of restitution*. The judgment may include an award of costs, enforceable in the same manner as other civil judgments for money in the same court. [Emphasis added.]

Thus, a summary eviction judgment *must* state the amount of past-due rent that, if timely paid, will allow a defendant to remain in possession of the premises. See also MCL 600.5744(1), (4), and (6). But unlike an ordinary damages award, and unlike the award of costs expressly authorized by this section, the amount of past-due rent is *not* a judgment for damages enforceable by a writ of execution. *Gregor v Olde*, 209 Mich 43, 48;

176 NW 580 (1920); see also *Armstrong v Grimm*, 268 Mich 437, 438; 256 NW 475 (1934).

Here, neither district court complaint contained a request for money damages, and neither consent judgment contained an award of money damages. Rather, both consent judgments contained a statement of the amount of past-due rent that, if timely paid, would allow defendant to remain in possession of the residence.

We agree with plaintiff that the district court proceedings did not preclude a subsequent action for damages. MCL 600.5750 states:

> The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except that a judgment for possession after forfeiture of an executory contract for the purchase of premises shall merge and bar any claim for money payments due or in arrears under the contract at the time of trial and that a judgment for possession after forfeiture of such an executory contract which results in the issuance of a writ of restitution shall also bar any claim for money payments which would have become due under the contract subsequent to the time of issuance of the writ. *The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be*. [Emphasis added.]

Thus, it is clear that a subsequent action for damages was not precluded by plaintiff's decision to institute summary eviction proceedings. As the Supreme Court explained in *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 168-169; 600 NW2d 617 (1999), "[p]lainly the Legislature took [summary eviction] cases outside the

realm of the normal rules concerning merger and bar [of related claims] in order that attorneys would not be obligated to fasten all other pending claims to the swiftly moving summary proceedings." Accordingly, the circuit court erred by ruling that plaintiff's action for damages was precluded by the prior district court summary eviction proceedings.

2. RES JUDICATA

Plaintiff argues that the circuit court erred by ruling that the prior district court consent judgments barred its circuit court action for damages. Plaintiff argued below that the district court consent judgments were conclusive on all issues, including defendant's liability for future damages, *except* the amount of damages due. That is incorrect.

In *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 576-577; 621 NW2d 222 (2001), our Supreme Court stated that although a summary eviction judgment does not bar other claims and remedies, it is "conclusive on the narrow issue whether the eviction was proper." In other words, a district court judgment is res judicata on the issue of who has the right to possess the premises, because that question is actually litigated in the district court. *Id*. at 574-577. Thus, where, as in this case, no claim for damages is asserted in the district court, the district court judgment is conclusive only on the question of who has a right to possess the premises.

C. DEFENDANT'S CONTINUING OBLIGATION TO PAY RENT

Plaintiff argues that it was entitled to summary disposition because there is no question of material fact that defendant remained obligated to pay occupancy fees pursuant to his membership in the cooperative.

Plaintiff adds that defendant's membership in the cooperative, which defendant failed to properly terminate, is different from defendant's tenancy, i.e., his right to possession of the dwelling unit. Conversely, defendant argues that he was entitled to summary disposition instead of plaintiff because there is no question of material fact that the consent judgments provided proper notice of the termination of the occupancy agreement.

Article 4 provides that after its initial three-year term, the occupancy agreement would be subject to automatic renewal for another three-year period, unless

> (1) notice of the Member's election not to renew shall have been given to the Corporation in writing at least four (4) months prior to the expiration of the then current term, and (2) the Member shall have on or before the expiration of said term (a) endorsed his or her stock certificate for transfer in blank and deposited the same with the Corporation, and (b) met all his or her obligations and paid all amounts due under this agreement up to the time of said expiration, and (c) vacated the Dwelling Unit, leaving the same in good state of repair. Upon compliance with provisions (1) and (2) of this Article, the Member shall have no further liability under this agreement and shall be entitled to no payment from the Corporation.

As a corollary to Article 4, Article 13 states:

> It is hereby mutually agreed as follows: At any time after the happening of any of the events specified in clauses (a) to (j) of this Article the Corporation may, at its option, give to the Member notice that this agreement will expire at a date not less than ten (10) days thereafter, whereupon this agreement and all of the Member's rights hereunder will expire on the date so fixed in such notice, unless in the meantime the default has been cured in a manner deemed satisfactory by the Corporation. It being the intention of the parties hereto to create hereby conditional limitations, and it shall thereupon be lawful for the Corporation to

> re-enter the Dwelling Unit and to remove all persons and personal property therefrom, either by summary proceedings or by other suitable action or proceeding at law or equity and to repossess the Dwelling Unit as if this agreement had not been made, and no liability whatsoever shall attach to the Corporation by reason of the exercise of the right of re-entry, repossession, and removal herein granted and reserved.
>
> * * *
>
> (h) In case the Member shall fail to pay any sum due to the Corporation pursuant to the provisions of Article 1 [carrying charges], Article 10 [utilities], Article 11 [repairs] or Article 19 [late charges] hereof.
>
> * * *
>
> *The Member expressly agrees that there exists under this Occupancy Agreement a landlord-tenant relationship* and that in the event of a breach or threatened breach by the Member of any covenant or provision of this agreement, there shall be available to the Corporation such legal remedy or remedies as are available under the law to a landlord for the breach or threatened breach by a tenant of any provision of a lease or rental agreement. [Emphasis added.]

Article 13 also specifies that these remedies are cumulative and are not waived by plaintiff's initial failure to assert them.

Defendant claims that the district court's consent judgments constituted written notice of termination under Article 4 and that this was sufficient to end his obligations under the occupancy agreement. It is undisputed, however, that defendant never indorsed his stock certificate to plaintiff, as required by Article 4. Defendant argues that the bank took possession of the certificate at the closing and, therefore, he could not

have indorsed it to plaintiff. However, this argument raises a factual dispute, thereby precluding summary disposition.

We note, however, that it is undisputed that plaintiff instituted summary eviction proceedings, as permitted by Article 13, after defendant defaulted on his obligation to pay carrying charges under Article 1. Further, it is undisputed that the parties signed a consent judgment entitling plaintiff to possess the unit unless defendant paid his past-due amount in full by a certain date. It is also undisputed that defendant never paid the amount due. Under *Sewell*, the two consent judgments were conclusive on the issue of who was entitled to possession of the dwelling unit, i.e. plaintiff. Moreover, it is undisputed that plaintiff knew that defendant had moved out of the residence. These circumstances raise the question whether plaintiff terminated the occupancy agreement under Article 13, such that rent would not have continued to accrue after December 2003 at the latest and the agreement would not have automatically renewed in November 2004. However, the parties did not address the effect of Article 13 below, nor have they done so on appeal, and the trial court did not consider this issue. Therefore, we remand this case for further proceedings regarding the effect, if any, of Article 13.

II. DOCKET NO. 282128

Defendants argue that the trial court erred by denying their motion for sanctions on plaintiff for filing a frivolous proceeding. We disagree.

A trial court's findings with regard to whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641

NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 661-662.

MCR 2.625(A)(2) provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." Similarly, MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

In light of our decision to reverse the trial court's grant of summary disposition in favor of defendant, defendants no longer qualify as prevailing parties and,

for that reason, are not entitled to sanctions under MCL 600.2591.[2] The trial court did not err by denying defendants' request for sanctions.

With regard to MCL 600.2591(3)(a)(i), there is no evidence that plaintiff's primary purpose in bringing this action was to embarrass, harass, or injure defendants. Further, most of the underlying facts were undisputed, so MCL 600.2591(3)(a)(ii) also is not applicable. Finally, with regard to MCL 600.2591(3)(a)(iii), because the district court's summary eviction proceedings did not preclude a subsequent circuit court action for damages as a matter of law, plaintiff's legal position was not devoid of arguable legal merit. Moreover, merely because a plaintiff might not ultimately prevail does not mean that the plaintiff's complaint was frivolous. *Kitchen*, *supra* at 662. In this case, the trial court did not clearly err by determining that plaintiff's action was not frivolous. Thus, the trial court did not err by denying defendants' request for sanctions.

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

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[2] For this reason, we also decline to grant defendants' request for sanctions under MCR 7.219.

MOSER v CITY OF DETROIT

Docket No. 283922. Submitted March 10, 2009, at Lansing. Decided June 23, 2009, at 9:00 a.m.

Robert S. Moser, II, brought an action in the Wayne Circuit Court against the city of Detroit, Wayne County, and the Department of Transportation, seeking damages for injury he sustained while driving on Interstate 75 when a piece of concrete detached from the fascia of the Cass Avenue overpass and crashed through the windshield of his car. The parties stipulated that the Department of Transportation had exclusive control and jurisdiction over the bridge and that the city and the county should be dismissed from the action. The department then moved for summary disposition, arguing that the fascia was not part of the improved portion of the roadway designed for vehicular travel and that the action therefore was not within the highway exception to governmental immunity from tort liability. The court, Robert J. Colombo, Jr., J., denied the motion. The department appealed.

The Court of Appeals *held*:

MCL 691.1402, the highway exception to governmental immunity, provides that the duty of the state to repair and maintain a highway, and the liability for a breach of that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside the improved portion of the highway designed for vehicular travel. MCL 691.1401(e) defines "highway" as a public highway, road, or street that is open for public travel and includes, among other things, bridges. In this case, the bridge fascia was a side of, and a part of, the bridge deck, which was designed for vehicular travel. Pieces of the bridge fascia falling onto the interstate highway below the bridge created an unsafe condition on the portion of the highway designed for vehicular travel. Thus, the department is subject to liability under the highway exception.

Affirmed.

WILDER, J., dissenting, stated that only the portion of the road upon which vehicles are driven is subject to the highway exception.

The bridge fascia in this case is not part of the improved portion of the highway designed for vehicular travel.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — BRIDGE FASCIAS.

The fascia of a bridge over a highway is part of the improved portion of the bridge designed for vehicular travel for which the governmental agency having jurisdiction of the bridge and highway may be liable under the highway exception to governmental immunity for personal injury or property damage caused by a piece of fascia falling onto an automobile traveling the highway below the bridge (MCL 691.1401[e], 691.1402[1]).

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Ven R. Johnson* and *Heather A. Jefferson*), for Robert S. Moser, II.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Ronald W. Emery*, Assistant Attorney General, for the Department of Transportation.

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

SERVITTO, J. Defendant Michigan Department of Transportation appeals as of right the circuit court's order denying its motion for summary disposition. Because the fascia of the bridge is a part of the improved portion of the highway designed for vehicular travel, we affirm.

Plaintiff was injured when a chunk of concrete fell from the fascia of an overpass (the Cass Avenue Bridge) and crashed through his windshield as he drove on I-75 below Cass Avenue. Although Cass is a city-owned street, defendant has contractually agreed to maintain and repair all of its bridge's structure; the city maintains only the Cass Avenue roadway surface. The parties stipulated that defendant had exclusive control and jurisdiction over the bridge and to the dismissal of the

city and the county defendants. Defendant then moved for summary disposition pursuant to MCR 2.116(C)(7), asserting that plaintiff's claims were barred by governmental immunity. According to defendant, the highway exception to governmental immunity, MCL 691.1402, only imposes liability for failing to maintain and repair the improved portion of the highway designed for vehicular travel, and the fascia of the bridge is not a part of that improved portion. The circuit court denied the motion, opining that a bridge, which is included in the definition of "highway," for which defendant is liable for repairing and maintaining, includes the fascia in its superstructure and is therefore part of the improved and traveled portion of the highway.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of the highway exception to governmental immunity is a question of law subject to de novo consideration on appeal. *Stevenson v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

A governmental agency is generally immune from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407. However, statutory exceptions to governmental immunity do exist and include what is commonly called "the highway exception." The purpose of this exception is to enhance the safety of travel on public highways. *Chaney v Dep't of Transportation*, 447 Mich 145, 154; 523 NW2d 762 (1994). MCL 691.1402(1) articulates the highway exception:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to

> his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel. . . .

"Highway" is defined in MCL 691.1401(e) as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." The highway exception to immunity is narrowly construed. *Grimes v Dep't of Transportation*, 475 Mich 72, 78; 715 NW2d 275 (2006).

A governmental agency must have jurisdiction over a highway for it to be liable under the highway exception for breaching its duty to maintain a highway in reasonable repair. *Carr v City of Lansing*, 259 Mich App 376, 381; 674 NW2d 168 (2003). In *Markillie v Livingston Co Bd of Rd Comm'rs*, 210 Mich App 16, 22; 532 NW2d 878 (1995), this Court held that the word "jurisdiction" in MCL 691.1402(1) "is synonymous with 'control.' " In this case, defendant has exclusive control over the maintenance and repair of the structure, except for the very surface of Cass Avenue, and the parties do not dispute that defendant has control and jurisdiction over the bridge itself. The only question before this Court is whether the crumbling fascia of the structure constitutes a defect in the highway for which the state is liable.

According to defendant, the highway exception permits a claim in avoidance of governmental immunity

only when the defect causing injury or damage arose from a condition in the improved portion of the highway designed for vehicular travel. Defendant contends that the fascia is not a part of the bridge deck and thus not a part of the driving surface, such that the highway exception is inapplicable. We disagree.

In *Grimes*, *supra* at 91, the Court held that "only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." Accordingly, it held that the shoulder of the road is outside the scope of the state's duty to repair and maintain the highway. *Id*. In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162; 615 NW2d 702 (2000), our Supreme Court opined on the liability of the state and counties with respect to highway conditions: "if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable . . . ." *Id*. at 180. Conversely, "[t]he state and county road commissions' duty, under the highway exception, is . . . implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage." *Id*. at 183.

Of note, the *Nawrocki* Court indicated that "if the condition proximately causing injury or property damage is located in the improved portion of the highway designed for vehicular travel, not otherwise expressly excluded, the state or county road commissions' statutory duty under the highway exception is implicated." *Id*. at 171. The definition of "highway" in MCL 691.1401(e) includes bridges, the bridge at issue was designed for vehicular travel, and bridges are not expressly excluded in the explanation in MCL 691.1402(1) of those areas to which the duty of the state and the

county road commissions to repair and maintain highways extends. The only areas specifically excluded from the duty to repair and maintain are "sidewalks, trailways, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel." MCL 691.1402(1).

More importantly, in *Nawrocki*, our Supreme Court recognized the highway exception in connection with the "improved portion of the highway," not just a road's surface, with the "actual physical structure of the roadbed surface." *Nawrocki*, *supra* at 183. The word "structure" suggests not just the surface area or top layer of construction materials, but to "[s]omething made up of a number of parts that are held or put together in a particular way." *American Heritage Dictionary* (4th ed). The Supreme Court's use of "roadbed surface," instead of "road surface," in stating the rule, implicates not just a road's two-dimensional surface that actually comes into contact with traffic, but also its construction components found underneath the surface.

Such an interpretation is supported by the testimony of Paul Dlugopolski, a bridge inspector for the Michigan Department of Transportation. Mr. Dlugopolski testified that the deck of a bridge is the part of a bridge that cars drive over. Mr. Dlugopolski testified that the deck is the part of the bridge on top of beams that cars travel on and includes the bottom, top, and sides. He testified that the deck fascia is the concrete side of the bridge. Mr. Dlugopolski testified that the top of the deck is where the tires meet the deck, and the bottom is the underside of the deck. He testified that you cannot have a top without the bottom and that the deck is the traveled roadway. From this testimony, it appears that the deck of a roadway is comprised of a top, a bottom,

and sides. If the sides are a part of the deck, and the deck is identified as the traveled portion of the roadway, then the sides are a part of the traveled roadway.

The fact is, a road is not a two dimensional surface comprised of only length and width. Logically, then, the maintenance of the improved portion of the highway includes the maintenance of the sides and underside of the highway. If the sides and underside are allowed to deteriorate, the highway is just as subject to collapse or other dangers, as it would be if the surface were allowed to deteriorate (perhaps even more so). To hold that the "improved portion of the highway" consists only of a road surface that the tires touch would not only be inconsistent with *Nawrocki*, it would also be contrary to the purpose of MCL 691.1402, which is to enhance the safety of travel on public highways. *Chaney*, *supra.*

We find that, under *Nawrocki*, the state is subject to liability in this case. Pieces of the bridge structure (which were part of the improved portion of the roadway, designed for vehicular travel) falling onto the highway below, created an unsafe condition on the traveled portion of the roadbed actually designed for vehicular travel. This defect rendered the improved portion of I-75, below the Cass Avenue bridge, unfit for public travel.

Affirmed.

METER, J., concurred.

WILDER, P.J. (*dissenting*). I respectfully dissent. I would conclude that the bridge fascia is not a part of "improved portion of the highway designed for vehicular travel" within the meaning of MCL 691.1402(1).

As the majority notes, in *Grimes v Dep't of Transportation*, 475 Mich 72, 91; 715 NW2d 275 (2006), the

Michigan Supreme Court held that "only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." The Supreme Court had previously held in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162; 615 NW2d 702 (2000), that "if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable . . . ." *Id*. at 180. The term "roadbed" is defined as "the material of which a road is composed." *Random House Webster's College Dictionary* (2001). The Supreme Court's reference to "travel lanes" and "roadbed" make clear that only the portion of the road upon which vehicles are driven is subject to the narrowly drawn highway exception. *Nawrocki*, *supra* at 180. Vehicles are not driven on the fascia of a bridge. As such, plaintiff has failed to show a defect in the improved portion of the highway that would subject the state to liability in this case. I would reverse.

2000 BAUM FAMILY TRUST v BABEL

Docket No. 284547. Submitted June 3, 2009, at Lansing. Decided June 23, 2009, at 9:05 a.m.

The 2000 Baum Family Trust and other owners of lots fronting Lake Charlevoix but separated from the water by Beach Drive, which was dedicated to public use in a subdivision plat that was recorded pursuant to 1887 PA 309, brought an action in the Charlevoix Circuit Court against William Babel and other back lot owners, the Charlevoix County Road Commission, and Charlevoix Township. The plaintiffs alleged trespass and nuisance, and sought injunctive relief against the back lot owners' use of the waterfront. The road commission counterclaimed trespass relating to boat docks, fences, landscaping, walls, septic drain fields, and a flagpole that all allegedly encroached on Beach Drive, which the road commission maintains. The back lot owners counterclaimed adverse possession or easement by acquiescence or prescription. Additional back lot owners were allowed to intervene as defendants and counterclaim adverse possession or easement by acquiescence or prescription. The plaintiffs moved for partial summary disposition against the road commission only, contending that they have riparian rights. The court, Richard M. Pajtas, J., denied the motion, ruling that the plaintiffs have no riparian rights because the statutory dedication of Beach Drive resulted in a fee vested in the public and the plaintiffs do not hold fee title to the waterfront land in front of their lots. The plaintiffs appealed by leave granted.

The Court of Appeals *held*:

Whether an owner of a lot that does not touch the water, but abuts a dedicated roadway that does touch the shoreline, has riparian rights depends on the effect of the dedication. The plain and unambiguous language of the 1887 plat act grants the public with fee title to a dedicated roadway for the use and purposes stated in the dedication. The dedication in this case states that "the streets and alleys as shown on said plat are hereby dedicated to the use of the public." This dedication language is unambiguous. It is clear that all the depicted streets and alleys are for the public's use, which includes use consistent with riparian rights. Accordingly, the public holds fee title to the dedicated streets and alleys in

the plat in this case, and the public's fee title to Beach Drive cuts off the plaintiffs' riparian rights.

Affirmed.

PROPERTY — RIPARIAN RIGHTS — SUBDIVISION PLATS — STREET DEDICATIONS.

The intent of a plat dedicator determines the riparian rights of an owner of a subdivision lot that does not touch a body of water but abuts a roadway that touches the shoreline and was dedicated in the subdivision plat for public use pursuant to a plat act.

Vandeveer Garzia, P.C. (by *Hal O. Carroll*), for the 2000 Baum Family Trust and others.

Joel D. Wurster, PLC (by *Joel D. Wurster*), for the Charlevoix County Road Commission.

Young, Graham, Elsenheimer & Wendling (by *Harry K. Golski*) for Charlevoix Township.

Amici Curiae:

Fraser Trebilcock Davis & Dunlap, P.C. (by *Michael C. Levine*), for the County Road Association of Michigan.

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), for the Higgins Lake Civic Association.

Carey & Jaskowski, PLLC (by *William L. Carey*), and *Law, Weathers & Richardson, P.C.* (by *Clifford H. Bloom*), for the Michigan Waterfront Alliance and the Higgins Lake Property Owners Association.

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

PER CURIAM. This appeal involves a dispute over riparian rights to Lake Charlevoix, formerly known as Pine Lake. Plaintiffs are owners of lots fronting Lake Charlevoix but separated from the water by Beach

Drive, a road dedicated to the use of the public that runs parallel and immediately adjacent to the lake. The trial court denied plaintiffs' motion for partial summary disposition, ruling that plaintiffs' lots were not riparian because a statutory dedication vested a fee in the public, thereby destroying plaintiffs' claim to riparian rights. Plaintiffs now appeal and we affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

The property at issue is riparian land on the northern shore of Lake Charlevoix in Charlevoix County, Michigan. On July 15, 1911, the North Charlevoix Company, a Michigan corporation, executed a dedication of the plat of North Charlevoix, the subject riparian land. The plat includes 49 approximately rectangular enclosed numbered lots. The exact dimensions of each of these lots are included in the plat, as well as the inland coordinates. The plat also includes six named streets, including Western Avenue, Central Avenue, Park Avenue, Cottage Avenue, Lake Avenue, and Beach Drive. All these streets run parallel to the lake, except for Central Avenue, which cuts through the center of the plat and is perpendicular to the lake. While the plat shows a single dock extending into the lake at the end of Central Avenue, there is no indication in the record whether this dock was ever built, or how, if it did exist, it was used. With respect to these roadways, the dedication includes the following language: "the streets and alleys as shown on said plat are hereby dedicated to the use of the public." Significantly, none of the platted lots touches the shoreline. Rather, Beach Drive, which runs east to west, abuts the shoreline and separates the 11 platted lots closest to the water, or the front tier lots, from Lake Charlevoix. In other words, these 11 lots extend to the edge of the road, not to the water's edge.

The Charlevoix County Board of Supervisors accepted the plat and the dedication of streets on August 7, 1911. It is undisputed that the public has continued to accept the dedication of the roadways, including Beach Drive. Today, the Charlevoix County Road Commission (CCRC) maintains Beach Drive, which is now paved. A recent aerial photograph, not included in the lower court record, shows that Beach Dive does not actually touch the water's edge. Rather, it appears that a small strip of land and some trees are between the water's edge and the roadway. In addition, multiple docks extend into the lake from Beach Drive.

The eight plaintiffs in this dispute all own front tier lots abutting Beach Drive. The legal descriptions of their properties do not extend to the lake's edge, nor is there a grant of riparian rights to these plaintiffs in their deeds of record.[1] The lots are taxed as "lake view" properties, rather than lakefront properties. Nonetheless, over the years, these plaintiffs have used the lake in front of their lots and, in some instances, have built docks extending into the lake in order to moor their boats and other water-related equipment. According to plaintiffs, the Army Corps of Engineers issued each of them a permit to maintain their docks in front of their properties.[2] Various other owners of properties in the plat not fronting the water, however, also allegedly began using the waterfront in front of plaintiffs' homes. According to plaintiffs, these back lot owners used the

[1] The lower court record does not include plaintiffs' deeds. Rather, the CCRC below provided a description of each of plaintiffs' deeds. No reference to lot numbers was made in the description. Plaintiffs never sought to introduce their deeds in the motion for summary disposition. However, in their brief on appeal, plaintiffs concede that there is no grant or express limitation of riparian rights in their deeds of record.

[2] There is no documentation in the lower court record reflecting these facts.

waterfront inconsistently with plaintiffs' riparian rights by installing their own docks or using a dock, and by docking and storing their boats and other water-related equipment on the waterfront. Allegedly, some of these back lot owners were unable to obtain permits to maintain their docks from the Army Corps of Engineers and therefore threatened to sue plaintiffs for permission to maintain their seasonal docks.[3]

On March 20, 2007, as a result of this overcrowding, plaintiffs filed a four-count complaint against these back lot owners, as well as the CCRC and Charlevoix Township, alleging claims of trespass and nuisance and seeking injunctive and equitable relief. Subsequently, on September 9, 2007, the CCRC counterclaimed, alleging that plaintiffs had trespassed on Beach Drive by maintaining encroachments on the drive, including docks, fencing, landscaping, rocks and rock walls, septic drain fields, and a flagpole among various other intrusions. The individually named back lot defendants also counterclaimed, asserting a claim of adverse possession or alternatively seeking a declaration that they have easements, either by acquiescence or by prescription.

On October 4, 2007, additional back lot owners who use the lakefront moved to intervene in the action. The trial court granted the motion on October 25, 2007. On November 1, 2007, these intervening defendants filed a counterclaim also alleging a claim of adverse possession or alternatively for a declaration that they have easements, either by acquiescence or by prescription.

On November 1, 2007, plaintiffs moved for partial summary disposition against the CCRC alone, alleging that there is no issue of material fact regarding which party is entitled to riparian rights. Plaintiffs argued that

[3] Again, there is no documentation in the lower court record reflecting these facts.

because their lots were separated from the water by a roadway contiguous to the water, their lots were riparian. In plaintiffs' view, the CCRC has a right to the use of Beach Drive as a roadway only. In response, the CCRC argued that plaintiffs did not have riparian rights because the public holds Beach Drive in fee pursuant to the statutory dedication under the applicable plat act, which means that plaintiffs' lands are not riparian. The back lot defendants also filed a motion in response, arguing that plaintiffs did not have riparian rights because, as shown on the plat, none of their properties abuts the lake. In its response, Charlevoix Township adopted the arguments of the CCRC and the back lot defendants. In addition, Charlevoix Township argued that the township could be defeased of Beach Drive only pursuant to the Land Division Act.

Subsequently, the trial court denied plaintiffs' motion, ruling that plaintiffs did not have any riparian rights. The trial court framed the issue as "whether Beach Drive is an easement with the fee title residing in the front lot owners or whether the public holds fee title." The court, relying on a Michigan property law treatise, found that the statutory dedication resulted in the "fee of this property [being] vested in the public." It followed, in the trial court's view, that because plaintiffs "do not hold fee title to the waterfront land in front of their respective lots, they do not possess riparian rights." The trial court cited a portion of *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), citing American Jurisprudence, in support of its determination. Subsequently, plaintiffs moved for reconsideration, but the trial court denied the motion. This interlocutory appeal followed.[4]

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[4] This Court granted leave for an interlocutory appeal on September 10, 2008. See *2000 Baum Family Trust v Babel*, unpublished order of the Court of Appeals, issued September 10, 2008 (Docket No. 284547).

II. STANDARDS OF REVIEW

We review de novo a trial court's determination on a motion for summary disposition. *Klein v Kik*, 264 Mich App 682, 684; 692 NW2d 854 (2005). In reviewing such a motion, we must consider all the pleadings, admissions, and other admissible evidence presented below in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Summary disposition under MCR 2.116(C)(10) is properly granted if no genuine factual dispute exists and the moving party is entitled to judgment or partial judgment as a matter of law. *Klein*, *supra* at 685. Further, plaintiffs' claim to establish title as sole riparian owners, or to quiet title, is equitable in nature and is reviewed de novo by this Court. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998). And, to the extent that we must address issues of statutory interpretation or other questions of law, our review is de novo. *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004).

III. APPLICABLE LAW

At the outset, we note that the material facts of this matter do not appear to be in dispute. Rather, the main question presented on appeal is a question of law: Whether plaintiffs have riparian rights where their lots abut a roadway that runs contiguous to the lakeshore and was created pursuant to a dedication in an approved plat. Plaintiffs argue that the trial court erred by ruling that the dedication of Beach Drive to the public conveyed an absolute fee interest in the land on which the road is maintained. According to plaintiffs, the dedication merely transferred a limited fee for the sole purpose of maintaining the road, and it had no effect on plaintiffs' riparian rights because the dedica-

tion language limited the public's interest in the alleys and streets to maintaining those roadways. We disagree. Because resolution of this dispute requires an understanding of several different aspects of Michigan property law, we first discuss these concepts before addressing plaintiffs' arguments.

A. WATER RIGHTS

Riparian rights[5] are property rights. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994). Land that includes, borders, or is bound by water is considered riparian land. *Dobie*, *supra* at 538. Generally, it is an "indispensable requisite" that riparian land actually touch the water. *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930). Owners of such land enjoy certain exclusive rights. *Thies*, *supra* at 288. These rights include the right to the natural flow of the waters with "no burden or hindrance imposed by artificial means." *Peterman*, *supra* at 192 (citation and quotation marks omitted). The riparian owner also has the right to exclusive use of the bank and the shore, including the right to erect and maintain docks, as well as to permanently anchor their boats off the shore. *Thies*, *supra* at 288. Normally, "the interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner." *Hilt*, *supra* at 218.

B. SUBDIVISION PLATS AND DEDICATED PROPERTY

Development of real estate in Michigan is, in many instances, subject to mandatory statutory control under

[5] Land bordering on a river is considered riparian, whereas land bordering on a lake is littoral. *Thies*, *supra* at 288 n 2. This opinion uses the term "riparian rights" interchangeably with "littoral rights."

the Land Division Act (LDA) and its predecessor statutes. See MCL 560.101 *et seq*. Every subdivision must be platted in accordance with the requirements of the LDA. The purpose of these requirements is to promote the orderly layout of lands and to provide for proper ingress and egress to lots and parcels. *Tomecek v Bavas*, 276 Mich App 252, 260; 740 NW2d 323 (2007), rev'd in part and vacated in part on different grounds 482 Mich 484 (2008). To meet this end, it is often necessary to establish public roadways or other areas for public use, which are accomplished through dedications recorded in the plat. "[A] dedication is " 'an appropriation of land to some public use, accepted for such use by or in behalf of the public.' " *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 213; 731 NW2d 472 (2007) (citation omitted). Generally, a valid statutory dedication of land for a public purpose requires a recorded plat designating the areas for public use and acceptance by the proper public authority. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 113; 662 NW2d 387 (2003).

C. PLATS AND WATER RIGHTS

"Where land is disposed of by reference to an official plat, the boundary lines shown on the plat control." *Mumaugh v McCarley*, 219 Mich App 641, 649; 558 NW2d 433 (1996). And, it is also true, as we have already noted, that property bordering or bound by a waterway is riparian land. *Hilt*, *supra* at 218; *Dobie*, *supra* at 538. The inference to be drawn is that the boundary lines of lots in an approved subdivision plat must touch the water's edge in order for the lot to be riparian land. However, this is not always the case. In some instances, a platted lot may be riparian even though it does not touch the water's edge but touches,

instead, the edge of a roadway, which, in turn, abuts the water's edge. See *Croucher v Wooster*, 271 Mich 337, 341-345; 260 NW 739 (1935) (intervening roadway); *Thies*, *supra* at 293 (intervening walkway); *Dobie*, *supra* at 540 (intervening park). Whether an owner of a lot that does not touch the water, but abuts a dedicated roadway that touches a shoreline, has riparian rights depends on the effect of the dedication because "not all dedications of land result in a similar interest being passed to the public authority." *Minerva Partners, Ltd*, *supra* at 214; see also *Thies*, *supra* at 290. As this Court explained in *Minerva Partners, Ltd*, *supra* at 214:

> The nature of the real property interest passing from the grantor to the government unit depends on the method of dedication. *Kalkaska v Shell Oil Co (After Remand)*, 433 Mich 348, 354 n 11; 446 NW2d 91 (1989). " '*The effect of a dedication under the statute has been to vest the fee in the county, in trust for the municipality intended to be benefited, whereas, at common law, the act of dedication created only an easement in the public.*' " *Id.*, quoting *Village of Grandville v Jenison*, 84 Mich 54, 65; 47 NW 600 (1890). [Emphasis added.]

See also *Thies*, *supra* at 290 (acknowledging this same general rule).

i. COMMON-LAW DEDICATIONS

If the dedication is created at common law, then the front lot owners have riparian rights. This is because a common-law dedication merely creates an easement, meaning that the grantor retains fee title to the land abutting the shore and parts with the property's use only. *People ex rel Dep't of Conservation Director v La Duc*, 329 Mich 716, 719; 46 NW2d 442 (1951); *Minerva Partners, Ltd*, *supra* at 215 ("Easements do not carry title to the land over which they are exercised and do

not dispossess the landowner of its property."). A common-law dedication occurs where there is

> (1) an intent by the owners of the property to offer it to the public for use; (2) [an] acceptance of this offer by the public officials and maintenance of the alley, street or highway by the public officials; [and] (3) . . . use by the public generally. [*Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958).]

Significantly, there is no requirement that the dedication be recorded in a plat. "Neither a grant nor written words are necessary to render the act of dedicating land to public uses effectual at common law; intent to dedicate can be gathered from the circumstances [alone]." *DeWitt v Roscommon Co Rd Comm*, 45 Mich App 579, 581; 207 NW2d 209 (1973). In the absence of a formal grant or written words, the facts and circumstances must unequivocally show that the dedication was intended. *Littell v Knorr*, 24 Mich App 446, 452; 180 NW2d 337 (1970).

ii. STATUTORY DEDICATIONS

Conversely, and as already noted, if the dedication is statutory, the public owns the fee under the statute. *Thies*, *supra* at 290; *Minerva Partners Ltd*, *supra* at 214. A statutory dedication is accomplished where two elements are met: there is (1) "a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and [(2)] acceptance by the proper public authority." *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554; 600 NW2d 698 (1999). In determining intent, the courts are to look to language used in the dedication, as well as the surrounding circumstances. *Thies*, *supra* at 293.

For example, in *Thies*, the recorded plat's dedication stated " 'that the Driveways, Walks and Alleys shown

on said plat are hereby dedicated to the joint use of all the owners of the plat.' " *Id*. at 286. At issue was a walkway recorded on the plat that abutted Gun Lake and separated the front lot owners from the shoreline. *Id*. Our Supreme Court framed the issue as whether the dedication language was intended to grant a fee in the walkway to all subdivision owners or whether it merely granted them an easement along the lakeshore. *Id*. at 293. After reviewing the dedication language used, the fact that the front lot landowners used the land as their own, that no walk ever existed, and that no evidence was presented showing that back lot owners paid any consideration for riparian access, the Court affirmed the trial court's finding that the plattors did not intend to create a fee vested in the public and that the back lot owners had no riparian rights. *Id*. at 293-294 & n 8. The Court stated that "[t]he phrase 'joint use' does not ordinarily denote the passing of a fee interest in land." *Id*. at 293. Consequently, the back lot owners merely had an easement and the front lot owners retained their riparian rights. *Id*. With this result in mind, the import of *Thies* is this: Although a dedication may appear to meet the requirements of a statutory dedication, as it appears to in *Thies*, it does not necessarily follow that a fee title interest is vested in the public; rather, the pertinent inquiry is whether the plattors intended a fee to vest in the public, i.e., what is the dedication's effect.[6] The dedication in *Thies* had the same effect of a common-law dedication.

IV. THE PLAT ACT OF 1887

Turning to plaintiffs' arguments on appeal, plaintiffs posit that the 1887 plat act creates a "base fee" as

[6] Often times, a failed statutory dedication creates a common-law dedication, *DeFlyer v Oceana Co Rd Comm'rs*, 374 Mich 397, 402; 132 NW2d 92 (1965). The result is the creation of an easement.

opposed to a fee simple or fee simple absolute, as the trial court found. While we agree that the statute does not create a fee simple absolute, we see no need to reach the question whether the statute creates a "base fee," as that term is defined in a legal sense, because, as we will explain, the language of the statute is clear and unambiguous.[7] Further, we also disagree with plaintiffs' characterization of the trial court's opinion. Nothing in the opinion and order indicates that the trial court interpreted the 1887 plat act as granting the public fee simple absolute ownership of the dedicated areas.

The North Charlevoix plat was recorded in 1911 and, accordingly, the subdivision is controlled by the plat act in effect at the time, 1887 PA 309. That provision provided, in relevant part:

> The map so made and recorded in compliance with the provisions of this act shall be deemed *a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses* in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporate city or village, then in the township within the limits of which it is included *in trust to and for the uses and purposes therein designated, and for no other use or purpose whatsoever*. [Emphasis added.]

Today, when land is platted, the LDA controls. It contains substantially similar language, and provides in relevant part:

> (1) When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or

[7] Plaintiffs do not define "base fee" in their brief on appeal. Black's Law Dictionary (8th ed) defines "base fee" as "[a] fee that has some qualification connected to it and that terminates whenever the qualification terminates." Base fees include determinable fees, conditional fees, fees simple subject to a condition subsequent, as well as other types of limited fees. *Id*.

> grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance *to vest the fee simple* of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees *for their use for the purposes therein expressed and no other*.
>
> (2) The land intended for the streets, alleys, commons, parks or other public uses as designated on the plat shall be held by the municipality in which the plat is situated *in trust to and for such uses and purposes*. [MCL 560.253 (emphasis added).]

When interpreting a statute, this Court must discern and give effect to the Legislature's intent. *Oneida Charter Twp v City of Grand Ledge*, 282 Mich App 435, 442; 766 NW2d 291 (2009). The first step in determining intent is to examine the language used. *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 684; 741 NW2d 579 (2007). It is presumed that the Legislature intended the meaning it plainly expressed. *City of Warren v Detroit*, 261 Mich App 165, 169; 680 NW2d 57 (2004). If the language is plain and unambiguous, this Court must apply the statute as written, and judicial construction is neither necessary nor permitted. *Kiefer v Markley*, 283 Mich App 555, 556; 769 NW2d 271 (2009); *Oneida Charter Twp*, *supra* at 442. The Court may consult dictionary definitions in order to discern the plain meaning. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 43; 761 NW2d 269 (2008); MCL 8.3a. Only if a provision is ambiguous, meaning reasonable minds could differ on the provision's interpretation, is judicial construction permitted. *Tyson Foods, Inc*, *supra* at 684.

Here, the language of the 1887 plat act is plain and unambiguous. The provision vests a "fee" for public uses in the city, village, or township "in trust to and for

the uses and purposes therein designated, and for no other use or purpose whatsoever." In our opinion, there is no ambiguity here. A conveyance under this provision grants fee title in the public limited to the uses and purposes designated in the plat. A fee is defined as "a heritable interest in land" and denotes an interest that is "the broadest property interest allowed by law . . . ." See Black's Law Dictionary (8th ed). Obviously, however, in the context of the statute, the term "fee" does not indicate a fee interest that is indefinite or infinite in duration, as in a fee simple absolute. Rather, the provision contains language that explicitly limits the public's ownership interest to the "uses and purposes" *designated in the plat*, and for "no other use or purpose whatsoever." Given this plain language, it is clear that the Legislature did not intend to give the public title in the nature of private and absolute ownership, but it did intend to give fee title for a use and purpose as designated in the plat by the plattors.

Consistently with this interpretation, the Michigan Supreme Court has regularly interpreted various plat acts, containing substantially similar language, as conveying only nominal title that is not coterminous with the rights of a proprietor owning lands in fee simple absolute. See *Wayne Co v Miller*, 31 Mich 447, 449 (1875) ("[The] purpose [of the plat act] was to vest in the county such a title as would enable the public authorities to devote the lands to all the public uses contemplated in making the plan."); *Bay Co v Bradley*, 39 Mich 163, 166 (1878) ("[The applicable plat act] vests [the public] with nominal title."); *Backus v Detroit*, 49 Mich 110, 115; 13 NW 380 (1882) ("The purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses . . . to which the land might be devoted."). More recently, the Supreme Court con-

strued the language in the LDA to mean that the public becomes fee simple owners of the dedicated lands, but only for the qualified purpose stated in the dedication and not for any other purpose. *Martin*, *supra* at 549 n 19.

Accordingly, we conclude that the 1887 plat act vests in the public a fee title interest limited to the uses and purposes stated in the dedication.

V. THE DEDICATION'S LANGUAGE

Plaintiffs next argue that the dedication of the roadways had no effect on their riparian rights. In plaintiffs' view, even if the public has fee title to Beach Drive, that title does not sever their riparian rights because the dedication is only for maintaining the alleys and streets of the plat. We cannot agree.

At the outset, we note that the parties do not dispute that the dedication is statutory and we see no reason to disagree. The dedication in the North Charlevoix Plat states that "the streets and alleys as shown on said plat are hereby dedicated to the use of the public." This language unequivocally states a clear intention to dedicate the areas delineated as streets and alleys to the public's use. *Beulah Hoagland Appleton Qualified Personal Residence Trust*, *supra* at 554. Accordingly, and assuming without deciding that the dedication has been accepted as the matter is not at issue, we conclude that the North Charlevoix plat created a statutory dedication vesting fee title of the streets and alleys depicted on the plat in the public consistent with the 1887 plat act.

Having concluded that the public holds fee title to the dedicated alleys and streets in the North Charlevoix plat pursuant to a statutory dedication, the next question becomes whether plaintiffs have riparian rights, i.e., whether the plattors intended to reserve riparian

rights in the general public or in the front lot owners alone. We could conclude, as the trial court did, that because the public holds fee title in Beach Drive pursuant to a statutory dedication, the public's intervening fee title cuts off plaintiffs' riparian rights. However, it is our opinion that the trial court's analysis concluded prematurely. Whether plaintiffs have riparian rights turns on the nature and scope of the fee interest arising out of the title transferred by the dedication language in the plat consistent with the 1887 plat act, i.e., the plat act only transfers fee title inasmuch as the plattors intended to do so by the words of their dedication. Thus, we must look to the language of the dedication with the goal of effectuating the plattors' intent. See *Tomecek v Bavas*, 482 Mich 484, 490-491; 759 NW2d 178 (2008).

Here, and as already noted, the dedication stated that "the streets and alleys as shown on said plat are hereby dedicated to the use of the public." When discerning the intent of the plattors, we look to the express language used in the dedication in connection with the surrounding facts and circumstances. *Thies*, *supra* at 293; *Dobie*, *supra* at 540. In doing so, we view the plat as a whole, harmonizing, if possible, all the language to make it meaningful. Cf. *City of Huntington Woods v Detroit*, 279 Mich App 603, 620; 761 NW2d 127 (2008). If the language is clear and unambiguous from the four corners of the plat, it must be given effect. See *Jacobs v Lyon Twp*, 444 Mich 914, 920-921 (1994) (LEVIN, J., dissenting); also cf. *Minerva Partners, Ltd*, *supra* at 216.

In the present matter, the dedication language is unambiguous. It is clear that all the depicted streets and alleys are for the public's use. "Use" is defined as "to employ for some purpose; put into service." *Random House Webster's College Dictionary* (1997). "Public" is defined as "the people constituting a community, state,

or nation." *Id*. The language of the dedication in no way limits what type of use may occur on the depicted streets or alleys or who may use them. Rather, the streets and alleys, which include Beach Drive, are dedicated "to the use of the public," which includes by definition use consistent with riparian rights. Significantly, the plattors did not dedicate these areas to just the lot owners of the subdivision or to any other limited community, like in *Thies*, but to the general public. Equally significant is that nothing in the depiction of the plat itself functions to cloud the clear intent of the language. It is plain on the face of the plat that plaintiffs' properties do not extend to the water's edge. Rather, each front-lot property is a rectangular-shaped and numbered lot, the northern and southern boundaries of which run parallel to one another, and the dimensions of which are included. The northern boundaries of each these lots abuts Beach Drive, not Lake Charlevoix. Further, Beach Drive runs all the way to the water's edge, indicating that the plattors intended the public, including all lot owners, to have access to Lake Charlevoix. This depiction does not support the position that plaintiffs have riparian rights, but rather is entirely consistent with the stated purpose of the dedication. In addition, plaintiffs' properties are not taxed as riparian properties, but as properties with a view of the lake. Nothing in the record demonstrates that plaintiffs paid any consideration for the enjoyment of riparian rights and plaintiffs concede that their deeds do not convey them such rights. And, although plaintiffs have set up and maintained docks on the shoreline as if they owned the portions of waterfront in front of their properties, this fact alone, considered in light of the dedication's clear language and other surrounding circumstances, does not serve to vest riparian rights in plaintiffs. Accordingly, given the language of the dedi-

cation, the depiction of the plat, as well as the surrounding circumstances, we conclude that plaintiffs do not have riparian rights.

There is no merit to plaintiffs' contrary argument that the alleys and streets must be used for the limited purpose of maintaining streets and alleys. Plaintiffs' interpretation of the dedication language reads a limited usage into the dedication that does not exist. In construing language, this Court will not inject additional requirements not included by the drafters. See *People v Zujko*, 282 Mich App 520, 523; 765 NW2d 897 (2009). Further, if we were to adopt plaintiffs' interpretation of the dedication, it would fail to have an effect consistent with its meaning, and as a result the dedication would be rendered nugatory. We decline to adopt such an interpretation. *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007).

VI. CONCLUSION

Our decision makes clear that a statutory dedication under the 1887 plat act vests a fee title interest in the public limited to the uses and purposes delineated by the plattors. After reviewing the language of the statutory dedication in this matter, we have concluded that the plattors did not intend to vest any riparian rights in plaintiffs' properties. This inquiry has required a two-tier analysis: First, whether a valid statutory dedication was created under the 1887 plat act and, second, if so, what type of fee interest has been vested in the public. This latter inquiry requires an interpretation of the plattors' intent. Conversely, had the dedication been one at common law, it would merely have created an easement in Beach Drive, and plaintiffs would retain riparian rights to Lake Charlevoix. *People ex rel Dep't of Conservation Director*, *supra* at 719.

Here, the trial court's analysis concluded prematurely. It ruled that the plat created a statutory dedication, thereby creating a fee interest that cut off plaintiffs' riparian rights. This will not always be the case. It is easy to imagine situations where a statutory dedication creates a fee interest that is somehow limited by the language of the dedication. The trial court's failure to specifically analyze the language of the dedication constitutes legal error, albeit harmless error. We will not reverse a trial court's decision if the right result was reached, even if for the wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007). In the instant matter, because the language of the statutory dedication indicates an intent to grant to the public a fee for the unlimited use of Beach Drive, we conclude that plaintiffs have no riparian rights by way of the dedication.

Affirmed.

BEATTIE v MICKALICH

Docket No. 284130. Submitted June 2, 2009, at Lansing. Decided June 25, 2009, at 9:00 a.m.

Trina L. Beattie brought a negligence action in the Lapeer Circuit Court against Mark P. Mickalich after sustaining injury when a horse owned by the defendant, and held by the plaintiff with a rope, reared up and pulled the plaintiff up from the ground as the defendant was saddling the horse. The defendant moved for summary disposition, claiming that the action is barred by MCL 691.1663, § 3 of the Equine Activity Liability Act (EALA), because the plaintiff's injury arose from an inherent risk of equine activity. The court, Nick O. Holowka, J., granted the motion, rejecting the plaintiff's contention that two exceptions to nonliability provided in the EALA applied. The plaintiff appealed.

The Court of Appeals *held*:

1. MCL 691.1663 states that except as otherwise provided in MCL 691.1665, an equine activity sponsor, an equine professional, or another person is not liable for injury to or the death of a participant, or for property damage, resulting from an inherent risk of an equine activity. MCL 691.1662(f) defines "inherent risk of an equine activity" as a danger or condition that is an integral part of an equine activity, such as an equine's propensity to behave in certain ways and react unpredictably to things. MCL 691.1665 provides four exceptions to the immunity granted by MCL 691.1663. MCL 691.1665(b) imposes liability if an equine activity sponsor, equine professional, or another person provides an equine and fails to make reasonable and prudent efforts to determine the ability of the participant to engage safely in equine activity and to determine the ability of the participant to safely manage the particular equine. MCL 691.1665(d) imposes liability if an equine activity sponsor, equine professional, or another person commits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage.

2. MCL 691.1665(d) does not permit a general negligence claim irrespective of the EALA limitations on liability. All of the conduct described in MCL 691.1665 falls outside the definition of "inherent risk of equine activity," which activity is the only activity for which the EALA precludes liability pursuant to MCL 691.1663. The

instances enumerated in MCL 691.1665 in which liability attaches are necessarily not equine activity because they involve human error not integral to engaging in an equine activity. Thus, the negligent act or omission referred to in MCL 691.1665(d) is negligent activity that is not within the gamut of inherently risky equine activity.

3. The plaintiff's claim under MCL 691.1665(d) fails as a matter of law because she did not plead a negligent act or omission involving something other than inherently risky equine activity.

4. The plaintiff's claim under MCL 691.1665(b) fails as a matter of law because she did not plead such a claim in her complaint or move to amend her complaint to so plead.

5. The plaintiff's claim that the defendant failed to post a warning sign required by MCL 691.1666 fails as a matter of law because she failed to plead such a claim in her complaint.

6. The plaintiff's claim that the EALA violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, is without merit. The basis for this claim—that the EALA grants blanket immunity—lacks merit.

Affirmed.

NEGLIGENCE — EQUINE ACTIVITY LIABILITY ACT — NEGLIGENT ACTS OR OMISSIONS.

The Equine Activity Liability Act provides for nonliability by an equine activity sponsor, an equine professional, or another person for injury or death of a participant in an equine activity, or for property damage, resulting from an inherent risk of an equine activity; an exception to that grant of immunity concerning negligent acts or omissions applies only where liability is claimed for an act or omission involving something other than inherently risky equine activity (MCL 691.1663, 691.1665[d]).

Otis M. Underwood, Jr., for the plaintiff.

Morrissey, Bove & Ebbott (by *Richard H. Ebbott*) for the defendant.

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

PER CURIAM. In this personal injury action, we must decide whether § 5(d) of the Equine Activity Liability

Act (EALA), MCL 691.1661 *et seq*., prescribes a general claim of ordinary negligence. The trial court granted summary disposition for defendant, ruling that § 3 of the EALA barred plaintiff's suit because her injuries arose from an "inherent risk of equine activity." We agree and affirm. In doing so, we hold that § 5(d) does not create a general negligence claim, but rather permits a negligence claim when it necessarily involves something other than inherently risky equine activity.

I. BACKGROUND

Plaintiff and defendant were neighbors in Columbiaville, Michigan. On 8 to 10 occasions in 2003 or 2004, defendant invited plaintiff over to his property to exercise a few of the horses.[1] During these times, plaintiff would fetch the horse and groom and saddle it before riding it. On one occasion, plaintiff rode one of defendant's horses without defendant's permission. Typically, plaintiff would ride Slim or Motown, a "100 percent broke horse." Plaintiff had previously owned her own horse in the 1960s and a pony with her sister when she was little. Plaintiff does not exercise horses for anyone else.

In May 2004, plaintiff went to defendant's property with her sister, Theresa, and her son, Matthew. Allegedly, defendant invited plaintiff to his arena to ride Whiskey, a horse that he owned. Defendant knew that Whiskey was "green broke," meaning that he was not responsive to cues from the rider and only the most experienced riders should handle him. Defendant de-

[1] Defendant and his former wife were married in 1990. They owned and boarded four or five horses at their property. Before the marriage, defendant never had any dealings with horses, never had any training with horses, and never engaged in riding competitions. Defendant and his wife divorced in 2003. The horses were left with defendant.

nies that he invited plaintiff to his property and contends that plaintiff arrived at his property uninvited asking to ride Whiskey. When plaintiff arrived on defendant's property, she went to defendant's arena, where defendant was allegedly attempting to tie a lead rope onto Whiskey by enticing him with a bucket of feed. Defendant claims that once he had clipped the lead rope to Whiskey's halter, he asked plaintiff to hold the lead while he went to fetch a saddle and other tack. Defendant did not tie Whiskey to crossties before handing the lead rope to plaintiff.

When defendant returned with the saddle, plaintiff was still holding onto Whiskey's lead rope, as well as his halter, with her right hand. Plaintiff continued to hold onto Whiskey in this way while defendant attempted to saddle Whiskey. As defendant was doing so, Whiskey reared up on his hind legs and plaintiff, whose hand was caught in the halter, was pulled up into the air. Plaintiff fell to the ground, sustaining injuries to her shoulder and arm. As a result, plaintiff was not able to return to work for several months and her physical abilities have since been limited.

A lawsuit resulted from these events. Plaintiff's complaint claimed that defendant was "negligent" because he

> failed to properly secure the horse's head before saddling the horse; and, by failing in his duty to avoid alarming the horse, and by failing to lift the saddle up to the horse's back and instead made a high arching throw of the saddle which caused the horse to "spook," and then rear-up . . . .

During discovery, it became clear that defendant's version of events leading to plaintiff's injuries differed from plaintiff's version. In his deposition testimony, defendant denied that he ever brought Whiskey into the arena or that he went to fetch a saddle. According to

defendant, plaintiff asked to ride Whiskey, but he said she could not and they went out to the pasture to see Whiskey anyway. Defendant testified that he never surrendered control of Whiskey's lead rope, but that plaintiff reached up and grabbed Whiskey's halter, at which point the horse reared and plaintiff was pulled up into the air.

The deposition testimony of Theresa and Matthew, however, corroborated plaintiff's version of events. According to Theresa, defendant was "adamant about [plaintiff] riding that horse." Theresa further testified that defendant had plaintiff hold Whiskey's halter and lead rope while he went to get the saddle. When defendant attempted to "thr[o]w" the saddle on Whiskey, the horse reared and plaintiff was pulled into the air. Matthew stated that defendant asked plaintiff whether she wanted to ride Whiskey. Matthew testified that after catching Whiskey, defendant had plaintiff hold Whiskey's lead rope while he retrieved the saddle. Matthew stated that defendant then "threw" the saddle onto Whiskey and the horse reared, consequently injuring plaintiff.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that § 3 of the EALA, MCL 691.1663, barred plaintiff's claim. In response, plaintiff contended that she had produced evidence supporting her claim under two of the statutory exceptions to the immunity granted by the EALA: § 5(b) and (d), MCL 691.1665(b) and (d). The trial court agreed with defendant, ruling that plaintiff's claim was barred by the EALA. The trial court stated:

> The statute recognizes that an equine may behave in a way that will result in injury and that equines may have unpredictable reactions to diverse circumstances, precisely one of the guiding motivations of the limited liability for

> equine professionals. Because there is no evidence indicating that Whiskey's behavior . . . represented anything other than unpredictable action to a person or unfamiliar object[,] [p]ursuant to the statute, Plaintiff's argument in this case is without merit . . . .

This appeal followed.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6; 614 NW2d 169 (2000). Summary disposition under MCR 2.116(C)(10) is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing such a motion, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted, as well as any legitimate inferences, in the light most favorable to the nonmoving party. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 423; 766 NW2d 878 (2009). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

Our review is also de novo to the extent that we address questions of statutory interpretation. *Cole*, *supra* at 7. When interpreting a statute our primary purpose is to ascertain and give effect to the Legislature's intent. *Amburgey v Sauder*, 238 Mich App 228, 232; 605 NW2d 84 (1999). Our first clue to determining the Legislature's intent is the words used. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). "The Legislature is presumed to have meant the meaning of the language it plainly ex-

pressed." *City of Warren v Detroit*, 261 Mich App 165, 169; 680 NW2d 57 (2004). When looking to the language used, we should assume that every word has some meaning and should avoid a construction that would render a provision nugatory or surplusage. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). If the language is clear and unambiguous, then judicial construction is neither necessary nor permitted. *People v Shakur*, 280 Mich App 203, 209; 760 NW2d 272 (2008). In addition, to the extent that the applicable statutes relate to the same subject matter or share a common purpose, we read them in *pari materia* and read them together as one law. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). "The object of the in *pari materia* rule is to effectuate the legislative purpose as found in harmonious statutes." *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). "If two statutes lend themselves to a construction that avoids conflict, that construction should control." *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009).

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court's ruling was legally erroneous, that summary disposition should have been denied because plaintiff sufficiently pleaded a claim of negligence, and that defendant's failure to post warning signs should eliminate any limitation on his liability. We disagree.

A. EQUINE ACTIVITY IMMUNITY

Plaintiff first contends that the trial court mischaracterized the EALA as granting "blanket immunity" to defendants defined in the act. In plaintiff's view, § 5 of the EALA, MCL 691.1665, permits certain types of

negligence claims, including a general claim of negligence, to be brought against defendants defined in the act. Although we agree that the EALA does not create blanket immunity, plaintiff's assertion that the trial court misinterpreted the EALA is factually inaccurate.

As this Court has previously noted, the purpose of the EALA is to "curb litigation [against the equine industry] and the correlative rising costs of liability insurance, and to stem the exodus of public stable operators from the [equine] industry." *Amburgey*, *supra* at 246. Consistently with this purpose, the "EALA proscribes liability only for injuries resulting from an 'inherent risk of equine activity' . . . ." *Id.* at 236. Specifically, § 3 of the EALA, MCL 691.1663, provides:

> Except as otherwise provided in section 5, an equine activity sponsor, an equine professional, or another person is not liable for an injury to or the death of a participant or property damage resulting from *an inherent risk of an equine activity*. Except as otherwise provided in section 5, a participant or participant's representative shall not make a claim for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an *inherent risk of an equine activity*. [Emphasis added.]

The EALA defines "inherent risk of an equine activity" as "a danger or condition that is an integral part of an equine activity," such as an equine's propensity to behave in certain ways and react in unpredictable ways "to things." MCL 691.1662(f). However, § 5 provides certain exceptions to the limitation on liability created in § 3:

> Section 3 does not prevent or limit the liability of an equine activity sponsor, equine professional, or another person if the equine activity sponsor, equine professional, or other person does any of the following:

> (a) Provides equipment or tack and knows or should know that the equipment or tack is faulty, and the equipment or tack is faulty to the extent that it is a proximate cause of the injury, death, or damage.
>
> (b) Provides an equine and fails to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and to determine the ability of the participant to safely manage the particular equine. A person shall not rely upon a participant's representations of his or her ability unless these representations are supported by reasonably sufficient detail.
>
> (c) Owns, leases, rents, has authorized use of, or otherwise is in lawful possession and control of land or facilities on which the participant sustained injury because of a dangerous latent condition of the land or facilities that is known to the equine activity sponsor, equine professional, or other person and for which warning signs are not conspicuously posted.
>
> (d) Commits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage. [MCL 691.1665.]

Given these provisions, it is plainly obvious that the EALA does not create blanket immunity. See *Amburgey*, *supra* at 233 (construing § 5 as granting "immunity" to *qualifying* defendants). And, the trial court recognized this fact when it stated that the EALA merely "limits [the] liability of equine activity sponsors and equine professionals." Thus, given the trial court's acknowledgment that the EALA creates a limitation on liability, we cannot conclude that the trial court legally erred in the manner that plaintiff contends.

Plaintiff's more compelling argument is that § 5(d) permits a general negligence claim irrespective of EALA's limitation on liability. But again, we disagree. As already noted, § 5 delineates a list of exceptions to the qualified immunity granted to certain defendants under § 3. Section 5(d) provides that liability will attach if the defen-

dant "[c]ommits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage." MCL 691.1665(d). Reading this subdivision in conjunction with subdivisions a, b, and c, as well as § 3 (which limits liability), leads us to the conclusion that the Legislature did not intend § 5(d) to prescribe a general or ordinary negligence claim. All of the conduct described in subdivisions a, b, and c of § 5 falls outside the definition of "inherent risk of equine activity," which activity is the only activity for which the EALA precludes liability. MCL 691.1663; see *Amburgey*, *supra* at 233. As previously noted, the phrase "inherent risk of equine activity" is defined as risks integral to equine activity. MCL 691.1662(f). "Equine activity" includes, but is not limited to, riding a horse belonging to another, boarding a horse and its normal daily care, as well as teaching or training activities. MCL 691.1662(c). The instances enumerated in § 5 in which liability attaches are necessarily outside this definition because they involve human error *not* integral to engaging in an equine activity, such as failure to inspect tack, MCL 691.1665(a), failure to inquire into a participant's level of ability to manage the horse, MCL 691.1665(b), and failure to warn of dangerous latent conditions in the land, MCL 691.1665(c). Reading the EALA as a whole in *pari materia*, it only makes sense if § 5(d) also includes other negligent activity that is not within the gamut of "inherent[ly] risk[y] . . . equine activity." MCL 691.1662(f). To do otherwise, as plaintiff suggests, would be to permit a general negligence claim under § 5(d), which would consequently render § 3 nugatory, as it would destroy the limited liability for qualifying defendants created under that section. This result would completely eviscerate the purpose for which the Legislature enacted the EALA. We decline to adopt such an interpretation. *Altman*, *supra* at 635. Accordingly, we hold that § 5(d) does not create a general negligence claim, but

rather permits a negligence claim to arise that involves something other than "inherent[ly] risk[y] . . . equine activity." MCL 691.1662(f).

B. NEGLIGENCE UNDER THE EALA

Plaintiff next argues that she sufficiently supported a claim of negligence pursuant to the EALA. Plaintiff asserts that defendant knew that Whiskey was not suitable for a social guest to ride and that Whiskey presented a high risk of harm, but permitted plaintiff to engage with the horse anyway and, as a result, plaintiff was injured. Plaintiff contends that defendant is not immune from liability on the basis of these facts and § 5(b) and (d). We cannot agree that summary disposition was improper. In light of our discussion interpreting the meaning of § 5(d), we first address plaintiff's claim under that provision.

i. MCL 691.1665(d)

As we have already indicated, liability will attach under § 5(d) if the defendant "[c]ommits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage" only if that act or omission involves something other than inherently risky equine activity. MCL 691.1665(d). We note at the outset that plaintiff has pleaded nothing more than an ordinary negligence claim. In order to state a claim that avoids the immunity provision of the EALA, a plaintiff must allege specific facts in his or her complaint under one of the exceptions enumerated under § 5. Plaintiff's complaint, however, makes no specific mention of § 5(d) and only alleges that defendant was negligent. Plaintiff's claim under § 5(d) fails as a matter of law on this basis. See MCR 2.116(C)(8).

Assuming that plaintiff had sufficiently pleaded a § 5(d) negligence claim under the EALA, it is our opinion after a review of the evidence that plaintiff has failed to establish that her injury resulted from activity beyond that of engaging in an inherently risky equine activity as that section requires. See MCL 691.1663; MCL 691.1665. As already stated, the EALA defines "inherent risk of an equine activity" as "a danger or condition that is an integral part of an equine activity," such as a propensity to behave in certain ways and an equine's unpredictable reaction "to things." MCL 691.1662(f). To "engage in an equine activity" under the EALA means

> *riding*, training, driving, breeding, being a passenger upon, or providing or assisting in veterinary treatment of an equine, *whether mounted or unmounted*. Engage in an equine activity includes visiting, touring, or utilizing an equine facility as part of an organized event or activity including the breeding of equines, or assisting a participant or show management. Engage in equine activity does not include spectating at an equine activity, unless the spectator places himself or herself in an unauthorized area and in immediate proximity to the equine activity. [MCL 691.1662(a) (emphasis added).]

And, "equine activity" means, but is not limited to:

> (*ii*) Equine training or teaching activities.
>
> (*iii*) Boarding equines, including their normal daily care.
>
> (*v*) Riding . . . an equine belonging to another . . . . [MCL 691.1662(c).]

Viewing the evidence in the light most favorable to plaintiff, it is plain that plaintiff was engaged in inherently risky equine activity. Defendant invited plaintiff to his property so that she could ride Whiskey. Although plaintiff did not mount or ride Whiskey, she held Whiskey's halter and lead rope while defendant at-

tempted to saddle the horse. When defendant hoisted the saddle into the air, the horse got spooked and reared up on its hind legs, resulting in an injury to plaintiff. This is exactly the type of risk that is integral to any equine activity. MCL 691.1662(f). In other words, Whiskey had an "unpredictabl[e] . . . reaction" to defendant's attempt to saddle him, MCL 691.1662(f)(*ii*), while plaintiff was engaging in an equine activity, MCL 691.1662(a) and (c). Plaintiff has failed to support a negligence claim that meets the requirements of § 5(d), i.e., some type of negligence involving something other than "inherent[ly] risk[y] . . . equine activity." MCL 691.1662(f).

ii. MCL 691.1665(b)

Plaintiff also argues that she sufficiently supported a claim for negligence pursuant to § 5(b), MCL 691.1665(b), which permits liability if a person

> [p]rovides an equine and fails to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and to determine the ability of the participant to safely manage the particular equine. A person shall not rely upon a participant's representations of his or her ability unless these representations are supported by reasonably sufficient detail.

Plaintiff's contention is without merit.

We first note that plaintiff never pleaded in her complaint that defendant should be liable under this provision. Nor did plaintiff ever move to amend her complaint to state a theory of liability under § 5(b). Again, on this basis alone, plaintiff's claim fails as a matter of law. See MCR 2.116(C)(8). Once more, we stress that in order to state a claim that avoids the immunity provision of the EALA, a plaintiff must allege specific facts in his or her complaint under one of the

exceptions enumerated under § 5. This mandate is imperative. Plaintiff's failure to do so in this matter is fatal to her claim.

Even if we were to consider plaintiff's claim, it would nonetheless be unsuccessful. The only evidence plaintiff produced relevant to this provision is her deposition testimony. In her deposition, plaintiff testified that on numerous occasions she requested that she be allowed to ride Whiskey. However, defendant refused permission unless he was present. This evidence tends to show that defendant was aware of both Whiskey's and plaintiff's abilities. Plaintiff failed to plead or otherwise establish through discovery how this was either unreasonable or imprudent, as required by § 5(b).

Plaintiff also attempts to rely on a letter from Timothy Wright in support of her § 5(b) claim. We cannot consider this so-called "expert" testimony. Mr. Wright was never qualified as an expert and he was never deposed. See MRE 702. The sole attempt to qualify him as an expert is a mere statement in a letter, which is not notarized and is not an affidavit, that he has a "lifelong affiliation with the horse industry." See *id.*; MCR 2.116(G)(6). Moreover, the letter is not accompanied by a curriculum vitae, which could have shed further light on his qualifications to offer expert testimony. Nothing in the contents of the letter constitute anything more than conclusory allegations, which are insufficient to create an issue of material fact to avoid summary disposition. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Plaintiff's failure to produce supportive evidence through discovery in support of her claims under § 5(b) and (d) is fatal to her claim. MCR 2.116(C)(10). Accordingly, we conclude that the trial court correctly granted summary disposition for defendant because plaintiff's

injury resulted from an inherent risk of an equine activity and plaintiff did not prove otherwise.

C. WARNING SIGNS

Plaintiff further asserts that the trial court erred by failing to consider her argument that summary disposition is precluded because defendant did not post warning signs, as required under the EALA. According to plaintiff, because defendant failed to post signs consistent with § 6, MCL 691.1666, he should not be able to avail himself of the limitations on his liability and the jury should have been instructed on plaintiff's theory of liability based on § 5(b) and (d).[2] We disagree.

Section 6 provides:

> (1) An equine professional shall post and maintain signs that contain the warning notice set forth in subsection (3). The signs shall be placed in a clearly visible location in close proximity to the equine activity. The warning notice shall appear on the sign in conspicuous letters no less than 1 inch in height.
>
> (2) A written contract entered into by an equine professional for providing professional services, instruction, or rental of equipment, tack, or an equine to a participant, whether or not the contract involves an equine activity on or off the location or site of the equine professional's business, shall contain in clearly readable print the warning notice set forth in subsection (3).

[2] Plaintiff did not plead a violation of § 6 in her complaint, but raised the issue in her answer to defendant's motion for summary disposition. The trial court, however, did not consider the argument. As such, plaintiff's claim is not properly preserved. However, "where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). We consider plaintiff's argument because the facts necessary for its resolution are apparent on the record.

> (3) A sign or contract described in this section shall contain substantially the following warning notice:
>
> WARNING
>
> Under the Michigan equine activity liability act, an equine professional is not liable for an injury to or the death of a participant in an equine activity resulting from an inherent risk of the equine activity. [MCL 691.1666.]

Again, because plaintiff failed to plead a violation of this provision in her complaint, her claim fails as a matter of law. See MCR 2.116(C)(8). But even if we consider her argument, it is plain that § 6 does not apply to defendant. Under § 6(1), an "equine professional" is required to post a warning sign for visitors. An "equine professional" is defined in the EALA as a person engaged in an activity for compensation. MCL 691.1662(e). Our review of the record reveals that defendant was not engaged in an equine activity for compensation and he is not an equine professional. The requirement to post a warning sign does not apply to him. We note in passing that even if this provision did apply to defendant, it would in no way eliminate the restrictions on liability set forth in § 3. Plaintiff's argument suggesting otherwise reads additional requirements into the statute that the Legislature did not include. *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998).

IV. CONSTITUTIONAL CLAIM

Lastly, plaintiff argues for the first time on appeal that the EALA violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, which states, in part, "No law shall embrace more than one object, which shall be expressed in its title." Plaintiff's argument depends on her contention that the EALA

functions to eliminate all liability, or grant blanket immunity to defendants, which is not encompassed in the act's title. The result, plaintiff contends, is a violation of the clause because the contents of the act exceed its title. On the contrary, we have already determined that the EALA does not grant blanket immunity, as discussed above. Accordingly, the assertions upon which plaintiff bases her argument are inaccurate and there is no merit to her argument. Thus, we decline to grant relief on this basis.

Affirmed.

BEGIN v MICHIGAN BELL TELEPHONE COMPANY

Docket Nos. 279891 and 284114. Submitted June 9, 2009, at Grand Rapids. Decided June 25, 2009, at 9:05 a.m.

Neil Begin brought an action in the Kent Circuit Court against Michigan Bell Telephone Company and it self-insurance claims manager, Sedgwick Claims Management Services, Inc., seeking payment as an allowable expense under the no-fault automobile insurance act, MCL 500.3107(1)(a), of the price of a van modified for his handicaps. The plaintiff, in a motor vehicle accident during the course of his employment with Michigan Bell, suffered accidental bodily injuries that rendered him a quadriplegic. The parties reached a consent judgment that provided that Michigan Bell pay for the van and the necessary modifications but also provided that the defendants did not waive their right to appeal from the judgment with regard to issues involving *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005), and *Davis v Citizens Ins Co of America*, 195 Mich App 323 (1992). The court, Dennis B. Leiber, J., entered a judgment consistent with the parties' agreement. Michigan Bell and Sedgwick appealed pursuant to their reserved claim of right to appeal (Docket No. 279891).

Begin filed a separate complaint in the Kent Circuit Court against Michigan Bell four months after the entry of the consent judgment in his earlier action, asserting several theories of liability arising out of Michigan Bell's handling of the plaintiff's claims for workers' compensation and no-fault benefits. One count alleged invasion of privacy-trespass. Three counts based on contract, estoppel, and statutory interpretation theories asserted a right to the payment of attendant care benefits in the manner used before Michigan Bell retained Sedgwick. A final count alleged intentional infliction of emotional distress. Michigan Bell moved for summary disposition, arguing that the claims were barred by the doctrine of res judicata and that the count for intentional infliction of emotional distress failed to state a claim on which relief can be granted. The court, Dennis B. Leiber, J., denied the motion. Michigan Bell appealed by leave granted the denial of its motion (Docket No. 284114). The appeals were consolidated.

The Court of Appeals *held*:

1. Michigan Bell waived its ability to contest both the reasonableness of the charge for the van and the reasonableness of the necessity for the van by agreeing to the entry of the consent judgment. In addition, the defendants did not properly preserve and present the issue for appellate review.

2. *Davis* held that under the facts of that case a van modified for the plaintiff in that case, who was rendered a paraplegic in a motor vehicle accident, was a reasonable and a reasonably necessary allowable expense under MCL 500.3107(1)(a). *Davis* also held that the three factors to establish an allowable expense under the statute are that the charge must be reasonable, the expense must be reasonably necessary, and the expense must be incurred. *Griffith*, which noted that the statute also required that an allowable expense must be for an injured person's care, recovery, or rehabilitation, did not overrule *Davis*, which remains binding precedential authority.

3. A product, service, or accommodation an injured person uses both before and after a motor vehicle accident may be an "allowable expense" no-fault benefit depending on the particular facts and circumstances involved. The fact that the plaintiff used a van before the accident does not prevent a finding that his use of a modified van after his accident was a reasonable charge, and that the van was a reasonably necessary product, service, or accommodation for his care. The trial court did not err by denying the defendants' motion for summary disposition, which was based on the claim that if an injured person uses a product, service, or accommodation both before and after a motor vehicle accident, it cannot meet the causal relationship tests for an "allowable expense" no-fault benefit. The judgment in Docket No. 279891 must be affirmed.

4. The plaintiff did not limit the relevant transaction for purposes of res judicata by allegedly narrowly drafting his first complaint to only address Michigan Bell's denial of his claim for reimbursement for the cost of the van as a no-fault benefit.

5. The plaintiff could have, with reasonable diligence, brought his attendant care claims in his first lawsuit. These claims are barred by res judicata.

6. The plaintiff's claim for intentional infliction of emotional distress could have been raised in his first lawsuit. The claim is barred by res judicata.

7. The plaintiff failed to state a claim of invasion of privacy by intrusion upon seclusion. Michigan Bell did not obtain the plaintiff's personnel and pension information through an objectionable method. Michigan Bell had a right to investigate a party asserting

a liability claim against it, and the plaintiff did not allege that Michigan Bell obtained any secret or private information that the plaintiff had a right to keep private.

8. The plaintiff could have asserted the claim of intentional infliction of emotional distress in the first lawsuit by moving to include that claim in the action when the facts that the plaintiff claims support the claim were revealed during the course of discovery. The trial court erred by not granting Michigan Bell's motion for summary disposition under MCR 2.116 (C)(7) and (8) in Docket No. 284114. The order in that case must be reversed and the case must be remanded to the trial court for entry of an order granting summary disposition in favor of Michigan Bell.

Judgment in Docket No. 279891 affirmed. Order in Docket No. 284114 reversed and case remanded for entry of order of summary disposition for the defendant.

HOEKSTRA, J., concurring, agreed with the resolution of Docket No. 284114 and with the result in Docket No. 279891, but wrote separately to state his disagreement with the majority's conclusion that *Davis* is controlling in this case. The clarification of the construction of MCL 500.3107(1)(a) stated in *Griffith* is applicable to all cases where compensation is sought for allowable expenses, including vans, under MCL 500.3107(1)(a). Under that analysis, the plaintiff was required to establish that the charge for the van was reasonable, and that the van was for his care, recovery, or rehabilitation. *Griffith* did not establish a bright-line rule that would preclude as an allowable expense any motor vehicle similar to one owned by the injured person before the injury. However, an inquiry into the specific facts and circumstances of this case regarding that issue is precluded because of the entry of the consent judgment.

Brinks & Associates (by *Sharon R. Brinks* and *Nadine Renee Klein*) for the plaintiff.

Lacey & Jones (by *D. Michael McCann*, *Gerald M. Marcinkoski*, and *Michael T. Reinholm*) for the defendants.

Before: JANSEN, P.J., and HOEKSTRA and MARKEY, JJ.

PER CURIAM. In Docket No. 279891, defendant Michigan Bell Telephone Company (defendant) and its self-

insurance claims manager, Sedgwick Claims Management Services, Inc. (Sedgwick), appeal by a reserved claim of right to appeal a July 19, 2007, consent judgment that, among other provisions, requires defendants to pay $25,059 for a 2005 Pontiac Montana van as an allowable expense under the no-fault act, MCL 500.3107(1)(a). Plaintiff's claim arises out of a 1988 motor vehicle accident that happened while plaintiff worked for defendant. Defendant insures itself for both workers' compensation and no-fault benefits. Plaintiff suffered accidental injuries rendering him a quadriplegic. We affirm.

In Docket No. 284114, defendant appeals by leave granted the trial court's order denying its motion for summary disposition with respect to a complaint plaintiff filed after entry of the consent judgment in Docket No. 279891. The appeals were consolidated. Plaintiff asserts in his second lawsuit several theories of liability arising out of defendant's handling of plaintiff's benefits claims, including intentional infliction of emotional distress, invasion of privacy-trespass, and claims regarding the method of payment for attendant care expenses under theories of breach of contract, promissory estoppel, and statutory construction. Defendant argues that it should be granted summary disposition under MCR 2.116(C)(7) because plaintiff's claims in the second suit could have been brought in the first lawsuit regarding the van, and therefore are barred by the doctrine of res judicata. Defendant also argues that summary disposition of the claim for intentional infliction of emotional distress should be granted under MCR 2.116(C)(8) for failure to state a claim. Because we agree that defendant's arguments have merit, we reverse and remand for the entry of an order granting summary disposition in favor of defendant.

A party that waives an objection to a rule of practice or to evidence, stipulates to facts, or confesses judgment, generally cannot later claim the right to appellate review of those matters. *Westgate v Adams*, 293 Mich 559, 564; 292 NW 491 (1940). But this Court "has previously recognized that an appeal of right is available from a consent judgment in which a party has reserved the right to appeal a trial court ruling." *Travelers Ins v Nouri*, 456 Mich 937 (1998). Nevertheless, unless an issue encompassed within the consent judgment has been specifically preserved for appeal, the general rule is that a party cannot stipulate a matter and then argue on appeal that the resulting action was error. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 168; 761 NW2d 764 (2008); see also *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001) ("A party cannot stipulate a matter and then argue on appeal that the resultant action was error.").

In this case, on July 6, 2007, the parties placed a settlement on the record providing, among other things, that defendant pay $25,059 for the van plaintiff had purchased. Since plaintiff's accident, defendant had purchased three other vans without any protest. In addition, defendant did not contest paying for modifications to the van to accommodate plaintiff's disabilities as a claim against its workers' compensation liability. Plaintiff's counsel stated on the record that the parties' settlement "does not waive Defendant's right to appeal from the judgment regarding the issues involving *Griffith* [*v State Farm Mut Automobile Ins Co*, 472 Mich 521; 697 NW2d 895 (2005)] and *Davis* [*v Citizens Ins Co of America*, 195 Mich App 323; 489 NW2d 214 (1992)] as set forth in the various motions and cross-motions that have been heard on a number of occasions,

including August the 4th, 2006, and June the 15th, 2007." The consent judgment was entered on July 19, 2007, providing that it "does not waive defendants' right to appeal from the Judgment regarding the issues involving Griffith and Davis as set forth in the various motions and cross-motions considered [on August 4, 2006 and June 15, 2007] . . . ."

The agreement regarding defendants' reserved right to appeal is further delineated by review of the two specified motion hearings. At the hearing on August 4, 2006, the trial court received arguments of counsel on defendants' motion for summary disposition under MCR 2.116(C)(8) and plaintiff's cross-motion for summary disposition under MCR 2.116(C)(10). Defendants argued in support of their motion under MCR 2.116(C)(8) as follows:

> I believe the Supreme Court case of *Griffith* . . . does give the Court guidance on this. The *Davis* case, which is the Court of Appeals case cited by counsel, is really *sua sponte* overruled by *Griffith*. *Griffith* indicates that expenses which are the same for an uninjured person are now [sic, not] allowable under the No-Fault Act.

In ruling on the parties' motions, the trial court reasoned:

> Of this I am certain. The principle enunciated in *Davis*, in my opinion, is still viable and controlling. And for that reason I find *Griffith* distinguishable and inapplicable to this case, and I must respectfully deny the defense motion predicated under [MCR] 2.116(C)(8).
>
> As to the [MCR 2.116](C)(10) motion brought by the plaintiff, again, in attempting to assess the issue presented, I do find this van in its totality represents a necessity because of the particularities of the plaintiff's condition and the necessity of having these accommodations in a vehicle adapted to meet his particular needs.

Despite this legal ruling, the trial court still denied plaintiff's motion for summary disposition because the court was uncertain whether plaintiff's claim exceeded the circuit court's jurisdictional limit of $25,000.

The second pertinent motion hearing was held on June 15, 2007, shortly before the case was scheduled for trial. During that hearing, the trial court addressed defense counsel, who was substituting for defendant's regular attorney because of illness.

> *The Court*: Well, here's [the posture of the case] as I understand it. The plaintiff is a person who requires a van outfitted with certain accommodations, which are not in contest, and the Court ruled that this is a necessary part of his care.

After further colloquy during which defense counsel and the trial court agreed that the $2,600 for necessary accommodations to the van were not at issue because defendant paid for them as part of plaintiff's workers' compensation claim, the trial court continued:

> *The Court*: Right, they have been [paid already]—$2,600 or so—but it's not accommodations in a vacuum. It's accommodations and a new van, because an operable vehicle is part and parcel of his entitlement, and we're sort of at a crossroads here of not making any progress whatsoever.

After further colloquy between the trial court and counsel, the court stated to defense counsel:

> But let me say this as clearly as I hope it can be communicated to Mr. McCann, whom I wish to be restored to health soon from whatever his malady or ailment.
>
> I don't know if it was called upon me to make a decision with regard to this matter, or the basis upon which summary disposition was denied to plaintiff at the time, but it seems to me—very strong evidence here, that a new van, or a relatively new van since the plaintiff has possessed this

> fourth van—seems to me that there's really no question that this is an absolute necessity, that the nature of the accommodations, of course, are important, but those accommodations would do nothing for the plaintiff unless he has a reliable vehicle to which they were attached, and reliable is critical because of the plaintiff's special needs, who depends on the van more than for transportation, but also to assist him in the manners described in the brief. And this is more than a matter in which an able-bodied person would regard a motor vehicle; this is a vehicle for which the plaintiff is solely dependent beyond transportation, but to attend to his daily living.
>
> So the question is how soon will the defense recognize the obvious, and maybe it will take a trial for that purpose. But of course, with a trial, with which comes the potential of an uncertain result . . . .

The trial court went on to deny the parties' pending motions and set a firm trial date of July 23, 2007. But, as already noted, the parties placed their settlement on the record on July 6, 2007, providing, among other things, that defendant pay $25,059 for plaintiff's van. The consent judgment was entered July 19, 2007, and reserved to defendants the right to appeal the *Griffith* and *Davis* issues argued at the two specified motion hearings. In addition, the consent judgment also relates that defendants previously had waived affirmative defenses regarding the statute of limitations, the failure to mitigate damages, and "their Davis defense." The meaning of the last defense is unclear. Plaintiff asserts in his brief that "Davis defense" refers to the reasonableness of an allowable expense under MCL 500.3107(1)(a), in this case, the van. Whether or not this is correct, we conclude that defendant has waived its ability to contest both the reasonableness of the charge and the reasonableness of the necessity for the van.

Defendants argue on appeal that plaintiff "has presented no evidence that the replacement van itself, without modifications, was reasonable and necessary within the meaning of" MCL 500.3105(1) and MCL 500.3107(1)(a). But defendant did not argue in the trial court that plaintiff's claim failed as a matter of law for these reasons, i.e., that the undisputed facts entitled defendants to summary disposition under MCR 2.116(C)(10). Rather, defendants argued entitlement to judgment as a matter of law under MCR 2.116(C)(8) on the basis that our Supreme Court's decision in *Griffith* overruled this Court's decision in *Davis*, which held that a van modified for the plaintiff who was rendered a paraplegic in a motor vehicle accident was, on the facts of that case, a reasonable and a reasonably necessary allowable expense under MCL 500.3107(1)(a). At the motion hearings, the trial court ruled that plaintiff had presented strong evidence to sustain his claim that the van was a "reasonable charge[] incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." *Id*. But the trial court denied plaintiff's MCR 2.116(C)(10) motion and scheduled a firm trial date. Had defendants wished to contest the factual support for the finding that the van was a reasonable charge and reasonably necessary for plaintiff's care under MCL 500.3107(1)(a), they should have exercised their right to a trial on those issues and developed a record in that regard. Instead, defendants agreed to the entry of a consent judgment. Although defendants have reserved their right to appeal the trial court's denial of their motion for summary disposition under MCR 2.116(C)(8) with regard to our Supreme Court's decision in *Griffith*, we conclude that this record reflects that defendants have waived appellate review of the

issues of reasonableness under MCL 500.3107(1)(a). *Westgate*, *supra* at 564; *Bonkowski*, *supra* at 168; *Chapdelaine*, *supra* at 177.

Additionally, although defendants' brief on appeal refers to parts of plaintiff's deposition and argues against plaintiff's reasons for asserting that the van is reasonably necessary for his care, defendants' presentation is totally inadequate to address those factual issues that were never formally decided by the fact-finder below. A party may not leave it to this Court to search for the factual basis to sustain or reject its position, but must support its position with specific references to the record. MCR 7.212(C)(7); *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). An appellant's failure to properly address the merits of an assertion of error constitutes abandonment of the issue. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Consequently, even if defendants did not formally waive contesting the evidentiary support for plaintiff's claim that the van was a reasonable charge and reasonably necessary for his care, they did so by agreeing to the consent judgment, or by failing to properly preserve and present the issue for appellate review.

Next, we consider defendants' claimed entitlement to judgment as matter of law under *Griffith* and their reasoning that because plaintiff used a van for transportation before his injuries, plaintiff's motor vehicle accident injuries did not create his need for a van. We disagree. We do not read *Griffith* as establishing the bright-line rule defendants espouse; rather, entitlement to no-fault benefits is dependent on the facts and circumstances of each case.

We review de novo whether the trial court erred by denying defendants' motion for summary disposition under MCR 2.116(C)(8). *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Such a motion tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted. *Id*. We must accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) may be granted only if no factual development could possibly justify recovery. *Corley*, *supra* at 277.

In *Davis*, this Court reviewed the trial court's determination that the purchase price of a modified van was a reasonable and necessary expense under MCL 500.3107(a) for the plaintiff, a wheelchair-bound paraplegic. *Davis*, *supra* at 324-325. To do so, the *Davis* Court applied a three-part test originating from the concurring in part and dissenting in part opinion of Justice BOYLE in *Manley v Detroit Automobile Inter-Ins Exch*, 425 Mich 140, 169; 388 NW2d 216 (1986). The three factors to establish an "allowable expense" under § 3107(1)(a), according to the *Davis* Court, are: "(1) the charge must be reasonable; (2) the expense must be reasonably necessary; and (3) the expense must be incurred." *Davis*, *supra* at 326. In the case before it, the Court first ruled that the first and third factors were satisfied. The Court then held that the specific expense requested was reasonably necessary, opining:

> We also find that the van was reasonably necessary. *Transportation is as necessary for an uninjured person as for an injured person*. However, the modified van *is necessary in this case* given the limited availability of alternative means of transportation. The ambulance service is limited

> to Branch County, traveling outside the county two or three times a week. Although this service is available twenty-four hours a day, seven days a week, advance notice is preferred for clients who, like plaintiff, reside more than five miles from town. Moreover, because the ambulance service is the only one in the county, transportation could be delayed or unavailable because of medical emergencies. The local transit authority provides door-to-door service to clients who make advance reservations, but it is unavailable during evenings. The van allows plaintiff to travel outside the county for medical purposes and vacations. In addition, the van was reasonably necessary according to plaintiff's treating physician. He testified that when he discharged plaintiff, one of the requirements was that plaintiff use a van for her transportation, allowing her the independence to go to work. *Under these circumstances*, *we find that the modified van is an allowable expense*. [*Id*. at 327-328 (emphasis added).]

In *Griffith*, our Supreme Court held that food provided in a noninstitutional setting to a severely injured motor vehicle accident victim is not an "allowable expense" under the no-fault act because it "is neither 'for accidental bodily injury' under MCL 500.3105(1) nor 'for an injured person's care, recovery, or rehabilitation' under MCL 500.3107(1)(a) . . . ." *Griffith*, *supra* at 524. The Court opined that MCL 500.3105(1) and MCL 500.3107(1)(a) "impose two separate and distinct requirements for 'care, recovery, or rehabilitation' expenses to be compensable under the no-fault act." *Griffith*, *supra* at 530. The first statutory provision requires that allowable expenses be " '*for accidental bodily injury* arising out of the ownership, operation, maintenance or use of a motor vehicle . . . .' " *Id*., quoting MCL 500.3105(1) (emphasis in original). The second statutory provision requires that allowable expenses be " 'reasonably necessary . . . for an injured person's care, recovery, or rehabilitation.' " *Griffith*, *supra* at 530, quoting MCL 500.3107(1)(a).

The *Griffith* Court further parsed MCL 500.3105(1) as requiring two different causal relationships: (a) the claimed *benefits* must be "causally connected to the accidental bodily injury arising out of an automobile accident" and (b) no-fault benefits are payable "for accidental bodily injury only if those injuries 'aris[e] out of' or are caused by 'the ownership, operation, maintenance or use of a motor vehicle . . . .' " *Griffith*, *supra* at 531, quoting MCL 500.3105(1). The Court held that while the plaintiff satisfied the second prong of the statute, the plaintiff had not satisfied the first causal element because the plaintiff did not claim that his "diet is different from that of an uninjured person, that his food expenses are part of his treatment plan, or that these costs are related in any way to his injuries." *Griffith*, *supra* at 531. We agree with the trial court that the present case is factually distinguishable from *Griffith* because here plaintiff claimed, and presented evidence, that his transportation needs were different from those of an uninjured person and that the modified van for which he sought reimbursement was related to care necessitated by his injuries arising out of the operation or use of a motor vehicle.

Certainly, the *Griffith* Court clarified that the truncated test for allowable expenses under MCL 500.3107(1)(a), first iterated by Justice BOYLE, and reiterated by this Court in *Davis*, *supra* at 326, did not sufficiently state all that statute's requirements. The *Griffith* Court observed that Justice BOYLE's statement that MCL 500.3107(1)(a) imposed only three requirements: " '1) the charge must be reasonable, 2) the expense must be reasonably necessary, and 3) the expense must be incurred,' " was incomplete. *Griffith*, *supra* at 532 n 8, quoting *Manley*, *supra* at 169 (BOYLE, J., concurring in part and dissenting in part). The *Griffith* Court noted that the statute also required "that

an 'allowable expense' must be 'for' one of the following: (1) an injured person's care, (2) his recovery, or (3) his rehabilitation." *Griffith*, *supra* at 532 n 8. To this extent, then, our Supreme Court without mentioning this Court's decision in *Davis*, clarified judicial construction of MCL 500.3107(1)(a), on which the *Davis* Court relied.

Although the *Griffith* Court clarified judicial construction of both MCL 500.3105(1) and MCL 500.3107(1)(a) to determine whether claimed no-fault benefits are "allowable expenses," the Court did not specifically overrule this Court's decision in *Davis*. Indeed, *Griffith* only specifically overruled *Reed v Citizens Ins Co of America*, 198 Mich App 443; 499 NW2d 22 (1993), which had held that room and board may be "allowable expenses" because there was no principled distinction between such necessities furnished in an institutional setting and the same items furnished to severely injured persons in their home. *Griffith*, *supra* at 529, 540. Because the *Griffith* Court did not overrule *Davis*, and because *Davis* was issued on or after November 1, 1990, the *Davis* decision is binding precedential authority until it is "reversed or modified by the Supreme Court, or by a special panel" of this Court. MCR 7.215(J)(1).

Moreover, we reject defendants' bright-line rule that if an injured person uses a product, service, or accommodation both before and after the person's motor vehicle accident, the person cannot for that reason meet the statutory causal relationship tests clarified in *Griffith* for an "allowable expense" no-fault benefit. Rather, the *Griffith* Court held that a product, service, or accommodation an injured person uses both before and after a motor vehicle accident might be an "allowable expense" no-fault benefit depending on the par-

ticular facts and circumstances involved. Just as the Court was careful to parse the words of the statute in the context of their use, *Griffith*, *supra* at 533-535, so too the context in which a product, service, or accommodation is used is key when considering whether it is an allowable expense under the no-fault act. Thus, in *Griffith*, the injured person's need for food at his own home was not an allowable expense because it was neither causally related to the accident under MCL 500.3105(1) nor necessary for the injured person's care, recovery, or rehabilitation under MCL 500.3107(1)(a). Nonetheless, the Court observed that food furnished to an injured person in an institutional setting could meet the statutory criteria of an allowable no-fault expense. The Court explained:

> Food costs in an institutional setting are "benefits for accidental bodily injury" and are "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." That is, it is "reasonably necessary" for an insured to consume hospital food during in-patient treatment given the limited dining options available. Although an injured person would need to consume food regardless of his injuries, he would not need to eat *that particular food* or bear the cost associated with it. Thus, hospital food is analogous to a type of special diet or select diet necessary for an injured person's recovery. Because an insured in an institutional setting is required to eat "hospital food," such food costs are necessary for an insured's "care, recovery, or rehabilitation" while in such a setting. [*Griffith*, *supra* at 537 (emphasis in original).]

The *Griffith* Court also observed that "[f]ood expenses in an institutional setting are 'benefits for accidental bodily injury,' and are 'reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation,' given the limited dining options available in hospitals." *Griffith*, *supra* at

538 n 14. We find the *Griffith* Court's reasoning regarding institutional food similar to this Court's reasoning in *Davis*, *supra* at 327-328.

A further example cited by the *Griffith* Court illustrates the fact that our Supreme Court did not adopt the bright-line rule defendants urge. In explaining what "allowable expenses" might come within the term "care" as used in MCL 500.3107(1)(a), the Court used the hypothetical example of a person whose leg was injured or amputated in a motor vehicle accident. The Court opined that "the cost of such items as a prosthetic leg or *special shoes* would be recoverable under the term 'care,' even though the person will never recover or be rehabilitated from the injuries, because the cost associated with such products or accommodations stems from the injury." *Griffith*, *supra* at 535 n 12 (emphasis added). Thus, in the Court's hypothetical example, the mere fact that the injured person almost certainly used shoes before the accident would not preclude a finding that "special shoes" would be necessary for the injured person's care and thus would be an "allowable expense" under MCL 500.3107(1)(a).

We also note that the *Griffith* Court, when discussing the cost of food provided to an injured person in an institutional setting, did not suggest that only the marginal increase in the cost of such food served in an institutional setting would be an allowable expense. Nor did the Court suggest that only the marginal cost of modifying regular shoes would be a recoverable "allowable expense" under MCL 500.3107(1)(a). Rather, in each example, the product, service, or accommodation used by the injured person before the accident is so blended with another product, service, or accommodation that the whole cost is an allowable expense if it satisfies the statutory criteria of being sufficiently re-

lated to injuries sustained in a motor vehicle accident and if it is a reasonable charge and reasonably necessary for the injured person's care, recovery, or rehabilitation under MCL 500.3107(1)(a). The latter inquiry, of course, is factual and dependent on the circumstances of each case. See *Rose v State Farm Mut Automobile Ins Co*, 274 Mich App 291, 296; 732 NW2d 160 (2007) ("whether PIP [personal protection insurance] expenses are reasonable and necessary is generally considered a question of fact for the jury").

Here, plaintiff alleged and presented evidence in support of his claim that a modified van was "causally connected to the accidental bodily injury arising out of an automobile accident." *Griffith*, *supra* at 531. There is no dispute that plaintiff's injuries arose out of an accident that occurred while he was using a motor vehicle. *Id*.; MCL 500.3105(1). Furthermore, plaintiff alleged and presented evidence in support of his claim that a modified van was a reasonable charge and was a reasonably necessary product, service, or accommodation for his care. *Griffith*, *supra* at 532; MCL 500.3107(1)(a). Although plaintiff's complaint is sparse, accepting all well-pleaded factual allegations as true and construing them in a light most favorable to plaintiff, it cannot be said that plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Corley*, *supra* at 277; *Maiden*, *supra* at 119. Consequently, the trial court did not err by denying defendants' motion for summary disposition under MCR 2.116(C)(8).

DOCKET NO. 284114

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7) and (8). Four months after the

entry of the consent judgment in Docket No. 279891, plaintiff filed a complaint that asserts several theories of liability arising out of defendant's handling of plaintiff's claims for workers' compensation and no-fault benefits. Plaintiff alleged a count of invasion of privacy-trespass; three counts (contract, estoppel, and statutory interpretation) asserting a right to payment of attendant care benefits in the manner utilized before defendant retained Sedgwick to manage its self-insurance claims, and a count of intentional infliction of emotional distress. Defendant argues that plaintiff's claims in the second suit are barred by the doctrine of res judicata. Defendant also argues that plaintiff's claim for intentional infliction of emotional distress should have been dismissed for failure to state a claim. We agree and therefore reverse.

We review de novo whether the doctrine of res judicata bars a subsequent action. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). We also review de novo a trial court's ruling on a motion for summary disposition. *Id*. A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is legally barred. The motion may, but need not, be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Maiden*, *supra* at 119. The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Id*. The motion is properly granted when the undisputed facts establish that the moving party is entitled to immunity granted by law. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). A motion brought under MCR 2.116(C)(8) is based on the pleadings alone and must be granted where no factual development could justify the asserted claim for relief. *Corley*, *supra* at 277.

The doctrine of res judicata will bar a subsequent action between the same parties when the facts or evidence essential to the action are identical to those that were essential to a prior action. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair*, *supra* at 121. For res judicata to apply, the prior action must also have resulted in a final decision. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). Res judicata applies to both consent judgments and judgments entered after a contested trial. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation. *Richards*, *supra* at 530; *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993).

The parties do not seriously dispute that the consent judgment entered in Docket No. 279891 was decided on the merits, was a final judgment, and involved the same parties or their privies. Plaintiff weakly asserts that identity of the parties is lacking because Sedgwick is not a party to the second suit. This argument is without merit because plaintiff and defendant are parties to both the prior action and this one. And, there is no dispute that Sedgwick is defendant's agent with respect to plaintiff's claims for workers' compensation and no-fault benefits. A privy of a party includes a person so identified in interest with another that he represents the same legal right, including, as in this case, a principal to an agent, or a master to a servant. *Adair*,

supra at 122; *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003). The only real issue in this case is whether plaintiff's claims were, or could have been, resolved in the first lawsuit. *Adair*, *supra* at 121.

Michigan broadly applies the doctrine of res judicata to advance its purposes. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). "As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events . . . ." *Id*. Thus, under Michigan's broad approach to res judicata, the doctrine "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, *supra* at 121. There are two alternative tests for determining when res judicata will bar a claim in a second lawsuit because the claim could have, with the exercise of reasonable diligence, been brought in the first action: the "same transaction" test and the "same evidence" test. *Id*. at 124. The "same evidence" test looks to "whether the same facts or evidence are essential to the maintenance of the two actions." *Jones*, *supra* at 401. As stated in *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999): "Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical."

Michigan also applies the more inclusive "same transaction" test as an alternative method to determine whether res judicata will bar a subsequent claim. In *Adair*, *supra* at 124, the Court clarified the differences between the two tests by quoting at length from *River Park, Inc v Highland Park*, 184 Ill 2d 290, 307-309; 703 NE2d 883 (1998) (citations omitted):

> "Under the 'same evidence' test, a second suit is barred 'if the evidence needed to sustain the second suit would

> have sustained the first, or if the same facts were essential to maintain both actions.' The 'transactional' test provides that 'the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.'
>
> * * *
>
> "Under the same evidence test the definition of what constitutes a cause of action is narrower than under the transactional test. As explained in the Restatement (Second) of Judgments, the same evidence test is tied to the theories of relief asserted by a plaintiff, the result of which is that two claims may be part of the same transaction, yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs. By contrast, the transactional approach is more pragmatic. Under this approach, a claim is viewed in 'factual terms' and considered 'coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; * * * and regardless of the variations in the evidence needed to support the theories or rights.' "

Thus, under Michigan's broad application of res judicata applying the "same transaction" test, whether evidence necessary to support a first lawsuit differs somewhat from that necessary for subsequent claims will not be dispositive. *Adair*, *supra* at 124-125. Instead, " '[w]hether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit . . . .' " *Id*. at 125, quoting 46 Am Jur 2d, Judgments, § 533, p 801 (emphasis in *Adair*).

In light of the broad application of the doctrine of res judicata and in furtherance of its purposes, we find

meritorious defendant's argument that its adjustment and payment of no-fault benefits arising out of plaintiff's 1988 motor vehicle accident is the pertinent "transaction" at issue in applying the doctrine of res judicata. Further, although defendant does not specifically argue this point, to the extent relevant to plaintiff's no-fault claims, we include in this pragmatic group of operative facts, plaintiff's workers' compensation claims arising out of the same motor vehicle accident.[1] For example, the parties agree that accommodations to plaintiff's van were paid under workers' compensation and both parties argue that attendant care benefits are payable under both workers' compensation and no-fault.

In applying the "same transaction" test for res judicata to plaintiff's claims in the second lawsuit, we first reject plaintiff's argument that he limited the "transaction" for purposes of res judicata by narrowly drafting his first complaint to only address defendant's denial of his claim for reimbursement of the cost of the van as a no-fault benefit. This argument flies in the face of the broad application of res judicata that bars "claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated." *Jones*, *supra* at 401. "A comparison of the grounds asserted for relief is not a proper test." *Id*.

Next, we agree with defendant that plaintiff could have, with reasonable diligence, brought his attendant

[1] In fact, defendant argues that any dispute the parties may have regarding benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., comes within the exclusive jurisdiction of the Workers' Compensation Agency, citing MCL 418.131 (exclusive remedy), and *Houghtaling v Chapman*, 119 Mich App 828, 831; 327 NW2d 375 (1982). See also *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000) ("MCL 418.841(1) . . . confers exclusive jurisdiction of claims under the WDCA on the Bureau of Worker's Compensation.").

care claims in his first lawsuit, under theories of contract, estoppel, or statutory construction. Each of these claims relates not to defendant's refusal to pay attendant care benefits, but to the manner in which defendant paid them. Specifically, at some point defendant stopped paying such claims in advance to an account controlled by plaintiff and instead paid individual care providers directly, using their social security numbers. Plaintiff argues that these claims were not "ripe" at the time he filed his first lawsuit on December 12, 2005, and did not become "ripe" until February 2007, when Willie Dillard, apparently a Sedgwick adjuster, began paying attendant care benefits under both workers' compensation and no-fault. Defendant asserts that neither the law nor the facts support plaintiff's argument. We agree.

The December 15, 1989, letter on which plaintiff bases his contract claim does not state whether attendant care benefits are payable as workers' compensation benefits, as no-fault benefits, or a combination of both. Plaintiff also attached to his complaint a letter dated April 14, 2005, from Sedgwick claims examiner Kimberly White, which advised plaintiff that the method of paying attendant care benefits would change on May 1, 2005. The letter also requested the social security number of plaintiff's caregiver spouse. Further, in the letter White denied plaintiff's claim for reimbursement for the van and request to increase the amount paid to plaintiff's spouse for attendant care. In the letter White cites both the workers' compensation act and the no-fault act as the basis for denying both requests. Plaintiff's counsel at that time wrote White a letter dated May 10, 2005, requesting reconsideration of the determination regarding the method of paying no-fault attendant care benefits, specifically citing MCL 500.3112 and no-fault caselaw, as reasons for doing so.

Counsel's argument in that letter is incorporated into plaintiff's statutory construction claim in the present case. Finally, defendant notes that because plaintiff's attendant care needs exceeded that which was payable as a workers' compensation benefit, citing MCL 418.315(1), defendant had always paid attendant care benefits under both workers' compensation and no-fault in excess of that paid under workers' compensation.[2] Consequently, we conclude that the record establishes that plaintiff, in the exercise of reasonable diligence, could have raised his attendant care claims in the first lawsuit but did not do so. Consequently, these claims are barred by res judicata. *Adair*, *supra* at 121.

Next, a perusal of plaintiff's claims regarding intentional infliction of emotional distress convinces us that they all involve the interaction between plaintiff and defendant, or defendant's agents, regarding the payment and adjustment of workers' compensation and no-fault benefits arising out of the 1988 motor vehicle accident plaintiff had while employed by defendant. As discussed already, we find that plaintiff's tort claim is related in time, space, origin, and motivation, and would form a convenient trial unit, with plaintiff's claims for no-fault benefits arising from his injuries in the motor vehicle accident. In fact, the factual basis of plaintiff's claim that defendant intentionally inflicted emotional distress is inextricably interwoven with his claims for benefits and defendant's response to the claims. As such, this claim is part of a pragmatic factual

[2] Plaintiff's complaint alleges that he needs attendant care 16 hours a day for most days and 24 hours a day for 48 days a year, or a minimum of 112 hours a week for attendant care. The workers' compensation act, MCL 418.315(1), provides, in part, "Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons."

grouping that constitutes a "transaction" for purposes of res judicata. *Id*. at 125. Because plaintiff, had he exercised reasonable diligence, could have raised this claim in his first lawsuit, it is now barred by res judicata. *Id*. at 121. Consequently, we do not reach defendant's argument under MCR 2.116(C)(8).

Last, we address the parties' arguments regarding plaintiff's claim for invasion of privacy-trespass. This tort can take different forms with different elements: intrusion, disclosure, false light, and appropriation. *Earp v Detroit*, 16 Mich App 271, 276; 167 NW2d 841 (1969). More specifically, these four tort theories are: "(1) the intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of private facts about the individual; (3) publicity that places someone in a false light in the public eye; and (4) the appropriation of another's likeness for the defendant's advantage." *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003). A careful reading of plaintiff's complaint discloses that its allegations relate only to the first theory. The elements of this tort were stated by this Court in *Doe v Mills*, 212 Mich App 73, 88; 536 NW2d 824 (1995) (citations omitted):

> An action for intrusion upon seclusion focuses on the manner in which information is obtained, not its publication; it is considered analogous to a trespass. There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man.

Plaintiff alleges in support of his invasion of privacy claim that as plaintiff's former employer, defendant had access to his personnel records and pension information and shared this information with its agent, Sedgwick.

Also, plaintiff alleges that defendant hired private investigators to conduct surveillance of him. Plaintiff also includes as a basis for this tort claim allegations that defendant or Sedgwick investigated his financial situation and required him to submit to an independent medical examination. Defendant argues that these allegations are insufficient to state a claim for relief under the theory of invasion of privacy by intrusion into seclusion. Defendant also argues that even if plaintiff has stated a claim for invasion of privacy, he should have added this claim to the first lawsuit. Plaintiff counters that he did not learn of the surveillance until the discovery process in the first lawsuit, which was after the time to amend his complaint as a matter of right had expired. Because defendant raised these arguments in its application for leave to appeal and the parties have appropriately briefed them, they are properly before the Court. MCR 7.205(D)(4).

We agree with defendant that plaintiff has failed to state a claim of invasion of privacy by intrusion upon seclusion. To the extent that personnel and pension information regarding plaintiff in defendant's possession concerns a secret and private subject matter, defendant obtained the information not by some method objectionable to a reasonable man, but because of its relation to plaintiff as his former employer. Thus, this allegation fails to state a claim on which relief may be granted for invasion of privacy by intrusion into seclusion.[3] *Doe*, *supra* at 88.

With respect to other matters plaintiff alleges as supporting his claim of invasion of privacy, defendant correctly asserts that it has a right to investigate a party

[3] Defendant's disclosing information to its agent, Sedgwick, would also not satisfy the disclosure theory of invasion of privacy because there is no *public* disclosure of private information.

asserting a liability claim against it. In *Saldana v Kelsey-Hayes Co*, 178 Mich App 230, 232; 443 NW2d 382 (1989), the defendant employer, suspecting that the plaintiff employee "was malingering, engaged a private investigating firm to investigate plaintiff and to attempt to determine the extent of plaintiff's injuries." The plaintiff filed suit alleging that the defendant had invaded the plaintiff's privacy by intruding into the plaintiff's secluded and private affairs. This Court concluded that the plaintiff's claims failed because the plaintiff did not allege facts that showed that the intrusions were into matters the plaintiff had a right to keep private. *Id*. at 234-235. Further, the Court concluded that the defendant had the "right to investigate matters that are potential sources of legal liability." *Id*. at 235. Moreover, in the present case, assuming that defendant or its agents employed investigative methods that might be determined to be objectionable to a reasonable man, plaintiff fails to allege that defendant thereby obtained any secret or private information that plaintiff had a right to keep private.

In addition, for much the same reason regarding his claim of intentional infliction of emotional distress, we conclude that plaintiff could have asserted, but did not, his claim for invasion of privacy in his first lawsuit. That plaintiff did not learn all the facts that he claims support this tort claim until during the course of discovery in the first lawsuit does not preclude the application of res judicata. See *Dubuc v Green Oak Twp*, 117 F Supp 2d 610, 625 (ED Mich, 2000), aff'd 312 F3d 736 (CA 6, 2002) ("When, in the course of a law suit, the plaintiff becomes aware of a new cause of action against the same defendant, the plaintiff should move to include the new claim or risk having the doctrine of claim preclusion [res judicata] apply to the omitted claim.").

For all the foregoing reasons, we conclude that the trial court erred by not granting defendant's motion for summary disposition under MCR 2.116(C)(7) and (8).

CONCLUSION

We affirm in Docket No. 279891. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

We reverse in Docket No. 284114 and remand for entry of an order granting defendant summary disposition. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

HOEKSTRA, J. (*concurring*). I agree with and join with the majority in its resolution of Docket No. 284114.

In Docket No. 279891 I concur in the result, but write separately to express my disagreement with the majority's conclusion that *Davis v Citizens Ins Co of America*, 195 Mich App 323; 489 NW2d 214 (1992), is controlling. The majority aptly noted that in *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521; 697 NW2d 895 (2005), "our Supreme Court without mentioning this Court's decision in *Davis*, clarified judicial construction of MCL 500.3107(1)(a), on which the *Davis* Court relied." *Ante* at 594. In my opinion, the clarification stated in *Griffith* is applicable to all cases where compensation is sought for allowable expenses, including vans, under MCL 500.3107(1)(a). Thus, to receive compensation for his modified van, plaintiff was required to establish that the charge was reasonable, that the expense was reasonably necessary, that the expense was incurred, and that the van was "for" his care, recovery, or rehabilitation. *Griffith*, *supra* at 532, 532 n 8.

Nonetheless, I join with the majority in rejecting defendants' claim that *Griffith* advocates a bright-line rule that precludes as an allowable expense any motor vehicle similar to one owned by the injured person before the injury. As stated by the majority, an analysis of a case's specific facts and circumstances is required. However, because of the entry of the parties' consent judgment, an inquiry into the present case's facts and circumstances is foreclosed. Consequently, I join in the result of affirming the trial court's order denying defendants' motion for summary disposition.

AUTO-OWNERS INSURANCE COMPANY v KEIZER-MORRIS, INC

Docket No. 284753. Submitted May 5, 2009, at Lansing. Decided June 25, 2009, at 9:10 a.m.

Gary Hayward brought an action for breach of warranty and negligence against Keizer-Morris, Inc., after he was allegedly injured by equipment manufactured and sold by Keizer-Morris. Auto-Owners Insurance Company, Keizer-Morris's insurer, after declining to defend Keizer-Morris against Hayward's lawsuit, brought an action in the Oakland Circuit Court against Keizer-Morris, seeking a declaration that it had no duty to defend or indemnify Keizer-Morris. Hayward moved to intervene in the declaratory judgment action, but the court, Colleen A. O'Brien, J., denied the motion and a subsequent motion for reconsideration. Hayward appealed.

The Court of Appeals *held*:

MCR 2.209(A)(3) provides that a person may intervene by right when the person claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the person's interest is adequately represented by existing parties. An injured person has a substantial interest in a declaratory judgment action pertaining to insurance coverage for the injury. Hayward's ability to recover damages from Keizer-Morris depends on Keizer-Morris's having insurance coverage for the injury-causing incident and Keizer-Morris, being a defunct business, did little to contest Auto-Owners' position and inadequately represented Hayward's interest.

Reversed and remanded for further proceedings.

INSURANCE — DECLARATORY JUDGMENTS — INTERVENING PARTIES — STANDING — INJURED PERSON'S RIGHT TO INTERVENE.

An injured person has standing to intervene in a declaratory judgment action concerning liability insurance coverage for the injury (MCR 2.209[A][3]).

Kallas & Henk PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*), for Auto-Owners Insurance Company.

Hewson & Van Hellemont, P.C. (by *Jerald Van Hellemont* and *Steven G. Silverman*), for Gary Hayward.

Before: JANSEN, P.J., and HOEKSTRA and MARKEY, JJ.

MARKEY, J. Appellant, Gary Hayward, appeals by right the circuit court's orders denying his motions to intervene and for reconsideration. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Appellant was injured while performing construction activities, allegedly as the result of an equipment explosion. Defendant, Keizer-Morris, Inc., manufactured and sold the equipment to appellant's employer. Appellant filed suit against defendant, asserting breach of warranty and negligence. Defendant attempted to turn its defense over to its insurer, plaintiff, Auto-Owners Insurance Company, but plaintiff denied coverage, asserting that the policy excluded coverage for the incident in question. Plaintiff filed the instant action, seeking a declaration that it had no duty to defend or indemnify defendant. Appellant sought to intervene as a necessary party because defendant was a dissolved or otherwise defunct corporation and his rights would be affected if defendant lacked insurance coverage. The trial court denied the motion without explanation and denied reconsideration. Shortly thereafter, the court granted plaintiff's motion for summary disposition and entered a judgment submitted by plaintiff. Defendant had neither appeared nor opposed anything pertaining to the lawsuit.

The sole issue in this appeal is whether the trial court erred in denying appellant's motion to intervene. This Court reviews a trial court's decision on a motion to intervene for abuse of discretion. *Precision Pipe & Supply, Inc v Meram Constr, Inc*, 195 Mich App 153, 156; 489 NW2d 166 (1992). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

Appellant claims a right to intervene under MCR 2.209(A)(3). That rule states that a person may intervene by right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"[T]he rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Precision Pipe & Supply*, *supra* at 156.

Appellant first argues that the trial court's dearth of explanation for its decision suggests that the court may have failed to understand that it had discretion in the matter. See *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998) (a trial court's failure to exercise its discretion, when properly asked to do so, is itself an abuse of discretion). We disagree. Appellant asked for a decision and twice received one. The question was briefed and argued orally. A trial judge is presumed to know the law. *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002). Although some explana-

tion might have been useful, at least for review purposes, its lack does not itself constitute an abuse of discretion.

Appellant also argues that his ability to recover damages from defendant depends on defendant's having insurance coverage for the injury-causing incident and that defendant as a defunct business in fact did little to contest plaintiff's position and inadequately represented appellant's interests. We agree.

Plaintiff argues that appellant, being neither a party to nor a third-party beneficiary of the insurance policy between plaintiff and defendant, but instead being merely an incidental beneficiary under the insurance policy, had no right to participate in the litigation over whether coverage existed. "[O]nly intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). An injured person not named in an insurance contract is not a third-party party beneficiary to the contract. He or she is merely an incidental beneficiary. *Id.* at 429.

However, *Schmalfeldt* involved a person injured by a patron in a bar. He first sought compensation from the bar owner, then from the owner's insurer directly for insurance benefits. *Id.* at 424. Further, the injured person apparently conceded that the owner was not liable. *Id.* at 424 n 1. The insurance company agreed to pay the injured party's dental expenses but only if the bar owner requested it; the bar owner refused to do so. Thereafter, the injured party sued the insurance company directly as a third-party beneficiary of the bar owner's policy. *Id.* at 424. Here, appellant has never made a claim under the policy between the parties and

acknowledges that his interest in plaintiff's coverage is wholly derivative of defendant's.

This case is more akin to *Allstate Ins Co v Hayes*, 442 Mich 56; 499 NW2d 743 (1993). That case involved the host of a party at which alcohol was served and the estate of a person killed in a drunken driving collision with one of the guests. When the personal representative of the decedent's estate filed suit against the host, the insurer of the host initially undertook the defense, but then sought a declaratory judgment that the pertinent policy did not cover the situation, naming as defendants both the host and the decedent's estate. Because the host failed to answer or otherwise participate as required, the insurer obtained a default judgment. *Id.* at 57-59. Our Supreme Court held that the default of one party does not deprive the trial court of its power to decide the rights and liabilities of the remaining parties; consequently, the decedent's estate remained entitled to litigate the question of the insurer's responsibility for the host's potential liability. *Id.* at 57, 73-75.

Plaintiff emphasizes that appellant is not a named party in this case, and that there was no formal default. But we do not deem appellant's right to participate in the case as dependent on either condition. Our Supreme Court stated that "the fact that the injured party is not a third-party beneficiary of the insurance contract is not determinative of his 'standing' to continue the action for a declaration of his rights as a conceded real party in interest." *Id.* at 63. Instead, "the injured party in an insurer's action for declaratory judgment is a proper party to that action." *Id.* at 67. The *Allstate* Court clearly recognized the injured person as having a substantial interest in the case. We do not read its pronouncement as a statement that an injured person's

rights depend on whether it was the insurer, as opposed to the injured person himself, who endeavored to get that person into the case. It is but a minor extension of *Allstate* to recognize the standing of an injured person to intervene in a declaratory action concerning insurance coverage for the alleged tortfeasor.

Plaintiff additionally argues that defendant adequately represented appellant's interests. We disagree. Plaintiff reminds this Court that dissolution of a corporation does not necessarily mean that that corporation is unable to protect itself and emphasizes that defendant was represented by counsel and offered some defense in the declaratory action, including filing an answer disputing the policy terms and responding to discovery. But defendant's willful decision not to oppose plaintiff's motion for summary disposition, or even to appear in the matter, bespeaks something less than zealous advocacy.[1] Appellant was entitled to apply his own vigorous advocacy on the question whether there was coverage under the policy. See *Allstate*, *supra* at 68 ("[T]he injured defendant's position is in conflict with that of the plaintiff and will be foreclosed by a determination of rights contrary to his position. We think the interest is sufficiently concrete to assure effective advocacy.").

Plaintiff additionally argues that regardless of appellant's participation below, there simply is no coverage under the policy, implying that any error in precluding appellant from participating in the case was thus harmless. Plaintiff then offers considerable discussion on the

[1] Plaintiff suggests that it so clearly had the advantage that defendant could not respond to its motion without inviting sanctions for frivolousness. However, lacking any statement on the record to that effect, imputing such principled inaction to the corporate defendant is speculative. This Court may not base its judgments on speculation. See, e.g., *Stockler v Dep't of Treasury*, 75 Mich App 640, 645; 255 NW2d 718 (1977).

particulars of the policy. Appellant, in turn, does not present a theory under which coverage might exist. Still, we conclude that it is preferable for appellant to have his opportunity to do so at the trial court level than for this Court to decide the question solely on the record and arguments from those who had been permitted to litigate.

For these reasons, we reverse the trial court's decision not to allow appellant to intervene and remand this case to the trial court for further proceedings consistent with this opinion.

We reverse and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, appellant may tax costs.

HERITAGE RESOURCES, INC v
CATERPILLAR FINANCIAL SERVICES CORPORATION

Docket No. 284036. Submitted June 9, 2009, at Grand Rapids. Decided June 30, 2009, at 9:00 a.m.

Heritage Resources, Inc., brought an action in the Kent Circuit Court against Caterpillar Financial Services Corporation, Michigan Tractor & Machinery Company (MCAT), and Gencor Industries, Inc., alleging, among other claims, breach of express warranties, breach of the implied warranty of fitness for a particular purpose, and breach of the implied warranty of merchantability relating to a rock classification machine, or trommel, purchased by the plaintiff from MCAT, financed by Caterpillar Financial, and manufactured by Gencor. Before trial, the plaintiff entered into settlement agreements with MCAT and Caterpillar Financial, under which the plaintiff released them from liability for all claims. After a bench trial, the court, Donald A. Johnston, J., entered a judgment and award of damages for the plaintiff and against Gencor. The plaintiff appealed, claiming that the trial court erred by failing to award additional damages. Gencor cross-appealed, claiming that it could not be liable to the plaintiff for breach of warranty because it had no contract with the plaintiff and therefore made no warranties.

The Court of Appeals *held*:

1. As a matter of law, Gencor could not have made any express warranties directly to the plaintiff. Under § 2313 of the Uniform Commercial Code, MCL 440.2313, express warranties are limited to statements, descriptions, representations, samples, and models that are made part of the basis of the bargain. Where, as between the plaintiff and Gencor, there is no contract, and therefore no bargain, there can be no express warranty under § 2313.

2. Any express warranties made by Gencor to MCAT in their contract were assigned to the plaintiff by MCAT under the terms of the contract between the plaintiff and MCAT. However, because the Gencor-MCAT contract was not introduced into evidence, the Court of Appeals cannot determine whether Gencor made express warranties to MCAT that the plaintiff, by assignment, can assert against Gencor.

3. The implied warranties of merchantability and fitness for a

particular purpose arise by operation of law, MCL 440.2314; MCL 440.2315. Assuming that Gencor did not disclaim these implied warranties, as it could have under MCL 440.2316, the plaintiff, under the terms of the release it granted to MCAT, is precluded from enforcing the implied warranties. The plaintiff completely released and discharged any and all actual and potential claims against MCAT and any other person, firm, business entity, or corporation charged or chargeable with responsibility that is or may be derivative from MCAT. Gencor was charged or chargeable with responsibility that is or may be derivative from MCAT with respect to the plaintiff's implied warranty claims, and those claims were released in the settlement agreement between the plaintiff and MCAT.

Reversed and remanded for the entry of judgment in favor of Gencor.

HOEKSTRA, J., concurring, stated that he is required by MCR 7.215(J) to follow caselaw that adopted the flat-bar rule. He would adopt the intent rule instead and would hold in this case that the plaintiff did not intend for its settlement agreement with MCAT to release and discharge its implied warranty claims against Gencor.

1. SALES — UNIFORM COMMERCIAL CODE — WARRANTIES — EXPRESS WARRANTIES.

An express warranty by a seller of goods cannot be created between a seller and a buyer of goods in the absence of a contract for the sale of the goods (MCL 440.2313).

2. SALES — UNIFORM COMMERCIAL CODE — WARRANTIES — IMPLIED WARRANTIES OF MERCHANTABILITY — IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE.

The implied warranty of merchantability and the implied warranty of fitness for particular purpose in a sale of goods arise through implication by operation of law but may be excluded or disclaimed by the seller (MCL 440.2314, 440.2315, 440.2316).

Schenk, Boncher & Rypma (by *Brent W. Boncher*) for Heritage Resources, Inc.

Dickinson Wright PLLC (by *Richard A. Glaser* and *Rock A. Wood*) for Gencor Industries, Inc.

Before: JANSEN, P.J., and HOEKSTRA and MARKEY, JJ.

JANSEN, P.J. Following a 16-day bench trial, the circuit court determined that defendant Gencor Industries,

Inc. (Gencor), had breached certain express warranties and entered judgment for plaintiff Heritage Resources, Inc. (plaintiff or Heritage), in the amount of $69,257 plus interest and taxable costs. Plaintiff appeals by right, arguing among other things that the circuit court erred by failing to award it substantial additional damages. Gencor cross-appeals, arguing that the circuit court erred by entering judgment in favor of plaintiff because it did not have a contract with plaintiff and made no warranties to plaintiff. For the reasons set forth in this opinion, we reverse and remand for entry of judgment in favor of Gencor.

I

Plaintiff, owned by brothers Kirk and Kim Velting, had been involved in heavy aggregate mining for several years. Plaintiff became interested in purchasing a rock classification machine, also known as a "trommel," from Michigan Tractor & Machinery Company (MCAT).[1] Plaintiff entered into discussions with MCAT representative Paul McCourt concerning its desire to purchase such a machine. McCourt, Kirk Velting, and another MCAT customer traveled to Kansas to view a rock classification machine that had been manufactured by Gencor.[2] Velting believed that the type of Gencor rock classification machine he viewed in Kansas would be generally suitable, provided that Gencor could

[1] MCAT was Gencor's dealer in Michigan. MCAT and its financing arm, Caterpillar Financial Services Corporation, are not parties to this appeal.

[2] Most or all Gencor rock classification machines were apparently manufactured by Gencor's British subsidiary, which has evidently gone out of business and ceased to exist. The distinction between Gencor and its British subsidiary is not relevant for purposes of the present appeal. Throughout this opinion, we will refer to both Gencor Industries, Inc., and its former British subsidiary as "Gencor."

build the machine to plaintiff's specifications. Among other things, Velting expressed that plaintiff would be interested in purchasing a Gencor rock classification machine (1) with hydraulic legs that could lift the machine so that a front-end loader could remove the sorted rock from underneath the unit, (2) with chutes or bins rather than a conveyor system, (3) with flared, hinged sides to accommodate loading by dump trucks, and (4) with a front "stopper plate" to prevent large boulders from being pushed under the machine.[3]

McCourt did not know whether Gencor could manufacture a rock classification machine according to these specifications. He arranged for Kirk Velting to meet with Michael Dunne, a Gencor sales representative. McCourt, Velting, and Dunne met for lunch at a Grand Rapids area restaurant in December 2000 and discussed whether Gencor could manufacture a machine to meet plaintiff's specific needs. Dunne allegedly represented that Gencor could fully satisfy plaintiff's requirements by manufacturing a machine that met all the desired specifications. However, no written agreement was produced at the lunch meeting. The parties did not discuss pricing at the lunch meeting, nor did Velting agree that plaintiff would purchase anything from, or pay anything to, MCAT or Gencor. The parties did apparently sketch on napkins while they met, but Dunne evidently took the napkins with him after the meeting. In addition, Dunne presented Velting with a Gencor brochure,

[3] Plaintiff also wanted a rock classification machine with a flat back, so that it could be placed directly against a quarry wall for loading by dump trucks. The Gencor rock classification machine that Velting viewed in Kansas apparently had a flat back, so Velting assumed that all Gencor machines were manufactured with flat backs. However, when the machine was ultimately delivered, plaintiff discovered that it had been manufactured with a curved back and could not be placed directly against a quarry wall for loading by dump trucks.

which depicted Gencor rock classification machines and described them as "portable," "heavy duty," "low maintenance," able to produce "from 100 to 1000 tons per hour," able to be loaded from the rear by dump trucks, and able to function automatically without a human operator.

Velting informed Dunne that plaintiff would not want certain items included on its machine, such as the conveyor system that Velting had seen on the Gencor machine he observed in Kansas. Velting and Dunne also discussed timing issues, including when the Gencor machine could be delivered to plaintiff's Michigan site and whether the machine would arrive in time for the 2001 spring season. Velting testified that Dunne had also guaranteed him that the machine would be able to achieve and sustain a certain rate of production. The trial testimony varied considerably concerning the remaining items that were discussed at the lunch meeting. But it is undisputed, as the circuit court found, that "no contract was finalized or entered into" at the lunch meeting and that "[n]o confirming letter, memorandum, or any other writing of any kind was ever prepared by any of the three participants at the [lunch meeting] to summarize what had been discussed, represented, or agreed to there."

On January 5, 2001, MCAT sent plaintiff a quotation for a Gencor rock classification machine, describing the various components as a "Feed Hopper and Feeder," a "Rotary Screen," a "Main Underframe/Chassis," a "Control Panel," and a "Collecting Hopper and Conveyor." The document quoted a "Price F.O.B. Delivered" of $532,000. Among other things, the quotation stated that the Gencor machine would include (1) a steel "[f]eed hopper" with a capacity of 27.5 tons, (2) "[f]old up and pin hopper extensions to accommodate 40 ton

articulated dump trucks," (3) a "[r]eciprocating tray type" feeder that would be "[f]itted directly under [the] feed hopper" and driven by a "hydraulic system powered by a CAT diesel engine," (4) a "[r]otary screen" with a diameter of 6 feet and a length of 33 feet, 4 inches, to be driven by the "main CAT [d]iesel [e]ngine," (5) a "[m]ain underframe" "[c]onstructed from rolled steel joists and channel sections of welded construction and heavily braced for strength and stability," (6) a "[r]unning gear," consisting of a "[q]uad-axle bogie fitted at [the] feed hopper end with . . . twin tyres, air brakes, screw type parking brake and 5th wheel towing connection at the discharge end," (7) a "[c]hassis fitted with hydraulic jacking type stabilising legs, (8) a "[c]ollecting hopper . . . [f]itted under the screening section," to be "[s]upported from the inside of the main chassis" and "[h]inged at the feed end with discharge point at the rear end of the unit," and (9) a "6 ft x 45 ft" "[b]elt conveyor" with a "[f]rame . . . [m]anufactured from heavy duty rolled steel channels." As the circuit court noted, the quotation "did not include certain of the things which Kirk Velting testified that he had been promised by Michael Dunne at the [lunch meeting]." For example, the quotation did not include any guaranteed rate of production and expressly stated that it excluded "[a]ny item not definitely specified." As the circuit court observed, "[n]either the Velting brothers, nor anyone else acting on behalf of [plaintiff], questioned the quot[ation] in any way, or requested that it be amended to include the items Kirk Velting testified were important to him, especially a guaranteed rate of production."

Notwithstanding the fact that the quotation did not mention certain items that were apparently important to the Veltings, plaintiff and MCAT entered into a "Sales and Security Agreement" on January 15, 2001,

which was signed by representatives of both parties. The sales agreement stated that plaintiff had agreed to purchase, among other things, a "Gencor Portable 182M." As is made clear by other documents contained in the lower court record, the Gencor 182M was the rock classification machine that was the subject of MCAT's quotation of January 5, 2001.[4] A space was provided on the sales agreement form for the parties to specify any warranties to be made by MCAT. However, the space was left blank.

Plaintiff began making preparations at its site in anticipation of the delivery of the machine. Then, in early March 2001, plaintiff received a fax containing "as built" drawings of the Gencor 182M. Upon receipt of the drawings, plaintiff realized that the machine had been built with a curved back rather than with a flat back as Kirk Velting had desired. However, as found by the circuit court, "neither Kirk Velting nor anyone else acting on behalf of [plaintiff] raised any objection or complaint about this non-conformity with either Gencor or MCAT, and no attempt was made to cancel the order." At that point, MCAT apparently informed plaintiff that the machine was already en route, but that it would be "a few weeks" late.[5]

Plaintiff had already purchased dump trucks and other equipment, and had hired several laborers, in anticipation of the expected delivery of the Gencor machine. Thus, plaintiff argues, it was "compelled to go ahead with the purchase and try to make it work since it already had procured . . . machinery for the operation

[4] In the same sales agreement of January 15, 2001, plaintiff also agreed to purchase certain other pieces of equipment from MCAT. The agreement did not contain a separate price for the Gencor 182M, but instead included a total price of $1,458,500 for all the specified equipment.

[5] However, the machine did not arrive until July 2001.

that was being anchored by the Gencor machine." Plaintiff engaged in what it describes as "mitigation of damages" by modifying its site to better accommodate a machine with a curved back, by laying off or reassigning laborers who had already been hired to work on the machine, and by making other alterations and modifications. Plaintiff argues on appeal that, "[i]n hindsight, [plaintiff] may have been better off canceling the order at that time but it had no idea that other problems would arise and could not simply return the other equipment" that it had already purchased.

On March 7, 2001, plaintiff and MCAT entered into a second "Sales and Security Agreement" pertaining to the "Gencor Portable 182M." This second agreement contained a purchase price of $542,000, which was $10,000 higher than the price specified in the original quotation of January 5, 2001. Like the first sales agreement, the March sales agreement form contained a space in which the parties could specify any warranties to be made by MCAT. In the space "Std. Man. Warranty" was written by hand. Below the words "Std. Man. Warranty," the sales agreement stated in relevant part:

> BUYER ACKNOWLEDGES THAT SELLER IS NOT THE MANUFACTURER OF THE EQUIPMENT AND DOES NOT MAKE AND IS NOT AUTHORIZED TO MAKE ANY WARRANTY. THE WARRANTY PROVIDED ABOVE IS THE SOLE WARRANTY, IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. . . . SELLER ASSIGNS TO BUYER, TO THE EXTENT ASSIGNABLE, ANY WARRANTIES OF THE EQUIPMENT BY ITS MANUFACTURER, PROVIDED THAT ANY ACTION TAKEN BY BUYER BY REASON THEREOF SHALL BE AT THE EXPENSE OF BUYER. IN THE EVENT THAT

> SELLER HAS ASSUMED ANY RESPONSIBILITIES [FROM THE MANUFACTURER] WHATSOEVER, SELLER'S SOLE OBLIGATION AND BUYER'S SOLE REMEDY FOR BREACH OF SUCH WARRANTY IS SELLER'S PROVIDING OF PARTS AND SERVICE THE SELLER DETERMINES ARE REQUIRED FOR PERFORMANCE OF THE WARRANTY. [Capitalization in original.]

On June 28, 2001, MCAT sent plaintiff an invoice for the Gencor 182M in the amount of $542,000. The invoice indicated that the Gencor machine would come with a "Standard Manufacturer's Warranty." On July 1, 2001, MCAT or its financing arm, Caterpillar Financial Services Corporation (CAT Financial), entered into an installment sales contract with plaintiff, by which plaintiff agreed to purchase the Gencor machine through 36 equal monthly payments of $15,978.85.[6]

On July 31, 2001, MCAT sent plaintiff an invoice for a "Hercules Rotary Screen," which was apparently one component of the Gencor machine, in the amount of $400,000. It is not clear why this second invoice, which only included the rotary screen component, was sent separately to plaintiff after the invoice of June 28, 2001, had already been sent.

When the Gencor machine ultimately arrived in Michigan in July 2001, it was delivered to the Battle Creek customs yard rather than to plaintiff's site as the Veltings had wanted. As the circuit court noted, "Kirk Velting and Paul McCourt went [to Battle Creek] to inspect [the machine]. They could easily discern that . . . the machine had a sloped rather than a flat back, but without actually setting it up and operating it, they were unable to discern whether in other respects it was consistent with what they

[6] These 36 monthly payments of $15,978.85 would total $575,238.60, which consisted of the purchase price of $542,000 plus certain fees and finance charges.

had ordered." McCourt told Velting to "take it or leave it, as is," because it was the last rock classification machine to be manufactured by Gencor's British subsidiary and that if plaintiff did not accept it, someone else would. Kirk Velting apparently spoke with his brother on the telephone and agreed to accept the machine. McCourt told Velting that MCAT would be willing to "work with [plaintiff]" regarding the machine. As the circuit court observed, "[n]o representative of Gencor was present [at the Battle Creek customs yard], and Gencor made no promises with respect to the machine at this time."

Upon transporting the Gencor machine to plaintiff's site, the Veltings realized that the machine failed to conform with their wishes in several other respects. For instance, the machine did not have flared and hinged sides, it did not have chutes or bins underneath to collect the processed material, the front "stopper plate" was not high enough to prevent rocks from being pushed underneath the machine, it had been built with the unwanted conveyor system that Kirk Velting had seen on the Gencor machine he observed in Kansas, and the hydraulic system or power source was too weak to allow the hydraulic legs to raise the machine sufficiently.

Once the Gencor machine was running at plaintiff's site, other serious problems arose. Specifically, hydraulic and electrical problems caused frequent breakdowns. Because the machine was frequently broken and inoperable as a result of these hydraulic and electrical problems, plaintiff alleges that it incurred substantial additional damages in the form of lost profits and wages paid to its laborers during the "down time."

As the circuit court properly noted, plaintiff "looked primarily to MCAT to address [the] numerous problems

[with the machine]," and "MCAT did, in fact, perform a number of repairs and corrective measures." MCAT also "withheld from Gencor $25,000 of the purchase price paid by [plaintiff], to address the absence of factory built bins and chutes for the machine, which sum was eventually returned to [plaintiff]." As the circuit court observed, "[w]hen MCAT ceased doing repairs on the machine, [plaintiff] continued to do them at its own expense."

After several repairs and modifications, by both MCAT and by plaintiff itself, the Gencor machine was made usable. Indeed, at the time of trial, plaintiff was still using the Gencor machine to sort rocks for retail sale. As the circuit court noted, plaintiff "never attempted to sell or return the Gencor 182M" and has "continued to use it for its intended purpose."

II

Plaintiff sued Gencor, MCAT, and CAT Financial in the Kent Circuit Court, setting forth various claims, including breach of contract, breach of express warranty, breach of the implied warranty of fitness for a particular purpose, and breach of the implied warranty of merchantability. As noted previously, MCAT and CAT Financial are not parties to this appeal. Before trial, plaintiff entered into separate settlement agreements with MCAT and CAT Financial and released all present and potential claims and causes of action against both entities in exchange for certain enumerated consideration. The settlement agreement between plaintiff and MCAT provided in relevant part:

> Complete and Mutual Release of All Claims. Heritage, on its own behalf and for its heirs, executors, administrators, personal representatives, successors, assigns, and any other person who may be entitled to assert

> claims under the transactions identified in this settlement agreement, completely releases and discharges Michigan CAT, a Michigan corporation, its agents, servants, and employees, and any other person, firm, business entity or corporation charged or chargeable with responsibility which is or may be derivative from Michigan CAT, and their heirs, executors, administrators, personal representatives and assigns, from any and all actual and potential claims, demands, actions, causes of action, damages, costs, loss of services, expenses, compensation and any and all consequential damages on account of or in any way growing out of or connected with any of the transactions which at any time have occurred between the parties to this agreement, whether or not included in Kent County Circuit Court Case No. 03-01720-CK. Michigan CAT, a Michigan corporation, on its own behalf and for its heirs, executors, administrators, personal representatives, successors, assigns, and any other person who may be entitled to assert claims under the transactions identified in this settlement agreement, completely releases and discharges Heritage, its agents, servants, and employees, and any other person, firm, business entity or corporation charged or chargeable with responsibility which is or may be derivative from Heritage, and their heirs, executors, administrators, personal representatives and assigns, from any and all actual and potential claims, demands, actions, causes of action, damages, costs, loss of services, expenses, compensation and any and all consequential damages on account of or in any way growing out of or connected with any of the transactions which at any time have occurred between the parties to this agreement, whether or not included in Kent County Circuit Court Case No. 03-01720-CK. The parties hereby mutually agree to release all such claims, whether presently known or unknown, which either may now have or which either may in the future ever have against the other parry in connection with any of the transactions identified in this settlement agreement.

The settlement agreement between plaintiff and CAT Financial provided in relevant part:

> In consideration of CAT Financial's partial forgiveness of the debt owed to it by Heritage . . . , Heritage agrees: (1) to immediately dismiss the above-mentioned lawsuit against CAT Financial with prejudice and without costs (each party will be responsible for paying their own attorney fees and other litigation expenses); and (2) Heritage acknowledges that the partial forgiveness of the debt it owes to CAT Financial is to be considered payment in full to it, its assigns, representatives, heirs or successors and that Heritage and its assigns, representatives, heirs or successors are giving up the right to pursue all claims or potential claims against CAT Financial and its owners, shareholders, employees, assigns, representatives, heirs or successors.

On December 15, 2005, the circuit court entered an order dismissing with prejudice any and all claims against CAT Financial, and on December 17, 2005, the circuit court entered an order dismissing with prejudice any and all claims against MCAT.

The lower court record makes clear that by the time of trial, plaintiff was no longer pursuing its claims of breach of contract and promissory estoppel. Indeed, Kim Velting admitted at trial that there had been no contract between plaintiff and Gencor. Instead, plaintiff proceeded to trial against Gencor on its claims of breach of express warranty, breach of the implied warranty of fitness for a particular purpose, and breach of the implied warranty of merchantability. Plaintiff's theory at trial was that Gencor had made specific express warranties running in its favor at the initial lunch meeting between the parties and that other implied warranties had accompanied the initial sale of the machine under the Uniform Commercial Code.[7]

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[7] In contrast to this position taken at trial, Kim Velting had testified at his 2004 deposition that "[plaintiff] didn't have a warranty with Gencor."

Following trial, the circuit court issued extensive findings of fact and conclusions of law.[8] The court captured the essence of plaintiff's claims in its prefatory statement that Michael Dunne's "alleged oral representations at the [lunch meeting] of December 2000 form the basis of Plaintiff Heritage Resources' warranty claims against Gencor." The circuit court found, consistently with Paul McCourt's testimony at trial, that Dunne had not guaranteed any specific rate of production at the lunch meeting. This was in contrast to the trial testimony of Kirk Velting, who testified that Dunne had guaranteed that the Gencor machine would be able to achieve a sustained production rate of 400 tons an hour. The circuit court noted that McCourt was "the more disinterested witness," that McCourt had "evinced a clearer recollection of the [lunch meeting]," and that McCourt had "testified more consistently with the other known facts . . . ." Therefore, the court accepted McCourt's testimony over that of Velting with respect to the contested rate-of-production issue.

The circuit court went on to find that "[n]o price was discussed at the [lunch meeting], and no contract was finalized or entered there." As noted earlier, the court also found that "[n]o confirming letter, memorandum, or any other writing of any kind was ever prepared by any of the three participants at the [lunch meeting] to summarize what had been discussed, represented, or agreed to there."

Despite the circuit court's findings in this regard, the court concluded that "[t]he contract was for the purchase and sale of a Gencor 182M trommel, to be built according to specifications contained in [the quotation

[8] The circuit court appears to have considered only plaintiff's express-warranty claims. It is unclear why the court failed to consider plaintiff's implied-warranty claims as well.

of January 5, 2001], and as promised at the December 2000 [lunch meeting]." The circuit court further concluded that "[t]he Gencor 182M trommel delivered by defendant Gencor in early July 2001, did not conform to the contract specifications in several respects" and that while "MCAT addressed and remedied some of these nonconformities, . . . plaintiff Heritage eventually addressed the others at its own expense." The court observed that "the reasonable measure of plaintiff's damages is the actual cost to plaintiff of remedying the nonconformities" and concluded that plaintiff had proven damages in the amount of $94,257.[9] From this $94,257 amount, the court deducted the $25,000 that MCAT had withheld from Gencor and eventually remitted back to plaintiff.[10] On February 11, 2008, the circuit court entered judgment for plaintiff in the amount of $69,257 plus interest and taxable costs.

III

Following a bench trial, we review for clear error the circuit court's findings of fact and review de novo its conclusions of law. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A finding of fact is clearly

[9] The circuit court concluded that plaintiff had proven by a preponderance of the evidence that these $94,257 in damages flowed directly from Gencor's breach of its express warranties to plaintiff. These damages included (1) $5,766 for the "absence of chutes and bins," (2) $17,304 for "hopper deficiencies," (3) $53,243 for "actual repair costs," (4) $13,347 for "electrical rewiring," and (5) $4,597 for "replacement of hydraulic lines."

[10] The circuit court concluded that Gencor had never made any express warranty with respect to whether the machine "would achieve any specific rate of production." The court also concluded that the other items of damages sought by plaintiff—including damages for lost production time, for untimely delivery of the Gencor machine, and for lost profits—had not been sufficiently proven. We do not disturb the court's factual findings or conclusions of law with respect to these particular matters.

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. *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). Assuming the court's individual findings of fact are upheld, whether those facts have resulted in the formation of a valid contract or the creation of a warranty is a question of law to be reviewed de novo. See *id*.

We review de novo the proper interpretation of a statute. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). Similarly, whether a statute applies in a particular case is a question of law that we review de novo. *Alex v Wildfong*, 460 Mich 10, 21; 594 NW2d 469 (1999). When interpreting a uniform act, such as the Uniform Commercial Code, it is appropriate for this Court to look for guidance in the caselaw of other jurisdictions in which the act has been adopted. *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999).

IV

Gencor argues on cross-appeal that the circuit court erred by entering judgment in favor of plaintiff because it did not have a contract with plaintiff and therefore could not have made any express warranties to plaintiff. In response, plaintiff argues that Gencor made express warranties running in its favor at the initial lunch meeting between the parties. Plaintiff also asserts that Gencor's sale of the rock classification machine was accompanied by certain implied warranties and that the circuit court erred by failing to consider plaintiff's implied-warranty claims. We hold that, as a matter of law, Gencor made no express warranties to plaintiff. We

further hold that plaintiff may not enforce any implied warranties that accompanied the initial sale of the Gencor machine.

A

We begin by noting that the existence of a contract or warranty in this case must be evaluated under the terms of the Uniform Commercial Code (UCC), MCL 440.1101 *et seq*. Article 2 of the UCC applies to "transactions in goods," MCL 440.2102, and the Gencor rock classification machine at issue here was indisputably a "good[]" within the meaning of the UCC. MCL 440.2105(1); see also *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 344; 480 NW2d 623 (1991), and *Neibarger v Universal Cooperatives, Inc*, 181 Mich App 794, 800; 450 NW2d 88 (1989), aff'd 439 Mich 512 (1992).

B

As is made clear by the circuit court's opinion in this case, and as plaintiff correctly points out on appeal, the court's award of damages for plaintiff was based on its finding that Gencor had breached certain express warranties that were purportedly made to plaintiff at the December 2000 lunch meeting. However, we conclude that, as a matter of law, Gencor made no express warranties to plaintiff at that time.

The creation of express warranties under the UCC is governed by MCL 440.2313, which provides in relevant part:

> (1) Express warranties by the seller are created as follows:
>
> (a) An affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of

> the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) A description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) A sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he or she have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty . . . .

An express warranty may be created only between a seller and a buyer, and any such express warranty becomes a term of the contract itself. See Official Comment 2 to UCC § 2-313 (noting that "this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale"); 18 Williston, Contracts (4th ed), § 52:45, p 260 (stating that "an express warranty is 'part of the basis of the bargain' and therefore a term of the parties' contract"); 1 Hawkland, Uniform Commercial Code Series, § 2-313:2, pp 526-527 (stating that an "express warranty is merely a term of the contract . . . and it is not different in kind from other express terms such as price, delivery, or quantity"). Indeed, our Supreme Court has long implicitly recognized that an express warranty is no different than any other term of the contract. See *Salzman v Maldaver*, 315 Mich 403, 412; 24 NW2d 161 (1946) (observing that "where a written contract is clear and unambiguous, parol evidence of prior negotiations and representations cannot be adduced to create an express warranty and thereby vary

the terms of the contract"); *Murphy v Gifford*, 228 Mich 287, 297-298; 200 NW 263 (1924) (observing that "where there is a written contract containing an express warranty no other or different may be inferred"). MCL 440.2313 clearly provides that express warranties are limited to statements, descriptions, representations, samples, and models that are "made part of the basis of the bargain." Given this statutory language, we are compelled to conclude that where there is no contract, and therefore no "bargain," there can be no express warranty under MCL 440.2313. See *Klanseck v Anderson Sales & Service, Inc*, 136 Mich App 75, 86; 356 NW2d 275 (1984); see also *In re Masonite Corp Hardboard Siding Products Liability Litigation*, 21 F Supp 2d 593, 601 (ED La, 1998); *Sithon Maritime Co v Holiday Mansion*, 983 F Supp 977, 986 (D Kan, 1997); *Ralston Dry-Wall Co, Inc v US Gypsum Co*, 740 F Supp 926, 929 (D RI, 1990).[11] Given that it is undisputed that plaintiff had no contract with Gencor, we hold as a matter of law that Gencor could not have made any express warranties directly to plaintiff.

Of course, there *was* a contract between Gencor and MCAT, and Gencor therefore could have made express warranties to MCAT. In the sales agreement of March 7, 2001, MCAT assigned to plaintiff, "TO THE EXTENT ASSIGNABLE, ANY WARRANTIES OF THE EQUIPMENT BY ITS MANUFACTURER, PROVIDED THAT ANY ACTION TAKEN BY BUYER BY REASON THEREOF SHALL BE AT THE EXPENSE OF

[11] The fact that a buyer may have an "understanding" does not give rise to an express warranty under MCL 440.2313 when no express statement of warranty has been made. *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 631; 386 NW2d 618 (1986). Nor is a "general expression of opinion" sufficiently specific to create an express warranty under MCL 440.2313. *McGhee v GMC Truck & Coach Div, Gen Motors Corp*, 98 Mich App 495, 501; 296 NW2d 286 (1980).

BUYER." (Capitalization in original.) Therefore, under the terms of the sales agreement, plaintiff would have been able to enforce any express or implied warranties that had been made by Gencor to MCAT, assuming those warranties were otherwise assignable. See *Burkhardt v Bailey*, 260 Mich App 636, 652; 680 NW2d 453 (2004) (observing that "[u]nder general contract law, rights can be assigned unless the assignment is clearly restricted").

In order to determine whether any express warranties were made, it is generally necessary to examine the terms of the parties' contract. See *Strickler v Pfister Associated Growers, Inc*, 319 F2d 788, 789 (CA 6, 1963). However, plaintiff has not produced the contract between Gencor and MCAT on appeal. Nor is the contract between Gencor and MCAT contained in the lower court record. As a Gencor representative testified at trial, Gencor's contract with MCAT has apparently been lost or misplaced and was not available for production in response to plaintiff's pretrial request for documents. Without the contract between Gencor and MCAT, we simply cannot discern whether Gencor made any express warranties to MCAT that in turn would have been assignable to plaintiff. See *id*. At any rate, we note that plaintiff did not pursue this matter at trial. Indeed, as the circuit court observed, "[w]hile it is true that [plaintiff] may have received by assignment whatever warranty Gencor made to MCAT, that's not what [plaintiff is] suing on . . . ." Because plaintiff did not pursue at trial the issue whether Gencor's warranties to MCAT had been assigned to it, we decline to address this matter further on appeal. See *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989).

Relying in part on *Spence v Three Rivers Builders & Masonry Supply, Inc*, 353 Mich 120, 126-135; 90 NW2d

873 (1958), plaintiff argues that even though it had no contract with Gencor, it can still enforce any express warranties made by Gencor because "[t]here is no requirement that there be privity of contract to recover when express warranties are made by a manufacturer to an end user." It is true that our Supreme Court, citing *Spence* and other cases, has previously held that for some remote purchasers it is unnecessary in actions for breach of implied warranty to establish privity of contract with the manufacturer. *Piercefield v Remington Arms Co, Inc*, 375 Mich 85, 98; 133 NW2d 129 (1965).[12] However, plaintiff is conflating the existence of an express warranty in the first instance with the existence of privity of contract. It is axiomatic that a remote plaintiff, or any plaintiff for that matter, cannot enforce a *nonexistent* warranty. And because an express warranty is merely a term of the contract, MCL 440.2313; 1 Hawkland, Uniform Commercial Code Series, § 2-313:2, pp 526-527, it necessarily cannot come into existence until the seller has contracted with *someone*. Only then, *after* the seller has created an express warranty by bargaining and contracting with a buyer, does it become relevant whether a nonparty to the contract—such as plaintiff in the instant case—must be in privity with the seller to enforce the warranty in his or her own right. We reiterate that MCAT was the only party with which Gencor had a contractual relationship in this case and that plaintiff has simply failed to provide any evidence concerning the express

[12] Our Supreme Court in *Piercefield* and *Spence* considered the issue of privity in the context of *implied* warranties. Our research has revealed no modern case in which the Supreme Court has ever held that privity of contract is unnecessary to enforce an *express* warranty. Indeed, because an express warranty is a term of the contract itself, MCL 440.2313; 1 Hawkland, Uniform Commercial Code Series, § 2-313:2, pp 526-527, we conclude that privity of contract *is* necessary for a remote purchaser to enforce a manufacturer's express warranty.

warranties, if any, contained in the Gencor-MCAT agreement. In an action for breach of express warranty, the court will not presume the existence of an express warranty, and the burden is on the plaintiff to prove that an express warranty exists. See *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). In short, plaintiff has failed to prove that any express warranties were actually made by Gencor in this case. It is therefore not relevant whether plaintiff was in privity of contract with Gencor for purposes of this issue.

C

Plaintiff argues that Gencor's initial sale of the rock classification machine was also accompanied by the implied warranties of merchantability and fitness for a particular purpose.[13] We hold that plaintiff's implied-warranty claims against Gencor were barred by plaintiff's settlement with MCAT.

Whereas an express warranty is a specific term of the parties' contract, MCL 440.2313; 1 Hawkland, Uniform Commercial Code Series, § 2-313:2, pp 526-527, the implied warranties of merchantability and fitness for a particular purpose arise through implication by operation of law, MCL 440.2314; MCL 440.2315. We have held in this case that, because an express warranty is a specific term of the contract, contractual privity is required for a plaintiff to enforce an express warranty against a remote manufacturer. In contrast, our Supreme Court has held, at least in certain circumstances, that an injured plaintiff who is not in privity of contract with a remote manufacturer may nonetheless enforce an *implied* warranty against that manufacturer. *Pierce-*

[13] The circuit court failed to address plaintiff's implied-warranty claims. However, any error in this regard was plainly harmless in light of our conclusion that plaintiff's implied-warranty claims were barred.

field, 375 Mich at 98; *Spence*, 353 Mich at 126-135. Much confusion surrounds our Supreme Court's decisions in *Piercefield* and *Spence*. As noted by several federal courts interpreting Michigan law, it is unclear if *Piercefield* and *Spence* removed the common-law privity requirement for plaintiffs in all actions for breach of implied warranty, or only for such plaintiffs who have not sustained solely economic losses.[14] Moreover, various panels of this Court have reached disparate results after applying the decisions in *Piercefield* and *Spence*. See *Cova v Harley Davidson Motor Co*, 26 Mich App 602, 604-610; 182 NW2d 800 (1970) (extending the rule of *Piercefield* and *Spence*, which eliminates the requirement of privity, to a claim of breach of implied warranty involving purely economic loss); but see *Auto-Owners Ins Co v Chrysler Corp*, 129 Mich App 38, 43; 341 NW2d 223 (1983) (holding that a party's claim of breach of implied warranty was barred by a lack of contractual privity with the remote manufacturer). Similarly, it is unclear whether the adoption of the UCC—and in particular Alternative A of UCC § 2-318, codified in Michigan as MCL 440.2318—has in any way affected the continued viability of *Piercefield* and *Spence*, neither of which was decided under the UCC. We urge the Supreme Court to clarify this matter, which has been the subject of increasing commercial litigation in recent years.

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[14] See, e.g., *Pack v Damon Corp*, 434 F3d 810, 818-820 (CA 6, 2006) (stating that no privity is required under Michigan law for claims of breach of implied warranty); *Harnden v Ford Motor Co*, 408 F Supp 2d 315, 322 (ED Mich, 2005) (stating that privity is required under Michigan law for claims of breach of implied warranty); *Ducharme v A & S RV Ctr, Inc*, 321 F Supp 2d 843, 853-854 (ED Mich, 2004) (same); *Pitts v Monaco Coach Corp*, 330 F Supp 2d 918, 924-926 (WD Mich, 2004) (same); *Parsley v Monaco Coach Corp*, 327 F Supp 2d 797, 803-805 (WD Mich, 2004) (same); *Mt Holly Ski Area v US Electrical Motors*, 666 F Supp 115, 117-120 (ED Mich, 1987) (same).

We need not reach the ultimate issue whether the lack of privity between plaintiff and Gencor has foreclosed plaintiff's ability to enforce the implied warranties of merchantability and fitness for a particular purpose against Gencor. Instead, we hold that plaintiff's ability to enforce these implied warranties, assuming that such warranties existed, was barred by plaintiff's settlement with MCAT.

We will presume for purposes of this appeal that there were, in fact, implied warranties of merchantability and fitness for a particular purpose made by Gencor at the time of the initial sale to MCAT.

Although the implied warranties of merchantability and fitness for a particular purpose arise by operation of law, MCL 440.2314; MCL 440.2315, both of these implied warranties may be excluded or disclaimed by the seller, MCL 440.2316; *McGhee v GMC Truck & Coach Div, Gen Motors Corp*, 98 Mich App 495, 500; 296 NW2d 286 (1980). Because plaintiff has not presented any evidence of the terms or conditions of the contract between Gencor and MCAT, we cannot be certain whether the implied warranties of merchantability and fitness for a particular purpose accompanied the initial sale by Gencor or, in the alternative, whether Gencor disclaimed these warranties. We note that MCAT's standard-form agreements with plaintiff contain typical warranty disclaimer language, so it would not be unreasonable to assume that the agreement between MCAT and Gencor contained similar disclaimer language. At any rate, however, the point is that we do not know whether Gencor disclaimed either or both of the UCC implied warranties at the time of the sale to MCAT.

Without knowing whether Gencor disclaimed the implied warranties of merchantability and fitness for a

particular purpose at the time of its sale to MCAT, we cannot know whether these implied warranties ran from Gencor to plaintiff. This is because a remote purchaser is subject to the manufacturer's disclaimer of implied warranties in the same manner as the original purchaser and can acquire no greater implied-warranty rights from the manufacturer than the original purchaser can. See, e.g., *Theos & Sons, Inc v Mack Trucks, Inc*, 431 Mass 736, 740-741; 729 NE2d 1113 (2000); *Lecates v Hertrich Pontiac Buick Co*, 515 A2d 163, 166 (Del Super, 1986); *Gen Motors Corp v Halco Instruments, Inc*, 124 Ga App 630, 634; 185 SE2d 619 (1971). Accordingly, if Gencor disclaimed the UCC implied warranties in its initial sale to MCAT, those implied warranties would have been extinguished and could not have run to plaintiff.[15] We do not have sufficient evidence to determine whether this occurred. But because the seller generally has the burden of proving that an implied warranty has been disclaimed, see 67A Am Jur 2d, Sales, § 779, p 178; *Krupp PM Engineering, Inc v Honeywell, Inc*, 209 Mich App 104, 106 n 1; 530 NW2d 146 (1995), we will presume for purposes of this appeal that Gencor sold the machine to MCAT with the standard UCC implied warranties intact.

Notwithstanding the presence of any implied warranties running from Gencor to MCAT, however, we hold that the language of the settlement agreement

[15] Of course, even if Gencor had disclaimed the UCC implied warranties in its initial sale to MCAT, new implied warranties could have arisen in the subsequent sale from MCAT to plaintiff. However, plaintiff has settled all claims with MCAT. Further, the sales agreement between MCAT and plaintiff sufficiently disclaimed any new implied warranties of merchantability and fitness for a particular purpose that otherwise would have been created by MCAT's sale to plaintiff. MCL 440.2316; *McGhee*, 98 Mich App at 500.

executed between plaintiff and MCAT was sufficiently broad to release and discharge any outstanding implied-warranty claims that plaintiff may have had against Gencor. Specifically, the settlement agreement stated that plaintiff had agreed to "completely" release and discharge MCAT, as well as

> *any other person, firm, business entity or corporation charged or chargeable with responsibility which is or may be derivative from [MCAT]*, and their heirs, executors, administrators, personal representatives and assigns, from *any and all actual and potential claims*, demands, actions, causes of action, damages, costs, loss of services, expenses, compensation and any and all consequential damages on account of or in any way growing out of or connected with any of the transactions which at any time have occurred between the parties to this agreement, whether or not included in Kent County Circuit Court Case No. 03-01720-CK. [Emphasis added.]

The phrase "any and all actual and potential claims" is very broad. "[T]here cannot be any broader classification than the word 'all'. In its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Pritts v J I Case Co*, 108 Mich App 22, 30; 310 NW2d 261 (1981) (quotation marks and citations omitted). Moreover, we note that it is common for an injured purchaser to first seek redress from its immediate seller, and only then to look secondarily or derivatively to the remote manufacturer. This is not dissimilar to what plaintiff did in this case. Plaintiff did not name Gencor as a defendant in its original complaint, and only included Gencor as a defendant in its later amended pleadings. It is clear that plaintiff's initial inclination was to seek redress from its immediate seller, MCAT, which it considered to be primarily responsible for damages. Given that plaintiff looked primarily to MCAT in this case, we find

that Gencor was "charged or chargeable with responsibility which is or may be derivative from [MCAT]" within the meaning of the settlement agreement. Furthermore, plaintiff's implied-warranty claims against Gencor were certainly "connected with any of the transactions which at any time have occurred between [plaintiff and MCAT]," especially given that the same rock classification machine formed the basis of plaintiff's claims against both MCAT and Gencor. In light of the sweeping language contained in the settlement agreement executed by MCAT and plaintiff—which released "any and all actual and potential claims" against "any other person, firm, business entity or corporation charged or chargeable with responsibility which is or may be derivative from [MCAT]"—we conclude that the document was sufficiently broad to release and discharge plaintiff's implied-warranty claims against Gencor. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc* (*On Remand*), 242 Mich App 645, 649-650; 620 NW2d 310 (2000); *Romska v Opper*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999); see also *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 298; 553 NW2d 387 (1996); *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994).

V

In light of our conclusions, we need not address the remaining arguments raised by the parties on appeal.

Reversed and remanded for entry of judgment in favor of Gencor. We do not retain jurisdiction. As the prevailing party, Gencor may tax costs pursuant to MCR 7.219.

MARKEY, J., concurred.

HOEKSTRA, J. (*concurring*). Because MCR 7.215(J) requires me to follow *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999), in which this Court adopted the flat-bar rule, I concur with the result reached by the majority. For the reasons stated in my dissent in *Romska*, I am convinced that the intent rule is the better-reasoned rule and the rule most consistent with Michigan caselaw and statutes. Here, it is apparent from the circumstances that Heritage did not intend for its settlement agreement with Michigan Tractor & Machinery Company to release and discharge its implied warranty claims against Gencor Industries, Inc. In all other aspects, I agree and join with the majority.

PEOPLE v PLUMAJ

Docket No. 285534. Submitted April 14, 2009, at Detroit. Decided April 23, 2009. Approved for publication June 30, 2009, at 9:05 a.m.

Luviq Plumaj moved in the Wayne Circuit Court to withdraw pleas of guilty of second-degree murder and no contest to charges of manslaughter and failure to stop at the scene of an accident. The court, Michael J. Callahan, J., granted the motion, noting that the pleas had not been taken under oath, as required by MCR 6.302(A). The prosecution appealed by leave granted.

The Court of Appeals *held*:

Although MCR 6.302(A) requires that a court place a defendant under oath before accepting a plea of guilty or no contest, a failure to do so does not, by itself, require reversal. The court must make an initial determination whether the plea was understandingly, knowingly, voluntarily, and accurately made before deciding whether to grant a motion to withdraw a plea.

Reversed and remanded for further proceedings.

CRIMINAL LAW — GUILTY OR NO CONTEST PLEAS — MOTION TO WITHDRAW A PLEA.

A court, before deciding a motion to withdraw a plea of guilty or no contest that was made without the defendant being placed under oath, must make an initial determination whether the plea was understandingly, knowingly, voluntarily, and accurately made (MCR 6.302[A]).

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 *Ana Quiroz*, Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs for the defendant.

Before: BECKERING, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM. The prosecution appeals by leave granted the trial court's orders granting defendant's motions to withdraw his plea of guilty of second-degree murder, MCL 750.317, and pleas of *nolo contendere* to manslaughter with a motor vehicle, MCL 750.321, and failure to stop at the scene of an accident when at fault, resulting in death, MCL 257.617(1) and (3). Because the trial court erred in granting defendant's motions to set aside his pleas without first determining whether the pleas were understandingly, knowingly, voluntarily, and accurately made, we reverse and remand for further proceedings consistent with this opinion.

Circuit court docket no. 07-005810 arises out of the January 28, 2007, death of Robert Brown. A truck driven by defendant struck Brown as Brown was standing near a stalled vehicle. Defendant was charged with manslaughter and failure to stop at the scene of an accident when at fault. Circuit court docket no. 07-009020 arises out of the February 21, 2007, shooting death of Timothy Porter and assault of Kenneth Hart. The prosecutor alleged that the shooting of Porter was done with the assistance, and at the direction, of defendant. Defendant was charged with first-degree murder, two counts of assault with intent to murder, and possession of a firearm during the commission of a felony.

At an August 27, 2007, hearing, the parties placed a plea agreement on the record. The agreement was that, in circuit court docket no. 07-009020, defendant would plead guilty of second-degree murder in exchange for a sentence of 25½ to 35 years in prison. In circuit court docket no. 07-005810, defendant agreed to plead *nolo contendere* to both manslaughter and failure to stop at the scene of an accident when at fault, resulting in death, in exchange for sentences of 10 to 15 years in prison on both counts, which were to run concurrently with the sentence in

circuit court docket no. 07-009020. The trial court ultimately accepted defendant's pleas. However, at no point during the plea hearing did the trial court place defendant under oath. The trial court sentenced defendant on September 13, 2007, pursuant to the agreement of the parties.[1]

In February 2008, defendant moved to set aside both pleas, claiming that he was denied the effective assistance of counsel, that the trial court erred in failing to place him under oath before taking the pleas, and that the trial court failed to comply with other aspects of the plea-taking procedure. A hearing on the motion was held on April 25, 2008, before a different trial judge. The prosecutor conceded that the oath requirement was not met in this case, but argued that the noncompliance "does not require reversal" because the failure to administer the oath does not necessarily mean that the plea was involuntary. The trial court disagreed with the prosecutor, stating that MCR 6.302(A) "isn't concerned with whether the plea is full, fair and voluntary. It says the plea shall be taken under oath." The trial court went on to state that "the plea taking procedure wasn't complied with as laid out in the court rule" and ruled, "I'm setting aside the plea."

The prosecutor now appeals by leave granted the trial court's decision to allow defendant to withdraw his pleas. The prosecutor argues that the oath requirement of MCR 6.302(A) is simply a tool to assist a court in determining the voluntariness of a plea, and the failure to give the oath does not require automatic reversal. According to the prosecutor, regardless of the error in failing to place defendant under oath at the plea hearing, the trial court could not set aside the plea without

[1] The maximum sentence imposed on the second-degree murder conviction was increased, by agreement of the parties, in order to comply with the rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). The sentence imposed was 25½ years to 38 years and 3 months in prison.

a finding that the plea was, in fact, involuntary. Defendant argues that MCR 6.302(A) clearly and unambiguously mandates administering the oath, that compliance with the oath requirement is not a mere technicality but is necessary in every case to impress upon a defendant the importance of telling the truth, and that the absence of an oath renders a plea unacceptable.

A trial judge's decision to accept or reject a plea is reviewed for abuse of discretion. *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Questions of law, including interpretation of court rules, are reviewed de novo on appeal. *People v Petit*,466 Mich 624, 627; 648 NW2d 193 (2002).

> The procedures governing the acceptance of a guilty plea were first adopted by [our Supreme Court] in 1973 and are currently set forth in MCR 6.302. MCR 6.302(A) provides that
>
> "[t]he court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E)."[2] [*People v Saffold*, 465 Mich 268, 272; 631 NW2d 320 (2001).]

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[2] Under MCR 6.302(B), which relates to an understanding plea, the court must speak directly to the defendant and determine that he or she understands the name of the offense and the maximum possible prison sentence, the trial rights being waived, and loss of the right to appeal. Pursuant to MCR 6.302(C), which relates to a voluntary plea, the court must make inquiries regarding the existence and details of any plea agreements and whether the defendant was promised anything beyond what was in the agreement, if any, or otherwise. The court must also ask the defendant whether he or she had been threatened and if the plea was his or her choice. MCR 6.302(D), which relates to an accurate plea, requires the court to establish a factual basis for a guilty plea and state

Strict compliance with MCR 6.302 is not essential; rather, our Supreme Court has "adopted a doctrine of substantial compliance, holding that 'whether a particular departure from Rule 785.7 [now MCR 6.302] justifies or requires reversal or remand for additional proceedings will depend on the nature of the noncompliance.' " *Saffold*, *supra* at 273, quoting *Guilty Plea Cases*, 395 Mich 96, 113; 235 NW2d 132 (1975). Automatic reversal is required only when the trial court fails to procure "an enumeration and a waiver on the record of the three federal constitutional rights as set forth in *Boykin v Alabama* [395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969)]: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers." *Saffold*, *supra* at 281. This Court may consider "the record as a whole" to determine whether the *Boykin* requirements were satisfied and whether a guilty plea was made knowingly and voluntarily. *People v Bettistea (After Remand)*, 181 Mich App 194, 197; 448 NW2d 781 (1989).

The prosecutor persuasively argues that the oath requirement of MCR 6.302(A) "does not stand alone," but rather is intended to aid the trial court in determining whether the defendant's plea was understandingly, voluntarily, and accurately made. In contrast, we are not persuaded by defendant's argument that the "substantial compliance" doctrine articulated in *Guilty Plea Cases* applies only to subrules B through E and that the Court could have moved the oath requirement when it amended the rule in 1995 had it wanted to include the oath within the doctrine. This argument

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why a plea of *nolo contendere* is appropriate. Finally, under MCR 6.302(E), the court must make additional inquiries, including whether the prosecutor and defense counsel are "aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D)."

glosses over *Saffold*, decided in 2001, which reiterated that there are only three reasons for automatic reversal, as enumerated above. Similarly unconvincing is defendant's assertion that even if the substantial compliance doctrine were applicable to MCR 6.302(A), that subrule uses the word "must" when it refers to "place the defendant . . . under oath" and therefore the failure to do so cannot be substantial compliance. This reasoning ignores the fact that the word "must" in subrule A also refers to "personally carry out subrules (B)-(E)."

Indeed, our Supreme Court has said on many occasions that "rules of automatic reversal are disfavored." *People v Hawthorne*, 474 Mich 174, 182 n 4; 713 NW2d 724 (2006). The preferred method is to determine the type of error and then apply the proper test:

> Constitutional errors that are structural in nature are subject to automatic reversal. If a case involves nonstructural, preserved constitutional error, an appellate court should reverse unless the prosecution can show that the error was harmless beyond a reasonable doubt.
>
> If the constitutional error is not preserved, it is reviewed for plain error. In cases involving preserved, nonconstitutional errors, the defendant must establish that it is more probable than not that the error undermined reliability in the verdict. Unpreserved, nonconstitutional errors are reviewed for plain error. [*People v Cornell*, 466 Mich 335, 363 n 16; 646 NW2d 127 (2002).]

In *People v Mosly*, 259 Mich App 90; 672 NW2d 897 (2003), this Court held that violation of a court rule was not structural error requiring automatic reversal. In *Mosly*, because the trial court believed defendant's written waiver sufficient, "the trial court expressly declined to question defendant on the record to ascertain the validity of defendant's waiver of his right to trial by jury," contrary to MCR 6.402(B). *Id.* at 93. This Court stated that "we are not persuaded that the trial

court's failure to follow the rule requires reversal if the record establishes that defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right." *Id.* at 96. The Court then cited federal caselaw holding that

> a trial court's failure to follow procedural rules for securing a waiver of the right to a jury trial does not violate the federal constitution *nor does it require automatic reversal*. Indeed, compliance with the court rules only creates a presumption that a defendant's waiver was voluntary, knowing, and intelligent. If a defendant's waiver was otherwise knowingly, voluntarily, and intelligently made, reversal will not be predicated on a waiver that is invalid under the court rules because courts will disregard errors that do not affect the substantial rights of a defendant. [*Id.* (citations omitted; emphasis added).]

Furthermore, the *Mosly* Court noted that "rules of automatic reversal are disfavored, for a host of obvious reasons." *Id.* at 97 (quotation marks and citations omitted). The Court held, therefore, that the "defendant was required to establish that the waiver was neither understandingly nor voluntarily made, not merely that the trial court failed to strictly comply with MCR 6.402(B)." *Id.* Similarly, in the case at bar, it was error for the trial court to apply a rule of automatic reversal for failure to strictly comply with MCR 6.302(A) instead of determining whether defendant's pleas were understandingly, knowingly, voluntarily, and accurately made.

Although MCR 6.302(A) requires that the court place the defendant under oath before accepting a plea of guilty or *nolo contendere*, a failure to do so, by itself, is not determinative. Because the oath obligation is not one of the protected rights requiring reversal, the trial court must make the initial determination regarding whether the pleas were understandingly, knowingly,

voluntarily, and accurately made. While an oath may assist the trial court in making its determination, an oath by itself does not establish any of the necessary requisites of a valid plea. The trial court must employ the decisional process to either grant or deny a motion to withdraw a plea and make findings in a hearing to support the application of discretion. Guided by the facts of a particular case, it is for the trial court to determine the ultimate issue whether the defendant's pleas were understandingly, knowingly, voluntarily, and accurately made.

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

KENEFICK v CITY OF BATTLE CREEK

Docket No. 282319. Submitted May 6, 2009, at Lansing. Decided May 19, 2009. Approved for publication July 2, 2009, at 9:00 a.m.

John Kenefick brought an action in the Calhoun Circuit Court against the city of Battle Creek, seeking a judgment declaring unconstitutional a Battle Creek ordinance that requires an owner of an abandoned residential structure that poses a potential hazard or danger to persons to pay a monitoring fee. The court, Allen L. Garbrecht, J., dismissed the action, ruling under MCR 2.116(I)(1) that judgment for the defendant was appropriate as a matter of law because the ordinance is not unconstitutionally vague and does not violate the Equal Protection Clause. The plaintiff appealed.

The Court of Appeals *held*:

1. The ordinance is not unconstitutionally vague. It provides fair notice of the conduct it regulates. The ordinance defines "abandoned structure" as a structure that has become "vacant or abandoned." Dictionary definitions of "vacant" and "abandoned" indicate that a residential structure that is left unoccupied, empty, or deserted is subject to the ordinance. Dictionary definitions of "potential," "hazard," and "danger," as used in the ordinance, indicate that a vacant or abandoned structure that poses a risk of peril, harm, or injury, or is a menace, is subject to the monitoring fee. A person of ordinary intelligence would be placed on notice of what the ordinance requires.

2. The ordinance is not void for vagueness on the asserted ground that it allows the defendant to enforce it arbitrarily. The ordinance affords no discretion to the defendant because it provides that any owner of an "abandoned residential structure shall register such propert[y] with the City and pay a monthly administration fee" and the word "shall" indicates mandatory conduct.

3. The ordinance does not violate the Equal Protection Clause on the asserted ground that it singles out owners of residential structures from owners of all other types of structures. The ordinance passes the rational-basis test because the classification it creates is rationally related to the legitimate governmental

purpose of reducing neighborhood blight, reducing crime, and promoting the general health, safety, and welfare of the defendant's residents.

Affirmed.

Ed Annen, Jr., for the plaintiff.

Barbara A. Hobson, City Attorney, for the defendant.

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

PER CURIAM. Plaintiff appeals as of right the trial court's dismissal of his complaint for declaratory relief challenging the constitutionality of a Battle Creek city ordinance. The trial court dismissed the complaint pursuant to MCR 2.116(I)(1) after determining that judgment as a matter of law was appropriate because the ordinance is not unconstitutionally vague and does not violate the Equal Protection Clause. We affirm.

We review de novo a trial court's conclusion that a defendant is entitled to judgment as a matter of law under MCR 2.116(I)(1). *Sobiecki v Dep't of Corrections*, 271 Mich App 139, 141; 721 NW2d 229 (2006). Similarly, we review de novo whether an ordinance is unconstitutional. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 627; 673 NW2d 111 (2003). Pursuant to MCR 2.116(I)(1), "[i]f the pleadings show that a party is entitled to judgment as a matter of law, . . . the court shall render judgment without delay." Judgment as a matter of law is proper when no factual dispute exists and only questions of law are at issue. *Sobiecki*, *supra* at 141.

Plaintiff first contends that Battle Creek Code of Ordinances, Chapter 1456 (the ordinance) is unconstitutionally vague on its face. "All statutes and ordinances are presumed to be constitutional and are con-

strued so unless their unconstitutionality is clearly apparent." *Houdek v Centerville Twp*, 276 Mich App 568, 573; 741 NW2d 587 (2007). "The party challenging the facial constitutionality of an act must establish that no set of circumstances exists under which the [a]ct would be valid." *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999) (quotation marks and citations omitted). An act is void for vagueness if "(1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated." *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001). Plaintiff contends that the ordinance does not provide fair notice of the conduct it regulates and that defendant has unlimited discretion in applying the ordinance.

To provide fair notice, an ordinance "must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 539; 669 NW2d 594 (2003). "The statute cannot use terms that require persons of ordinary intelligence to guess its meaning and differ about its application." *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999). "A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id*.

Here, the ordinance requires "owners of abandoned residential structures" to pay a monitoring fee. The ordinance defines "abandoned structure" as a structure that has become "vacant or abandoned" for a given period and that meets one of 12 enumerated conditions

in the ordinance. One of the enumerated provisions in the ordinance states that any vacant or abandoned structure that poses a "potential hazard or danger to persons" constitutes an "abandoned" structure for purposes of the ordinance. Plaintiff contends that the terms "vacant" and "abandoned" and "potential hazard or danger to persons" are unduly vague.

A review of common dictionary definitions of the words used in the ordinance leads to the conclusion that the ordinance is not unduly vague. See *id*. The word "abandoned" is defined as "forsaken or deserted." *Random House Webster's College Dictionary* (1997). "Vacant" is defined as "having no contents; empty; void . . . having no occupant; unoccupied." *Id*. These definitions indicate that a residential structure that is left unoccupied, empty, or deserted is subject to the provisions of the ordinance.

With regard to the phrase "potential hazard or danger to persons," "potential" is defined as "possible as opposed to actual[;] . . . capable of being or becoming"; "hazard" is defined in part as "something causing danger, peril, risk"; and "danger" is defined as "liability or exposure to harm or injury; risk; peril[;] . . . an instance or cause of peril; menace." *Random House Webster's College Dictionary* (1997). Therefore, the phrase "potential hazard or danger to persons," as used in the ordinance, requires that vacant or abandoned structures that pose a risk of peril, harm or injury, or are a menace, be subject to the monitoring fees. When these common dictionary definitions are viewed in the context of the entire ordinance, the stated purpose of which is to eliminate dangerous and unsightly blight, we conclude that a person of ordinary intelligence would be placed on fair notice of what the ordinance requires. See *STC, Inc*, *supra*.

Plaintiff also contends the ordinance is void for vagueness because it allows defendant to enforce the ordinance in an arbitrary manner. In determining if an act inappropriately allows for arbitrary enforcement, we examine the act to determine if it "provides standards for enforcing and administering the laws in order to ensure that the enforcement is not arbitrary or discriminatory . . . ." *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 469; 688 NW2d 523 (2004) (quotation marks and citations omitted).

This ordinance does not provide unlimited discretion to defendant. The clear language of the ordinance states that any owner of an "abandoned residential structure *shall* register such propert[y] with the City and pay a monthly administration fee." Battle Creek Code of Ordinances, Chapter 1456, § 3 (emphasis added). Defendant does not have discretion to apply the monitoring fees to structures that fall within the definition of an "abandoned" or "vacant" structure as the ordinance states that an owner of such structure "shall pay" certain fees. The word "shall" indicates mandatory conduct. *AFSCME v Detroit*, 252 Mich App 293, 311; 652 NW2d 240 (2002). Additionally, there is no evidence on the record suggesting that defendant acts in an arbitrary manner when applying the provisions of the ordinance.

Next, plaintiff contends the ordinance violates the Equal Protection Clause because it singles out owners of residential structures from owners of all other types of structures. In addressing whether a law violates the Equal Protection Clause, a court must determine which level of review applies. *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). When an ordinance, such as the one here, classifies individuals on the basis of anything other than a suspect class, or a class receiving

heightened scrutiny such as gender or illegitimacy, the ordinance is reviewed under the rational-basis test. *Muskegon Area Rental Ass'n v City of Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001). Under this test the legislation is presumed constitutional and "courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose." *Crego*, *supra* at 259. This Court need only determine if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v Beach Communications*, *Inc*, 508 US 307, 313; 113 S Ct 2096; 124 L Ed 2d 211 (1993). This finding may be based on "rational speculation unsupported by evidence or empirical data." *Id*. at 316. "[I]n other words, the challenger must 'negative *every conceivable basis* which might support' the legislation." *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001), quoting *Lehnhausen v Lake Shore Auto Parts Co*, 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973) (emphasis added).

The ordinance's stated purpose is to overcome the detrimental effects of neighborhood blight and reduce enforcement costs associated with the blight. This Court has held that "protecting and promoting public health, safety, and general welfare are legitimate governmental interests, . . . and protecting aesthetic value is included in the concept of the general welfare." *Norman Corp v City of East Tawas*, 263 Mich App 194, 200-201; 687 NW2d 861 (2004). Thus, the general reduction of blight is undisputedly a legitimate governmental purpose.

The classification is also rationally related to the legitimate governmental purpose of reducing neighborhood blight because there is a "reasonably conceivable state of facts that could provide a rational basis for the

classification." See *FCC*, *supra* at 313. Defendant could have reasoned that in Battle Creek there are mostly residential structures in areas zoned residential and there are more residences in districts with mixed zoning. Thus, regulating such structures is the most effective way to reduce neighborhood blight with the resources available. Alternatively, defendant could have concluded from past experience that residential structures that become vacant and abandoned pose greater risks of danger to the general health, safety, and welfare of the community because they pose a greater risk for criminal activity. Further, defendant could have reasoned that residential structures are more often located in close proximity to other residential structures and that they therefore have a greater effect on the general health, safety, and welfare of the city's residents.

Although the ordinance offers no reasoning in support of the classification, in enacting the ordinance, defendant was not required to articulate a purpose or rationale in support of the classification. See *Heller v Doe*, 509 US 312, 320; 113 S Ct 2637; 125 L Ed 2d 257 (1993). Moreover, under the rational-basis test, defendant "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id*. Plaintiff has failed to overcome his substantial burden to "negative *every conceivable basis* which might support" the ordinance. See *Lehnhausen*, *supra* at 364 (emphasis added).

Affirmed.

TEEL v MEREDITH

Docket No. 280215. Submitted January 13, 2009, at Detroit. Decided July 2, 2009, at 9:05 a.m.

Ricky Teel, individually and as personal representative of the estate of Lillian Teel, deceased, brought an action in the Wayne Circuit Court against Doris Meredith, the owner and landlord of an apartment that the Teels rented and that was damaged in a fire in which Lillian died and Ricky was injured. The plaintiff alleged that Meredith failed to maintain the apartment in a safe condition. The plaintiff also named as a defendant Allstate Insurance Company, which insured the apartment pursuant to a policy issued to Meredith, alleging, in part, that an investigator for the insurer altered the scene and removed certain items from the apartment, thereby allegedly spoiling the evidence concerning the origin and the cause of the fire and affecting the plaintiff's ability to successfully bring litigation relating to the fire. Allstate moved for summary disposition, alleging that Michigan does not recognize spoliation of evidence as a valid cause of action. The court, Michael F. Sapala, J., granted the motion and dismissed the claims against Allstate with prejudice. The plaintiff appealed that order.

The Court of Appeals *held*:

The trial court did not err by granting summary disposition for Allstate on the basis that the plaintiff failed to state a claim on which relief can be granted. Michigan does not recognize a cause of action for the spoliation of evidence. The plaintiff failed to articulate any basis for imposing a specific duty on Allstate to preserve or maintain the evidence. Absent an articulable, legally recognized duty, there can be no cause of action for the alleged tort of spoliation of evidence.

Affirmed.

DAVIS, J., dissenting, stated that spoliation of evidence is recognized as a legally wrongful act. There is a well-established right of a litigant in Michigan to the integrity of evidence in a lawsuit. It follows that courts are empowered and obligated to provide a remedy for violations of that right. The reason that the Court of Appeals should recognize a cause of action for spoliation of evidence is that, where the spoliator is not already a party, there

is simply no other way to provide a remedy for the invasion of the recognized right to that evidence. Where an individual's ability to pursue or defend an action has been impaired by a third party's willful or negligent spoliation of evidence, that individual should be able to pursue a tort action against the spoliator. This would not create new rights, but merely provide a means of protecting rights already recognized in Michigan. The order of the trial court should be reversed.

TORTS — SPOLIATION OF EVIDENCE — ACTION FOR SPOLIATION OF EVIDENCE.

Michigan does not recognize a cause of action for the spoliation of evidence.

Fabian, Sklar & King, P.C. (by *Stuart A. Sklar*) (*Donald M. Fulkerson*, of counsel), for Ricky Teel.

Garan Lucow Miller, P.C. (by *David M. Shafer* and *Frederick B. Plumb*), for Allstate Insurance Company.

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

SERVITTO, J. Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant Allstate Insurance Company. Because Michigan does not yet recognize as a valid cause of action spoliation of evidence that interferes with a prospective civil action against a third party, we affirm.

Plaintiff initiated this action after a fire broke out in his family's rented apartment, causing the death of his wife, Lillian Teel, and extensive damage to the apartment. Allstate, the liability insurer for the property pursuant to a policy issued to defendant Doris Meredith, the owner/landlord of the apartment, sent a representative to the apartment, without notice to or the presence of plaintiff, to inspect the apartment. Apparently, during the inspection, the investigator altered the scene and removed certain items from the apartment, thereby allegedly spoiling evidence concerning the origin and cause of the fire and affecting

plaintiff's ability to bring, or succeed in, litigation relating to the fire. In his complaint, plaintiff alleged that defendant Meredith breached her duty to maintain safe premises. Plaintiff also alleged that defendant Allstate failed to, among other things, notify plaintiff of its intended inspection of the premises as required by statute, properly document and preserve the fire scene and the evidence, and avoid spoliation of the evidence. Allstate moved for summary disposition pursuant to MCR 2.116(C)(8), and the trial court granted the motion, ruling, in part, that Michigan does not recognize spoliation of evidence as a valid cause of action.

On appeal, plaintiff asserts that the trial court erred by granting summary disposition because the complaint presented sufficient allegations to establish a claim of intentional or negligent spoliation of evidence that interferes with a civil action against a third-party and that Michigan should recognize the same as an actionable tort. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition pursuant to MCR 2.116(C)(8). *Kisiel v Holz*, 272 Mich App 168, 170; 725 NW2d 67 (2006). Where summary disposition is sought pursuant to MCR 2.116(C)(8), "the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When reviewing such a motion, "all well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

In arguing that the trial court erred, plaintiff cites *Panich v Iron Wood Products Corp*, 179 Mich App 136;

445 NW2d 795 (1989). *Panich* (which is not binding precedent pursuant to MCR 7.215, because it was decided before November 1, 1990) held that a cause of action arising out of the alleged spoliation of evidence, under the facts before it, was not recognized in Michigan. Plaintiff asserts that the factual circumstances in this case, however, warrant the recognition of such a cause of action.

The function of this Court is to correct errors. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). As stated above, MCR 2.116(C)(8) provides that summary disposition is appropriate where a party fails to state a claim for which relief can be granted. Here, no error occurred where the lower court granted summary disposition after plaintiff's complaint alleged a cause of action that has not been recognized in Michigan. Although plaintiff now invites this Court to legally recognize the cause of action and to reverse and remand, we decline to do so.

As Justice WEAVER has stated in a concurring opinion, "[t]he legislative power includes the power to create new legal rights. And, where the Legislature chooses, it may exercise its discretion to create and define new causes of action." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 668-669; 684 NW2d 800 (2004). See, also, *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174 (2004). While it is true that this Court may determine as a matter of law whether a duty is owed, our Supreme Court has also noted that in certain instances it is preferable for a duty to be statutorily declared. *Harts v Farmers Ins Exch*, 461 Mich 1, 12; 597 NW2d 47 (1999). We believe that this is one of those instances.

There are certainly considerations that would support the recognition of an independent tort claim for

spoliation of evidence. There is no doubt, for instance, that the preservation of evidence is a compelling policy consideration and that the destruction of crucial evidence may undermine the fairness of an underlying lawsuit and the justice sought to be achieved. However, there are also countervailing policy considerations that weigh against the adoption of a tort for spoliation of evidence.

The traditional response to the problem of evidence spoliation frames the alleged wrong as an evidentiary concept, not as a separate cause of action. The proposed cause of action carries with it many potential concerns and effects, resulting in more complications than clarifications. For example, the scope of a duty to preserve evidence would need to be defined. It would be unreasonable to impose a boundless scope of duty to preserve evidence, particularly where the spoiler of evidence is a third party, i.e., not a party alleged to have committed the wrong that serves as the basis for the underlying or potential litigation. The extent and the amount of damages in a spoliation case are also highly speculative, because it is impossible to know what the destroyed evidence would have shown, and there is no way to determine whether a plaintiff would have had a significant possibility of success in the potential civil action if the evidence were available. It would prove difficult for a trier of fact to meaningfully assess what role the missing evidence would have played in the determination of the underlying action and, if the evidence would not actually have helped to establish a plaintiff's case, an award of damages for its destruction would work as a windfall to the plaintiff.

The Legislature would have the resources and tools needed to investigate the consequences of the proposed cause of action and to study the long-term effects of the

cause of action in the jurisdictions that have recognized it. We leave it to the Legislature to do so, should it choose. Because plaintiff has not established that the lower court committed error, and because the Legislature is the body best suited to creating new causes of action, plaintiff is not entitled to relief.

Contrary to the dissent's assertions, by permitting this case to proceed, we would not simply be recognizing the existence of a legal "duty"[1] on the part of the insurance industry, but we would be creating a new cause of action in this state, which would necessarily require us to define which parties may bring a cause of action and within what time limits, how a plaintiff may establish a prima facie case, and what remedies would be available. Not only is the Legislature in a superior position to gather information regarding the propriety of such changes in the law, public policy dictates against our creation of an entirely new cause of action where the Michigan Legislature has taken upon itself to comprehensively regulate the insurance industry. Indeed, our insurance statutes contain more than 1,000 sections, showing a clear intent by the Legislature to define the parameters and regulate the conduct of those conducting business in this arena as well as the rights and remedies available to the public. See *Harts*, 461 Mich at 11-12. To that end, we are mindful of our Supreme Court's observations in *Henry v Dow Chem Co*, 473 Mich 63, 88-89; 701 NW2d 684 (2005):

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[1] The dissent mistakenly conflates the ordinary job of a common-law judge to decide whether there is a legal "duty" in the first instance in a garden variety tort case with the much different question before us: whether the state of Michigan should create an entirely new cause of action in an arena, insurance, that is comprehensively regulated by the Legislature.

> Although the caution engendered by our difficulty in identifying, much less weighing, the potential costs and benefits of a decision in plaintiffs' favor is an important factor militating against recognizing plaintiffs' proposed cause of action, there is a stronger prudential principle at work here: the judiciary's obligation to exercise caution and to defer to the Legislature when called upon to make a new and potentially societally dislocating change to the common law.
>
> Ours, after all, is a government founded on the principle of separation of powers. In certain instances, the principle of separation of powers is an affirmative constitutional bar on policy-making of this Court. In other cases, however, the separation of powers considerations may operate as a *prudential* bar to judicial policy-making in the common-law arena. This is so when we are asked to modify the common law in a way that may lead to dramatic reallocation of societal benefits and burdens. [Emphasis in original.]

Were we persuaded to ignore the Legislature's pervasive role in this area of law and feel inclined to create a new cause of action, prudence would counsel against it because such a significant departure from Michigan law should only come from our Supreme Court, not an intermediate appellate court. See *Dahlman v Oakland Univ*, 172 Mich App 502, 507; 432 NW2d 304 (1988).

Moreover, if we were to adopt the reasoning of the dissent and recognize an independent cause of action for spoliation of evidence as merely a remedy for a violation of the already-established right to the preservation of evidence, we would nevertheless decline to find such remedy appropriate under the specific facts and circumstances before us. First, there are remedies available to a party claiming prejudice resulting from the loss or destruction of evidence. When a party destroys or loses material evidence, whether intentionally or unintentionally, and the other party is unfairly prejudiced because it is unable to challenge or respond

to the evidence, a trial court has the inherent authority to sanction the culpable party to preserve the fairness and integrity of the judicial system. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). There is also a general rule that if a party intentionally destroys evidence that is relevant to a case, a presumption arises that the evidence would have been adverse to that party's case. *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005).

We acknowledge that there is a distinction between the destruction of evidence by a party to the underlying litigation and spoliation of evidence by a third party in that not all the litigation-related remedies for spoliation are applicable to third parties. However, as aptly observed in *Dowdle Butane Gas Co, Inc v Moore*, 831 So 2d 1124, 1132 (Miss, 2002):

> The victim of third party spoliation, however, is not entirely helpless. Some discovery sanctions are available to punish third party spoliation, including monetary and contempt sanctions against persons who flout the discovery process by suppressing or destroying evidence. A criminal sanction remains available under Penal Code section 135, as are disciplinary sanctions against attorneys who may be involved in spoliation. As we have pointed out, the victim of third party spoliation may deflect the impact of the spoliation on his or her case by demonstrating why the spoliated evidence is missing. It also may be possible to establish a connection between the spoliator and a party to the litigation sufficient to invoke the sanctions applicable to spoliation by a party. We do not believe that the distinction between the sanctions available to victims of first party and third party spoliation should lead us to employ the burdensome and inaccurate instrument of derivative tort litigation in the case of third party spoliation. We observe that to the extent a duty to preserve evidence is imposed by statute or regulation upon the third party, the Legislature or the regulatory body that has imposed this duty generally will possess the authority to devise an effective sanction for

> violations of that duty. To the extent third parties may have a contractual obligation to preserve evidence, contract remedies, including agreed-upon liquidated damages, may be available for breach of the contractual duty. Criminal sanctions, of course, also remain available.

Where, as here, a plaintiff has not alleged or demonstrated a complete lack of an available remedy for the spoliation of evidence by a third party, we decline to announce an as-yet unrecognized cause of action as the single appropriate remedy.

In addition, very few states recognize spoliation of evidence as an independent tort, and those that do have not only faced considerable disapproval, but have varied among themselves in the parameters and application of such a tort. Notably, the state generally acknowledged as providing the origin of a distinct cause of action for the tort of spoliation of evidence, California (in *Smith v Superior Court of Los Angeles Co*, 151 Cal App 3d 491; 198 Cal Rptr 829 [1984]), has recently moved away from its prior holding. In *Cedars-Sinai Medical Ctr v Superior Court of Los Angeles Co*, 18 Cal 4th 1, 17-18; 74 Cal Rptr 2d 248; 954 P2d 511 (1998), the California Supreme Court expressly disapproved of *Smith* and held that "there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action."

More recently, in *Temple Community Hosp v Superior Court of Los Angeles*, 20 Cal 4th 464; 84 Cal Rptr 2d 852; 976 P2d 223 (1999), the California Supreme Court held that no tort cause of action will lie for intentional third-party spoliation of evidence. In reaching its decision, the court opined:

> [T]he burdens and costs of recognizing a tort remedy for third party spoliation are considerable—perhaps even greater than in the case of first party spoliation. The same burdens identified in *Cedars-Sinai* exist, namely, jury confusion and the potential for abuse in bringing the action and for inaccurate and arbitrary verdicts, magnified by the potential for punitive damages, as well as the obvious burden to the judicial system, litigants, and witnesses, inherent in derivative litigation. Beyond these burdens, in the case of third party spoliation additional burdens arise from the circumstance that the class of potential plaintiffs and defendants is greatly expanded. As noted, *both* parties in the underlying litigation may be injured by a third party's single act of destruction of evidence, thereby giving rise to two claims with potentially inconsistent or duplicative verdicts. . . . In addition, although spoliation claims between parties have an inherently limited number of potential *defendants*, if spoliation by nonparties were actionable in tort, the cast of potential defendants would be much larger. We believe the broad threat of potential liability, including that for punitive damages, might well cause numerous persons and enterprises to undertake wasteful and unnecessary record and evidence retention practices. [*Id*. at 476 (citation omitted; emphasis in original).]

Given that the majority of states recognizing a cause of action for spoliation of evidence generally relied heavily on California's now disapproved-of *Smith v Superior Court* case, the strength and longevity of the other states' opinions are in question. Moreover, while we are certainly not bound by out-of-state decisions, we do find the rationale employed in *Temple* compelling.

In any event, the states recognizing such a cause of action appear to base their recognition on a few key, interrelated factors: exclusive possession of the evidence by the person or company that ultimately destroys the evidence; knowledge of a potential lawsuit involving the evidence; and a specific duty to preserve

the evidence. For example, in *Boyd v Travelers Ins Co*, 166 Ill 2d 188, 191; 652 NE2d 267 (1995), Tommie Boyd filed a claim for workers' compensation benefits against his employer and his employer's workers' compensation insurer for injuries he received when a portable heater Boyd owned exploded while he was working inside his employer's van. Employees of the workers' compensation insurer took possession of the heater and transported it to the insurer's office for the express purpose of investigating Boyd's workers' compensation claim. Subsequently, when Boyd asked that the heater be returned to him, the insurer was unable to locate it. The Illinois Supreme Court held that because the insurer's employees knew that the heater was evidence relevant to future litigation, the insurer assumed a duty to preserve the heater. Because it failed to do so, an action for negligent spoliation could be stated under existing Illinois negligence law. *Id*. at 195.

In *Thompson v Owensby*, 704 NE2d 134, 136 (Ind App, 1998), a dog broke free from the cable restraining it in its owners' yard and attacked a child, causing her serious injuries. The child's parents sought compensation from the dog's owners and the dog's owners' landlord. The landlords' insurer investigated the plaintiffs' claim and, in doing so, took possession of the cable. The insurer promptly lost the cable, before anyone had the opportunity to inspect it. The Indiana Court of Appeals noted:

> A liability carrier like the Insurance Company can rationally be held to understand that once a claim is filed, there is a possibility of litigation concerning the underlying injuries. The Insurance Company's knowledge and investigation of the Thompsons' claims and its possession of what would be a key item of evidence in the event litigation ensued created a relationship between the Company and

> the Thompsons that weighs in favor of recognizing a cognizable duty to maintain evidence.
>
> . . . Further, the foreseeability of the harm in losing evidence can be inferred from the allegation that the Company's investigator took possession of the cable: if an insurance carrier's investigator deems certain evidence important enough to be collected, it is foreseeable that loss of the evidence would interfere with a claimant's ability to prove the underlying claim. [*Id.* at 137-138.]

See, also, the Alabama case of *Smith v Atkinson*, 771 So 2d 429 (Ala, 2000).

Here, assuming that Allstate was aware of a potential lawsuit at the time it inspected plaintiff's apartment, it did not have exclusive possession of the fan or lamp that plaintiff alleges may have caused the fire. It should be noted that before Allstate's investigation of the scene, the Detroit Fire Department's arson section and the Michigan State Police investigated and prepared reports concerning the fire. The arson section's investigative report concluded that the fire originated within a leather loveseat in the living room of the apartment. However, the cause of the fire was listed as "undetermined" by both the Detroit Fire Department and the Michigan State Police. Approximately one week after the fire, the fire investigator hired by Allstate performed his inspection. The Allstate investigator never removed the fan or the lamp from the apartment and only removed two smoke detectors, some fire debris, and a carpet sample. The investigator did not believe that either the fan or the lamp had been a source of igniting the loveseat. Allstate maintains that the items collected by the investigator have been preserved, although plaintiff has never requested to see them. Where Allstate was at least the third entity to inspect the apartment and at no time removed or otherwise took possession of the items plaintiff now alleges may

have caused the fire,[2] it seems unreasonable to hold Allstate liable for the spoliation of such items. Furthermore, there is no allegation that plaintiff's representatives were barred from the premises.[3] While we recognize that a tragedy had just occurred in the Teel family, it appears that someone on behalf of the family could have had equal access to the apartment to inspect and preserve any potential evidence.

With regard to a cognizable duty to preserve evidence, as previously discussed, we believe that identifying the existence and parameters of such a duty is best left to our Legislature. Other states have recognized a duty to preserve evidence where there has been a voluntary undertaking to preserve the evidence or a promise to maintain the evidence (see, e.g., *Smith v Atkinson*) or where special circumstances surrounding the relationship of a potential plaintiff with a holder of evidence exist. While plaintiff contends that a special relationship between Allstate and plaintiff was created by virtue of Allstate's undertaking to investigate the scene, plaintiff's reliance on *Thompson* to support this conclusion is misplaced. Instrumental in the *Thompson* court's determination that the insurer had a duty to preserve evidence was the fact that the insurer took exclusive possession of the potential evidence.

Plaintiff has not articulated any basis for imposing a specific duty on Allstate to preserve or maintain the

[2] Plaintiff does not assert that Allstate actually took possession of any specific item of potential evidentiary value and then destroyed it or lost it. Instead, the crux of his complaint is that Allstate, by undertaking the inspection of the premises, assumed control and should have prevented anyone else (including the owner) from entering the apartment, taking possession of any items in the apartment, or renovating or repairing the apartment.

[3] As pointed out in the dissent, Ricky Teel "was medically not competent."

evidence. There is no alleged statutory duty, no alleged promise by Allstate to maintain it, and no special relationship existing that would warrant the imposition of a duty on Allstate to preserve evidence. Absent an articulable, legally recognized duty, there can be no cause of action for the alleged tort of spoliation of evidence.

Finally, this case is similar to *American Nat'l Prop and Cas Co v Wilmoth*, 893 NE2d 1068, 1069 (Ind App, 2008). In that case, a fire broke out in a home that a family, consisting of the parents and their two children, rented from Robert and Betty Bowers. Tragically, the two children and one of the parents died as a result of the fire. While fighting the fire, firefighters threw a couch and other items onto the front yard, where they remained for approximately six weeks. The fire department concluded that the fire was accidental and was caused by an electrical space heater, and the Bowerses eventually discarded the items. The surviving parent's later-retained experts, however, believed that the fire started because of electrical arcing from an air conditioner power cord "in the area of the sofa." The parent brought an action against the landlords' insurer, alleging that it permitted spoliation of evidence concerning the origin of the fire (specifically the couch), which evidence might have been needed in an action against the Bowerses. Noting that the duty to preserve evidence has limits, the *American Nat'l* court recognized that the insurer never had possession, much less exclusive possession, of the couch and that when the Bowerses disposed of the couch, the fire department had determined that the fire was an accident caused by an electrical space heater. The Indiana Court of Appeals ultimately held that the insurer was entitled to summary disposition of the parent's claim "because it owed no duty to [the parents]. Its contractual relationship

was with its insured, [the] Bowers[es]; it never had exclusive possession of the couch . . . ." *Id.* at 1071. We find the above reasoning sound.

Affirmed.

SAAD, C.J., concurred.

DAVIS, J. (*dissenting*). I respectfully dissent. As the majority explains, our system of government allocates the development of new rights to the legislative branch. However, the majority gives inadequate recognition to the judiciary's traditional and proper role of developing new *remedies* for violations of established rights. That distinction is everything at this stage of this case.

" 'Wherever there is a valuable right and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation.' " Cooley, A Treatise on the Law of Torts, § 4, pp 7-8 (J. Lewis ed, 3d ed, 1907), quoting *Foot v Card*, 58 Conn 1, 9; 18 A 1027 (1889), citing *Lynch v Knight*, 9 HL Cas 577 (1861). This principle is not foreign in Michigan. "Where there is a person negligently injured by another, normally there is recovery therefor. *Ubi injuria, ibi remedium*." *Williams v Polgar*, 391 Mich 6, 11; 215 NW2d 149 (1974). As applied, our Supreme Court has, in the past, *upheld* a tort action for destruction of a will—which could not then be proven in probate court—because no applicable statute covered "the distinct wrong of spoliation, or provide a remedy for the varied damages which may result therefrom." *Creek v Laski*, 248 Mich 425, 430; 227 NW 817 (1929). Our Supreme Court explained that " 'whenever the law gives a right or prohibits an injury, it will also afford a remedy,' " irrespective of the existence of any precedent for any specific action necessary to obtain that remedy. *Id*., quoting 11 C J, p 4.

As noted by my colleagues, a wholly new right must be crafted by the Legislature, but a novel application thereof is within the competence and authority of the courts. " 'Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.' " Cooley, *supra* at 9 n 13, quoting *Pavesich v New England Life Ins Co*, 122 Ga 190, 193-194; 50 SE 68 (1905) (additional quotation marks and citation omitted). This general principle has been adopted by our Supreme Court from yet another of Justice COOLEY's treatises, observing that a " 'right cannot be recognized until the principle is found which supports it,' " but " 'when a right is found, a remedy must follow of course.' " *Harvey v Harvey*, 239 Mich 142, 147; 214 NW 305 (1927) (overruled in part on changed statutory grounds in *Hosko v Hosko*, 385 Mich 39, 44-45; 187 NW2d 236 [1971]), quoting 1 Cooley, Torts (3d ed), p 22.

Relevant to this case, in addition to the spoliation action upheld in *Creek*, Michigan law has long recognized that destruction of evidence by a party to a suit gives rise to a presumption that the evidence would have been harmful to that party's case. *Pitcher v Rogers' Estate*, 199 Mich 114, 121; 165 NW 813 (1917). If a party knowingly makes it impossible for the other party to prove some injury, "the law will supply the deficiency of proof thus caused by the misconduct of the party by making every reasonable intendment against him, and will give weight and force to every presumption which the nature and extent of the wrong will justify and the circumstances will permit." *Bethel v*

Linn, 63 Mich 464, 475; 30 NW 84 (1886). The maxim *omnia præsumuntur contra spoliatorem*, "said to be a favorite one of the law," was translated as "all things are presumed against a wrong-doer." *Id*. and n 1.

In *Brenner v Kolk*, 226 Mich App 149; 573 NW2d 65 (1997), the plaintiff was injured in a motor vehicle accident while driving a car borrowed from the defendants. The plaintiff stored the vehicle for a time, then had it demolished, only later to decide to commence suit, alleging that the now-demolished vehicle had been defective. This Court considered "the proper analysis for a trial court to apply when, although no discovery order has been violated, a party has failed to preserve vital evidence." *Id*. at 156. This Court agreed with federal precedent that a rebuttable presumption against the plaintiff would have been simply inadequate, and in the absence of a discovery order violation, there was no applicable court rule, either; the remedy must come from the court's "inherent powers." *Id*. at 157-160. The trial court therefore possessed the inherent power and authority to impose a sanction tailored to prevent the wrongdoer from reaping any benefit from the wrongdoing. *Id*. at 160-161.

Critically, this Court recognized that "[e]ven when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Id*. at 162, citing *Fire Ins Exch v Zenith Radio Corp*, 103 Nev 648, 651; 747 P2d 911 (1987). It was significant that in *Brenner* the plaintiff knew that she was contemplating a lawsuit, and that the actions and omissions that resulted in the vehicle's going unpreserved and the defendants' going unaware of the potentially pending suit were intentional. *Brenner*, *supra* at 162. The Court of Appeals

concluded that dismissal had been inappropriate in that case because it was too drastic without the trial court first considering whether lesser sanctions would be sufficient or, at least, placing on the record a finding that dismissal was the only way to "deny plaintiff the fruits of her misconduct." *Id*. at 164. Six years later, this Court reaffirmed the principles set forth in *Brenner* and concluded that, on the facts before it, dismissal was indeed the appropriate sanction for failing to preserve evidence. *Bloemendaal v Town & Country Sports, Inc*, 255 Mich App 207, 211-215; 659 NW2d 684 (2003).

Although the cases in Michigan have, thus far, only addressed spoliation of evidence by litigants, spoliation of evidence is nevertheless *recognized as a legally wrongful act*. In other words, there is *already* a well-established right of a litigant in Michigan to the integrity of evidence in a lawsuit. It follows that the courts are not only empowered, but obligated to provide a remedy for violations of that right.

The harm flowing from spoliation of evidence is, at a minimum, the inability to put on a full claim or full defense. In this case, the harm is much worse. Here, one person died, and another was hospitalized. Because the evidence was allegedly destroyed by an agency that had every reason to expect future litigation, plaintiff cannot proceed to the presentation of proofs on his claims. If the spoliator of evidence is already a party to the relevant litigation, it is straightforward matter for the court to impose a sanction as compensation. But if the spoliator of evidence is *not* a party, the same *way* of compensating for the spoliation is either impossible or unjust: the end result effectively punishes a party that has done nothing wrong. The reason why this Court should recognize a cause of action for spoliation of

evidence is that, where the spoliator is not already a party, there is simply *no other way* to provide a remedy for the invasion of the recognized right to that evidence.

I understand that relatively few other states have recognized a cause of action for spoliation of evidence. See, e.g., the cases enumerated in *Trevino v Ortega*, 969 SW2d 950, 952 n 3 (Tex, 1998), noting that at the time Alaska, New Mexico, and Ohio recognized causes of action for intentional spoliation of evidence; Florida and New Jersey recognized causes of action for negligent spoliation of evidence, and California recognized both. Since *Trevino* was decided, Montana has additionally recognized the need for such a cause of action where the spoliator was not a party to the impeded litigation. *Oliver v Stimson Lumber Co*, 1999 MT 328, ¶¶ 31-60; 297 Mont 336, 345-353; 993 P2d 11 (1999). I do find persuasive and significant the reasoning in *Oliver* explaining that, as my own research has shown, the jurisdictions that have rejected a spoliation cause of action have typically done so on the ground that an adequate remedy already existed and in cases where the spoliator was a party to the action. Neither of those conditions applies here, and, in any event, this Court should strive to do justice and correct legally recognized injuries even if no one else has been called upon before to do so in the same manner.

The facts in this case are particularly compelling. Even though the insurer was not a party (and likely could not have been, given that there is no suggestion that the insurer caused the fire), the insurer or its agent had every reason to anticipate future litigation based on the nature of the occurrence and the known injury and loss of life. The insurer acted without notice to the tenants of the apartment. The landlord gave the insurer access. Mrs. Teel had died in the fire, and Mr. Teel was

hospitalized with injuries from the fire. Furthermore, the insurer had every reason to know that anything under inspection in the apartment would likely be relevant evidence in impending litigation.[1] Critically, the majority's opinion makes it clear that Michigan law affords no remedy for this wrong unless the insured can pursue an independent action against the insurer.

The majority's analysis places would-be plaintiffs in an impossible situation if evidence is destroyed by a nonparty. There are, indeed, existing mechanisms to deal with the destruction of evidence by another party, but in this case, those mechanisms are unavailable because the injured party *cannot even get into court*. At most, the majority points out that in *some* instances, the injured party may be able to moderate the resulting harm to some extent; but even presuming the existence of criminal sanctions against whomever destroyed the evidence, imposition of those sanctions would not help the injured party bring a now-unavailable lawsuit. If the would-be plaintiff cannot even get into court because the evidence has been destroyed, none of the theoretical "remedies" suggested by the majority would be available. The *only* way to remedy such a harm is to permit this kind of a cause of action.

Furthermore, the majority arrives at a disturbing factual conclusion: that, notwithstanding the fact that Lillian Teel died in the fire and Ricky Teel was in the

[1] It is worth noting that, in an action like this, some kind of scienter must be present: the individual who spoils evidence "must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct." See Holmes, The Common Law (1881), p 163. Thus, a person with no reasonable basis to know that spoiled evidence *was* evidence should not be held to an essentially unknowable duty. Although this may present a proof problem, as could demonstration of damages, such difficulties are routinely dealt with by trial courts as a matter of course.

hospital[2] as a result of the fire, Ricky somehow should have won a race with the insurer of the property to be the first to send an inspector to the property or to have taken steps to preserve the scene. Even if Ricky were not hospitalized, and even if he had been informed that the insurer was sending an inspector to the property, it is inconceivable that someone who had recently suffered a serious injury and the loss of his wife in a fire should be expected to make the immediate logical deduction that the first order of business would be to preserve the premises from its insurer. At the same time, the majority analyzes the facts and concludes, at least by implication, that no spoliation actually took place. This latter conclusion, if true, would be a matter for the trier of fact, not us. In any event, I would not "hold Allstate liable for the spoliation of such items" outright, but would hold that plaintiff should have the opportunity to make a claim and present proofs thereof to the trier of fact.

I would hold that, where an individual's ability to pursue or defend an action has been impaired by a third party's willful or negligent spoliation of evidence, that individual may pursue a tort action against the spoliator. This would not create any new rights; it would merely provide a means of protecting rights already recognized to exist in the jurisprudence of this state. Although it is the role of the Legislature to craft new rights, it is the role of the courts to ensure—by crafting new remedies if necessary—that people who suffer an invasion of their rights have a meaningful way to be made whole.

I would reverse.

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[2] The inspector stated that he had been advised that Ricky "was medically not competent."

HAMED v WAYNE COUNTY

Docket No. 278017. Submitted June 3, 2009, at Detroit. Decided July 7, 2009, at 9:00 a.m.

Tara K. Hamed brought an action in the Wayne Circuit Court against Wayne County, the Wayne County Sheriff's Department, former Wayne County sheriff's deputy Reginald Johnson, and others after she was subjected by Johnson to unwelcome sexual contact during her detention at the Wayne County Jail. The court allowed the plaintiff to amend her complaint to assert a claim of sexual harassment under the Civil Rights Act, MCL 37.2103(i), and subsequently denied a motion by the county and the sheriff's department (hereafter the defendants) to strike the allegations in the amended complaint on the asserted ground that the allegations contradicted the plaintiff's prior statements at an internal affairs interview, her deposition, and Johnson's trial for criminal sexual conduct. The court, Michael F. Sapala, J., also granted partial summary disposition for the defendants with respect to the plaintiff's claim of quid pro quo sexual harassment. The plaintiff appealed, and the defendants cross-appealed.

The Court of Appeals *held*:

1. The trial court erred by ruling that the defendants could not be found liable for quid pro quo sexual harassment under a theory of respondeat superior. MCL 37.2103(i) provides that discrimination because of sex includes sexual harassment. The statute defines "sexual harassment" as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under three conditions, one of which relates to quid pro quo sexual harassment and is relevant to this case: submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing. Employers are vicariously liable for acts of quid pro quo sexual harassment committed by their employees when those employees use their supervisory authority to perpetrate the harassment. The plaintiff in this case has stated a viable claim of quid pro quo sexual harassment against the defendants by alleging that Johnson subjected her to unwanted sexual conduct under

circumstances that suggested that her treatment in jail, a public service, depended on whether she submitted to Johnson's conduct and by alleging that Johnson used his supervisory authority over her to perpetrate the harassment.

2. MCL 37.2301(b) of the Civil Right Act defines "public service" to exclude a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment. That exclusion does not apply in this case. The defendant was in the Wayne County Jail not to serve a sentence, but to await processing on a bench warrant.

3. The trial court did not abuse its discretion by allowing the plaintiff to amend her complaint and by denying the defendant's motion to strike the allegations in the amended complaint. The record does not support the defendant's assertion that the plaintiff acted in bad faith or with dilatory motives in amending the complaint to add a discrimination claim and that the defendants suffered prejudice. The allegations in the amended complaint do not contradict the plaintiff's prior statements such that the allegations should be stricken.

Reversed and remanded for further proceedings.

CIVIL RIGHTS — SEXUAL HARASSMENT — PUBLIC SERVICES — QUID PRO QUO SEXUAL HARASSMENT — COUNTY JAIL DETAINEES — RESPONDEAT SUPERIOR.

A county jail and its sheriff's department can be held liable under a theory of respondeat superior for quid pro quo sexual harassment in the provision of a public service if a sheriff's deputy with supervisory authority over jail detainees makes an unwelcome sexual advance to, requests a sexual favor of, or engages in other verbal or physical conduct or communication of a sexual nature toward or with a person detained in jail for a reason other than to serve a sentence of incarceration if the advance, request, conduct, or communication is made under circumstances suggesting that compliance by the detainee will result in favorable treatment of the detainee (MCL 37.2103[i][*ii*], 37.2301[b]).

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), for Tara K. Hamed.

Zausmer, Kaufman, August, Caldwell & Tayler, P.C. (by *Carson J. Tucker*), for Wayne County and others.

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

PER CURIAM. In this action arising from alleged violations of the Michigan Civil Rights Act (CRA), plaintiff, Tara K. Hamed, appeals as of right the trial court's April 10, 2007, order granting partial summary disposition to defendants Wayne County and Wayne County Sheriff's Department (the department) with respect to plaintiff's claims for hostile environment sexual harassment and "application of county rules, policies and procedures." Plaintiff also appeals as of right the trial court's April 26, 2007, order granting summary disposition to Wayne County and the department with respect to plaintiff's claim for quid pro quo sexual harassment. Wayne County and the department's cross-appeal, arguing that the trial court erred by denying their motion to strike allegations in plaintiff's amended complaint and by rejecting some of their alternative arguments in support of summary disposition. We reverse and remand for further proceedings.

I. FACTUAL BASIS FOR THE CAUSE OF ACTION

Plaintiff was arrested on an outstanding warrant for unpaid child support in Livingston County on or around September 7, 2001. The Livingston Circuit Court ordered her to serve 45 days in the Livingston County Jail, subject to release upon payment of $1,500. The court did not immediately order her into custody, but instead ordered her to check into an inpatient substance abuse treatment program and to report to the Livingston County Jail on September 14, 2001, to serve her term, unless she was in a drug treatment program.

On the night of September 7 to 8, 2001, Livingston County officials transferred her to the custody of Wayne County deputy sheriffs, who transported her to the Wayne County Jail pursuant to outstanding warrants

for probation violation. When the officers arrived with plaintiff at the Wayne County Jail, they realized that Deputy Reginald Johnson was alone on duty in the male registry area. Jail regulations require the attendance of a female deputy when female inmates are present. The transporting officers contacted Sergeant Kenneth Dawwish to advise him of the situation. He permitted them to leave plaintiff alone with Johnson.

After the transporting officers left, Johnson kept plaintiff with him in the command "bubble" instead of placing her in a cell. He allegedly commented to plaintiff that he could "help" her and that she would be "indebted" to him for his help. Plaintiff's complaint avers that she interpreted Johnson's comments as an offer of favorable treatment in exchange for sexual favors. Johnson placed her in Cell No. 2 without locking the door, but, for no apparent reason, switched her to Cell No. 7, which was dark and infested with cockroaches. Plaintiff allegedly begged him to let her out. Johnson asked plaintiff whether she would be a "good girl" before he released her from Cell No. 7. He then directed her into a private office that was closed to inmates and outside the range of surveillance cameras. Johnson sexually assaulted plaintiff inside the office. He partially removed her clothes and fondled her breasts and buttocks. He ejaculated on her clothing and made an unsuccessful attempt to sexually penetrate her. Afterward, a female officer, apparently unaware of the assault, escorted plaintiff to the women's area of the jail.

Plaintiff reported the incident to the department's officials, and the department later terminated Johnson's employment. He was subsequently convicted of criminal sexual conduct. Defendants do not dispute that Johnson sexually assaulted plaintiff inside the jail,

although they challenge her allegations regarding the details of the events preceding the assault.

II. RESPONDEAT SUPERIOR LIABILITY

On appeal, plaintiff first claims that the trial court erred by determining that Wayne County and the department could not be found liable under a theory of respondeat superior. We agree with plaintiff.

This Court reviews de novo a trial court's resolution of a summary disposition motion. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The reviewing court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the nonmoving party. *Id.* The motion may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Reed*, *supra* at 537. The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of material fact. *Id.*

The question raised here is whether the rule of strict vicarious liability for employers, applicable in quid pro quo sexual harassment cases in the employment dis-

crimination context, also applies to quid pro quo sexual harassment arising from the provision of public accommodations and public services when the harassment consists of a sexual assault. This is a question of first impression in Michigan.

The CRA defines discrimination based on sex to include sexual harassment. MCL 37.2103(i) defines sexual harassment as follows:

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

This definition is generally applicable to all provisions of the CRA and does not differentiate between discrimination in employment, public accommodations, or public services.

Sexual harassment that falls within subsection *i* or *ii* of this definition is known as quid pro quo harassment. Sexual harassment that falls within subsection *iii* is known as hostile environment sexual harassment. *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d

910 (2000). In order to establish a claim of quid pro quo harassment in the employment context, a plaintiff must demonstrate (1) that she was subjected to unwelcome sexual conduct or communication as described in the statute and (2) that her employer or the employer's agent used her submission to or rejection of the unwanted conduct as a factor in a decision affecting her employment. *Id.* at 310. By analogy, a plaintiff claiming quid pro quo harassment in the context of public accommodations or public services must show that the provider of those services or accommodations, or the provider's agent, used her submission to or rejection of the unwanted conduct as a factor in a decision affecting the plaintiff's access to the public services or accommodations.

Plaintiff alleged that Johnson subjected her to unwanted sexual conduct under circumstances that suggested that her treatment as an inmate would depend on whether she submitted to that conduct. She alleged that Johnson fraternized with her by talking about having a close personal relationship with her in which she would be "indebted" to him upon her release. Johnson moved her to an uncomfortable cell and asked her whether she would be a "good girl" before he released her. He did not refer her to a female deputy or the female area of the jail until after he sexually assaulted her. These allegations permit an inference that his treatment of plaintiff in the jail would depend on whether she complied with his request for sexual favors, and the complaint therefore sufficiently alleges quid pro quo sexual harassment. *Chambers*, *supra* at 310-311. While defendants challenge certain aspects of plaintiff's amended pleading, they do not argue that plaintiff failed to allege facts in support of these elements. Instead, they argue that plaintiff failed to establish their vicarious liability for Johnson's conduct.

The parties' primary dispute arises from their conflicting views regarding the application of *Champion v Nation Wide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996), and *Zsigo v Hurley Med Ctr*, 475 Mich 215; 716 NW2d 220 (2006). In *Champion* our Supreme Court held that a supervisor's sexual assault of a subordinate employee is a form of quid pro quo sexual harassment and that the employer is liable for the supervisor's conduct where the assault is "accomplished through the use of the supervisor's managerial powers." *Champion*, *supra* at 704. The Court clarified its holding by stating that it did not "extend *unlimited* liability to employers whose supervisors rape subordinates." *Id.* at 713 (emphasis added). The Court reiterated that it held employers strictly liable only "where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim." *Id.* at 714. The Court concluded, "[W]e adopt the nearly unanimous view that imposes strict liability on employers for quid pro quo sexual harassment committed by supervisory personnel." *Id*. at 712.

On appeal, defendants contend that *Champion* does not control this matter because the decision in *Champion* was subsequently weakened by the Supreme Court's decision in *Zsigo*. In concluding that the supervisor in *Champion* could be held vicariously liable, the *Champion* Court cited 1 Restatement Agency, 2d, § 219(2)(d). *Champion*, *supra* at 712 n 6. In *Zsigo*, the Supreme Court explained that *Champion*'s reference to 1 Restatement Agency, 2d, § 219(2)(d), did not qualify as an adoption of that provision. The Supreme Court stated:

> The reference to "Restatement Agency, 2d, § 219(2)(d)" in footnote six of *Champion* may have contributed to appellate court confusion about whether this Court adopted the aided by the agency exception to employer nonliability under the doctrine of respondeat superior. We

> now clarify that the reference to § 219(2)(d) in *Champion*, *supra*, was made only in passing and on the basis of the very distinct facts of that civil rights matter. We did not, by that reference, adopt § 219(2)(d). The Court of Appeals erred in finding that this Court affirmatively adopted the "aided by the agency relationship" exception to liability under the respondeat superior doctrine set forth in Restatement Agency, 2d, § 219(2). [*Zsigo*, *supra* at 223-224.]

The Court noted that, according to *Champion*, "even in the context of quid pro quo sexual harassment, the sexual assault must be 'accomplished through the use of the supervisor's managerial powers.' " *Id*. at 224 n 19, quoting *Champion*, *supra* at 704.

The *Zsigo* Court, while rejecting the application of agency principles from 1 Restatement Agency, 2d, § 219(2)(d), continued to find that strict liability applies to employers whose managers misuse their managerial authority to commit sexual assaults on subordinates. This Court is asked to determine if this strict liability analysis of *Champion* is applicable to the circumstances presented in this case.

Defendants misread *Zsigo* as overruling *Champion*. The *Zsigo* Court clearly articulated that it was not overruling *Champion* because *Champion*'s holding was not based on 1 Restatement Agency, 2d, § 219(2)(d). The Court in *Zsigo* explained:

> The dissent contends that the *Champion* Court implicitly adopted § 219(2)(d) and did not limit its application. We note, to the contrary, that the *Champion* holding was carefully crafted to apply only in the context of quid pro quo sexual harassment under MCL 37.2103(i). Specifically, the Court stated:
>
> "In this case, we must decide whether an employer is liable for quid pro quo sexual harassment under *MCL 37.2103(i)* . . . where one of its employed supervisors rapes a subordinate and thereby causes her constructive dis-

> charge. We hold that an employer is liable for such rapes where they are accomplished through the use of the supervisor's managerial powers. We believe that this result best effectuates the remedial purpose of the Civil Rights Act, MCL *37.2101* et seq. . . . ." [*Champion*, *supra* at 704-705 (emphasis added).]
>
> Thus, even in the context of quid pro quo sexual harassment, the sexual assault must be "accomplished through the use of the supervisor's managerial powers." *Id.* This limited exception clearly does not apply to the facts in this case. [*Zsigo*, *supra* at 224 n 19.]

In other words, the offender in quid pro quo sexual harassment does not merely use his employment or agency as an opportunity to exploit the victim sexually (as did the nursing assistant in *Zsigo*); rather, his authority over the subordinate is the tool that is instrumental and integral in his commission of the sexual exploitation. The nursing assistant in *Zsigo* did not use authority delegated by his employer to render the plaintiff vulnerable to his abusive conduct. He merely seized the opportunity that arose when he was alone with a restrained patient who was not capable of acting in her own best interests. In contrast, the supervisor in *Champion* used his authority as a means of committing the assault. He selected the plaintiff to be the only security guard with him in the hospital and offered to use his authority to her advantage if she granted him sexual favors. When she refused, he used his managerial authority to direct her to an isolated area where he could lock her in a room, cut her off from outside help, and force himself on her. *Champion*, *supra* at 706-707. The *Zsigo* Court recognized a distinction between seizing an opportunity to commit unlawful conduct and using one's authority over a subordinate as a means of subjecting that subordinate to abusive and unlawful conduct. *Zsigo*, *supra* at 224 n 19.

In the instant case, Johnson did not merely use his position to find opportunities to commit a sexual assault against a female inmate; he used his authority as a turnkey to exploit her sexually. As the sole deputy in charge of plaintiff, Johnson had both physical power and legal authority over her. He alone had the authority to decide when she would be referred to the female area of the prison. He could use his authority to decide which cell plaintiff would be placed in and to direct her around the jail. Plaintiff's amended complaint pleads facts sufficient to support a claim that Johnson's managerial authority was an instrumental and integral tool in perpetrating the sexual assault.

Defendants also argue that *Champion* applies only to employment discrimination actions arising under article 2 of the CRA. This argument is clearly inconsistent with the plain language of MCL 37.2103(i), in which each of the three categories of sexual harassment is expressly defined as applying to "employment, public accommodations or public services, education, or housing." As this Court held in *Diamond v Witherspoon*, 265 Mich App 673, 685; 696 NW2d 770 (2005), "the plain language of the CRA includes situations outside the realm of employment where an individual's access to public accommodations or public services is affected." As an inmate in the Wayne County Jail, plaintiff was entitled to the public service of being treated in accordance with her constitutional rights and with jail regulations. Johnson's exploitation of her status deprived her of this service.

Defendants also argue that public accommodations and public services claims are distinguishable from employment discrimination claims because the public accommodations or public services provisions of the CRA, "unlike the employment discrimination provi-

sions, make no reference whatsoever to agents or agency principles." Defendants do not cite any provisions of the CRA, but they presumably refer to the definition of "employer" in MCL 37.2201(a) as "a person who has 1 or more employees, and includes an agent of that person." In contrast, MCL 37.2301 defines "place of public accommodation" and "public service" as follows:

> (a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. . . .
>
> (b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.

The absence of any reference to agents in these definitions cannot reasonably be construed as an omission of agency principles from the public accommodations and public services provisions of the CRA. The definition of "employer" in MCL 37.2201 reflects that an employer might be an individual person or an entity such as a corporation, whereas the definitions of "place of public accommodation" and "public service" in MCL 37.2301 reflect that such entities are not individuals. Indeed, if the absence of a reference to agents in MCL 37.2301 were construed as an omission of agency principles from the entire article, only individual defendants could be held liable for discrimination in the provision of public services or accom-

modations, thus exempting the vast majority of providers who can only function through the actions of individuals.

We therefore conclude that plaintiff established a valid claim for quid pro quo sexual harassment under article 3 of the CRA and that the trial court erred by granting summary disposition for defendants on the ground that Johnson acted outside the scope of his authority when he sexually assaulted plaintiff. Employers are vicariously liable for acts of quid pro quo sexual harassment committed by their employees when those employees use their supervisory authority to perpetrate the harassment. Evidence was presented that Johnson used his authority as a sheriff's deputy to exploit plaintiff's vulnerability, thereby subjecting defendants to vicarious liability for his conduct.

III. PUBLIC SERVICES UNDER THE CRA

Defendants assert that the trial court erred when it concluded that plaintiff was not an "individual serving a sentence of imprisonment" and, therefore, was not excluded from the scope of the CRA. We disagree.

Defendants argue that the Wayne County Jail does not provide a public service within the meaning of article 3 of the CRA. Defendants argue that the statutory definition of "public service" within the CRA expressly excludes claims of CRA violations by individuals serving a sentence of imprisonment where those claims arise from actions and decisions regarding their incarceration. MCL 37.2301(b) defines "public service" as follows:

> "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, *except that public*

> *service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment*. [Emphasis added.]

The Legislature added the emphasized clause in 1999, effective March 10, 2000. See 1999 PA 202.

Defendants contend that plaintiff was serving a sentence of imprisonment in a county correctional facility and, therefore, is not entitled to raise a claim of discrimination in the provision of a public service with regard to her treatment in the jail. Defendants emphasize that plaintiff was brought to the Wayne County Jail after the Livingston Circuit Court ordered her to serve 45 days in jail. The trial court rejected this argument because plaintiff was not brought to the Wayne County Jail to serve a sentence, but for processing in matters unrelated to the Livingston County matter. On cross-appeal, defendants argue that the trial court erred in its interpretation and application of MCL 37.2301(b).

This issue raises a question of statutory interpretation. When faced with questions of statutory interpretation, courts must discern and give effect to the Legislature's intent as expressed in the words of the statute. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Where the language is unambiguous, it must be presumed that the Legislature intended the meaning clearly expressed, and no further judicial interpretation is permitted. *Id.* Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary definition for those meanings. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

The exception in MCL 37.2301(b) does not encompass all legally incarcerated persons. Rather, it encompasses only those who are "serving a sentence of im-

prisonment" in a state or county correctional facility. Defendants concede that the exclusionary phrase in MCL 37.2301(b) does not exclude all individuals legally detained in a correctional facility. In oral arguments, they further conceded that pretrial detainees are not within the ambit of MCL 37.2301(b). Although defendants implicitly argued in the trial court that the statute provides a blanket exception for correctional facilities, they have abandoned that argument on appeal. Defendants concede that plaintiff would not come within the exclusionary clause of MCL 37.2301(b) if the sole reason for her incarceration in the Wayne County Jail was to await disposition of alleged probation violation charges. Defendants cite *People v Monasterski*, 105 Mich App 645; 307 NW2d 394 (1981), in which this Court held that the time constraints of the Interstate Agreement on Detainers Act, MCL 780.601 *et seq.*, were not applicable to the defendant there because the statute applied only where a defendant was serving a term of imprisonment in the sending state. The Court concluded that the defendant was not serving a term of imprisonment in the sending state because he was in custody in that state pending prosecution on criminal charges. *Id.* at 652-653.

Defendants instead argue that plaintiff here was an individual serving a sentence of imprisonment within the meaning of the statute because she was serving a sentence imposed by the Livingston Circuit Court. We reject this argument. The Livingston Circuit Court order is a standard court form entitled "Support Enforcement Order." The trial court checked the paragraph that reads:

> The payer shall be committed to 45* days in the county jail, to be released upon payment of $1,500 to the county sheriff, friend of the court, or clerk of the court as appro-

> priate. The sum shall be applied as directed by the friend of the court.

The numbers and the asterisk were handwritten on blank lines. The asterisk refers to a handwritten paragraph that provides:

> Pltf to be released today & to check into inpt treatment program by 9-14-01 at 5:00 pm/if not in program Pltf to report to Jail on 9-14 at 5:00 to serve 45 days w/$1,500 release payment.

Although defendants characterized this matter as a "probation violation" at the summary disposition hearing, it is clear from the order that plaintiff was ordered to serve jail time for failing to comply with a child support order. Consequently, we conclude that the order is properly classified as a penalty for contempt of court. See MCL 552.625, MCL 552.631, MCL 552.633, and MCL 600.1715.

The record does not support a finding that plaintiff was serving a term of imprisonment when she was in the Wayne County Jail. She had been found guilty of not complying with a valid court order, and the court fashioned a penalty that, even if it characterized as a term of imprisonment, was not set to begin until September 14, 2001, seven days after she was sexually assaulted while awaiting disposition on a Wayne County bench warrant. Plaintiff was not transported to the Wayne County Jail to serve the 45-day term, but for processing in unrelated matters. In addition to being prospective, the imprisonment portion of the Livingston order was conditional. She was not scheduled to begin the 45-day sentence unless she had not paid the $1,500 and had not entered an inpatient drug treatment program before September 14, 2001. There is no indication in the record that the Livingston Circuit Court would credit her time served in Wayne County toward the 45-day term. The Livingston County order

does not reference the Wayne County Jail at all. Apparently a check of the Law Enforcement Information Network was done on plaintiff, and an outstanding Wayne County warrant was discovered. Subsequently, plaintiff was surrendered to Wayne County officers for disposition of that warrant. Under these circumstances, we cannot conclude that plaintiff was serving a sentence of imprisonment in the Wayne County Jail. Consequently, the exclusion of correctional facilities from the definition of public services with respect to actions and decisions regarding an individual serving a sentence of imprisonment does not apply to plaintiff.

We note that defendants also argue that the trial court's interpretation of MCL 37.2301(b) is inconsistent with the Legislature's intent. When the Legislature amended MCL 37.2301(b), it chose to do so by designating a particular class of incarcerated persons, those serving sentences of imprisonment, as persons excluded from the protections of the CRA with respect to actions and decisions regarding their incarceration. The 1999 amendment represents the first legal demarcation between incarcerated persons serving sentences of imprisonment and other categories of detainees for purposes of determining whether a correctional facility is a public service under MCL 37.2301(b).

Under these circumstances, there is no basis for interpreting the 1999 amendment as having any meaning other than that expressed by the plain and unambiguous statutory language: "public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment." Attempting to broaden the scope of the limitation by extending it to incarcerated persons who are not serving sentences of imprisonment would violate the clear rules of statutory

construction prohibiting deviations from clear and unambiguous statutory language. *Pohutski*, *supra* at 683. Broadening the scope of the restriction would also violate the well-established maxim *expressio unius est exclusio alterius*, meaning that the "express mention in a statute of one thing implies the exclusion of other similar things." *Ross v Blue Care Network of Michigan*, 480 Mich 153, 184; 747 NW2d 828 (2008). "So well established is this maxim that it can be assumed that legislators are fully aware the courts will utilize it when construing their words." *Id.* The Legislature included one class of incarcerated persons in its restriction, thereby leaving out other classes of incarcerated persons. The fact that the Legislature's amendment was prompted by a judicial interpretation that was deemed contrary to legislative intent does not provide any basis for deviating from the established principles of applying clear and unambiguous language as written, or from inferring that the Legislature intended any meaning different from that expressed in the statutory language.

In sum, the trial court did not err by concluding that the Wayne County Jail was providing a public service to plaintiff because her action alleging a civil rights violation did not arise from defendants' actions or decisions regarding an individual serving a sentence of imprisonment. Plaintiff was not serving a sentence of imprisonment in the Wayne County Jail. Although she had recently been sentenced to serve 45 days in the Livingston County Jail, and although she was conditionally required to report to the Livingston County Jail to begin that sentence the following week, she was not detained in the Wayne County Jail in relation to the Livingston County court order. Further, because we determine that the trial court did not err in its holding regarding the public service component of the CRA, we need not address whether the trial court erred in its

holding regarding the public accommodations component of that statute. The trial court was precluded from granting defendants summary disposition regardless of whether the Wayne County Jail was a place of public accommodation.

IV. ALLEGATIONS IN THE AMENDED COMPLAINT

Finally, defendants allege that the trial court erred by allowing plaintiff to amend her complaint and by denying defendants' motion to strike the allegations that appeared in the amended complaint. We disagree.

This Court reviews a trial court's decision to grant or deny a motion to amend a complaint for abuse of discretion. *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 314; 760 NW2d 699 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Id.* This issue also involves the trial court's denial of defendants' motion to strike pleadings in plaintiff's verified amended complaint. This Court reviews a trial court's decision regarding a motion to strike a pleading pursuant to MCR 2.115 for abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003).

Defendants argue that plaintiff acted in bad faith and with dilatory motives in belatedly amending her claim to add a claim of discrimination arising under the CRA. Defendants contend that plaintiff materially changed her allegations, and deviated from her previous sworn testimony, in order to manufacture a claim of sexual harassment. This argument mirrors the arguments that defendants raised in their motion to strike the allegations in plaintiff's verified amended complaint.[1] Defendants argued in that motion that various allega-

[1] MCR 2.115(B) provides:

tions in plaintiff's amended verified complaint should have been stricken because they contradicted plaintiff's prior sworn testimony in her deposition, at Johnson's criminal trial, and in her interview with an internal affairs investigator. These primarily relate to statements that Johnson made to plaintiff, plaintiff's response to Johnson's statements, and whether Johnson locked the door of Cell No. 7.

Defendants' argument that an amended pleading should be disallowed or stricken on the basis of prior inconsistent testimony derives from principles regarding summary disposition under MCR 2.116(C)(10). These principles preclude a party or witness from creating a factual dispute in avoidance of summary disposition by submitting an affidavit that contradicts his or her own sworn testimony or prior conduct. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). By analogy, a plaintiff should not be permitted to amend a complaint to include allegations that contradict prior sworn testimony given in that litigation if the prior statements would have led to summary disposition of the plaintiff's claim. Inconsistency and contradiction are treated very differently. Inconsistency leads to impeachment, while contradiction can lead to dismissal.

We do not believe that the allegations in plaintiff's amended verified complaint directly contradicted her prior sworn statements. We accept defendants' assertion that some of plaintiff's many statements are incon-

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> On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules.

This rule does not provide a basis for striking allegations because of prior inconsistent testimony.

sistent with other statements she has made. These inconsistencies, while fodder for cross-examination, do not rise to the level of contradiction. In each of her numerous accounts plaintiff asserts that she was highly emotional, that she was under the direct supervision and control of Johnson, and that Johnson had nonconsensual sexual contact with her. Defendants emphasize that plaintiff alleged in her complaint that she cried and begged Johnson to let her out of Cell No. 7 and not return her there. In contrast, plaintiff stated in her deposition and in her internal affairs interview that she felt "freaked out," "grossed out," or squeamish because of the cockroaches in the cell. Although plaintiff's statements vary with respect to the degree of her distress and emotionality, she gave no sworn testimony that she was calm. Similarly, plaintiff's varying accounts of Johnson's statements do not detract from the essence of her allegations of quid pro quo harassment. In her complaint, plaintiff alleged that Johnson asked her if she would be a "good girl" and told her that she would be "indebted" to him for favorable treatment. Previously, plaintiff stated that she could not recall exactly what he said. She also previously testified that Johnson advised her to contact him instead of returning to her rehabilitation program, because he would "clean [her] up and take care of [her]." These differences are not substantial, because all of Johnson's alleged statements imply that he had power to act to plaintiff's advantage or disadvantage, thus giving her an incentive to please him. Finally, plaintiff's inconsistencies regarding whether the cell door was locked are not material, because she could not reasonably have believed that she was free to leave the cell without Johnson's permission even if the door was unlocked. None of plaintiff's prior statements, including her statement that she could not remember everything Johnson said, contradicted this basic account.

Defendants made a weak argument regarding plaintiff's dilatory motives and prejudice accruing to the defense. The inconsistencies between plaintiff's amended verified complaint and her prior statements do not reveal an attempt to resuscitate a futile claim for quid pro quo sexual harassment. The record offers little support for any finding that the basis for the amendment was delay. Nor is there record evidence of prejudice to defendants. To the extent that the amended complaint requires additional discovery, that request can be made to the trial court.

V. CONCLUSION

We hold that the trial court erred by determining that defendants could not be held vicariously liable for Johnson's actions. Consequently, because plaintiff was not an inmate serving a sentence of imprisonment at Wayne County Jail, the sexual assault operated to deprive her of a public service. Furthermore, the trial court did not abuse its discretion by allowing plaintiff to amend her complaint. Therefore, defendants were improperly granted summary disposition.

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

PEOPLE v LLOYD

Docket No. 280373. Submitted January 6, 2009, at Detroit. Decided July 9, 2009, at 9:00 a.m.

James A. Lloyd, Jr., pleaded guilty in the Wayne Circuit Court of possession of a firearm during the commission of a felony and was sentenced to two years of imprisonment. The defendant moved for a correction of the presentence investigation report (PSIR) to strike a reference to other pending charges against him and for a review or dismissal of an order at sentencing that he pay court costs and the cost of his court-appointed attorney. The court, Daniel P. Ryan, J., denied the motions. The defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. The trial court erred by denying the defendant's motion to correct the PSIR without determining the validity of the defendant's challenge. A challenge to the validity of information contained in a PSIR may be raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals. MCL 769.34(10); MCR 6.429(C). A defendant challenging the accuracy of PSIR information bears the burden of going forward with an effective challenge. If an effective challenge is raised, the prosecution must prove by a preponderance of the evidence that the facts are as the prosecution asserts. If a court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made part of the record, the PSIR shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the Department of Corrections. In this case, the trial court's order denying the motion to correct the PSIR must be vacated and the case remanded for a determination of the validity of the defendant's challenge.

2. The trial court had authority under MCL 769.1k and 769.34(6) to order the defendant to pay court costs and the cost of his court-appointed attorney even though the felony-firearm statute, MCL 750.227b, makes no provision for such costs.

3. The trial court complied with the requirement set by *People v Dunbar*, 264 Mich App 240 (2004), to provide some indication

that it reviewed the financial and employment information in the PSIR or provide a general statement of consideration of ability to pay before ordering the defendant to pay the cost of his court-appointed attorney.

Affirmed in part, vacated in part, and remanded.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Carolyn M. Breen*, Assistant Prosecuting Attorney, for the people.

Charles P. Reisman for the defendant.

Before: FORT HOOD, P.J., and WILDER and BORRELLO, JJ.

PER CURIAM. Defendant, James A. Lloyd, Jr., appeals by delayed leave granted the trial court's order denying his motion for correction of the presentence investigation report (PSIR) and for dismissal or review of costs and attorney fees. We affirm in part, vacate in part, and remand for proceedings consistent with this opinion.

Defendant pleaded guilty of possession of a firearm during the commission of a felony, MCL 750.227b, and two other felony counts were dismissed as a result of a plea agreement. Defendant was sentenced to two years' imprisonment. At sentencing, he did not object to information contained in the PSIR that indicated there were other charges pending against him. After sentencing, defendant filed a motion to contest the assertion that charges were pending against him under an alias. Additionally, for the first time after sentencing, counsel for defendant challenged the order requiring payment of $600 in court costs and $600 in attorney fees. The sentencing court denied the motion for correction of the PSIR because the challenge had not been raised before sentencing. The court also concluded that the order of court costs was authorized by statute. Lastly, the sen-

tencing court denied defendant's motion to reduce or eliminate the attorney fees, concluding that, although any income earned by defendant would be limited and derived from prison work, defendant nonetheless had the ability to work.

Defendant first alleges that the trial court erred by denying his request for correction of the PSIR. We vacate this order and remand to allow the trial court to address the merits of defendant's challenge.

At a sentencing hearing, either party may challenge the accuracy or relevancy of information contained in the PSIR. MCL 771.14(6). If necessary, the court may adjourn the sentencing to allow the parties to prepare a challenge or respond to a challenge. *Id*. There is a presumption that the information contained in the PSIR is accurate unless the defendant raises an effective challenge. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). When a defendant challenges the accuracy of the information, the defendant bears the burden of going forward with an effective challenge. See *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987). If an effective challenge has been raised, the prosecution must prove by a preponderance of the evidence that the facts are as the prosecution asserts. *Id*. Once a challenge to the accuracy of the PSIR has been alleged, the trial court is required to respond. *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008). "If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections." MCL 771.14(6). The Department of Corrections relies on the information

contained in the PSIR to make critical decisions regarding a defendant's status. *Uphaus*, *supra* at 182. Therefore, it is imperative that the PSIR accurately reflect the sentencing judge's determination regarding the information contained in the report. *Id*.

In the present case, defendant alleged that the reference to other pending charges under an alias was erroneous. The trial court did not evaluate the merits of the information presented, but denied the motion on procedural grounds because the challenge had not been raised at sentencing.[1] A challenge to the validity of information contained in the PSIR may be raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10). Accordingly, we vacate the trial court's order denying the motion and remand for a determination of the validity of defendant's challenge.

Next, defendant submits that he cannot be held accountable for court costs because the statute governing felony-firearm, MCL 750.227b, does not contain any express provision addressing costs. We disagree. The application and interpretation of statutes present questions of law that are reviewed de novo. *People v Keller*,

[1] The trial court concluded that defendant's claim was without merit because the challenge to the PSIR was not raised at sentencing. However, MCR 6.429(C) was amended to provide that a challenge to the information relied upon in determining a sentence may be raised "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." This amendment, effective June 29, 2004, was designed to conform the court rule to MCL 769.34(10). See *People v Kimble*, 470 Mich 305, 314 n 7; 684 NW2d 669 (2004). In the present case, defendant did not expressly entitle the motion as one seeking resentencing, but to preclude review based on the label given the motion would exalt form over substance. See *People v Fleming*, 185 Mich App 270, 273-274; 460 NW2d 602 (1990). Furthermore, defendant explained that the motion was not entitled resentencing because the penalty for felony-firearm is a fixed two-year sentence.

479 Mich 467, 473-474; 739 NW2d 505 (2007). The reviewing court's function is to resolve disputed interpretations of statutory language by effectuating the legislative intent. *People v Metamora Water Service, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). "When the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written." *Id*.

"A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute." *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). The felony-firearm statute, MCL 750.227b, does not authorize a trial court to order a defendant to pay court costs. However, in 2005 PA 316, the Legislature enacted MCL 769.1k, effective January 1, 2006, which governs the imposition of the fines, costs, or assessments and provides, in pertinent part:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine.
>
> (*ii*) Any cost in addition to the minimum state cost set forth in subdivision (a).
>
> (*iii*) The expenses of providing legal assistance to the defendant.

Additionally, MCL 769.34(6) addresses the sentencing guidelines and duties of the court when sentencing and further provides for an order of court costs: "As part of the sentence, the court may also order the defendant to

pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law." Thus, the plain language of these statutes reveals that, as part of the sentence, costs may be ordered, MCL 769.34(6), after a defendant is found guilty following a plea or trial, MCL 769.1k. *Metamora*, *supra*.

Defendant acknowledges these statutory provisions, but contends that they merely explain how an assessment is collected and delineate that a sentence may include fines and costs. Defendant asserts, "One has to look to the law under which the defendant is convicted of to see if it authorizes costs." Again, we disagree. It is presumed that the Legislature acts with knowledge of existing law. *People v Schultz*, 435 Mich 517, 543-544; 460 NW2d 505 (1990); *People v Harrison*, 194 Mich 363, 369; 160 NW 623 (1916) ("It is a general rule of construction that lawmaking bodies are presumed to know of and legislate in harmony with existing laws, and the language of every enactment is, so far as possible, to be construed consistent with other laws which it does not in plain and unequivocal terms modify or repeal.").

In *People v Jones*, 182 Mich App 125, 126; 451 NW2d 525 (1989), the defendant pleaded guilty of possession with intent to deliver marijuana, MCL 333.7401(2)(c), of possession of LSD, MCL 333.7403(2)(c), and of being an habitual offender, MCL 769.10, and in exchange for the plea, an additional drug charge was dismissed. The trial court sentenced the defendant to a term of imprisonment, but also assessed costs of $1,500 against the defendant on the conviction of possession with intent to deliver marijuana. *Id*. On appeal, the defendant alleged that the trial court was without authority to impose costs. This Court agreed, holding that sentencing au-

thority was confined to the limits permitted by the statute under which it acts. *Id*. at 127. In so ruling, this Court noted that "the prosecutor does not cite any court rule, nor any other authority for that matter, which would permit a trial court to impose *as part of a criminal defendant's sentence* terms different than, or in excess of, those prescribed by the statute under which he or she is convicted." *Id*. (emphasis added). This Court reaffirmed its adherence to this rule of law in *People v Krieger*, 202 Mich App 245, 247; 507 NW2d 749 (1993), by stating that "[the trial court's] sentencing authority is confined to the limits permitted by the statute under which it acts."

However, the Legislature, presumably aware of the rule of law requiring statutory authority to award costs in criminal cases, enacted MCL 769.1k and MCL 769.34(6)[2] and expressly granted authority to a sentencing court to order a defendant to pay court costs.[3] The plain language of these statutes evidences that trial

[2] Defendant acknowledges the statutory authority of MCL 769.1k and MCL 769.34(6), but asserts that the case of *People v Antolovich*, 207 Mich App 714; 525 NW2d 513 (1994), sets forth what these fines and costs are. However, the plain language of these statutes did not codify the *Antolovich* holding, but rather changed the law. Furthermore, MCL 769.1k was enacted over 12 years after the *Antolovich* decision. Thus, the assertion that the *Antolovich* decision would govern over a plain-language analysis of MCL 769.1k is simply without merit.

[3] Defendant also contends that the Legislature was required to amend the felony-firearm statute to delineate the amount of court costs. It is the function of the Legislature, not the courts, to change the criminal statutes. See *People v Guthrie*, 97 Mich App 226, 237-238; 293 NW2d 775 (1980). A legislative act conferring power on a court is not constitutionally deficient because it does not delineate standards to guide the court in discharging its judicial duty. *People v Peters*, 397 Mich 360, 368; 244 NW2d 898 (1976). The Legislature maintains policy-making control. *People v Turmon*, 417 Mich 638, 647; 340 NW2d 620 (1983). Therefore, the Legislature has the authority to enact a general cost provision and was not required to amend each individual criminal statute to provide for an order of court costs.

courts have the authority to award, costs, fines, and assessments. *Metamora*, *supra*.[4]

Lastly, defendant contends that he did not receive meaningful notice of the order requiring payment of attorney fees and was not given a chance to be heard. The consideration of a defendant's ability to pay does not require a specific formality, but merely requires the court to provide some indication that it reviewed the financial and employment sections of the defendant's PSIR or provide a general statement of consideration regarding the ability to pay. *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). A review of the record reveals that the sentencing court complied with the *Dunbar* decision. Therefore, this challenge is without merit.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

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[4] Defendant also asserts that the order allowing for court costs constitutes a violation of due process of law, citing *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). However, the *Dunbar* decision acknowledged that an order requiring a defendant to reimburse attorney fees without regard to ability to pay infringed the indigent defendant's fundamental right to counsel. *Id*. at 252-253, citing *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984). The ordered payment of court costs does not implicate any fundamental rights.

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the numerosity requirement for class certification; such plaintiff must have suffered an actual injury and show that the class members also suffered the injury for which the lawsuit seeks redress; the numerosity requirement is not met if only a portion of the class would have viable claims (MCR 3.501[A][1][a]). *Duskin v Dep't of Human Services*, 284 Mich App 400.

5. A plaintiff seeking class certification must be able to demonstrate that all members of the class had a common injury that could be demonstrated with generalized proof rather than evidence unique to each class member; the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof to meet the commonality requirement for class certification (MCR 3.501[A][1][b]). *Duskin v Dep't of Human Services*, 284 Mich App 400.
6. The claims of representative plaintiffs in a class action and unnamed class members are not typical where the defendant may have genuine defenses with regard to the claims of some plaintiffs that are not applicable to unnamed class members. *Duskin v Dep't of Human Services*, 284 Mich App 400.
7. A two-step inquiry is applicable in determining whether representative parties can fairly and adequately represent the interests of the class as a whole: first, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action and, second, the members of the advanced class must not have antagonistic or conflicting interests (MCR 3.501[A][1][d]). *Duskin v Dep't of Human Services*, 284 Mich App 400.

CONSOLIDATION OF ACTIONS

8. Where two cases involve claims that could not have been brought as separate counts in a single complaint, but are nevertheless consolidated for administrative convenience, the consolidated cases are not merged and both cases retain their separate identities; a circuit court case and a Court of Claims case that are joined for trial are not merged and both cases retain their separate identities, and the time to appeal each case must be determined by

CONSTITUTIONAL LAW

See, also, CRIMINAL LAW 1
GOVERNMENTAL IMMUNITY 1, 2

ADMINISTRATIVE LAW

1. *Hughes v Almena Twp*, 284 Mich App 50.

DUE PROCESS

2. *Kenefick v City of Battle Creek*, 284 Mich App 653.

EFFECTIVE ASSISTANCE OF COUNSEL

3. Criminal defendants do not sustain harm, for purposes of justiciability analysis and the constitutional right to the effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing deficiencies in the system; there needs to be an instance of deficient performance or inadequate representation for harm to occur. *Duncan v State of Michigan*, 284 Mich App 246.

EQUAL PROTECTION

4. State and federal constitutional guarantees of equal protection mandate that persons in similar circumstances be treated similarly; however, unless the dissimilar treatment alleged impinges on the exercise of a fundamental right or targets such protected classifications as those based on race or gender, the challenged regulatory scheme will survive equal protection analysis if it is related to a legitimate governmental interest. *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453.

5. *Kenefick v City of Battle Creek*, 284 Mich App 653.

RIGHT TO COUNSEL

6. The indigent are constitutionally entitled to be represented by counsel when prosecuted for a crime by the state; the state has an obligation to provide such defendants counsel when they lack the financial means to hire an attorney (US Const, Ams VI and XIV; Const 1963, art 1, § 20). *Duncan v State of Michigan*, 284 Mich App 246.

7. The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration; a critical stage is any stage where the absence of counsel may harm a defendant's right to a fair trial and applies to preliminary

rent jurisdiction over claims seeking declaratory relief against the state where there are no contract or tort claims asserted (MCL 600.6419, 600.6419a). *Duncan v State of Michigan*, 284 Mich App 246.

COVERAGE EXCLUSION FOR OWNERS OF UNINSURED MOTOR VEHICLES—*See*

INSURANCE 9

COVERAGE UNDER INSURANCE POLICIES—*See*

INSURANCE 1

CRIMINAL LAW

CONSTITUTIONAL LAW

1. The Sixth Amendment right to confrontation articulated in Crawford v Washington, 541 US 36 (2004), which held that the Sixth Amendment generally forbids the introduction of out-of-court testimonial statements in a criminal prosecution, does not apply to probation revocation hearings; a due process standard applies in determining the admissibility of statements made by out-of-court declarants at probation revocation hearings regardless of whether the statements are testimonial or nontestimonial in nature. *People v Breeding*, 284 Mich App 471.

DEFENSES

2. The common-law defense of duress is available to a defendant charged with being a felon in possession of a firearm; the defense requires the defendant to offer evidence from which a jury could conclude (1) that there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct caused that fear in the defendant's mind, (3) the fear or duress operated on the defendant's mind at the time of the defendant's act, and (4) the defendant committed the act to avoid the threatened harm; a defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another person from death or serious physical harm; the threatening conduct must be present, imminent, and pending, and the threat must have arisen without the negligence or fault of the defendant; the

NEGLIGENCE

See, also, INSURANCE 1

EQUINE ACTIVITY LIABILITY ACT

1. The Equine Activity Liability Act provides for nonliability by an equine activity sponsor, an equine professional, or another person for injury or death of a participant in an equine activity, or for property damage, resulting from an inherent risk of an equine activity; an exception to that grant of immunity concerning negligent acts or omissions applies only where liability is claimed for an act or omission involving something other than inherently risky equine activity (MCL 691.1663, 691.1665[d]). *Beattie v Mickalich*, 284 Mich App 564.

MEDICAL MALPRACTICE

2. The statute that sets forth the requirements with which a notice of intent to bring a medical malpractice action must comply does not require multiple statements or state that the plaintiff must explicitly line up particularized standards of care with individual defendants (MCL 600.2912b[4]). *Esselman v Garden City Hosp*, 284 Mich App 209.

3. Although all the information required to be contained in a notice of intent to bring a medical malpractice action must be specifically identified in an ascertainable manner within the notice, it need not be set forth in any particular method or format; the statements need not be any more specific than would be required of allegations in a complaint or other pleading and must provide a good-faith statement that gives each defendant fair notice of what is being claimed against the defendant. *Esselman v Garden City Hosp*, 284 Mich App 209.

4. A notice of intent to bring a medical malpractice action involving multiple defendants must provide each defendant enough information to discern the general nature of what theory he, she, or it may expect to defend against; each defendant must be reasonably able to

ZONING

See, also, CONSTITUTIONAL LAW 1
EQUITY 1

TOWNSHIPS

1. *Hughes v Almena Twp*, 284 Mich App 50.

VARIANCES

2. "Substantial property right," as used in a zoning ordinance that requires a zoning board of appeals faced with a variance application to consider whether the variance is necessary for the preservation and enjoyment of a substantial property right similar to that possessed for other properties in the same zoning district, includes the right to possess, use, and enjoy the valuable and important aspects of one's land, but subject to land use regulations that advance governmental interests. *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453.