MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

May 13, 2008 to July 24, 2008

DANILO ANSELMO
REPORTER OF DECISIONS

VOLUME 279
FIRST EDITION

WEST®
A Thomson Reuters business

2009

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COURT OF APPEALS CASES

GUARDIAN ENVIRONMENTAL SERVICES, INC
v BUREAU OF CONSTRUCTION CODES AND FIRE SAFETY

Docket No. 276564. Submitted May 7, 2008, at Detroit. Decided May 13, 2008, at 9:00 a.m. Leave to appeal sought.

Guardian Environmental Services, Inc., a licensed mechanical contractor, brought an action in the Wayne Circuit Court against the Bureau of Construction Codes and Fire Safety, seeking a declaratory judgment that it qualified under MCL 338.887(3)(i) of the Electrical Administrative Act for an exception to the general requirement that all electrical wiring must be performed by a licensed electrical contractor. The work for which the plaintiff claimed the exception involved replacing an existing pneumatic energy management system with a direct digital control energy management system. The court, William J. Giovan, J., granted the requested declaratory judgment and enjoined the defendant from prohibiting the plaintiff from performing the work. The defendant appealed.

The Court of Appeals *held*:

1. MCL 338.887(3)(i) provides that a mechanical contractor may perform maintenance, service, repair, replacement, alteration, modification, reconstruction, or upgrading of control wiring circuits and electrical component parts within existing mechanical systems. The statute also states that energy management systems are an example of electrical component parts or control wiring circuits.

2. The circuit court correctly interpreted MCL 338.887(3)(i) when deciding that the plaintiff can, pursuant to the statute, replace the pneumatic control energy management system of an existing mechanical system with a direct digital control energy management system.

3. Because the defendant's interpretation of MCL 338.887(3)(i) was contrary to the intent of the Legislature, as expressed in the unambiguous language of the statute itself, a cogent reason existed for the circuit court not to defer to the defendant's erroneous interpretation. Accordingly, the circuit court did not violate the constitutional doctrine of the separation

of governmental powers and did not exceed its authority in rejecting the defendant's erroneous interpretation.

Affirmed.

LICENSES — ELECTRICAL ADMINISTRATIVE ACT — MECHANICAL CONTRACTORS.

A mechanical contractor, under a statutory exception to the general rule that all electrical wiring must be performed by a licensed electrical contractor, may replace the pneumatic control energy management system of an existing mechanical system with a direct digital control energy management system (MCL 338.887[3][i]).

Dickinson Wright PLLC (by *Frank R. Mamat, Joseph W. DeLave*, and *Charles G. Goedert*) for the plaintiff.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Richard P. Gartner* and *Susan Przekop-Shaw*, Assistant Attorneys General, for the defendant.

Before: OWENS, P.J., and METER and SCHUETTE, JJ.

PER CURIAM. Defendant, the Bureau of Construction Codes and Fire Safety (the Bureau),[1] appeals by leave granted from the trial court's final order granting declaratory and injunctive relief to plaintiff Guardian Environmental Services, Inc. We affirm.

This declaratory judgment action arose from a dispute between plaintiff, a licensed mechanical contractor, and the Bureau, which was charged with the enforcement of the Electrical Administrative Act (EAA), MCL 338.881 *et seq*.[2] In August 2004, plaintiff

[1] The Bureau of Construction Codes and Fire Safety is part of the Michigan Department of Labor and Economic Growth.

[2] The question presented by the parties on appeal is one of statutory construction, the parties did not present extensive evidence regarding the nature, purpose, and makeup of the energy management systems that plaintiff planned to install, and the trial court did not engage in

contracted with the Allen Park School District to perform renovation work in five of the district's school buildings. Specifically, plaintiff was hired to replace existing pneumatic energy management systems with direct digital control energy management systems in four of the school buildings and to replace a hybrid energy management system with a direct digital control energy management system in the fifth school building. Replacement of the existing energy management systems required plaintiff to install low-voltage wiring and communications network cabling. Plaintiff intended to perform this work itself instead of subcontracting the work to a licensed electrical contractor.[3] Plaintiff maintained that because it was a licensed mechanical contractor and because the work involved the "replacement" and "upgrading" of energy management systems that control existing mechanical systems, MCL 338.887(3)(i) permitted it to perform this work without an electrical contractor's license.

On March 17, 2005, William Fox, a state inspector for Wayne County, ordered plaintiff to cease installing low-voltage wiring at the Allen Park project. Concerned that Fox's action would affect its other projects, including work that it was performing for the Warren Consolidated School District, plaintiff contacted Virgil Monroe, chief of the Bureau's electrical division. Monroe determined that MCL 338.887(3)(i) did not allow plaintiff to install low-voltage wiring and forwarded to Chuck Goerlitz, plaintiff's manager, a May 1998 bulletin authored by Tom Kriegish, the former chief of the

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significant fact-finding. Therefore, we accept the allegations in the complaint as true for purposes of presenting pertinent background facts in this opinion.

[3] Plaintiff subcontracted the high-voltage wiring associated with the project to a licensed electrical contractor.

electrical division, which set forth the Bureau's position regarding what work was permissible without an electrical contractor's license pursuant to MCL 338.887(3)(i).[4]

Goerlitz requested an appeal of Monroe's decision that plaintiff was not allowed to install the low-voltage electrical wiring. He also noted that the term "existing mechanical systems" required clarification and requested a statement of the Bureau's position on the meaning of the phrase. In response to Goerlitz's communications, Monroe confirmed that the May 1998 article set forth the Bureau's "complete and final position" on work that may be performed without an electrical contractor's license pursuant to MCL 338.887(3)(i). With respect to the meaning of the phrase "existing mechanical systems," Monroe explained:

> Existing mechanical systems are not defined in the Act. According to Webster's New World Dictionary, Third College Edition, "Existent" is defined as 1 — having existence or being; existing, 2 — existing now; present; immediate. Using this definition, the term "existing mechanical systems" would be systems existing at the time of service, repair, replacement, etc. 7(3)(i) would cover these installations. It would not include systems removed then changed to a different type of system, such as, the replacement of an

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[4] The May 1998 article provides in relevant part:

> Recently, several individuals have asked bureau staff whether a mechanical contractor or authorized master plumber may perform work relating to electrical installations, without an electrical license.
>
> * * *
>
> Existing pneumatic control systems may be modified, upgraded, or replaced by a mechanical contractor. However, when an existing pneumatic system is abandoned, and replaced with a new electrical control system, it must be installed by a licensed electrical contractor.

> existing pneumatic controlled system with a new electrical controlled system. In this instance a licensed electrical contractor would be required.
>
> This is the final position of the Electrical Division.

Plaintiff requested that the Electrical Administrative Board overrule Monroe's decision. However, at its October 7, 2005, meeting, the Electrical Administrative Board unanimously upheld Monroe's interpretation of MCL 338.887(3)(i). Plaintiff then petitioned the Michigan Department of Labor and Economic Growth for declaratory relief, which the department denied.

On February 27, 2006, plaintiff filed an action seeking a declaration from the trial court that an exception to the requirement that all electrical wiring be performed by an entity holding an electrical contractor's license set forth under MCL 338.887(3)(i) applied to the work plaintiff sought to perform, namely, the replacement of an existing pneumatic energy management system with a direct digital control energy management system. The trial court granted plaintiff's request for declaratory and injunctive relief on August 7, 2006.[5]

On appeal, the Bureau argues that the trial court's interpretation of MCL 338.887(3)(i) was contrary to the plain language of the statute. We disagree. We review de novo both questions of law arising from a declaratory judgment action and questions of statutory interpreta-

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[5] The trial court's order stated, in pertinent part:

> [P]ursuant to the exemption provided in MCL 338.887(3)(i), [plaintiff], a licensed mechanical contractor, may install low voltage electrical wiring when replacing, modifying or upgrading energy management systems within existing mechanical systems, including, but not limited to, the replacement of a pneumatic control energy management system with a direct digital control energy management system.

tion. *Green Oak Twp v Munzel*, 255 Mich App 235, 238; 661 NW2d 243 (2003); *Dessart v Burak*, 252 Mich App 490, 494; 652 NW2d 669 (2002), aff'd 470 Mich 37 (2004). We review the trial court's decision to grant or deny declaratory relief for an abuse of discretion. *Gauthier v Alpena Co Prosecutor*, 267 Mich App 167, 170; 703 NW2d 818 (2005). In the absence of fraud, findings of fact made or adopted by an administrative agency are conclusive on appeal if they are supported by competent evidence on the record; however, the decision of an administrative agency may be reversed if the agency's decision was based on erroneous legal reasoning or if the agency operated within the wrong legal framework. *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003).

In interpreting a statute, the fundamental task of a court is to "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 plain and ordinary meaning of the statutory language is clear, further judicial construction is unwarranted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). See also *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Judicial construction of a statute is proper only where reasonable minds could differ about the meaning of the statute. *Adrian School Dist v Michigan Pub School Employees' Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998).

We accord to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning or is defined in the statute. *Casco Twp v Secretary of State*, 472 Mich 566, 593 n 44; 701 NW2d 102 (2005); MCL 8.3a. In ascertaining the plain and ordinary meaning of undefined statutory terms, we

may rely on dictionary definitions. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

MCL 338.887 provides, in pertinent part:

> (1) Except as otherwise provided in this act or in subsection (3), a person, firm, or corporation shall not engage in the business of electrical contracting unless the person, firm, or corporation has received from the board or from the appropriate municipality an electrical contractor's license.
>
> (2) Except as otherwise provided in this act or in subsection (3), a person, other than a person licensed under this act and employed by and working under the direction of a holder of an electrical contractor's license, shall not in any manner undertake to execute any electrical wiring.
>
> (3) A license under this act is not required in the execution of the following classes of work:
>
> * * *
>
> (i) Work performed by mechanical contractors licensed in classifications listed in section 6(3)(a), (b), (d), (e), and (f) of the Forbes mechanical contractors act, 1984 PA 192, MCL 338.976, plumbing contractors licensed under 1929 PA 266, MCL 338.901 to 338.917, and employees of persons licensed under those acts while performing maintenance, service, repair, replacement, alteration, modification, reconstruction, or upgrading of control wiring circuits and electrical component parts within existing mechanical systems defined in the mechanical and plumbing codes provided for in the Stille-DeRossett-Hale single state construction code act, 1972 PA 230, MCL 125.1501 to 125.1531, including, but not limited to, energy management systems, relays and controls on boilers, water heaters, furnaces, air conditioning compressors and condensers, fan controls, thermostats and sensors, and all interconnecting wiring associated with the mechanical systems in buildings which are on the load side of the unit

> disconnect, which is located on or immediately adjacent to the equipment, except for life safety systems wiring.

Here, each party argues that the plain language of the statute supports its interpretation of MCL 338.887(3)(i). Plaintiff contends that under the plain meaning of MCL 338.887(3)(i), a mechanical contractor may replace an energy management system within an existing mechanical system. The Bureau, however, asserts that the statutory exception set forth under MCL 338.887(3)(i) unambiguously allows mechanical contractors only to replace wiring and other electrical components within existing energy management systems.

In making this argument, the Bureau contends that the statute would allow a mechanical contractor to replace a pneumatic energy management system with another pneumatic energy management system. The Bureau also contends that the statutory exception provided under MCL 338.887(3)(i) allows plaintiff to remove a direct digital control energy management system, but it does not permit plaintiff to replace an existing pneumatic energy management system with a direct digital control energy management system. However, the Bureau's proposed interpretation of the term "replacement" imposes the additional, extra-statutory requirement that the substituted system must be of like kind.

Instead, we conclude that the Legislature intended to allow plaintiff to replace an existing pneumatic or hybrid energy management system with a direct digital control energy management system within an existing mechanical system. *Random House Webster's College Dictionary* (1997) defines "replacement" as "the act of replacing" and as "a person or thing that replaces another," and defines "replace" as "to assume the

function of; substitute for: *to replace gas lights with electric lights*." Especially in light of the example of "replace" included in this definition, we conclude that the proper interpretation of "replacement" as used in MCL 338.887(3)(i) includes the abandonment or removal of a pre-existing defective or obsolete pneumatic energy management system and the installation of a new direct digital control system for an existing mechanical system.

The statutory exception included in MCL 338.887(3)(i) provides that a mechanical contractor may "perform[] maintenance, service, repair, replacement, alteration, modification, reconstruction, or upgrading of control wiring circuits and electrical component parts within existing mechanical systems . . . ." According to the statute, an example of the "electrical component parts" or "control wiring circuits" "include[es], but [is] not limited to, energy management systems . . . ." MCL 338.887(3)(i). Thus, an energy management system is one example of an electrical component part of a pre-existing mechanical system that a licensed mechanical contractor is permitted to replace. The Legislature's choice of the term "replacement" reflects its intent that an electrical contractor's license is not required for the removal of a pneumatic energy management system and the installation of a direct digital control energy management system in a pre-existing mechanical system. We conclude that the trial court's decision that the exception set forth under MCL 338.887(3)(i) allowed plaintiff to perform the disputed work was based on a correct, plain-language interpretation of the statute.

Next, the Bureau argues that the trial court exceeded its authority when it improperly declined to defer to the Bureau's interpretation of the statute. We disagree. An administrative agency's interpretation of a statute it is charged with enforcing is entitled to great weight and

we will overrule the interpretation only if it is clearly erroneous. *Schmaltz*, *supra* at 471. However, if an administrative agency's interpretation of a statute is contrary to the statute's plain meaning, the intent of the Legislature as expressed in the statutory language must prevail.[6] *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 49-50; 703 NW2d 822 (2005).

The Bureau asserts that the interpretation of a statute by an agency charged with enforcing the statute should not be overruled in the absence of "cogent reasons." See *Oakland Schools Bd of Ed v Superintendent of Pub Instruction*, 401 Mich 37, 41; 257 NW2d 73 (1977), quoting *United States v Moore*, 95 US 760, 763; 24 L Ed 588 (1877). However, an agency's interpretation of a statute contrary to the plain language of the statute constitutes a compelling, "cogent" reason for overruling the agency's clearly erroneous interpretation. See *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 157 n 8; 596 NW2d 126 (1999) ("An agency

[6] Our Supreme Court has granted leave to appeal in another case involving the issues of: "(1) what legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation if a statute within its purview; [and] (2) whether the Court of Appeals erred in deferring to the Michigan Public Service Commission's interpretation of MCL 484.2502(1)(a) . . . ." *SBC Michigan v Pub Service Comm*, 480 Mich 977 (2007). See also *In re Complaint of Rovas Against Ameritech Michigan*, 276 Mich App 55; 740 NW2d 523 (2007). Our Supreme Court's decision in *SBC Michigan* could alter the common law regarding the deference that must be given to agency interpretations. However, under existing law, deference to an administrative agency's interpretation of a statute is proper only where reasonable minds could differ regarding the meaning of the statute, i.e., the statutory language is ambiguous. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 49-50; 703 NW2d 822 (2005). Further, pursuant to the language of this Court in *By Lo Oil Co*, if an administrative agency's interpretation of a statute is contrary to the plain meaning of the statute, the agency's interpretation is clearly erroneous. *Id.* at 49-50. Where, as here, the statutory language is unambiguous, the statute must be applied as written. *Pohutski*, *supra* at 683.

interpretation cannot overcome the plain meaning of a statute."). Mindful that one branch of government may not exercise powers conferred to other branches of government, Const 1963, art 3, § 2, the Bureau's contention that the trial court's failure to defer to its construction of MCL 338.887(3)(i) violated the "separation of powers" doctrine ignores the significant concepts of checks and balances and judicial review. The judiciary alone is the final authority on questions of statutory interpretation and must overrule administrative interpretations that are contrary to clear legislative intent. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 491 n 23; 697 NW2d 871 (2005). See also *Chevron USA Inc v NRDC, Inc*, 467 US 837, 843 n 9; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

Because the Bureau's construction of MCL 338.887(3)(i) was contrary to the intent of the Legislature, as expressed in the unambiguous language of the statute itself, a cogent reason existed for the trial court not to defer to the Bureau's erroneous interpretation. Accordingly, the trial court neither violated the "separation of powers" doctrine nor exceeded its authority in rejecting the Bureau's invitation to defer to its construction of MCL 338.887(3)(i).

Affirmed.

In re B AND J
In re E AND A

Docket Nos. 279461, 279462, and 279585. Submitted April 9, 2008, at Lansing. Decided May 13, 2008, at 9:05 a.m.

The Department of Human Services filed a petition in the Macomb Circuit Court, Family Division, seeking to terminate the parental rights of Hugo R. Diaz to his two minor children, B and J, and of Rosita Orozco-Miranda to her two minor children, E and A, on the basis that Hugo had allegedly sexually abused one of Rosita's children and Rosita had failed to protect her children from Hugo's alleged abuse. The petition did not, at that time, seek to terminate the parental rights of Floricelda Orozco, Hugo's wife and Rosita's mother, to B and J, although all four children were being held by the petitioner in protective custody. The court, following a trial, determined that the petitioner had failed to meet its burden of establishing by clear and convincing evidence a statutory ground for termination of Hugo's and Rosita's parental rights. The court, however, concluded that there was sufficient evidence to support taking jurisdiction over the children. The court ordered the petitioner to prepare a parent-agency agreement, allow supervised visitation, and provide services toward reunification. The petitioner made meager attempts to provide services and, in fact, reported Hugo, Floricelda, and Rosita, who were Guatemalan citizens illegally residing in this country, to federal officials, who eventually deported the respondents to Guatemala. The petitioner thereafter filed supplemental petitions, seeking to terminate all three respondents' parental rights to the children, three of whom were born in the United States and are therefore United States citizens. Following a dispositional hearing, the court, John C. Foster, J., determined that the respondents had not deserted the children and that the children would not be harmed if returned to their parents. The court, however, did conclude that the requirements for termination of parental rights under MCL 712A.19b(3)(g) had been established because the respondents, who had been deported, were unable to provide proper care and custody for the children. The court further held that the children were in need of permanency and that the termination of the respondents'

parental rights was not contrary to the children's best interests. All three respondents appealed from the court's orders, and their appeals were consolidated.

The Court of Appeals *held*:

1. The petitioner was not entitled to seek termination of the respondents' parental rights under MCL 712A.19b(3)(g) because the petitioner, itself, intentionally set out to create the very grounds for termination required by the statute. A state may not, consistent with due process, create the conditions that strip an individual of an interest protected under the Due Process Clause.

2. The trial court erred in holding that termination of the respondent's parental rights was not clearly contrary to the children's best interests.

3. The trial court erred by continuing to exercise jurisdiction over the children because doing so constituted an improper, de facto termination of the respondents' parental rights. This de facto termination, which was based on less than clear and convincing evidence of parental unfitness, violated the respondents' substantive due process rights. The orders terminating parental rights and assuming jurisdiction over the children must be reversed.

Reversed.

1. PARENT AND CHILD — CONSTITUTIONAL LAW — TERMINATION OF PARENTAL RIGHTS.

A state may not, consistent with due process of law, create the conditions that will strip an individual of an interest protected under the Due Process Clause; a state may not set out with the overt purpose of virtually assuring the creation of the grounds for the termination of a person's parental rights.

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — BURDEN OF PROOF.

A state, in order to comply with the guarantees of substantive due process, must prove parental unfitness by at least clear and convincing evidence before terminating parental rights; a court, however, may exercise jurisdiction over a child when the court determines by a preponderance of the evidence that the child comes within the statutory requirements for the court to take jurisdiction (MCL 712A.2; MCL 712A.19b[3]).

Eric J. Smith, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Attorney, and *Betsy B. Mellos*, Assistant Prosecuting Attorney, for the Department of Human Services.

Maryanne Spryszak-Hanna for Hugo R. Diaz.

Larry O. Smith for Floricelda Orozco.

Janet L Szpond for Rosita Orozco-Miranda.

Before: JANSEN, P.J., and DONOFRIO and DAVIS, JJ.

JANSEN, P.J. In these consolidated appeals, respondents Hugo Rene Diaz, also known as Hugo Rene Dias (Hugo), and Floricelda Orozco (Floricelda) appeal by right the family court's order terminating their parental rights to minor children B and J under MCL 712A.19b(3)(g). Respondent Rosita Orozco-Miranda (Rosita) also appeals by right the family court's order terminating her parental rights to minor children E and A under MCL 712A.19b(3)(g). We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Hugo and Floricelda were married and are the parents of B and J. Rosita—Floricelda's adult daughter—lived with Hugo and Floricelda with her two children, E and A. Hugo, Floricelda, and Rosita are Guatemalan citizens who were illegally residing in this country. B was born in Guatemala and is therefore also a Guatemalan citizen. The other three children were born in the United States. All speak Spanish as their primary language.

In 2005, petitioner Department of Human Services investigated an allegation that Hugo had sexually abused Rosita's children. However, the allegation was never substantiated. The following year, petitioner again investigated alleged abuse by Hugo. The children were removed from the home in July 2006. Petitioner filed petitions seeking to terminate Hugo's and Rosita's parental rights. The petitions alleged that Hugo had

sexually abused one of Rosita's children and that Rosita had failed to protect her children from Hugo's abuse. Petitioner did not seek at that time to terminate Floricelda's parental rights, but it did seek to continue the children in protective custody.

Preliminary hearings were held and the petitions were authorized. The family court continued temporary protective custody of the children.

A combined trial concerning the parental rights of Hugo and Rosita was held in late 2006. On the final day of trial, the family court found that petitioner had failed to meet its burden of establishing statutory grounds for termination of Hugo's and Rosita's parental rights by clear and convincing evidence. However, the court concluded that there was sufficient evidence to take jurisdiction over the children.[1] The court ordered petitioner to prepare a parent-agency agreement, to allow supervised visitation, and to provide services toward reunification.

Petitioner made meager attempts to provide services and made little effort to locate Spanish-speaking assistance for respondents. Petitioner also failed to produce the children for at least two scheduled visits with respondents following the court's order. Before these issues could be remedied, however, respondents were detained by United States Immigration and Customs Enforcement (ICE) officials[2] and deported to Guatemala. It is evident from the record that petitioner, itself, reported respondents to ICE.

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[1] It is not clear exactly why the court took jurisdiction over the children. The court's adjudicative ruling on the final day of trial could not be transcribed because of technological difficulties. Nonetheless, it is clear that the court took jurisdiction over all four children, and an order to this effect is contained in the lower-court file.

[2] The investigative and law-enforcement functions of the former Immigration and Naturalization Service (INS) have now been transferred to ICE.

At a subsequent hearing in January 2007, the family court observed that such conduct by petitioner was in bad faith and "morally repugnant." The court observed that petitioner had been charged with providing services toward reunification, that respondents had fully and actively participated in the proceedings, and that respondents had attempted to visit the children despite petitioner's failures. Nonetheless, the court noted that respondents were in the country illegally and therefore subject to deportation.

A permanency planning hearing was held in March 2007, at which time petitioner noted that it would again seek to terminate parental rights. Thereafter, petitioner filed supplemental petitions seeking termination of parental rights with respect to all three respondents under MCL 712A.19b(3)(a)(*ii*), (g), and (j).

In late June 2007, a new dispositional hearing was held concerning the parental rights of all three respondents. A caseworker from Lutheran Social Services testified that she had called the Guatemalan embassy and had performed an Internet search for possible services in Guatemala. But she testified that she had been unable to find any services for respondents in their native country. The caseworker also testified that she was unable to locate respondents, and testified that respondents had made no attempt to contact petitioner. It was suggested at the hearing that B—the oldest of the four children—might know how to contact respondents in Guatemala. Incredibly, however, the caseworker testified that she had never asked B how to contact respondents because she had not wanted to upset him by asking him about his family. The caseworker confirmed that she believed that it had been petitioner's intention all along to have respondents deported.

At the conclusion of the hearing, the family court noted that the parent-agency agreement had been unrealistic and that petitioner should have attempted to provide greater services for the family. The court found that the requirements for termination under § 19b(3)(a)(*ii*) had not been established with respect to any of the respondents, reasoning that respondents' involuntary deportation was not a desertion of the children. The court also found that the requirements for termination under § 19b(3)(j) had not been established with respect to any of the respondents because petitioner had failed to prove by clear and convincing evidence that the children would likely be harmed if returned to their parents. However, the court concluded that the requirements for termination under § 19b(3)(g) had been sufficiently established with respect to all three respondents because respondents, who had been deported, were unable to provide proper care and custody for the children. The court further concluded that the children were in need of permanency and that termination of parental rights was not clearly contrary to the their best interests.

II. STANDARDS OF REVIEW

We review a family court's decision to terminate parental rights for clear error. MCR 3.977(J); *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). This standard controls our review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). We review de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

III. TERMINATION OF PARENTAL RIGHTS

There is a strong public policy favoring the preservation of the family because the family unit is deeply rooted in our nation's history and tradition. *Moore v East Cleveland*, 431 US 494, 503; 97 S Ct 1932; 52 L Ed 2d 531 (1977). Natural parents have a fundamental liberty interest in the care, custody, and management of their children, and the state must therefore meet a high burden before terminating an individual's parental rights. See *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982). To terminate parental rights, the family court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Fried*, 266 Mich App 535, 540-541; 702 NW2d 192 (2005). The petitioner has the burden of proving the statutory ground. *In re Trejo*, *supra* at 350. "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *Id*. at 354; see also MCL 712A.19b(5).

A. STATUTORY GROUNDS FOR TERMINATION

The family court found that petitioner had failed to establish the statutory grounds for termination contained in §§ 19b(3)(a)(*ii*)[3] and (j) by clear and convinc-

[3] We agree with the family court that respondents' involuntary deportation to Guatemala did not constitute desertion of the children for

ing evidence. Nonetheless, the court found that petitioner had proven the grounds for termination under § 19b(3)(g) by clear and convincing evidence. MCL 712A.19b(3)(g) provides that the family court may terminate a respondent's parental rights if it finds by clear and convincing evidence that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." The court concluded that because all three respondents had been deported to Guatemala, they were necessarily unable to provide proper care and custody for the children, and would not be able to do so within a reasonable time.

Petitioner was not entitled to seek termination of respondents' parental rights under § 19b(3)(g) in this case because petitioner, itself, intentionally set out to create that very ground for termination. Relying on *Logan v Zimmerman Brush Co*, 455 US 422, 424; 102 S Ct 1148; 71 L Ed 2d 265 (1982), the Connecticut Supreme Court has held that "a state may not, consistent with due process of law, create the conditions that will strip an individual of an interest protected under the due process clause." *In re Valerie D*, 223 Conn 492, 534; 613 A2d 748 (1992). Said another way, the state may not set out with the overt purpose of "virtually assur[ing] the creation of a ground for termination of parental rights." See *In re Shane P*, 58 Conn App 234, 241; 753 A2d 409 (2000). We conclude that when the

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purposes of MCL 712A.19b(3)(a)(*ii*). The dictionary definitions of the words "desert" and "desertion" indicate that desertion is an intentional or willful act. See *Moore v Prestige Painting*, 277 Mich App 437, 448-449; 745 NW2d 816 (2007). Because respondents were involuntarily deported, the family court properly concluded that they had not "deserted" their children within the meaning of § 19b(3)(a)(*ii*).

state deliberately takes action with the purpose of "virtually assur[ing] the creation of a ground for termination of parental rights," and then proceeds to seek termination on that very ground, the state violates the due process rights of the parent.[4]

B. BEST INTERESTS OF THE CHILDREN

Even assuming arguendo that the family court properly relied on § 19b(3)(g) to terminate respondents' parental rights, we conclude that the family court erred by holding that termination was not clearly contrary to the children's best interests. The record establishes that respondents were bonded with their children and that they did not want to leave the children behind in the United States at the time of their deportation. Nonetheless, because the family court continued to exercise jurisdiction over the children, respondents were apparently never given the opportunity to take the children with them to Guatemala.[5]

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[4] We do not in any way diminish the seriousness of respondents' illegal presence in this country or question petitioner's right—and possibly even obligation—to report respondents' illegal status to ICE. Regardless of petitioner's right or obligation to report illegal aliens, however, petitioner still must act fairly. We note for future cases that, even assuming petitioner has the right and power to report illegal aliens to ICE, it must not do so arbitrarily and capriciously. " '[T]he touchstone of due process is protection of the individual against arbitrary action of government,' " *Sacramento Co v Lewis*, 523 US 833, 845; 118 S Ct 1708; 140 L Ed 2d 1043 (1998), quoting *Wolff v McDonnell*, 418 US 539, 558; 94 S Ct 2963; 41 L Ed 2d 935 (1974), and the substantive due-process guarantee protects individuals against government power that is arbitrarily and oppressively exercised, *Daniels v Williams*, 474 US 327, 331-332; 106 S Ct 662; 88 L Ed 2d 662 (1986).

[5] When an alien-parent's child is a United States citizen and the child is below the age of discretion, and if the alien-parent is deported, it is the parent's decision whether to take the minor child along or to leave the child in this country. *Liu v United States Dep't of Justice*, 13 F3d 1175, 1177 (CA 8, 1994); see also *Newton v Immigration & Naturalization*

In support of its contention that termination was not contrary to the children's best interests, petitioner relies on the fact that respondents did not contact it following entry of the family court's order terminating parental rights. We find petitioner's reliance on this specific fact to be disingenuous and without merit. As confirmed at oral argument before this Court, respondents did contact their own counsel, and it is clear that respondents had an ongoing interest in the lives of their children. It is also perfectly understandable that respondents did not contact petitioner under the unique circumstances of this case. As noted above, petitioner was either unwilling or unable to communicate with respondents in Spanish, and petitioner on at least two occasions had failed to produce the children for visitation with respondents. In light of the particular facts of this case, respondents' reluctance to communicate with petitioner did not constitute evidence that termination was not contrary to the best interests of the children.

Also in support of the contention that termination was not contrary to the children's best interests, petitioner relies on the allegations of abuse against Hugo. However, as the family court found, petitioner failed to prove by clear and convincing evidence that any abuse had occurred or that the children would be harmed if returned to their parents' custody. It is true that the family court continued to exercise jurisdiction over the children. But as counsel indicated at oral argument before this Court, this continued exercise of jurisdiction was based on a finding of "environmental neglect," consisting of inadequate sleeping accommodations for the children in respondents' home.

Service, 736 F2d 336, 343 (CA 6, 1984); and see *Ayala-Flores v Immigration & Naturalization Service*, 662 F2d 444, 446 (CA 6, 1981).

Finally, petitioner suggests that termination was not contrary to the children's best interests because the children will have a better and more prosperous life in the United States than in Guatemala. Although petitioner may truly believe that the children would be better served by remaining in the United States, petitioner's subjective belief in this regard is certainly not evidence that termination was not contrary to the children's best interests. J, E, and A were born in the United States, are United States citizens, and may well decide to return to this country upon reaching the age of discretion. *Newton*, *supra* at 343; *Ayala-Flores*, *supra* at 446. However, such future decisions are for J, E, and A to make—not for petitioner or the courts.

The evidence in this case showed that termination of respondents' parental rights would harm the children and that the children would thereby lose all ties to their native language and culture. The family court erred by finding that termination of respondents' parental rights was not clearly contrary to the children's best interests. *In re Trejo*, *supra* at 354; see also MCL 712A.19b(5).

IV. JURISDICTION OVER THE CHILDREN

Lastly, we conclude that the family court erred by continuing to exercise jurisdiction over the children because doing so constituted an improper, de facto termination of respondents' parental rights. The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997). The government may not infringe a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. *Id*. at

721; *Reno v Flores*, 507 US 292, 302; 113 S Ct 1439; 123 L Ed 2d 1 (1993). It is undisputed that parents have a fundamental liberty interest in the companionship, care, custody, and management of their children. *Santosky*, *supra* at 753-754; *In re JK*, *supra* at 210. This fundamental liberty interest pertains to citizens and aliens alike because "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v Davis*, 533 US 678, 693; 121 S Ct 2491; 150 L Ed 2d 653 (2001).

In order to comply with the guarantees of substantive due process, the state must prove parental unfitness by "at least clear and convincing evidence" before terminating a respondent's parental rights. *Santosky*, *supra* at 748. Michigan law fully comports with this requirement, requiring proof of at least one statutory ground "by clear and convincing evidence" before the family court may terminate a respondent's parental rights. MCL 712A.19b(3). In contrast, for the family court to exercise jurisdiction over a child, "the factfinder must determine *by a preponderance of the evidence* that the child comes within the statutory requirements of MCL 712A.2 . . . ." *In re S R*, 229 Mich App 310, 314; 581 NW2d 291 (1998) (emphasis added); see also MCR 3.972(C)(1). Therefore, a lower standard applies to the acquisition and exercise of jurisdiction than to the termination of parental rights.

If the family court had not continued to exercise jurisdiction over the children in this case, respondents would have been able to take the children with them to Guatemala, *Liu*, *supra* at 1177, and there would have arisen no cause for termination of parental rights. However, the court's continued exercise of jurisdiction made it all but certain that respondents would be

permanently separated from their children and that respondents would become unable to provide proper care and custody. In other words, the family court's continued exercise of jurisdiction—based only on a preponderance of the evidence—constituted a de facto termination of respondents' parental rights. This de facto termination of parental rights, which was based on less than clear and convincing evidence of parental unfitness, violated respondents' substantive due process rights. *Santosky*, *supra* at 748. Under the unique and particular facts of this case, we conclude that the family court's continued exercise of jurisdiction over the children was unconstitutional. *Id*. The family court's order assuming jurisdiction over the minor children is therefore reversed.

V. CONCLUSION

The termination of respondents' parental rights is reversed, and the family court's order assuming jurisdiction over the minor children is also reversed. Petitioner shall take immediate steps to reunite the minor children with respondents in Guatemala. MCR 7.216(A)(7); MCR 7.216(A)(9). Petitioner shall fully cooperate with the family court and with respondents' counsel to achieve this objective. MCR 7.216(A)(9). This opinion shall take immediate effect. MCR 7.215(F)(2).

Reversed. We do not retain jurisdiction.

COLDSPRINGS TOWNSHIP
v KALKASKA COUNTY ZONING BOARD OF APPEALS

Docket No. 268753. Submitted September 6, 2007, at Lansing. Decided May 13, 2008, at 9:10 a.m.

Coldsprings Township petitioned the Kalkaska Circuit Court for judicial review of a decision by the Kalkaska County Zoning Board of Appeals that granted certain zoning variances to Lee and Gerald Gancer. The court, Dennis F. Murphy, J., dismissed the petition, ruling that the petitioner did not have standing to assert the claims on behalf of its residents affected by the zoning decision. The township appealed by leave granted, and the Gancers intervened as appellees.

The Court of Appeals *held*:

A municipality lacks standing to sue on behalf of residents affected by a zoning decision and would only have standing if it can show that it itself suffered a concrete, particularized injury. A political subdivision whose power is derivative and not sovereign, cannot sue under the doctrine of *parens patriae* on behalf of its residents. In order to have standing, the petitioner must show that it, and not merely certain residents, is detrimentally affected by the respondent's approval of the zoning variances in a manner distinct from the interest of the general public. The petitioner presented no evidence that it suffered any specific, concrete, or particularized injury in fact.

Affirmed.

1. MUNICIPAL CORPORATIONS — ACTIONS — STANDING.

A municipality lacks standing to sue on behalf of residents that are affected by a zoning decision; a municipality may have standing to contest a zoning decision if it can show that it has suffered a concrete, particularized injury distinct from the interest of the general public.

2. MUNICIPAL CORPORATIONS — ACTIONS — *PARENS PATRIAE* DOCTRINE.

A political subdivision whose power is derivative and not sovereign cannot sue as *parens patriae* to assert the alleged interest of its citizens.

Michael T. Edwards for the petitioner.

Cummings, McClorey, Davis & Acho, P.L.C. (by *Haider A. Kazim*), for the respondent.

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

ZAHRA, J. Petitioner Coldsprings Township appeals by leave granted the dismissal for lack of standing of petitioner's appeal of the grant of zoning variances by respondent Kalkaska County Zoning Board of Appeals to intervening appellees Lee and Gerald Gancer. We must determine whether a municipality has standing to assert legal claims on behalf of residents affected by a zoning decision. We hold that a municipality lacks standing to sue on behalf of those residents and only has standing if the municipality can show that it suffered a concrete, particularized injury. Petitioner failed to assert such an injury. We affirm.

I. BASIC FACTS

The Gancers own property in Coldsprings Township that fronts Manistee Lake. On December 6, 2004, they filed a variance application with respondent, seeking to construct a new home with an attached garage on the property with a 25-foot setback from the lake (later determined by respondent to be a 30-foot setback) and to build a second garage on the property. The applicable zoning ordinance required a 60-foot setback and prohibited a second garage of less than 1,200 square feet on the property. At the time the application was filed, there was a cottage on the subject property with a 28-foot setback, which they planned to raze. The existing cottage was 24 by 44 feet, and the proposed new home was to be 46 by 52 feet with an attached garage of 24 by 24 feet.

Respondent held a public hearing on January 5, 2005, at which the variance requests were considered. Respondent asserts, and petitioner does not dispute, that notice of the hearing was mailed to all property owners who owned property within 300 feet of the subject property as required by the zoning ordinance. Since Gerald Gancer is the chairman of the Kalkaska County Zoning Board of Appeals, he recused himself from the board when his variance requests were heard. During the hearing, a letter from Mike Neubecker, petitioner's supervisor was read. The letter stated that the variances should be denied because a new construction or a remodeling project that is less than 60 feet from the lake would contribute to poor water quality of the lake because of erosion and "improper septic tanks and fields." Respondent granted the Gancers requested variances, with the setback set at 30 feet.

Petitioner filed the instant petition for review, arguing that granting the variance request was inconsistent with §§ 1.02, 4.01, 16.01 of the Kalkaska County zoning ordinance, which stated that the purpose of the applicable zoning restrictions was to preserve water quality and prevent erosion and pollution. Petitioner also alleged that although the ordinance allowed nonconforming uses to continue, nonconforming uses could not be enlarged or extended.

Respondent maintained that petitioner lacked standing to appeal the zoning decision because it was not "a person having an interest affected by the zoning ordinance" within the meaning of MCL 125.223(2) or MCL 125.585. (These statutes were repealed by 2006 PA 110, effective July 1, 2006, but the repeal did not affect actions like the present action pending on that date, see MCL 125.3702.) The trial court found that petitioner

did not have standing under state law or under the local ordinance and dismissed petitioner's claim.

II. STANDING

A. STANDARD OF REVIEW

Whether a party has standing is a question of law that is reviewed de novo by this Court. *Homer Twp v Billboards by Johnson, Inc*, 268 Mich App 500, 504; 708 NW2d 737 (2005).

B. ANALYSIS

At the onset, we note that petitioner conceded during oral argument that MCL 125.223(2) cannot confer standing merely because "a person [has] an interest affected by the zoning ordinance . . . ." Rather, as our Supreme Court made clear in *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc,* 479 Mich 280, 302; 737 NW2d 447 (2007), "[t]he elements of individual and organizational standing must be met in environmental cases as in every other lawsuit, unless the constitution provides otherwise." To establish standing:

> 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. [*Id.* at 294-295 (citations and quotation marks omitted).]

Petitioner claims that it, like a nonprofit corporation, has standing on behalf of its residents who possess riparian rights to the lake. Whether a municipality can sue on behalf of its residents is an issue of first impression in this state. There is no dispute that a nonprofit organization has "standing to bring suit in the interest of its members if its members would have standing as individual plaintiffs." *Id.* at 296. However, petitioner's "analogy of its representation of its citizens to a private organization's representation of its members misconceives the very concept of associational standing." *Olmsted Falls, Ohio v Federal Aviation Admin,* 352 US App DC 30, 36; 292 F3d 261 (2002). Petitioner "does not have 'members' who have voluntarily associated . . . ." *Id*. at 37. Rather petitioner is "effectively attempting to assert the alleged interests of its citizens under the doctrine of *parens patriae*." *Id*. *Parens patriae* "is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc." Black's Law Dictionary (6th ed). However, "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae* . . . ." *In re Multidistrict Vehicle Air Pollution MDL No 31, State of California v Automobile Manufacturers Ass'n, Inc*, 481 F2d 122, 131 (CA 9, 1973); see also *Roseville v Norton*, 219 F Supp 2d 130, 141, (D DC, 2002); *Safety Harbor v Birchfield*, 529 F2d 1251 (CA 5, 1976); *United States v WR Grace & Co-Conn*, 185 FRD 184 (D NJ, 1999); *City of New York v Heckler*, 578 F Supp 1109, 1123 (ED NY, 1984); *Warren Co v North Carolina,* 528 F Supp 276, 283 (ED NC, 1981).

Because petitioner here cannot sue as *parens patriae* on behalf of its residents with riparian rights, petitioner must show that it, and not merely certain residents, is

detrimentally affected by respondent's approval of the zoning variances in a manner distinct from the interest of the general public. *Nestlé, supra* at 294. Here, petitioner broadly asserts that it has an interest in the lake to protect the health, safety, and welfare of its citizens from pollution and its effects. These claimed harms, however, are not at all distinct from those of the general public and are indeed purported to be consistent with the interest of the general public. Petitioner presented no evidence that it suffered any specific injury. The record below does not indicate that petitioner owned, used, or had access to the lake or that it "enjoyed a recreational, aesthetic, or economic interest" in the lake. *Id*. at 297. Petitioner thus failed to establish that it has a substantial interest in the lake, detrimentally affected by respondent's approval of the zoning variance, distinct from the interest of the general public. The absence of a concrete, particularized injury in fact is fatal to petitioner's standing to challenge respondent's approval of the zoning variance.

Affirmed.

PEOPLE v HORN

Docket No. 274130. Submitted February 12, 2008, at Lansing. Decided May 15, 2008, at 9:00 a.m. Leave to appeal sought.

Marvin S. Horn was convicted by a jury in the Kalamazoo Circuit Court, Richard R. Lamb, J., of one count of kidnapping, MCL 750.349, and four counts of first-degree criminal sexual conduct, MCL 750.520b, and was sentenced as a second-offense habitual offender to five concurrent sentences of 40 to 60 years in prison. The defendant appealed.

The Court of Appeals *held*:

1. The prosecution did not improperly elicit testimony from the defendant's daughter that the victim (the defendant's estranged wife) had stopped seeing the defendant in private places before the date of the offenses in this case because the defendant had raped the victim on a prior occasion. Defense counsel had already elicited testimony from the victim that opened the door to the evidence.

2. Even if the trial court abused its discretion in denying the defendant's request to attend his trial without leg restraints, the defendant failed to show that prejudice had resulted from the use of the restraints.

3. None of the defendant's claims of ineffective assistance of counsel is supported by the record. The defendant failed to overcome the strong presumption that his counsel engaged in sound trial strategy.

4. The jury's verdict was not against the great weight of the evidence.

5. The trial court did not depart from the minimum sentence range recommended by the sentencing guidelines merely because of a generalized concern regarding the defendant's criminal propensities. The court's departure was properly based on the objective and verifiable factor of the defendant's recurring and escalating acts of violence against the same victim. The increasing severity of the defendant's repetitive criminal conduct toward the victim demonstrates that the increased sentences are proportionate to both the offense and the offender. The trial court did not

engage in speculation or rely on nonobjective, nonverifiable factors in imposing the sentences.

Affirmed.

SENTENCES — DEPARTURES FROM SENTENCING GUIDELINES.

A sentencing court must articulate substantial and compelling reasons for a departure from the minimum sentence range recommended by the sentencing guidelines and the reasons must be based on objective and verifiable factors; although a sentencing court's belief that the defendant is a danger to himself or herself and others is not in itself an objective and verifiable reason, objective and verifiable factors underlying the court's belief, such as repeated offenses, failures at rehabilitation, or uncontrollable urges to commit certain offenses constitute an acceptable justification for an upward departure; specific characteristics of an offense and an offender that strongly presage future criminal acts may justify an upward departure if they are objective and verifiable, and if they are not already adequately contemplated by the guidelines.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Jeffrey R. Fink*, Prosecuting Attorney, and *Judith B. Ketchum*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marla R. McCowan*) and Marvin S. Horn *in propria persona*.

Before: WILDER, P.J., SAAD, C.J., and SMOLENSKI, J.

SAAD, C.J. A jury convicted defendant of kidnapping, MCL 750.349, and four counts of first-degree criminal sexual conduct, MCL 750.520b. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to five concurrent sentences of 40 to 60 years in prison.

I. NATURE OF THE CASE

Defendant perpetrated a series of physical and sexual attacks on his estranged wife that culminated in an

attempt to have her murdered while he was incarcerated for the kidnapping and criminal sexual charges at issue here. Defendant challenges his convictions for abducting his wife and repeatedly raping her and, for the reasons stated in this opinion, we affirm his convictions without difficulty. Defendant also complains that the trial court failed to articulate a substantial and compelling reason to justify its upward departure from the recommended minimum sentence range under the sentencing guidelines. The trial court stated that "the particular danger" that defendant presented to his wife justified an increased sentence because this danger was clear from defendant's pattern of extreme violence against his wife, and the guidelines do not take into consideration a defendant's determined course of targeting a specific victim. Defendant mischaracterizes this finding as "speculation" concerning defendant's propensity for future criminal acts, and avers that this is not an objective or verifiable reason for the departure. Defendant's assertion fails to appreciate the salient and dispositive distinction between a general criminal propensity and, as here, an actual, established pattern and practice of repeatedly victimizing a targeted individual. The trial court's observation and conclusion that defendant repeatedly targeted his wife and poses a grave danger to her is based on compelling and concrete evidence, namely, defendant's repeated and relentless efforts to harm her, his vicious assaults upon her, and his efforts to kill her. Thus, contrary to defendant's characterization of the sentencing decision, the trial court did not engage in speculation or rely on nonobjective, nonverifiable factors. Therefore, we also affirm defendant's sentences.

II. FACTS

In January 2006, defendant had dinner with his estranged wife, LH, at a restaurant in Portage. In the

parking lot, defendant grabbed LH, slid her into the bed of his pickup truck, and wrapped duct tape around her head and mouth. Defendant also taped LH's wrists and ankles and tied them together with a cable. Defendant then drove LH to a house that he was remodeling and led her upstairs where there were three sleeping bags spread out on the floor. Defendant then picked up a red-handled knife and held it to LH's throat. He ripped the duct tape off her head and, in the process, tore a chunk of hair from her scalp. He then used the knife to cut the tape from LH's wrists and to cut off her sweater, shirt, and bra. LH testified that defendant then pulled her blue jeans down, ripped off her underwear, and raped her. After he finished, defendant grabbed LH's head, pushed it toward his penis, and ordered her to perform oral sex. Defendant then pushed her onto her hands and knees and raped her again. LH stated that the red-handled knife always remained within defendant's reach. LH further testified that, after she was allowed to use the bathroom, defendant raped her again and again forced her to perform oral sex. Later, defendant, for a third time, ordered LH to perform oral sex by forcing her mouth over his penis. In the morning, defendant drove LH back to the restaurant's parking lot.

Several other incidents of defendant's violence toward LH are significant for purposes of the appeal of defendant's sentences. On November 2, 2005, defendant assaulted LH with a dangerous weapon. Further, LH testified that, in December 2005, she stopped seeing defendant in private places because he had raped her. On January 23, 2006, the trial court sentenced defendant to probation for the November assault, but the sentence proved to be no deterrent for defendant. Within a week of his sentencing, defendant committed the kidnapping and multiple sexual assaults that led to his convictions here. Moreover, on April 7, 2006, while defendant was incarcerated and awaiting trial for these

offenses, he attempted to solicit the murder of LH, and he has pleaded no contest to this charge.

III. PROSECUTORIAL MISCONDUCT

At trial, the prosecutor asked defendant's daughter, Charlotte, whether she knew why LH had stopped seeing defendant in December 2005 and Charlotte replied that it was because defendant had raped LH. Defendant complains that the prosecutor's question elicited testimony about other acts without the provision of notice as required by MRE 404(b)(2).[1]

We reject defendant's argument because defense counsel opened the door to the evidence and, therefore, the prosecutor's question was not improper. *People v Verburg*, 170 Mich App 490, 498; 430 NW2d 775 (1988). Before Charlotte testified, defense counsel asked LH about her relationship with defendant between November 2005 and January 2006 and, specifically, about when she had met defendant in private places. LH testified, without objection, that she stopped seeing defendant in private places after he sexually assaulted her in December 2005. Thus, defense counsel had already elicited testimony about this issue and it was reasonable for the prosecutor to believe that defense counsel opened the door for his question to Charlotte about whether she knew why LH had stopped seeing

[1] Defendant did not preserve this claim of prosecutorial misconduct, so we review it for plain error affecting defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant also claims that the trial court erred when it denied his motion for a mistrial based on the prosecutor's questioning of Charlotte. We review this issue for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

defendant in December 2005. *Id.*; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Were we to conclude that the prosecutor improperly elicited Charlotte's testimony, we would nonetheless hold that the trial court correctly denied defendant's motion for a mistrial. A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). The trial court instructed the jury on the proper use of the other-acts evidence, and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has failed to establish that the trial court's instructions were insufficient to cure any alleged unfair prejudice. Moreover, a mistrial would have been inappropriate because, as discussed, LH had already testified about defendant's prior sexual assault and Charlotte's testimony was merely cumulative of LH's testimony.

IV. DEFENDANT'S LEG RESTRAINTS

The trial court denied defendant's request to attend his trial without leg restraints and defendant complains this denied him a fair trial. However, even were we to agree that the trial court abused its discretion by denying defendant's request, defendant has failed to show that he suffered prejudice as a result of the use of the restraints. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). The jury never saw defendant in restraints in the courtroom and our caselaw holds that a defendant is not prejudiced if the jury was unable to see the shackles on the defendant. *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). A cloth was placed around the defense table, and the

restraints were removed outside the presence of the jury before defendant walked to the witness chair to testify.

Defendant asserts that members of the jury saw him in leg restraints while he was being transported to and from the courtroom, but the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom. *People v Panko*, 34 Mich App 297, 300; 191 NW2d 75 (1971). Further, when jurors inadvertently see a defendant in shackles, there still must be some showing that the defendant was prejudiced. *People v Moore*, 164 Mich App 378, 385; 417 NW2d 508 (1987), mod on other grounds 433 Mich 851 (1989). On the fourth day of trial, a deputy informed the trial court and the parties that members of the jury *may* have seen defendant in leg restraints while defendant was being transported to the courtroom. Defendant, however, chose not to question any jurors about what they may have seen. Also, on the third day of trial, when he was returning from lunch, a juror rode in the elevator with defendant but, when questioned by the trial court, the juror stated that he did not recall seeing leg restraints on defendant. Absent any indication that a member of the jury saw defendant in restraints, we are unable to conclude that defendant suffered any prejudice. *Id*. Therefore, defendant is not entitled to relief on the basis of this claim.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that he was denied the effective assistance of counsel.[2] We note that defendant asks for

[2] To establish his claim, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings

a remand for a hearing under *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), and so that he can file a motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. We have previously denied defendant's request for a remand, *People v Horn*, unpublished order of the Court of Appeals, entered September 20, 2007 (Docket No. 274130), and we decline to reconsider defendant's request.

Because no *Ginther* hearing occurred, our review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Therefore, we decline to consider the affidavits submitted with defendant's motion for remand. See *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001).

Defendant argues that under *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), he is entitled to a presumption that prejudice occurred because defense counsel failed to spend adequate time meeting with him. He also claims that defense counsel failed to personally interview defense witnesses before trial. However, these claimed deficiencies are not apparent from the record and, thus, are not subject to our review. See *People v Odom*, 276 Mich App 407, 417; 740 NW2d 557 (2007).

Defendant further contends that defense counsel failed to (1) adequately question defense witnesses about defendant's physical limitations in January 2006, (2) call other witnesses, (3) present as evidence the blue

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would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

jeans LH wore on the night of the assault, (4) cross-examine LH regarding inconsistencies in her statements to the investigating police officers, (5) argue that the duct tape found in defendant's truck was consistent with defendant's testimony that he and LH mutually agreed to use the tape as a restraint during consensual sex. Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), as is a decision concerning what evidence to highlight during closing argument, *In re Rogers*, 160 Mich App 500, 505-506; 409 NW2d 486 (1987). We will not second-guess counsel on matters of trial strategy, nor we will assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy.

Defendant asserts that counsel failed to object to the prosecutor's closing remarks about defendant's pretrial silence. Defendant correctly notes that a defendant's silence after he or she has been informed of the right to remain silent under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), may not be used as evidence against the defendant. *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001). However, we must consider a prosecutor's comments in light of the defendant's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Considering the remarks in this light, we conclude that the prosecutor did not use defendant's silence after being advised of his *Miranda* rights to argue that defendant was guilty. Rather, the prosecutor used defendant's silence to rebut defendant's argument that the police failed to adequately investigate the events of the evening in question. Counsel is not ineffective for failing to make a

futile objection, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), and defendant has failed to establish that an objection during the prosecutor's rebuttal argument would have been meritorious.

Moreover, if we were to conclude that the prosecutor improperly commented on defendant's silence after being advised of his *Miranda* rights, we would also conclude that counsel's failure to object did not fall below an objective standard of reasonableness. Our Supreme Court has recognized that "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Counsel may have believed that it was better not to draw the jury's attention to the fact that defendant never offered a statement to the investigating officers. Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. *People v Sabin (On Second Remand),* 242 Mich App 656, 659; 620 NW2d 19 (2000).[3]

VI. GREAT WEIGHT OF THE EVIDENCE

As noted, we deny defendant's request for remand so that he can challenge whether the great weight of the

[3] Defendant also asserts that counsel should have objected when the prosecutor asked Charlotte if she knew why LH stopped seeing defendant after December 2005. The record reflects defense counsel's concern about the prejudicial value of Charlotte's answer. After Charlotte finished her testimony and the trial court excused the jury for the day, counsel moved for a mistrial. Thus, counsel engaged in the strategic decision to move for a mistrial outside the presence of the jury to avoid drawing the jury's attention to Charlotte's answer. We will not second-guess counsel on matters of trial strategy. *Rice (On Remand), supra*.

Defendant also complains that counsel failed "to timely object" after members of the jury saw defendant in leg restraints. However, as previously explained, the record does not establish that any member of the jury actually saw defendant in restraints. Accordingly, defendant has failed to establish the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

evidence supported the verdict. However, we will review defendant's claim for plain error affecting his substantial rights. See *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).[4]

We disagree with defendant's assertion that LH's testimony was devoid of probative value and that the evidence weighed heavily in his favor. Defendant specifically complains that LH's testimony about the kidnapping contradicted indisputable facts and defied physical realities. Defendant maintains that, at the time of the kidnapping, he suffered physical impairments from a prior stroke, but this was not an undisputed fact. Defendant's son saw him on a daily basis and testified that defendant was physically fine. Similarly, LH testified that defendant had no weakness on his right side when she saw him in December 2006. Moreover, it does not defy physical reality that defendant would be able to lift LH into his truck and wrap duct tape around her head while she was struggling because defendant is three to four inches taller and 10 pounds heavier than LH. Nor does it defy physical reality that LH did not suffer cuts, abrasions, or marks on her throat and face when defendant cut and ripped off the tape. Moreover, though LH's trial testimony contained some inconsistencies, they did not render her testimony devoid of all probative value. *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998).

[4] The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Except in extraordinary circumstances, such as where testimony contradicts indisputable physical facts or physical realities, the trial court must defer to the jury's determination. *Id.* at 645-646 (citation omitted).

Because LH's testimony was not devoid of all probative value, and was not contradicted by indisputable physical facts and did not defy physical reality, we defer to the jury's credibility determination. *Id.* Accordingly, we reject defendant's claim that the jury's verdict was against the great weight of the evidence.[5]

VII. SENTENCES

Defendant disputes the trial court's upward departure from the recommended minimum sentence range. Specifically, he complains that the trial court's reasons for departure are a matter of subjective opinion, they were already taken into account by the sentencing guidelines, and the sentences the court imposed violate the principle of proportionality. The recommended minimum sentence range was calculated under the statutory sentencing guidelines as 171 to 356 months (14 years and three months to 29 years and 8 months). The trial court exceeded these guidelines and sentenced defendant to 40 to 60 years in prison for each conviction, to be served concurrently.

Our Legislature's statutory sentencing system provides a means of calculating a minimum sentence range by scoring offense variables, which assess the egregiousness of the crime committed, and the prior record variables, which assess a defendant's history of recidivism. The purpose of this statutory scheme is to ensure a degree of consistency in sentencing defendants with comparable histories who have committed comparable

[5] Defendant avers that defense counsel was ineffective for failing to move for a new trial on the ground that the jury's verdict was against the great weight of the evidence. Because the jury's verdict was not against the great weight of the evidence, any motion by defense counsel for a new trial would have been futile, and trial counsel is not ineffective for failing to make a futile motion. *Fike, supra*.

crimes, while also affording the sentencing court a degree of discretion to account for the specific circumstances of the case. To preserve this balance between consistency, based on general circumstances, and discretion, based on individual situations, the Legislature provides relatively narrow grounds for departures from the sentencing guidelines ranges. Accordingly, the sentencing court must articulate substantial and compelling reasons for the departure. And, these reasons must be based on objective and verifiable factors.[6]

We review a trial court's departure from the recommended sentencing range by applying three standards. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). We review for clear error the trial court's cited factors supporting its departure, we review de novo whether the factors are objective and verifiable, and we review for an abuse of discretion the trial court's determination that the factors constitute substantial and compelling reasons to depart from the recommended range. *Id.*

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[6] The reason for departure also must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. *People v Babcock,* 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed. *People v Abramski,* 257 Mich App 71, 74; 665 NW2d 501 (2003). The trial court's reason for departure may not be based on " 'an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.' " *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007), quoting MCL 769.34(3)(b). To determine whether a factor was given inadequate or disproportionate weight in the guidelines calculations, a court must first determine the effect of the factor on the recommended minimum sentence range. *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007).

Here, the trial court articulated its reasons for the departure as follows:

> [S]ubstantial and compelling cannot be something that merely reiterates or takes into account something that's already in the guidelines but perhaps in a more aggravating situation. In this case—I've read letters from family members of the defendant—they talk about an individual who, you know, they have a lot of respect for and a lot of support for him. And you may be that person to those other people . . . *but between you and your wife you are a very dangerous person as demonstrated by your conduct in this case and by your previous convictions. And as between you and your wife, you do constitute a danger*.
>
> And I don't know what it will take to—to correct that. But I think that beyond what's been scored in the guidelines—and the guidelines have taken into account a lot of the aggravating factors of this case. But *particularly aggravating is when all this conduct is directed towards your wife* and it's within a very short and compressed time frame that these aggressive acts are carried out against her and *what's particularly compelling is while you're being held in custody for having assaulted her you're trying to hire someone to kill her*. That's staggering.
>
> So I will deviate from the guidelines because *the guidelines don't take into account in their general approach to assessing points your repetitive acts directed towards your wife, and I don't think they take into account the particular danger you present to your wife*; and I think it's a continuing danger. [Emphasis added.]

As noted, defendant avers that the trial court's "continuing danger" reference is a subjective opinion. Although a trial court's "belief" that a defendant is a danger to himself and others is not in itself an objective and verifiable reason, *People v Solmonson*, 261 Mich App 657; 683 NW2d 761 (2004), objective and verifiable factors underlying this belief—such as repeated offenses and failures at rehabilitation—constitute an ac-

ceptable justification for an upward departure. *Id*. at 671-672. Similarly, in *People v Geno*, 261 Mich App 624, 636-637; 683 NW2d 687 (2004), this Court affirmed the trial court's upward departure from the guidelines range on the basis of the defendant's propensity to commit future sex crimes against children. The Court implicitly agreed that a mere mention of "future risk" would not constitute an objective and verifiable reason justifying an upward departure. *Id.* at 636. However, in reasoning that is equally applicable to the instant case, the Court determined that the trial court's decision was not based on a subjective perception of future risk, but on concrete factors that established a firm probability of future offenses, namely, the defendant's past criminal history, his past failures at rehabilitation, and his admission that he was sexually attracted to children. *Id.*; see, also, *People v Armstrong,* 247 Mich App 423, 425; 636 NW2d 785 (2001).

The teaching of *Solmonson, Geno,* and *Armstrong* is that specific characteristics of an offense and an offender that strongly presage future criminal acts may justify an upward departure from the recommended sentencing range if they are objective and verifiable, and if they are not already adequately contemplated by the guidelines. Although a trial court's mere opinion or speculation about a defendant's general criminal propensity is not, in itself, an objective and verifiable factor, objective and verifiable factors underlying that conclusion or judgment are not categorically excluded as proper reasons for an upward departure. These factors include a history of recidivism, and obsessive or uncontrollable urges to commit certain offenses.

Here, contrary to defendant's assertions, the trial court did not merely opine that defendant is likely to harm his wife in the future. Rather, the trial court

stated that defendant's repeated perpetration of vicious acts against his wife within a short period was a "particularly aggravating," "particularly compelling," and "staggering" factor.[7] The trial court emphasized that defendant's incarceration while awaiting trial for the instant offenses did not dissuade him from continuing his course of merciless aggression against his wife, because he tried to solicit her murder while he was incarcerated. Defendant's determined course to terrorize and abuse his wife, clearly evident from the recurring and escalating acts of violence, is an objective and verifiable reason that is based on occurrences external to the sentencing judge's mind, and capable of being confirmed. *People v Abramski,* 257 Mich App 71, 74; 665 NW2d 501 (2003).

Furthermore, the factor of repetitive acts of escalating violence against a specific victim is not adequately considered by the guidelines. Neither offense variable

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[7] The Department of Corrections prepared defendant's presentence investigation report. See MCR 6.425. Although these reports are usually restrained in their assessments of offenders, this report understandably expresses anxiety for LH's safety, stating:

> Defendant has an alarming criminal pattern towards the victim, being his wife in the instant offense, also his wife being the victim in the prior [solicitation of murder] conviction and his wife being the victim in the previous probation term [for felonious assault]. The Michigan Department of Corrections has many concerns for the protection of [LH]. He has already demonstrated an ability to recruit unknown persons to act out his wishes to harm and even kill her. He has no remorse for his negative actions based on his continued criminal behavior, and definitely no regard for the well being of his wife and mother of his children.
>
> It should be noted that if/when the Defendant paroles, the victim needs to be contacted regarding his release for her own safety and protection. The Defendant appears to have built an obsessive rage inside himself and will apparently act upon it regardless of any barriers or even the laws that govern him.

(OV) 7, MCL 777.37, aggravated physical abuse, nor OV 13, MCL 777.43, continuing pattern of criminal behavior, considers that the defendant's aggression targeted a specific individual, or that the degree of violence increased. Similarly, none of the prior offense variables, MCL 777.50-777.57, takes into consideration the defendant's recurring and escalating course of violence against a selected victim. The trial court did not clearly err in finding that "the guidelines don't take into account in their general approach . . . repetitive acts directed towards [defendant's] wife . . . ."[8]

In sum, the trial court did not err in finding that defendant's repeated criminal assaults upon his wife and his relentless attempts to brutalize and kill his wife presage future violence and aggression. An individual's established pattern of predatory conduct toward a selected victim clearly constitutes probative evidence of future behavior toward that victim.[9] Accordingly, anticipatory harm based on an established pattern of violence toward a specific victim is an objective and verifiable

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[8] We note that the concurring judge in *People v Havens*, 268 Mich App 15, 19; 706 NW2d 210 (2005) (O'CONNELL, P.J., concurring), commented that the sentencing court's classification of the defendant as "dangerous" and a "serious threat" does not constitute "an objective finding of any factual event, but a statement of personal opinion." However, the trial court's determination in *Havens* was not based on a history of criminal conduct or failed attempts at rehabilitation, or on any other objective and verifiable indicia of propensity for future crime. Rather, it was apparently based on the court's subjective perception of the egregiousness of the sentencing offense. *Id.* at 18. Furthermore, the trial court in *Havens* was concerned generally about the defendant's future drug-dealing activities, whereas the court here was specifically concerned about defendant's persistent course of terror against his wife. Consequently, the concurring judge's statement in *Havens* applied to circumstances that are materially distinct from the circumstances here.

[9] Indeed, the laws governing the issuance of personal protection orders, MCL 600.2950 and 600.2950a, are predicated on the assumption that a stalker's course of aggression will persist.

factor, not a speculative prediction. The trial court did not depart from the guidelines merely because of a generalized concern regarding defendant's criminal propensities. Rather, the trial court's departure was based on the objective and verifiable factor of defendant's recurring and escalating acts of violence against LH. Furthermore, the increasing severity of defendant's repetitive criminal conduct toward LH demonstrates that the increased sentences are proportionate to both the offense and the offender. Accordingly, the court's upward departure from the guidelines is fully justified and entirely consistent with Michigan law.

Affirmed.

PEOPLE v BAYER

Docket No. 281479. Submitted May 7, 2008, at Detroit. Decided May 15, 2008, at 9:05 a.m. Leave to appeal sought.

Albert N. Bayer was bound over for trial in the Oakland Circuit Court on three counts of third-degree criminal sexual conduct, MCL 750.520b(1)(f)(*iv*) and MCL 750.520d(1)(b), relating to a sexual relationship that he engaged in with his patient while functioning as the patient's psychiatrist. The court, Edward Sosnick, J., granted the defendant's motion to dismiss the charges, ruling that MCL 750.520b(1)(f)(*iv*), which defines "force or coercion" used to accomplish sexual penetration to include when the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable, represents an unconstitutional delegation of legislative authority because it permits a third party such as the American Psychiatric Association (APA) to make a determination of what constitutes prohibited behavior on the basis of its code of ethics. The prosecution appealed as of right.

The Court of Appeals *held*:

1. The provisions of MCL 750.520b(1)(f)(*iv*) do not violate the doctrine that a legislative body may not delegate to another its lawmaking powers. A vital distinction exists between conferring the power of making what is essentially a legislative determination on private parties and adopting what private parties do in an independent and unrelated enterprise. Where a private organization's standards have significance independent of a legislative enactment, they may be incorporated into a statutory scheme to function as a measuring device without violating constitutional restrictions on delegation of legislative power. The statute refers to factual conclusions of independent significance that function as a measuring device and not an improper delegation of legislative authority. The statute relies on a determination of independent significance to ascertain whether a medical treatment or examination was conducted in a manner or for a purpose that is medically recognized as unethical or unacceptable. This finding is then used as the measure against which conduct by the medical professional will be evaluated. Aside from the factual determination made by the APA for its own purposes and

outside the context of this state's laws regarding what constitutes inappropriate and unethical behavior for its members, it is the Legislature that defines and delineates the legal consequences that flow from that limited factual determination. By using such independent determinations as a referent, the Legislature is not delegating how that fact will be used.

2. MCL 750.520b(1)(f)(*iv*) is not unconstitutionally vague; it adequately notified the defendant that the conduct in which he engaged was criminal because it is undisputed that the intentional touching of a patient for the purpose of sexual arousal or gratification is considered unacceptable and unethical.

3. The manipulation of the patient within the context of a medical or treatment relationship is determinative of the presence of force or coercion. The presence of a victim's consent is not necessarily the factual equivalent of the absence of coercion. The focus of the inquiry is a determination of the validity of that consent. The fact that a victim consented to a touching, or even voluntarily pursued an intimate relationship with the medical professional, is only of significance if it can also be shown that there exists no inference or demonstration of impermissible manipulation of the victim by the medical professional in order to secure the sexual contact. There is a sufficient basis under the circumstances of this case to reinstate the criminal charges against the defendant given the existence of a factual issue regarding the use of force or coercion to obtain sexual gratification through the defendant's abuse of the treatment setting and the purposeful manipulation of the victim.

Reversed and remanded for the reinstatement of the charges.

1. CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWERS — CRIMINAL SEXUAL CONDUCT — FORCE OR COERCION — MEDICAL TREATMENT.

A private medical organization's standards regarding what constitutes inappropriate and unethical behavior for its members that are developed for its own purposes and outside the context of the state's laws may be used as a measuring device to determine whether a defendant has engaged in inappropriate and unethical conduct in violation of a statutory prohibition of behavior medically recognized as unethical or unacceptable without violating the constitutional restriction on the delegation of legislative powers (MCL 750.520b[1][f][*iv*]).

2. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — FORCE OR COERCION — MEDICAL TREATMENT.

A defendant may be found to have committed criminal sexual conduct by sexual penetration through the use of force or coercion

> where the defendant engaged in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable; the presence of consent by the victim is not necessarily the factual equivalent of the absence of coercion; any inquiry regarding consent must focus on the validity of such consent (MCL 750.520b[1][f][*iv*]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Chief, Appellate Division, and *Janice A. Kabodian*, Assistant Prosecuting Attorney, for the people.

Christine A. Derdarian and *Ronald E. Kaplovitz* for the defendant.

Before: FORT HOOD, P.J., and TALBOT and BORRELLO, JJ.

TALBOT, J. Following a preliminary examination, defendant was bound over for trial on three counts of third-degree criminal sexual conduct (CSC). MCL 750.520b(1)(f)(*iv*); MCL 750.520d(1)(b). Defendant filed a motion to dismiss the charges or quash the information, challenging the constitutionality of MCL 750.520b(1)(f)(*iv*) by asserting that it is unduly vague, overbroad, and constitutes an improper delegation of legislative authority. The trial court granted defendant's motion and dismissed the charges against defendant, ruling that MCL 750.520b(1)(f)(*iv*) violated the nondelegation provision of the state constitution. The prosecution appeals as of right. We reverse and remand for the reinstatement of the charges.

I. FACTUAL HISTORY

Defendant is a practicing psychiatrist who provided treatment and prescribed medications for the victim

from 1999 to 2005. The victim was referred to defendant by her attorney in 1999 for a child-custody evaluation. Purportedly, the victim had lost custody of her children because of psychiatric problems. Although her initial treatment schedule was more sporadic, encompassing office appointments with defendant on three-month intervals, over time the victim was scheduled for weekly sessions with defendant.

The victim described her relationship with defendant as changing substantially in 2003, concurrent with defendant's divorce, and asserted, "It started becoming personal." Defendant began telling the victim about his wife and divorce and initiated inquiries regarding the victim's sexual relationship with her husband. While initially taken aback by the questions, the victim began to discuss with defendant problems in her marriage and the sexual difficulties she was experiencing.

The victim's relationship with defendant further evolved in late 2003 or early 2004 when she acknowledged developing "sexual feelings" for defendant. The victim confessed these feelings to defendant and defendant assured her that they comprised a normal reaction to his efforts to assist her. Defendant instructed the victim to write down her feelings and send them to him as part of her therapy. Defendant purportedly suggested to the victim that women who are sexually deprived at home tend "to go elsewhere."

The first of the charged sexual encounters between defendant and the victim occurred at his office on February 7, 2004. Billing records confirm that defendant submitted charges to the victim's insurance carrier for this date. The victim noted that she was the last patient of the day for defendant and that during this session, defendant sat next to her on the couch and they began to kiss. Defendant proceeded to loosen the vic-

tim's bra and massage her breasts. The victim then performed oral sex on defendant at his request. The victim acknowledged that she had taken a substantial amount of medication on that day. She also reported that defendant, following the sexual encounter, expressed that "it was amazing, the best he's ever had."

Following this encounter, the victim reported feeling "dirty" and began to engage in compulsive washing rituals. The victim, without identifying defendant, discussed the incident with her daughter's therapist. The victim was placed in a partial-hospitalization program, and all medications prescribed by defendant were stopped. The victim also participated in an outpatient program, but in August 2004 returned to defendant's care.

The victim asserted that her return to treatment with defendant was initiated by his phone call to her indicating that the other physicians were "peons" and implying that he was better suited to assist her because of their established relationship and his knowledge of her. Defendant refilled the victim's prescriptions. The victim informed defendant that she had recorded many of his phone conversations with her, which prompted defendant to request they meet and destroy the tapes, to which she consented.

The next charged sexual encounter occurred on September 3, 2004, and was initiated by defendant's phoning the victim and requesting that she meet him at a Comfort Inn motel. The victim reported engaging in oral and vaginal sex with defendant and that she thereafter continued to engage in sexual encounters with defendant at various motels and in defendant's office. The victim stated that she was often highly medicated during these encounters from prescriptions provided by defendant. The victim asserted that defen-

dant contended that the sexual encounters were therapeutic because "I would be less frustrated at home." The victim also reported that defendant told her that their relationship comprised more than sex, "we had something special." The next charged sexual encounter occurred at a motel on September 16, 2004. However, when the victim began to perform oral sex on defendant, he indicated that he merely wanted to hold her that day.

The victim asserted that throughout these encounters she continued to discuss her problems with defendant. She informed defendant that she was experiencing guilt because of their sexual relationship, which was manifesting itself in compulsive scratching and washing behaviors. Defendant responded by increasing the victim's dosage of Resperdal and continued her prescriptions for Lorcet, Provigil, Effexor, and Klonopin. At some point, defendant exchanged the victim's Lorcet prescription for Oxycontin. The victim testified that she was very distraught after the initiation of the sexual relationship with defendant, but when she expressed concerns regarding her symptoms defendant's response was to further increase her prescription medication.

According to the victim, defendant advised her not to confess her relationship with him to her husband or to reveal the types and amounts of medication she was prescribed. The victim acknowledged that she had feelings for defendant, but opined that her sexual encounters with him were attributable to her highly medicated condition. The victim informed defendant that she had developed suicidal ideation but asserted that defendant discouraged her from seeking hospitalization and from consulting other professionals for treatment. The victim reported that defendant offered her $50,000 to not reveal their relationship to anyone. The victim finally

terminated her contacts with defendant following her attempted suicide. The victim asserted that she terminated the relationship and that defendant "never stopped treating me. He never declined me as a patient, I stopped seeing him." At this point, the victim, on her own and in conjunction with her new therapist, contacted the authorities and disclosed defendant's behavior. Billing records from defendant to the victim's insurance company show charges for services from August 11, 2001, through May 7, 2005.

When interviewed by the police, defendant admitted having a sexual relationship with the victim and that the encounters occurred at both his office and local motels. Initially, defendant attributed his behavior to his use of Vicodin to treat a medical condition, suggesting it made him vulnerable to advances by the victim. Defendant asserted that he permitted the relationship with the victim to continue because of her threats to expose their conduct and ruin his career. During the interview, defendant also indicated that he allowed the relationship with the victim to continue in an effort to provide therapy and help her. Defendant admitted to the police his awareness of the impropriety of his conduct and pleaded that charges not be pursued, because it would result in his professional ruin.

II. PRELIMINARY EXAMINATION AND LOWER-COURT PROCEEDINGS

At the preliminary examination, Dr. Patricia Campbell, a licensed psychiatrist and physician, testified concerning professional standards in the field of psychiatry.[1] Dr. Campbell testified that in the field of psychiatry there are professional standards on the

[1] The parties stipulated that Dr. Campbell was qualified as an expert in psychiatry.

national, state, and local community levels, as well as legal regulations and an ethical code. The American Psychiatric Association (APA) has adopted the American Medical Association (AMA) code of ethics with annotations pertaining to psychiatrists. The APA ethics code comprises the national ethical standard and is applicable to practitioners in Michigan.

Dr. Campbell testified that the APA ethics code expressly forbids a psychiatrist from having sexual contact with a current or former patient. Dr. Campbell indicated that the code precludes sexual encounters between a doctor and a patient because "the inherent inequality in the doctor-patient relationship may lead to exploitation of the patient, sexual activity with a current or former patient is unethical." Dr. Campbell opined that sexual activity with a current or former patient is considered unethical and unacceptable and that under no circumstances would sexual contact be considered an appropriate medical treatment for any patient. Dr. Campbell indicated that the proscription against intimate relationships constituted a "clear cut" rule. When queried regarding how a psychiatrist should respond to a patient seeking to initiate a romantic relationship with his or her therapist, Dr. Campbell responded that the psychiatrist must establish explicit boundaries and instruct the patient that a sexual relationship would be unacceptable. If the psychiatrist desired a romantic relationship with the patient, Dr. Campbell indicated that the therapist should "seek supervision or transfer the patient to another psychiatrist." Dr. Campbell added that, even in cases where the psychiatrist refers the patient elsewhere before starting the romantic relationship, some states require a certain time to have lapsed before the romantic relationship can commence in order to rebut the presumption of exploitation.

At the conclusion of the preliminary examination, defendant was bound over for trial on three counts of third-degree CSC. On September 5, 2007, defendant filed a motion to dismiss the charges or quash the information. Defendant alleged that the statutory provision under which he was charged, MCL 750.520b(1)(f)(*iv*), is unconstitutional because it is unduly vague, overbroad, and constitutes an improper delegation of legislative authority.

Defendant was prosecuted for using "force or coercion" to accomplish sexual penetration. MCL 750.520d(1)(b). MCL 750.520b(1)(f)(*iv*) defines force or coercion as including circumstances when "the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable." Defendant maintained that this provision is unconstitutionally vague because, unlike the other sections of the statute defining "force or coercion" with which the instant provision is grouped, it makes no reference to consent, or the use of physical dominance or threat.[2] Defendant further argued that the provision is unconstitutionally vague because it fails to provide information defining or elucidating what is considered unethical or unacceptable conduct. Defendant claimed that the statute is overbroad because it criminalizes sexual relations between consenting adults who are not incapacitated or related by blood or affinity. Finally, defendant argued that the provision unlawfully delegates to an undefined third party the legislative power to define a crime because of the failure of the statutory provision to delineate what constitutes unethical behavior or to point to any guidelines or organization for that definition.

The prosecution responded that the provision, when read in context, is not vague because it provides fair

[2] See MCL 750.520b(1)(f)(*i*), (*ii*), (*iii*), and (*v*).

notice of the conduct prohibited and defines what constitutes "force or coercion." Further, the prosecution alleged that defendant's professional code of ethics expressly prohibits sexual contact with a patient. Accordingly, defendant knew that his actions were unethical as demonstrated by his offering the victim money to not reveal their relationship, his destruction of incriminating audiotapes, and his admissions to the police regarding the impropriety of his behavior. The prosecution addressed the issue of consent by asserting that the victim was incapable of consenting given her mental and emotional instability and her heavily medicated condition. Finally, the prosecution maintained that the Legislature did not improperly delegate its authority because sexual contact with a patient is absolutely unethical and is expressly prohibited by the APA code of ethics and defendant was aware of the proscription against such a relationship with his patient.

After taking the matter under advisement, the trial court entered an order dismissing all charges against defendant. The trial court noted that the medical profession has recognized canons of ethics to which its members are obligated to adhere. The trial court further opined that the evidence presented at the preliminary examination demonstrated that sexual relations between a doctor and patient are always and expressly forbidden. The trial court concluded, "[i]f the statute is construed to refer to the canons of ethics adopted by the defendant's licensing agency or agencies, the statute is not void for vagueness." Nevertheless, the court determined that the statute was unconstitutional because it "delegate[ed] the content of a criminal law to a third-party in a manner that violates the nondelegation provision of the state constitution."

III. STANDARD OF REVIEW

On appeal, the prosecution contends that the trial court erred in finding that MCL 750.520b(1)(f)(*iv*) constituted an improper delegation of legislative authority. Whether a statute is constitutional is a question of law that this Court reviews de novo. *People v Martin*, 271 Mich App 280, 328; 721 NW2d 815 (2006).

IV. ANALYSIS

It is undisputed that defendant, while functioning as the victim's psychiatrist, engaged in a sexual relationship with his patient. Defendant was charged with violating MCL 750.520d(1)(b), which provides:

> A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> * * *
>
> (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(*i*) to (*v*).

MCL 750.520b(1)(f)(*iv*) provides that "force or coercion" includes:

> When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.[3]

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[3] The statute further indicates that "force or coercion" also includes: (*i*) when the actor overcomes the victim through the actual application of physical force or physical violence, (*ii*) when the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute the threats, (*iii*) when the actor coerces the victim to submit by threatening

The lower court accepted defendant's argument that MCL 750.520b(1)(f)(*iv*) allowed for an improper delegation of legislative authority because the statutory provision failed to sufficiently define the precluded conduct and permitted a third party, such as the APA, to make a determination of what constitutes prohibited behavior on the basis of that group's ascertainment of an applicable ethical code.

The Michigan Constitution prohibits the delegation of "legislative power." Const 1963, art 4, § 1. The nondelegation doctrine is recognized as encompassing a "standards" test:

> There is no doubt that a legislative body may not delegate to another its lawmaking powers. It must promulgate, not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what occasion, provided, however that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits. [*Associated Builders & Contractors v Dep't of Consumer & Industry Services Director (On Remand),* 267 Mich App 386, 391; 705 NW2d 509 (2005), quoting *West Ottawa Pub Schools v Director, Dep't of Labor*, 107 Mich App 237, 243; 309 NW2d 220 (1981), quoting *Detroit v Detroit Police Officers Ass'n,* 408 Mich 410, 458; 294 NW2d 68 (1980), quoting *Osius v St Clair Shores,* 344 Mich 693, 698; 75 NW2d 25 (1956) (internal quotation marks and emphasis omitted).]

However, a "vital distinction" exists " 'between conferring the power of making what is essentially a legislative determination on private parties and adopting what private parties do in an independent and unre-

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to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat, and (*v*) when the actor, through concealment or by the element of surprise, is able to overcome the victim. MCL 750.520b(1)(f)(*i*), (*ii*), (*iii*), and (*v*).

lated enterprise.' " *Associated Builders & Contractors, supra* at 393 (citation omitted). The independent significance standard has been described as:

> "[W]here a private organization's standards have significance independent of a legislative enactment, they may be incorporated into a statutory scheme without violating constitutional restrictions on delegation of legislative powers. A private entity's standards cannot be construed as a deliberate law-making act when their development of the standards is guided by objectives unrelated to the statute in which they function." [*Taylor v Gate Pharmaceuticals,* 468 Mich 1, 12; 658 NW2d 127 (2003) (citation omitted).]

In other words, " '[c]are must be exercised in distinguishing between statutes which delegate the authority to make the standards to private parties and those which refer to outside standards as the measuring device.' " *Id.* at 13 (citation omitted).

After construing MCL 750.520b(1)(f)(*iv*), we hold that the statute refers to factual conclusions of independent significance, which function as a "measuring device" and not an improper delegation of legislative authority. The statute relies on a determination of independent significance to ascertain whether a medical treatment or examination was conducted in a manner or for a purpose that is "medically recognized as unethical or unacceptable." This finding is then used as the measure against which conduct by the medical professional will be evaluated. The APA does not determine whether criminal charges will be filed. Instead, the APA for its own purposes and outside the context of this state's laws makes factual determinations and delineates guidelines regarding what constitutes inappropriate and unethical behavior for its professional members. This is consistent with this Court's previous recognition that "medical testimony is necessary to prove that a defendant's behavior during a medical

examination was not acceptable or ethical . . . ." *People v Capriccioso,* 207 Mich App 100, 105; 523 NW2d 846 (1994), citing *People v Thangavelu,* 96 Mich App 442, 450; 292 NW2d 227 (1980). Aside from this limited factual determination, it is the Michigan Legislature that defines and delineates "the legal consequences that flow from that finding." *Taylor, supra* at 14. "By using such independent determinations as a referent, the Legislature is not delegating how that fact will be used . . . ." *Id.* Contrary to the lower court's ruling, the Legislature's deferral to and use of these private standards or findings does not run afoul of the nondelegation doctrine.

In addition, we must address defendant's assertion of alternative bases to affirm the trial court's determination that the challenged statute is unconstitutional. Defendant contends that the statute is unconstitutionally vague and overly broad because it is silent on the issue of consent.

We begin our analysis with the premise that a statute is constitutional. *Phillips v Mirac, Inc,* 470 Mich 415, 442; 685 NW2d 174 (2004) (WEAVER, J., concurring in part and dissenting in part). A statute may be found to be unconstitutionally vague on three grounds: (a) the statute fails to provide fair notice to the public of the proscribed conduct, (b) the statute gives the trier of fact unstructured and unlimited discretion to determine if an offense has been committed, and (c) the statute is overly broad and impinges on First Amendment rights. *People v Nichols,* 262 Mich App 408, 409-410; 686 NW2d 502 (2004). A statute is overbroad when it precludes or prohibits constitutionally protected conduct in addition to conduct or behavior that it may legitimately regulate. *People v McCumby,* 130 Mich App 710, 714; 344 NW2d 338 (1983).

A plain reading of the statute precludes a medical professional from abusing the setting or status of the medical relationship by using it as a pretext to have sexual contact with a patient. Merely because the statute does not definitively list all possible prohibited conduct and necessitates the use of medical testimony to discern "whether a person has intentionally touched a patient's intimate parts for an improper purpose under such pretense," which touching was unrelated to "rendering . . . treatment," does not make the statute unconstitutionally vague. *Capriccioso, supra* at 105. A statutory provision will not be found invalid on overbreadth grounds "where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed." *People v Rogers,* 249 Mich App 77, 96; 641 NW2d 595 (2001). Defendant admitted engaging in an ongoing sexual relationship with his patient. The undisputed evidence adduced at the preliminary examination clearly demonstrated that sexual contact by a medical professional in the context of treatment is both unethical and unacceptable under any factual scenario. A defendant cannot successfully challenge a statute as being unconstitutionally vague or overbroad if the conduct of the defendant clearly falls within the constitutional scope of the statute. *Id.* at 95. "Because it was undisputed that the intentional touching of a patient for the purpose of sexual arousal or gratification is considered unacceptable and unethical, we find that the statutory offense adequately notified defendant that the conduct in which he engaged was criminal." *Capriccioso, supra* at 105.

Specifically, defendant asserts that there is an important distinction between the facts underlying the existing caselaw regarding the prosecution of medical personnel for criminal sexual conduct under this statutory

provision and the circumstances of this case because this alleged victim consented and willingly participated in a sexual relationship. Defendant is correct in asserting that the rather sparse caselaw on this topic demonstrates that use of the definition of force or coercion as contained in subsection 520b(f)(*iv*) is restricted to factual situations where there exists evidence to show that the defendant used the pretext of medical necessity or treatment in order to engage in an offensive contact. Specifically, in *Capriccioso,* the defendant, an emergency-room physician, was charged with fourth-degree criminal sexual conduct pursuant to MCL 750.520e(1)(a) in conjunction with his "improper conduct during the examinations of seven female patients . . . ." *Capriccioso, supra* at 101. Female patients came to the emergency room with complaints of back pain and dizziness, bronchitis, stomach problems, and forms of allergy or sinus discomfort. The patients complained that the defendant engaged in prolonged and repetitive examinations of their breasts and, in one instance, penetrated the victim's vagina with an ungloved hand. The defendant's manner in conducting these examinations was "described as not typical of previous breast examinations" and a "medical expert opined that the . . . examinations performed by defendant were unnecessary for the patients' ailments and the manner of defendant's performance . . . was medically inappropriate and unacceptable." *Id.* at 104.

This Court addressed the issue of force or coercion within the context of the delivery of medical treatment, by stating, in relevant part:

> [T]he conduct proscribed [by subsection 520b(f)(*iv*)] is the intentional touching of a patient by a doctor for sexual gratification under the pretense that the contact is necessary in the diagnosis of the patient's ailment. The objective is to prevent a person in the medical profession from taking

> such an unconscionable advantage of the patient's vulnerability and abusing the patient's trust and unwitting permission of the touching under the belief that it is necessary. In turn, the Legislature has defined force or coercion as encompassing these situations. [*Capriccioso, supra* at 105.]

Similarly, in *People v Regts,* 219 Mich App 294; 555 NW2d 896 (1996), this Court found that the defendant, who was the victim's psychotherapist, "manipulated therapy sessions to establish a relationship that would permit his sexual advances to be accepted without protest." *Id.* at 296. More recently, in *People v Alter*, 255 Mich App 194; 659 NW2d 667 (2003), this Court again addressed "sexual relations that [the defendant] had with the victim while he was her therapist." *Id.* at 196. The defendant initiated sexual contact with his victim at hotels as part of her purported therapy. In that instance, "[t]he victim denied that she had any romantic feelings toward defendant while in therapy with him" and "denied ever giving defendant permission to have . . . sexual contact with her." *Id.* at 197, 203. This Court determined that the lack of permission from the victim comprised "sufficient evidence that defendant used actual force or an unethical or unacceptable manner of treatment to accomplish sexual contact," pursuant to MCL 750.520b(1)(f)(*i*). *Alter, supra* at 203. In the alternative, this Court recognized that "the coercion element was satisfied because defendant, as the victim's therapist, engaged in sexual contact with the victim through the use of an unethical or unacceptable manner of treatment" under the pretense of assisting the victim address problems in her marital relationship. *Id.*

Clearly, MCL 750.520b(1)(f)(*iv*) has historically been applied to situations where the pretext of medical necessity or treatment was used to secure the victim's consent to what would, outside the medical context,

comprise an offensive contact or touching. As such, the statutory provision has functioned as a means to negate any consent by the victim when a medical pretense is used. *Capriccioso, supra* at 105. In other words, the statute criminalizes a medical professional's abuse or manipulation of a patient in order to procure their concession or acquiescence to sexually intimate contact on the basis of a belief or understanding that such contact is necessary to conduct a medical examination or for treatment purposes.

Defendant contends that this case does not conform to the established standard because his relationship with the victim was consensual, thereby failing to demonstrate the statutory requirement of "force or coercion." We note at the outset that a factual question exists regarding whether the victim's sexual encounters with defendant were consensual or the result of manipulation in the context of therapy. The victim asserts that defendant discouraged her from consulting other medical professionals for treatment and continued to engage in therapy and the prescription of medication for her. And we note that at least one of the charged sexual encounters occurred in defendant's office, allegedly during a therapy session, which was billed to the victim's medical insurer.

Although defendant denies the use of any medical pretext for the sexual encounters, a factual issue exists. While the victim acknowledged having "feelings" for and a sexual attraction to the defendant, this is not dispositive of whether defendant victimized her. The victim's voluntary participation in this relationship is called into question by the inherent inequality and potential for exploitation within the doctor-patient relationship. The medical profession's code of ethics expressly provides that sexual contact between a doctor

and a patient is absolutely inappropriate, unethical, and unacceptable under any set of facts or circumstances. In addition, this victim's ability to either consent or voluntarily participate in this relationship is questionable because of her history of mental-health issues and susceptibility to manipulation through defendant's prescription of multiple medications. Defendant was well aware of the victim's condition given his prolonged history of involvement as her therapist. As such, defendant's actions are particularly egregious. Even if the victim initiated and voluntarily sought a sexual relationship, defendant had a professional duty to rebuff advances and set clear boundaries, which duty he failed miserably. Because of the alleged manipulation by defendant of his therapeutic relationship with the victim to obtain sexual contact and gratification, a factual question exists regarding the use of force or coercion as statutorily defined by MCL 750.520b(1)(f)(*iv*).

In addition, defendant misconstrues the role of consent in arguing against the criminalization of the charged behavior. Consent is not an element of the charged crime to be proven by the prosecution, and its absence from the statutory language does not render the statute unconstitutionally vague. As previously noted by this Court:

> Although the statute is silent on the defense of consent, we believe it impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither "mentally defective", . . . "mentally incapacitated", . . . nor "physically helpless", . . . is not criminal sexual conduct. [*People v Khan,* 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978).]

Consequently, while consent can be used as a defense to negate the elements of force or coercion, *People v Waltonen,* 272 Mich App 678, 689; 728 NW2d 881

(2006), citing *People v Stull,* 127 Mich App 14, 19-21; 338 NW2d 403 (1983), this defense is not absolute.

The prosecution must prove "sexual penetration" through the use of "[f]orce or coercion." MCL 750.520d(1)(b). In this circumstance, force or coercion is demonstrated by showing that defendant "engage[d] in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable." MCL 750.520b(1)(f)(*iv*). However, the temporal or spatial contiguity of the charged behaviors to the treatment setting is not the focus of our inquiry. As noted previously by this Court in *Capriccioso, supra* at 105, it is the manipulation of the patient within the context of a medical or treatment relationship that is determinative of the presence of force or coercion. Contrary to defendant's argument, the presence of consent is not necessarily the factual equivalent of the absence of coercion. Rather, it is a determination of the validity of that consent that is the focus of the inquiry. The fact that a victim "consented" to the touching, or even voluntarily pursued an intimate relationship with the therapist, is only of significance if it can also be shown that there exists no inference or demonstration of impermissible manipulation by the medical professional of his or her patient to secure the sexual contact. Hence, under the circumstances of this case, we conclude that there is a sufficient basis to reinstate the criminal charges against defendant given the existence of a factual issue regarding the use of force or coercion to obtain sexual gratification through defendant's abuse of the treatment setting and purposeful manipulation of the victim.

Reversed and remanded to the trial court for the reinstatement of charges against defendant. We do not retain jurisdiction.

CITIZENS INSURANCE COMPANY v SECURA INSURANCE

Docket No. 274751. Submitted November 16, 2007, at Detroit. Decided May 15, 2008, at 9:10 a.m.

Citizens Insurance Company brought an action in the Ingham Circuit Court against Secura Insurance, Geraldine Irvine, Andrew Gillespie, and others, seeking a declaratory judgment that Secura owed Gillespie a duty to defend and indemnify in several lawsuits filed against him. The plaintiffs in those lawsuits sought damages for injuries and deaths sustained in an automobile accident in which Gillespie was allegedly under the influence of medication and alcohol while driving a vehicle owned by Irvine, his mother. Citizens insured vehicles owned by Gillespie and Secura insured the vehicle owned by Irvine that was involved in the accident. Irvine filed a motion for summary disposition, contending that there was no genuine issue of material fact that Gillespie did not have her consent to operate her vehicle at the time of the accident and, therefore, she was not liable under the owner-liability statute, MCL 257.401. The court, Beverley Nettles-Nickerson, J., denied the motion, holding that a genuine issue of material fact remained regarding whether Gillespie was operating Irvine's vehicle with her consent. The court thereafter granted summary disposition for Citizens, holding that Secura had a duty to defend and indemnify with regard to the underlying actions filed against Gillespie. Secura and Irvine appealed.

The Court of Appeals *held*:

1. The Secura policy provides coverage in a situation where an individual is operating the vehicle in question with the permission of the insured. MCL 257.401(1) creates a rebuttable presumption that a vehicle is being driven with the knowledge and consent of the owner if it is being driven by the spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. This presumption, taken together with the plaintiffs' allegations in the underlying suits that Gillespie was operating the vehicle with Irvine's consent, are sufficient to support the conclusion that Secura has a duty to defend Gillespie in the underlying suits. The trial court did not prematurely grant summary disposition in favor of Citizens with regard to Secura's duty

to defend. That part of the trial court's order must be affirmed. Secura's argument that Gillespie was operating Irvine's vehicle without her consent does not defeat its duty to defend Gillespie in this case.

2. The statutory presumption of consent may be rebutted and, in that event, if it is shown that Irvine did not consent to the use of her vehicle, Secura would not be obligated to indemnify Gillespie. Summary disposition with regard to Secura's duty to indemnify was granted prematurely. The part of the order regarding Secura's duty to indemnify must be reversed.

3. Secura's appeal was not vexatious. The request by Citizens for costs and sanctions against Secura must be denied.

Affirmed in part and reversed in part.

INSURANCE — DUTY TO DEFEND INSURED.

An insurance company has a duty to defend its insured if the allegations of the underlying suit arguably fall within the coverage of the policy; this duty is not limited to meritorious suits and may even extend to actions that are groundless, false, or fraudulent as long as the allegations against the insured even arguably come within the policy coverage; the duty to defend arises from the language of the insurance contract and does not depend on the insured's liability to pay.

Mellon, McCarthy & Pries, P.C. (by *Daniel J. McCarthy* and *Brian R. Harris*), for Citizens Insurance Company.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh*), for Secura Insurance and Geraldine Irvine.

Before: ZAHRA, P.J., and WHITE and O'CONNELL, JJ.

ZAHRA, P.J. In this action for a declaratory judgment arising out of a fatal automobile accident, defendants Secura Insurance and Geraldine Irvine, Secura's insured, appeal as of right from the trial court's order granting plaintiff Citizens Insurance Company's motion for summary disposition under MCR 2.116(C)(10). The trial court determined that Secura owed defendant

Andrew Gillespie, Citizens' insured, a duty to defend and indemnify in regard to underlying actions filed against Gillespie. Pursuant to the Secura insurance policy, Gillespie would be insured if he operated the vehicle he was driving with the express or implied consent of Irvine, the vehicle's owner. Whether Irvine consented to Gillespie's use of her vehicle is a disputed issue that must be resolved by the fact-finder. As more fully explained in this opinion, we conclude that Secura had a duty to defend Gillespie. We further conclude that the question of Secura's duty to indemnify turns on the fact-finder's determination whether Gillespie operated the vehicle with the express or implied consent of Irvine. We affirm the order as it relates to Secura's duty to defend Gillespie. We reverse the order, in part, as it relates to Secura's duty to indemnify Gillespie.

I. BASIC FACTS AND PROCEDURE

On August 23, 2004, Gillespie was operating a 1998 Toyota Camry belonging to his mother, Geraldine Irvine, while allegedly under the influence of medication and alcohol. Gillespie caused a car accident that resulted in the deaths of Alysha Lynn Salt and Robert Bolanowski and caused critical injuries to Stephen Ancona and Terrance Hall.

Ancona, Hall, and the personal representatives of the estates of Salt and Bolanowski filed lawsuits against Gillespie (the underlying lawsuits), alleging that he negligently operated Irvine's vehicle at the time of the accident. The plaintiffs in the underlying suits also alleged that Gillespie operated Irvine's vehicle with her consent and, accordingly, that Irvine is liable under MCL 257.401 (the owner-liability statute). Irvine, who was insured by Secura at the time of the accident, filed a motion for summary disposition under MCR

2.116(C)(10), arguing that there was no genuine issue of material fact that Gillespie did not have her consent to operate her vehicle at the time of the accident. The trial court denied this motion, holding that a genuine issue of material fact remained regarding whether Gillespie was operating Irvine's vehicle with her consent.

Citizens insured Gillespie at the time of the accident. Citizens contacted Secura by letter informing it that Secura had a duty to defend Gillespie in the underlying lawsuits. Secura refused to defend Gillespie. Citizens then filed the present action, seeking a determination that Secura owed Gillespie a duty to defend and indemnify in the underlying lawsuits. The trial court granted Citizens' motion for summary disposition and ordered Secura to defend and indemnify Gillespie in the underlying lawsuits.

II. ANALYSIS

A. STANDARD OF REVIEW

We review a trial court's ruling on a motion for summary disposition de novo. *Maskery v Univ of Michigan Bd of Regents,* 468 Mich 609, 613; 664 NW2d 165 (2003). The interpretation and construction of insurance contracts are also questions of law, which this Court reviews de novo. *Shefman v Auto-Owners Ins Co,* 262 Mich App 631, 636; 687 NW2d 300 (2004).

B. CITIZENS' LIABILITY UNDER ITS POLICY WITH GILLESPIE

Gillespie obtained from Citizens an insurance policy that covered two vehicles that he owned. This policy provided, in part, that Citizens would "pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an 'auto accident'[,]" and that Citizens will "settle or

defend . . . any claim or suit asking for these damages." The "other insurance" clause of the policy declared that the coverage provided by Citizens for a vehicle not owned by Gillespie "shall be excess over any other collectable insurance." Here, Gillespie was driving a vehicle he did not own. By the plain terms of the Citizens insurance policy, any coverage under that policy is excess to other coverage that is afforded Gillespie.

C. SECURA'S LIABILITY UNDER ITS POLICY WITH IRVINE

Although a copy of Irvine's policy with Secura is not included in the lower-court record, Secura acknowledges that MCL 257.520(b)(2) provides that properly certified policies of liability insurance shall

> insure the person named therein *and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured*, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada. [Emphasis added.]

Therefore, we assume, as did the trial court, that the Secura policy complies with this statute and provides coverage in a situation where an individual is operating the vehicle in question with the permission of the insured.

Secura acknowledges that if Irvine consented to Gillespie's use of her vehicle, Gillespie would be an insured under its policy. Nonetheless, Secura argues that the trial court prematurely granted Citizens' motion for summary disposition because the question whether Gillespie was an insured under Secura's policy could not be determined until a jury determines that Gillespie was in fact operating Irvine's vehicle with her consent at the time of the accident. We disagree.

MCL 257.401(1) creates a rebuttable presumption that a vehicle "is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family." Pursuant to this statutory provision, we start our analysis with the presumption that Gillespie, who was driving Irvine's vehicle at the time of the injury and who is the son of Irvine, had the consent of Irvine to drive her vehicle and thus Gillespie is an insured under the Secura policy. We recognize this statutory presumption is rebuttable. We nonetheless conclude that the presumption, taken together with the plaintiffs' allegations in the underlying suits, are significant and sufficient to support the conclusion that Secura has a duty to defend Gillespie in the underlying suits.

1. SECURA'S DUTY TO DEFEND GILLESPIE

An insurance company has a duty to defend its insured "if the allegations of the underlying suit arguably fall within the coverage of the policy . . . ." *Royce v Citizens Ins Co,* 219 Mich App 537, 543; 557 NW2d 144 (1996). An insurer's duty to defend is broader than its duty to indemnify. *Busch v Holmes,* 256 Mich App 4, 9; 662 NW2d 64 (2003). The duty to defend arises from the language of the insurance contract. *Michigan Ed Employees Mut Ins Co v Turow,* 242 Mich App 112, 117; 617 NW2d 725 (2000). In determining whether there is a duty to defend, courts are guided by established principles of contract construction. *McKusick v Travelers Indemnity Co,* 246 Mich App 329, 332; 632 NW2d 525 (2001).

> The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not

> limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured *even arguably* come within the policy coverage. An 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. [*Detroit Edison Co v Michigan Mut Ins Co,* 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (emphasis in original; citations omitted).]

See also *Protective Nat'l Ins Co of Omaha v Woodhaven,* 438 Mich 154, 159; 476 NW2d 374 (1991).

Here, the underlying complaints allege that Gillespie had the permission of Irvine to operate the vehicle. This is a theory of liability that the Secura policy arguably covers. In *Polkow v Citizens Ins Co of America,* 438 Mich 174, 180; 476 NW2d 382 (1991), a case concerning an insurance company's duty to defend in a pollution suit, our Supreme Court stated:

> Fairness requires that there be a duty to defend at least until there is sufficient factual development to determine what caused the pollution so that a determination can be made regarding whether the discharge was sudden and accidental. Until that time, the allegations must be seen as "arguably" within the comprehensive liability policy, resulting in a duty to defend.

In *Guerdon Industries, Inc v Fidelity & Cas Co of New York,* 371 Mich 12, 18; 123 NW2d 143 (1963), our Supreme Court stated, "[i]t is settled that the insurer's duty to defend the insured is measured by the allegation

in plaintiff's pleading. The duty to defend does not depend upon [the] insurer's liability to pay."

In *Zurich Ins Co v Rombough,* 19 Mich App 606, 612; 173 NW2d 221 (1969), aff'd 384 Mich 228 (1970), a party brought a negligence action against the defendant as a result of a car accident. The plaintiff, the defendant's insurance company, argued that it did not have any duty to defend the defendant in the underlying suit because the defendant was operating the vehicle while hauling a trailer as a part of a business. The policy carried an endorsement that provided that the policy did not apply while the automobile or any attached trailer was used to carry property in any business. *Id.* at 610. The *Zurich* Court found the insurance company had a duty to represent the defendant, stating:

> The complaint sets forth allegations which, if true, would subject [the defendant] to liability covered by the policy. It is only by the introduction of extrinsic evidence showing that the driver was hauling a trailer with goods, that coverage might be defeated. The plaintiff has a duty to represent the defendant in the original action. [*Id.* at 612.]

In sum, our Legislature has provided a statutory presumption that Gillespie was operating Irvine's vehicle with her consent. The underlying complaints each set forth allegations that Gillespie was driving with the express or implied consent of Irvine. If consent is established in the underlying suits, Gillespie would be insured under the Secura policy and Secura would be subject to liability under its policy. Secura's argument that Gillespie was operating Irvine's vehicle without her consent does not defeat its duty to defend Gillespie in this case.[1]

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[1] The trial court ordered defendant to pay $17,868.09 plus interest, the cost to defend Gillespie in the underlying suits. We affirm the trial court on this issue.

2. SECURA'S DUTY TO INDEMNIFY

While we conclude that the allegations of the underlying complaints and the statutory presumption found at MCL 257.401(1) are sufficient to impose on Secura the duty to defend Gillespie, this statutory presumption and the allegations of the complaint can be rebutted, and, if rebutted, Secura would not be obligated to indemnify Gillespie for his negligent conduct. Citizens claims that Secura will not be wrongly required to indemnify Gillespie irrespective of the outcome of the underlying cases. Citizens claims that should the juries in the underlying cases determine that Gillespie was operating Irvine's vehicle without her consent, then there would be no coverage under Secura's policy with Irvine, and Secura would not be forced to indemnify Gillespie.

We agree with Citizens' assessment of the coverage afforded Irvine and Gillespie under the Secura policy of insurance. Nonetheless, the language of the trial court's order granting summary disposition to Citizens does not limit Secura's duty to indemnify to a situation in which Irvine consented to Gillespie's use of her vehicle. In the underlying lawsuits, Gillespie's liability may be premised on his negligent operation of the motor vehicle, while Secura and Irvine's liability for Gillespie's negligence only arises where it is determined that Irvine consented to the use her vehicle. It may well turn out that one or more of the juries in the underlying suits find Gillespie negligent in the operation of the vehicle and at the same time conclude that Irvine did not consent to Gillespie's use of her vehicle. In that case, Secura would not be under a duty to indemnify Gillespie. Accordingly, we limit Secura's duty to indemnify Gillespie in the underlying suits to situations in

which there is a factual or legal determination that Irvine expressly or impliedly consented to Gillespie's use of her vehicle.

D. CITIZENS' REQUEST FOR SANCTIONS

Citizens requests that this Court grant costs and sanctions, including appellate costs and attorney fees, claiming Secura's appeal is vexatious. Damages may be awarded or other disciplinary action may be taken when an appeal or proceedings in an appeal are determined to be vexatious. MCR 7.216(C). Such a determination may be made at the Court's own initiative "or on the motion of any party filed under MCR 7.211(C)(8) . . . ." MCR 7.216(C)(1).

We conclude that Secura's appeal is not vexatious. Contrary to Citizens' view, this case presents a unique question that is not well settled under Michigan law. All the caselaw presented by Citizens addresses the duty to defend and indemnify a party that is unquestionably an insured under the relevant policy of insurance. Here, the critical question is whether Gillespie is an insured under the Secura insurance policy issued to Irvine. Citizens has not presented nor has this Court discovered caselaw that squarely addresses this issue of insurance law.

Moreover, "[a] party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule." MCR 7.211(C)(8). In this case, Citizens' request for sanctions was contained in its brief filed under MCR 7.212 and, therefore, does not constitute a motion as required by the applicable court rule.

III. CONCLUSION

The trial court properly granted Citizens' motion for summary disposition on the issue of Secura's duty to defend Gillespie. The trial court prematurely granted Citizens' motion for summary disposition on the issue of Secura's duty to indemnify Gillespie. We decline to impose sanctions.

Affirmed in part and reversed in part.

DONIGAN v OAKLAND COUNTY ELECTION COMMISSION

Docket No. 284909. Submitted May 13, 2008, at Detroit. Decided May 15, 2008, at 9:15 a.m.

The Oakland County Election Commission approved language in a petition seeking the recall of Marie Donigan, the State Representative from the 26th House District, that listed as the reason for the recall Donigan's favorable votes on HB 5194 and HB 5198 of 2007, which, respectively, increased the income tax and imposed a new tax on certain services. Donigan then filed an action in the Oakland Circuit Court challenging the decision of the commission. The court, Shalina Kumar, J., granted Donigan's motion for summary disposition, holding that the language of the petition was not sufficiently clear to satisfy the clarity requirement of MCL 168.952(1)(c) because it did not fully explain the nature and effect of the House bills. The election commission appealed by delayed application for leave to appeal granted.

The Court of Appeals *held*:

The petition's language clearly states the reason for the recall. The language is sufficiently clear. The truthfulness of the petition's statements and whether the language of the petition sufficiently explains the nature of any legislation referred to within it are political questions to be considered by the voters, not by the courts. The circuit court erred in failing to uphold the election commission's approval of the petition language.

Reversed.

1. PUBLIC OFFICERS — RECALL PETITIONS.

The statutory requirement that a petition for the recall of an officeholder state clearly each reason for the recall does not require a meticulous and detailed statement of the charges against the officeholder and is satisfied where each reason for the recall stated in the petition is of sufficient clarity to enable the officeholder and the electors to identify the course of conduct that is the basis for the recall; doubt should be resolved in favor of the person formulating the petition where the clarity of the reasons stated in the petition is a close question (MCL 168.952[1][c], [3]).

2. PUBLIC OFFICERS — RECALL PETITIONS.

Truth itself is not a consideration in determining the clarity of recall petition language; the truthfulness of a petition's statements and whether the language of a petition sufficiently explains the nature of any legislation referred to within it are political questions to be considered by the voters, not the courts (MCL 168.952[1][c], [3]).

Sachs Waldman, Professional Corporation (by *Mary Ellen Gurewitz*), for the plaintiff.

Vandeveer Garzia (by *John J. Lynch* and *Christian E. Hildebrandt*) for the defendant.

Before: FITZGERALD, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM. Defendant, Oakland County Election Commission, appeals by delayed application for leave to appeal granted the circuit court order granting summary disposition in favor of plaintiff, Marie Donigan, the State Representative from the 26th House District, and declaring the language of a recall petition insufficiently clear pursuant to MCL 168.952(1)(c). We reverse.

Defendant received a petition seeking to recall plaintiff. The petition states the reasons for plaintiff's recall as: "Voted yes on 2007 House Bill 5194 to increase the income tax to 4.35 percent, and voted yes on 2007 House Bill 5198 to impose new 6 percent taxes on certain services."

Under MCL 168.952(1)(c), a petition for the recall of an officer shall "[s]tate clearly each reason for the recall. Each reason for the recall shall be based upon the officer's conduct during his or her current term of office." The petition was submitted to defendant, MCL 168.952(2), and defendant met pursuant to MCL 168.952(3) to determine whether each reason for the

recall stated in the petition is of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall. Defendant, by a divided vote, approved the petition language.

Plaintiff thereafter filed the present action challenging defendant's decision. Plaintiff moved for summary disposition, arguing that the petition language is not sufficiently clear, and raising a constitutional challenge to MCL 168.23(1) and MCL 168.952.[1] The circuit court granted plaintiff's motion, ruling that the language in the petition is not sufficiently clear and does not satisfy the clarity requirement of MCL 168.952(1)(c) because it does not refer to the subject bills in their entirety or inform the electors of the specific vote on the bills and the specific outcome. The court opined that the petition must include "enough language to give the electors enough information about what was actually voted on to give them the ability to make an informed decision about the recall petition."

Defendant argues that the circuit court erred by concluding that the language of the petition is not sufficiently clear under MCL 168.952(1)(c). This Court reviews de novo both the circuit court's decision on plaintiff's motion for summary disposition and its construction of MCL 168.952(3). *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558; 737 NW2d 476

[1] Plaintiff argues that this matter should be remanded to the trial court to resolve the constitutional issue. Although this Court may address constitutional issues that the trial court did not resolve, *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (1998), we decline to address the issue at this juncture. Plaintiff is free to pursue the issue in the trial court. Further, the issue is pending before this Court in two consolidated appeals, *Bogeart v Wayne Co Election Comm* (Docket No. 284098), and *Hett v Wayne Co Election Comm* (Docket No. 284101).

(2007); *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 525; 734 NW2d 533 (2007).

The standard to be applied when reviewing the clarity of a petition for recall is set forth in *Dimas v Macomb Co Election Comm*, 248 Mich App 624, 627-628; 639 NW2d 850 (2001):

> The standard of review for clarity of recall petitions has been described as both "lenient," and "very lenient." "Thus, recall review by the courts should be very, very limited." A meticulous and detailed statement of the charges against an officeholder is not required. It is sufficient if an officeholder is apprised of the course of conduct in office that is the basis of the recall drive, so that a defense can be mounted regarding that conduct. "Where the clarity of the reasons stated in the petition is a close question, doubt should be resolved in favor of the individual formulating the petition." [Citations omitted.]

"All that is required is that the reason for recall be stated with sufficient clarity 'to enable the officer and electors to identify the transaction and know the charges made in connection therewith.' " *Mastin v Oakland Co Elections Comm*, 128 Mich App 789, 795; 341 NW2d 797 (1983), quoting *Woods v Saginaw Co Clerk*, 80 Mich App 596, 598-599; 264 NW2d 74 (1978).

The circuit court determined that the language of the instant petition is not sufficiently clear because it does not fully explain the nature and effect of the bills at issue. This is not a basis for finding the language unclear. The language clearly states the basis for the recall: plaintiff's votes on two House bills. In challenging the language as not sufficiently clear, plaintiff seems to suggest that the way the petition language is framed in this case either untruthfully represents the bills or at least fails to provide a complete synopsis of the bills. However, "truth itself is not a consideration in determining the clarity of recall petition language." *Mastin*,

supra at 798. The circuit court does not have authority to review petition statements for truthfulness. *Meyers v Patchkowski*, 216 Mich App 513, 518; 549 NW2d 602 (1996). "Such a determination is a political question for the voters, not the courts." *Id*. See also Const 1963, art 2, § 8 (the sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question). This same principle applies with regard to whether the language of the petition sufficiently explains the nature of any legislation referred to within it. Whether HB 5194 simply increased the income tax rate, whether HB 5198 imposed a new tax on services, or whether those bills imposed some additional or different measures, are political questions to be considered by the voters, not by the court.

In *In re Wayne Co Election Comm*, 150 Mich App 427, 438; 388 NW2d 707 (1986), this Court explained:

> [D]oubt as to clarity should be resolved in favor of the proponents of the recall. Moreover, if any one of several allegations contained in the petition is deemed to be sufficiently clear, the petition must be upheld. The foregoing rules demonstrate that the standard of review for clarity of statement is very lenient. [Citations omitted.]

In *Schmidt v Genesee Co Clerk,* 127 Mich App 694, 699; 339 NW2d 526 (1983), the Court offered this reflection by a commentator who approved of the judicial restraint demonstrated by the majority when reviewing the clarity of recall-petition language in *Molitor v Miller*, 102 Mich App 344; 301 NW2d 532 (1980):

> "Overall, the decision [to exercise judicial restraint] is correct from the standpoint that quite often laymen are required to draft recall petitions. To require technical detail in the statement of charges would be too burdensome and could defeat the purpose of the recall statute. The Michigan constitution reserves the power of recall to the

> people. Courts should not, and generally do not, interfere with this basic right. To require meticulous and technically detailed statements of the charges in recall petitions would in effect thrust the courts into reviewing every recall petition, thereby usurping the power of the people." [*Schmidt*, *supra* at 699, quoting Berry, *Local Government Law*, 28 Wayne L R 979, 984 (1982).]

Keeping in mind the limitation on our review of the petition language, we conclude that the language of the recall petition submitted to defendant for approval is sufficiently clear. The petition specifically identifies plaintiff's favorable votes regarding two House bills as the reasons recall was sought. The language specifically identifies the House bills and indicates that one of the bills increases taxes and one imposes new taxes. Whether the representations of those bills are truthful or complete is irrelevant for purposes of determining the clarity of the language. The petition language is concise and clear, and meets the requirements of MCL 168.952(1)(3). The circuit court erred by failing to uphold defendant's approval of the petition language.

Reversed.

PEOPLE v JONES

Docket No. 275438. Submitted February 6, 2008, at Detroit. Decided May 20, 2008, at 9:00 a.m. Leave to appeal sought.

Jeffrey J. Jones was charged in the Wayne Circuit Court with various controlled-substances and firearm offenses following the search with a warrant of two residences he owned. The warrant was based on information obtained from an informant and on the reaction of a police narcotics-detection canine that, when brought to the front door of one of the residences, gave a positive indication that drugs were inside the residence. The court, David J. Allen, J., granted the defendant's motion to suppress the evidence and dismissed the charges, ruling that the canine sniff was obtained in violation of the rights guaranteed by the Fourth Amendment of the United States Constitution because the canine sniff itself is a search that must be supported by probable cause and a warrant. The prosecution appealed.

The Court of Appeals *held*:

1. A search within the meaning of the Fourth Amendment occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.

2. A canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at the vantage point when its sense is aroused, even if it is at the front door of a defendant's home. A canine sniff reveals only the presence of contraband, in which there is no legitimate expectation of privacy.

3. The canine was lawfully present at the front door of the defendant's residence when it detected the presence of contraband. There is no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch.

4. The defendant had legitimate privacy interests or expectations with respect to the legal activities taking place in the home and the legal contents therein. However, the canine sniff did not invade these legitimate privacy interests or the defendant's legitimate expectation of privacy because of the uniqueness of the

canine sniff that focused only on contraband, for which there was no legitimate privacy interest. The canine sniff was constitutionally sound, not because the defendant had no legitimate privacy interest in the contraband, but because no legitimate privacy interests or expectations were intruded upon by the canine sniff.

Reversed and remanded.

BORRELLO, J., dissenting, stated that the majority disregards the heightened Fourth Amendment protection that the United States Supreme Court has historically recognized exists in a person's home and improperly focuses on the illegality of the contraband obtained as a result of a search, running afoul of the principle that the Fourth Amendment's protection of the home has never been tied to a measurement of the quality or quantity of information obtained. The Fourth Amendment remains decidedly about "place," and when the place at issue is a home, a firm line remains at its entrance blocking the noses of canines from sniffing government's way into the intimate details of an individual's life. The canine sniff of the defendant's home constituted an unreasonable search in violation of the Fourth Amendment. The order of the trial court should be affirmed.

SEARCHES AND SEIZURES — SNIFF BY NARCOTICS-DETECTION CANINE.

A canine sniff by a trained narcotics-detection canine is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at the vantage point when its sense is aroused, even if it is the front door of a residence that is open to the public; a canine sniff does not reveal the presence of lawful activity or items, but only reveals the presence of contraband, in which there is no legitimate privacy interest (US Const, Am IV; Const 1963, art 1, § 11).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

Muawad & Muawad, P.C. (by *Elias Muawad*), for the defendant.

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

FITZGERALD, P.J. The prosecution appeals as of right from an order granting defendant's motion to suppress evidence and dismissing the charges against him. We reverse and remand.

I

The police received information from an informant regarding defendant's alleged possession and sale of marijuana. The informant indicated that defendant had been arrested several times in the past for possessing illegal narcotics, that defendant kept a small amount of marijuana for personal use at his 24975 South Sylbert residence in Redford Township, and that defendant kept larger amounts of illegal narcotics at his 15888 Southfield Road residence in Detroit. A Law Enforcement Information Network (LEIN) check revealed that defendant had a misdemeanor conviction for possession of marijuana and two felony convictions for delivery/manufacture of a controlled substance. Prompted by this information, the police arranged to have a trained narcotics-detection dog brought to the defendant's Southfield residence so that a canine sniff could be conducted. The dog gave a positive indication for narcotics at the front door of the residence. On the basis of the dog's reaction, as well as their prior information, the police obtained a search warrant to search both premises.

Defendant was charged in lower-court Docket Number 011698 as a fourth-offense habitual offender, MCL 769.12, with possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, as the result of a search of the South Sylbert premises. Defendant was charged in lower-court Docket Number 012320 as a fourth-offense ha-

bitual offender, MCL 769.12, with the manufacture of 5 to 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii), felon-in possession, MCL 750.224f, possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), and felony-firearm, MCL 750.227b, as a result of a search of the Southfield Road premises.

Defendant moved to suppress all the items of evidence that had been seized during the two searches. Defendant argued that the canine sniff outside his front door, which alerted the officers to the presence of a controlled substance inside his house, was an illegal search. In support of his argument, defendant relied on *State v Rabb*, 920 So 2d 1175 (Fla App, 2006) (a canine sniff from outside a home to detect narcotics inside the home uses extra-sensory procedure that violates the firm line at the door of the home protected from intrusion by the Fourth Amendment).[1] The prosecution relied on *Illinois v Caballes,* 543 US 405, 408-409; 125 S Ct 834; 160 L Ed 2d 842 (2005), in arguing that the canine sniff was not a search at all because the police were lawfully present at the front door of defendant's residence and defendant possessed no reasonable expectation that his drugs would go undetected. Following a hearing on the motion, the trial court granted defendant's motion to suppress. In support of its decision, the trial court relied on *Kyllo v United States,* 533 US 27, 29; 121 S Ct 2038; 150 L Ed 2d 94 (2001). In *Kyllo,* the Court held that the use of a thermal-imaging device to detect relative amounts of heat within a private home

[1] The prosecution noted that *Rabb* is a Florida state court decision not binding on Michigan courts. *Rabb* has not been cited in any subsequent decisions for the holding that a canine sniff at a residence's front door constitutes an illegal search. *Rabb* relied on *United States v Thomas*, 757 F2d 1359 (CA 2, 1985), a decision that has been criticized by other federal circuit courts and appears never to have been followed by any federal courts outside the second circuit.

was a Fourth Amendment search and must be supported by probable cause and a warrant. The *Kyllo* Court held that where the government uses "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40. In the present case, the trial court found that a canine sniff is akin to the use of a thermal-imaging device. The trial court concluded that the canine sniff is a search that must be supported by probable cause and a warrant.

II

The sole issue on appeal is whether the trial court properly suppressed the evidence against defendant on the ground that the canine sniff, which provided the probable cause for the issuance of the search warrant, was obtained in violation of the rights guaranteed by the Fourth Amendment of the United States Constitution.[2] Resolution of this issue requires a determination whether the canine sniff of the front door of defendant's residence is a search under the Fourth Amendment. We review a trial court's factual findings at a suppression hearing for clear error, but review de novo the ultimate ruling on a motion to suppress. *People v Davis,* 250 Mich App 357, 362; 649 NW2d 94 (2002).

Both the United States Constitution and the Michigan Constitution guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const

[2] There is no dispute that a positive reaction by a properly trained narcotics dog can establish probable cause to believe that contraband is present. See, e.g., *United States v Berry,* 90 F3d 148, 153 (CA 6, 1996). The prosecution concedes in this case that probable cause is lacking absent the result of the canine sniff.

1963, art 1, § 11; see *Illinois v McArthur,* 531 US 326; 121 S Ct 946; 148 L Ed 2d 838 (2001). The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment of the United States Constitution. *People v Levine,* 461 Mich 172, 178; 600 NW2d 622 (1999). A search within the meaning of the Fourth Amendment "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v Jacobsen,* 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

The United States Supreme Court has held that a "canine sniff" does not unreasonably intrude upon a person's reasonable expectation of privacy. See *United States v Place*, 462 US 696, 706-707; 103 S Ct 2637; 77 L Ed 2d 110 (1983). In *Place,* the Court held that a canine sniff of a traveler's luggage in an airport was not a search within the meaning of the Fourth Amendment because the information obtained through this investigative technique revealed only the presence or absence of narcotics. As the Court explained:

> [T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. [*Id.* at 707.]

The Supreme Court reaffirmed the *Place* Court's holding in *Jacobsen, supra.* In *Jacobsen, supra* at 123, the Court held that a chemical field test of a white substance found inside a package was not a Fourth Amendment search because the test "merely discloses whether or not a particular substance is cocaine . . . ." Because there is no legitimate interest in possessing cocaine, the field test did not compromise any legitimate privacy interest. *Id.* The Court further explained that "the *reason* [the *Place* canine sniff] did not intrude

upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items." *Id.* at 124 n 24 (emphasis in original).

The Supreme Court later held in *Caballes, supra* at 407-408, that a canine sniff of a vehicle during a traffic stop, conducted absent reasonable suspicion of illegal drug activity, did not violate the Fourth Amendment because it did not implicate any legitimate privacy interest. The Court explained that, because there is no legitimate interest in possessing contraband, the use of a well-trained narcotics dog that "*only* reveals the possession of contraband 'compromises no legitimate privacy interest' " and does not violate the Fourth Amendment. *Id.* at 408 (quoting *Jacobsen, supra* at 123). The Court also noted:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States,* 533 U.S. 27 [121 S Ct 2038; 150 L Ed 2d 94] (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.,* at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. [*Caballes, supra* at 409-410.]

The majority of the federal circuit courts have viewed the *Place* Court's holding as a general categorization of canine sniffs as nonsearches. See, e.g., *United States v Reed,* 141 F3d 644, 648 (CA 6, 1998) (holding that a canine sniff of the inside of an apartment was not a search when the canine team was lawfully present in the building); see also *United States v Roby,* 122 F3d

1120 (CA 8, 1997); *United States v Brock,* 417 F3d 692 (CA 7, 2005); *United States v Vasquez*, 909 F2d 235 (CA 7, 1990).[3] Similarly, the vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search.[4] Binding and persuasive authority convinces us that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused. *Reed, supra*

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[3] But see *United States v Thomas*, n 1 *supra*. *Thomas* held that a canine sniff of an apartment is a search, distinguishing *Place* on the basis of the heightened expectation of privacy in homes. But Supreme Court precedent makes clear that the status of a canine sniff does not depend on the object sniffed. For this reason, a number of other courts have criticized *Thomas* as inconsistent with *Place* and its progeny. See *Reed, supra* at 650 (explaining that *Thomas'*s holding "ignores the Supreme Court's determination in *Place* that a person has no legitimate privacy interest in the possession of contraband, thus rendering the location of the contraband irrelevant to the Court's holding that a canine sniff does not constitute a search").

[4] See, e.g., *State v Box,* 205 Ariz 492, 496-497; 73 P3d 623 (Ariz App 2003); *Sims v State,* 356 Ark 507; 157 SW3d 530 (2004); *People v Ortega,* 34 P3d 986, 991 (Colo, 2001); *Bain v State,* 839 So 2d 739 (Fla App, 2003); *Cole v State,* 254 Ga App 424; 562 SE2d 720 (2002); *State v Parkinson,* 135 Idaho 357; 17 P3d 301 (Idaho App, 2000); *People v Cox,* 318 Ill App 3d 161; 739 NE2d 1066 (2000); *Bradshaw v State,* 759 NE2d 271 (Ind App, 2001); *State v Bergmann,* 633 NW2d 328 (Iowa, 2001); *State v Barker,* 252 Kan 949; 850 P2d 885 (1993); *State v Kalie,* 699 So 2d 879 (La, 1997); *State v Washington,* 687 So 2d 575 (La App, 1997); *Fitzgerald v State*, 384 Md 484; 864 A2d 1006 (2004); *Commonwealth v Feyenord,* 62 Mass App 200; 815 NE2d 628 (2004); *Millsap v State,* 767 So 2d 286 (Miss App, 2000); *State v LaFlamme,* 869 SW2d 183 (Mo App, 1993); *Gama v State,* 112 Nev 833; 920 P2d 1010 (1996); *State v VanCleave,* 131 NM 82; 33 P3d 633 (2001); *People v Offen,* 78 NY2d 1089; 578 NYS2d 121; 585 NE2d 370 (1991); *State v Fisher,* 141 NC App 448; 539 SE2d 677 (2000); *State v Kesler,* 396 NW2d 729 (ND, 1986); *State v Rusnak,* 120 Ohio App 3d 24; 696 NE2d 633 (1997); *Scott v State,* 927 P2d 1066 (Okla Crim App, 1996); *State v Smith,* 327 Or 366; 963 P2d 642 (1998); *Commonwealth v Johnston,* 515 Pa 454; 530 A2d 74 (1987); *State v England,* 19 SW3d 762 (Tenn, 2000); *Rodriguez v State,* 106 SW3d 224 (Tex App, 2003); *State v Miller*, 256 Wis 2d 80; 647 NW2d 348 (Wis App, 2002); *Morgan v State,* 95 P3d 802 (Wy, 2004).

at 649; see also *Place, supra* at 709 (noting that the sniffed luggage was located in a public place), and *United States v Diaz,* 25 F3d 392, 397 (CA 6, 1994).

The trial court rejected the holding in *Place* on the ground that an individual has a greater privacy interest with regard to his or her residence than one has in a public space. However, the holding in *Place* did not turn on the location of a canine sniff. Central to the holding in *Place* and its progeny is the fact that a canine sniff detects only contraband, in which there is no legitimate expectation of privacy. The heightened expectation of privacy that a person has in his residence is irrelevant under *Place*'s rationale. Whether or not a heightened expectation of privacy exists, the fact remains that a canine sniff reveals only evidence of contraband. *Place, supra* at 707; *Jacobsen, supra* at 122-124. The only relevant locational determination is whether the canine was lawfully at the location where the object was sniffed. The location or circumstance of the sniff is relevant only to determine whether the presence of the canine and the officer at the location was constitutional. See also *Diaz, supra* at 396.

III

Here, the canine was lawfully present at the front door of defendant's residence when it detected the presence of contraband. There is no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch. See *People v Custer (On Remand),* 248 Mich App 552, 556, 561; 640 NW2d 576 (2001) (under Michigan law, the police can lawfully stand on a person's front porch and look through the windows into the person's home, as long as there is no evidence that the person expected the porch to remain private, such as by erecting a fence or gate).

The record contains no evidence that the canine team crossed any obstructions, such as a gate or fence, in order to reach the front door, or that the property contained any signs forbidding people from entering the property. Any contraband sniffed by the canine while on defendant's front porch—an area open to public access —fell within the "canine sniff" rule. Consequently, there was no search in violation of the Fourth Amendment.

IV

We find it necessary to address some of the issues and points raised in our colleague's dissenting opinion. First, we wholeheartedly agree with the dissent that the United States Supreme Court has historically recognized the significant privacy interest that an individual has in his or her home and has guardedly protected that interest against governmental invasions and intrusions, i.e., searches, that offend the Fourth Amendment. See *Payton v New York*, 445 US 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). However, the dissent fails to grasp that a canine sniff is simply not a search or an intrusion on an expectation of privacy that implicates the Fourth Amendment under *Caballes*, *Place,* and their progeny, where the police and the canine are lawfully present at the location at issue, even if it is at the front door of a defendant's home.

Contrary to the assertions made by the dissent, *Place* and *Caballes* contain no language suggesting that the analysis would differ under the circumstances presented here in which the canine sniff occurred outside the home from a lawful vantage point. The high court's

fleeting reference to a "public place" in *Place* simply indicated, at most, that the luggage containing contraband was in an area in which the police and the canine were lawfully present. *Place, supra* at 707. The *Place* Court recognized that a person "possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." *Id.* However, the canine sniff was unique and disclosed "only the presence or absence of narcotics, a contraband item." *Id.* Therefore, there was no search within the meaning of the Fourth Amendment. *Id.* Here, defendant likewise possessed a general privacy expectation with respect to his home that was absolutely protected by the Fourth Amendment, but the canine sniff from outside the home and from a lawful vantage point could only disclose the presence of narcotics and not lawful activity and thus did not constitute a search of the home under the Fourth Amendment because no legitimate privacy interest was implicated. Any intrusion on defendant's expectation of privacy was insufficient to find a Fourth Amendment infringement, given that the canine sniff could only intrude to the extent that illegal drugs or activities, for which there is no legitimate privacy interest, were detectable. A person has a legitimate expectation of privacy regarding his or her home, but there is no legitimate privacy interest in contraband that may be inside the home; however, this does not mean that the state has free reign to invade the person's general expectation of privacy without a warrant in order to obtain contraband on the basis that there is no legitimate privacy interest in the contraband. This is because, typically, such an invasion or search would compromise both illegitimate *and* legitimate interests or expectations and that is the danger against which the Fourth Amendment protects.

The dissent's discussion of *Caballes* and contention that it supports the proposition that a canine sniff at a home would be treated differently is even more misplaced than its attempt to distinguish *Place*. The dissent states, "Similarly, in *Caballes*, which relied on the reasoning of *Place*, the Court recognized that the expectation of privacy that an individual has regarding 'intimate details in a home' is 'categorically distinguishable from [a person's] hopes or expectations concerning the nondetection of contraband in the trunk of his car.' " *Post* at 105, quoting *Caballes, supra* at 409-410. The two quoted excerpts taken from *Caballes* in this passage are cited out of context, coming from two different sentences and then grafted together. As indicated earlier in this opinion, the *Caballes* Court actually stated:

> Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view,"—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.
>
> This conclusion is entirely consistent with our recent decision [in *Kyllo*] that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful

> traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. [*Id.* (citations omitted).]

Thus, the Court did not state or suggest that police activity at a home is categorically distinguishable from police activity involving the trunk of a car for purposes of analyzing the constitutionality of a canine sniff. Rather, the categorical distinction of which the Court spoke related to the difference between police activity that reveals lawful as well as unlawful conduct, thereby invading a zone of privacy and implicating Fourth Amendment protections, and a canine sniff that reveals only the presence of contraband (unlawful conduct) and does not intrude on legitimate privacy interests. Indeed, the Court distinguished *Kyllo* not because a home was involved there, but because lawful as well as unlawful activity could be detected in *Kyllo*. If the dissent were correct in its analysis, the Court in *Caballes* could have simply disregarded or distinguished *Kyllo* on the basis that the *Kyllo* search was of a home.

The dissent states, "If, as the majority suggests, a person never has an expectation of privacy in contraband, irrespective of the location of the contraband, then it would follow that a search of contraband would never be unreasonable and such evidence would therefore never be suppressed." *Post* at 113. The dissent misconstrues our holding. As reflected in the preceding few paragraphs, the principle that a person does not have a legitimate privacy interest in contraband does not equate to a conclusion that the seizure of the contraband does not violate the Fourth Amendment protection against an unreasonable search. Defendant certainly had legitimate privacy expectations or interests with respect to his home because we can safely assume that legal activities were also taking place in the

home and that some of the home's contents were legal to possess. But the canine sniff did not invade these legitimate privacy interests or defendant's legitimate expectation of privacy because of the uniqueness of the canine sniff that focused only on contraband, for which there was no legitimate privacy interest. Had the police entered the front door of defendant's home without a warrant and located the narcotics, absent exigent circumstances, the entry would have been an unlawful intrusion on defendant's legitimate expectation of privacy, violating the Fourth Amendment, because, despite the presence of the illegal narcotics, the police could also observe and handle contents of the home that were lawfully possessed. Under such circumstances, it would be incorrect to conclude that the search was legal merely because defendant had no expectation of privacy in the contraband, nor does our opinion suggest that such a search would be lawful. The canine sniff here was constitutionally sound, not because defendant had no legitimate privacy interest in the contraband, which will always be the case in Fourth Amendment disputes over seized incriminating evidence, but because no legitimate privacy interests or expectations were intruded upon by the canine sniff. As indicated in *Place*, it is the uniqueness and attributes of a canine sniff that dictate a finding that the Fourth Amendment was not violated in the case at bar.

Reversed and remanded to the trial court for further proceedings. Jurisdiction is not retained.

MURPHY, J., concurred.

BORRELLO, J. (*dissenting*). In this case, the majority has held that a person has no legitimate privacy interest in the possession of contraband and, therefore, a canine sniff of the porch of the home in which the contraband

is located does not constitute a search. In my view, the majority opinion erodes the protections afforded by the Fourth Amendment to protect the privacy and sanctity of individuals' homes and runs afoul of the principle articulated by the United States Supreme Court that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo v United States*, 533 US 27, 37; 121 S Ct 2038; 150 L Ed 2d 94 (2001). Because the majority opinion disregards the heightened Fourth Amendment protection that the Supreme Court has historically recognized exists in a person's home, instead focusing on the illegality of the contraband obtained as a result of the search, I respectfully dissent. I would hold that the canine sniff in this case constituted an unreasonable search of defendant's home in violation of the Fourth Amendment of the United States Constitution, US Const, Am IV, and the prohibition against unreasonable searches and seizures in the Michigan Constitution, Const 1963, art 1, § 11, and that any evidence obtained as a result of this illegal search must be suppressed as fruit of the poisonous tree. *Wong Sun v United States*, 371 US 471, 484-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). Accordingly, I would affirm the trial court's order dismissing the charges against defendant for the reasons set forth in this dissent.

I. EXPECTATION OF PRIVACY IN THE HOME

The majority concludes that the canine sniff of defendant's porch did not constitute a Fourth Amendment search because defendant has no legitimate interest in possessing contraband. According to the majority, "[t]he heightened expectation of privacy that a person has in his residence is irrelevant . . . ." *Ante* at 94. I

disagree with the majority's analysis in this regard. In my view, the majority's conclusion that the canine sniff of defendant's porch did not constitute a Fourth Amendment search disregards the significant privacy interest that the Supreme Court has historically recognized that an individual has in his or her home. At the very core of the Fourth Amendment is the right of an individual to retreat into his or her own home and be free from governmental intrusion. *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961). Thus, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v New York*, 445 US 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980). See also *United States v United States Dist Court for the Eastern Dist of Michigan*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .").

I cannot agree with the majority's failure to recognize the significance of the fact that the canine sniff at issue in this case was effectuated at defendant's home. The majority opinion ignores "the shroud of protection wrapped around a house by the Fourth Amendment[.]" *State v Rabb*, 920 So 2d 1175, 1182 (Fla App, 2006). In my view, this case turns on the fact that the search was undertaken not in a public setting where defendant would have had a diminished expectation of privacy, but at defendant's home, where defendant reasonably had the highest expectation of privacy. A person's home is not some abstract place or location for which it is unclear whether the person has a reasonable expectation of privacy. Indeed, "in the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expecta-

tion of privacy that *exists*, and that is acknowledged to be *reasonable*." *Kyllo*, *supra* at 34 (emphasis in original).

The Supreme Court cases cited above plainly reveal the fact that the Fourth Amendment affords individuals a heightened expectation of privacy in their homes. While it is true that, in general, the Fourth Amendment protects people, not places,[1] it is clear that when the place involved is an individual's home and the person has not knowingly exposed the contents of the home to the public, *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967), the Fourth Amendment does provide heightened protection for that particular place. Justice Harlan's concurrence in *Katz* underscores the fact that, contrary to the view of the majority in this case, the place or location of a search is significant, particularly if that place or location is an individual's home:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy . . . . [*Id.* at 361 (Harlan, J., concurring).]

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[1] I would observe, however, that the United States Supreme Court has, in numerous Fourth Amendment cases, characterized places as "constitutionally protected areas." See, e.g., *Kyllo, supra* at 31, 34; *Berger v New York*, 388 US 41, 57, 59; 87 S Ct 1873; 18 L Ed 2d 1040 (1967); *Hoffa v United States*, 385 US 293, 301; 87 S Ct 408; 17 L Ed 2d 374 (1966); *Lopez v United States*, 373 US 427, 438-439; 83 S Ct 1381; 10 L Ed 2d 462 (1963); *Silverman, supra* at 510, 512.

By focusing on the illegality of the contraband obtained by the search, the majority disregards the significant privacy interest that defendant had in his home. Under the majority's view, the crux of the issue is not where the search took place, but rather the legality of the item that was being sought. The majority's failure to engage in a meaningful discussion regarding the privacy interests that an individual has in his or her home is disturbing; any discussion of what constitutes a search that does not begin its analysis by taking into consideration the level of the expectation of privacy in the place searched is, in my view, fundamentally flawed. The majority essentially asserts that because the item sought was illegal contraband, there is no Fourth Amendment protection and no suppression remedy for illegally obtained evidence. Under this reasoning, the government could justify any search of an individual's home, no matter how unreasonable, as long as the government is searching for contraband. I find such a conclusion abhorrent to the principles and legal traditions set forth by and from the Fourth Amendment.

II. CANINE SNIFF

The importance of the fact that the canine sniff occurred at defendant's home, and not in a public place, is highlighted by two decisions of the United States Supreme Court that have addressed the constitutionality of the government's use of a canine sniff in public places. In *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983), the Supreme Court held that a canine sniff of a passenger's luggage at an airport did not constitute a search within the meaning of the Fourth Amendment. Although part of the rationale for the Court's conclusion that the canine sniff did not constitute a search was the fact that the canine "sniff disclose[d] only the presence or absence of narcotics, a

contraband item," *id.* at 707, the fact that the sniff occurred in a public place was also an important part of the Court's rationale:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. . . . Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, *which was located in a public place*, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment. [*Id.* (emphasis added).]

The United States Supreme Court revisited the issue of canine searches in public places in *Illinois v Caballes*, 543 US 405; 125 S Ct 834; 160 L Ed 2d 842 (2005). In *Caballes*, the police stopped the defendant's vehicle for speeding. While one officer was writing the defendant a warning ticket, another officer walked his dog around the car, and the dog indicated that it detected drugs in the trunk. On the basis of the dog's response, the officers searched the trunk, found marijuana, and arrested the defendant. In holding that the arrest and search were lawful, the Court stated:

> [T]he use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement. [*Caballes*, *supra* at 409.]

In *Place*, the fact that the canine sniff of the defendant's luggage occurred "in a public place" was part of the Court's rationale in concluding that the canine sniff did not constitute a search within the meaning of the Fourth Amendment. *Place*, *supra* at 707. Similarly, in *Caballes*, which relied on the reasoning of *Place*, the Court recognized that the expectation of privacy that an individual has regarding "intimate details in a home" is "categorically distinguishable from [a person's] hopes or expectations concerning the nondetection of contraband in the trunk of his car." *Caballes*, *supra* at 409-410. In light of the Court's explicit recognition in *Place* that the defendant's luggage was located "in a public place[,]" *Place*, *supra* at 707, I cannot concur with the majority's contention that "[t]he heightened expectation of privacy that a person has in his residence is irrelevant under *Place*'s rationale." *Ante* at 94. The plain language of the Court's opinion in *Place* reveals that part of the rationale for the Court's holding was that the canine sniff of the luggage occurred in a public place. In *Place*, the canine sniff occurred in the terminal of an airport, and in *Caballes*, the canine sniff was performed on an automobile that was stopped on an interstate highway. If anything, the majority's claim that "the holding in *Place* did not turn on the location of a canine sniff," *ante* at 94, underscores the inapplicability of the holdings of *Place* and *Caballes* to the facts

of this case because although those cases involved canine sniffs, the canine sniffs occurred in public places, not, like in this case, in an individual's home.

III. *STATE v RABB*, 920 So 2d 1175 (Fla App, 2006)

I am persuaded by the reasoning and holding of the Florida Court of Appeals in *Rabb*,[2] a case that is factually on point with the instant case because it did involve a canine sniff of an individual's home.[3] The issue in *Rabb* was identical to the issue in this case: "whether a dog sniff at the exterior of a house is a search under the Fourth Amendment." *Rabb*, *supra* at 1182. The court in *Rabb* began its analysis with a discussion about the "constitutional protections afforded a house throughout the long history of the Fourth Amendment," noting the existence of a "shroud of protection wrapped around a house by the Fourth Amendment[.]" *Id.* In ruling that the canine sniff constituted an unreasonable search of the defendant's house, *Rabb* concluded that *Kyllo*, *supra*, controlled the outcome of the case. In *Kyllo*, the police used a thermal

[2] This was the *Rabb* court's second opinion in the matter. Its first opinion, *State v Rabb*, 881 So 2d 587 (Fla App, 2004), was vacated by the United States Supreme Court and remanded for further consideration in light of *Caballes*, *supra*. *Florida v Rabb*, 544 US 1028 (2005).

[3] The majority conclusorily rejects *Rabb* with the statement: "*Rabb* has not been cited in any subsequent decisions for the holding that a canine sniff at a residence's front door constitutes an illegal search." *Ante* at 89 n 1. For reasons explained in the body of my dissent, I, like the trial court in this case, am persuaded by the reasoning and holding of the *Rabb* opinion. Furthermore, I would note that, while the United States Supreme Court's denial of certiorari does not express the Supreme Court's view of the merits of the lower court's judgment, *Hathorn v Lovorn*, 457 US 255, 262 n 11; 102 S Ct 2421; 72 L Ed 2d 824 (1982), the United States Supreme Court did deny certiorari following the *Rabb* court's decision on remand. *Florida v Rabb*, ___ US ___; 127 S Ct 665; 166 L Ed 2d 513 (2006).

imager to scan the petitioner's house. *Kyllo*, *supra* at 29. The scan revealed the presence of heat in certain locations in the house, from which the police concluded that the petitioner was using halide lamps to grow marijuana. *Id.* at 30. The United States Supreme Court stated that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained" and ruled that the use of the sense-enhancing thermal imager amounted to an unreasonable search of the petitioner's house. *Id.* at 37, 40.

In relying on *Kyllo*, the *Rabb* court noted the importance of the fact that the canine sniff was a search of the defendant's home:

> This logic is no different than that expressed in *Kyllo*, one of the recent pronouncements by the United States Supreme Court on law enforcement searches of houses. The use of the dog, like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house, which is reasonably considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in *Kyllo*, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the house at all, or in this case, the fact that a dog's sense of smell crossed the "firm line" of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an "intimate detail" of that house, no less so than the ambient temperature inside Kyllo's house. Until the United States Supreme Court indicates otherwise, therefore, we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search. [*Rabb*, *supra* at 1184.]

In concluding that the canine sniff of the defendant's house constituted an unreasonable search, the *Rabb* court distinguished the United States Supreme Court's rulings in *Place* and *Caballes* on the basis that although *Place* and *Caballes* involved canine sniffs, the canine sniffs in those cases occurred in public places, whereas in *Rabb* the canine sniff occurred at the defendant's house:

> In the present case, there are significant place and situation differences from *Caballes*. The challenged dog sniff occurred at the exterior of Rabb's house, the most sacred of places under Fourth Amendment jurisprudence. To repeat, the Fourth Amendment draws "a firm line at the entrance to the house." *Payton,* 445 U.S. at 589. *Caballes*, on the other hand, does not involve a house, but rather a vehicle lawfully stopped by law enforcement while traveling along a public interstate highway. 125 S.Ct. at 836. Throughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to houses for several reasons: the ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of those passing by, and the reality of "pervasive regulation" of vehicles by government, all of which result in a decreased expectation of privacy. . . . The case on which *Caballes* principally relies, *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L. Ed. 2d 110 (1983), also does not involve a house. Rather, it involves luggage in an airport, another public place. *Place*, 462 U.S. at 699, 103 S.Ct. 2637. Without doubt any protection of luggage in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world. The individual's expectation of privacy could not be more minimal in today's airports with their luggage screenings, passenger scans, and patdown searches.
>
> Juxtaposed against the realities of travel by car and plane, the house stands strong and alone, shrouded in a cloak of Fourth Amendment protection. A house is not movable or on display to the public (at least as far as its interior). The interior of the house is not pervasively

> regulated by government. If the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, this most sacred of places under Fourth Amendment jurisprudence. [*Id.* at 1189.]

Ultimately, the *Rabb* court, observing that the Supreme Court has not yet addressed "the intersection between the staunchly-protected house, as discussed in *Kyllo*, and law enforcement's use of dog sniffs by trained canines to detect contraband[,]" *id.* at 1183, ruled that a canine sniff of a home constitutes an unreasonable search because "the Fourth Amendment remains decidedly about 'place,' and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life." *Id.* at 1192.

Like the *Rabb* court, I would conclude that this case is controlled by *Kyllo* because, similar to the facts of this case, *Kyllo* involved the government's use of sensory-enhancing technology to effect a search of a home.[4] The

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[4] Two other cases decided by the United States Supreme Court, in which the government used beepers to monitor the defendants' activities, further underscore the fact that whether the use of sensory-enhancing methods constitutes an unreasonable search is dependent on whether the monitoring is of a public place or a private home. In *United States v Knotts*, 460 US 276, 280-285; 103 S Ct 1081; 75 L Ed 2d 55 (1983), the Supreme Court held that the monitoring without a warrant of a beeper (located in a container of chloroform) in an *automobile* did not invade any legitimate expectation of privacy and that there was neither a search nor a seizure within the contemplation of the Fourth Amendment because the governmental surveillance conducted through the beeper was nothing more than following an automobile on public streets. Justice Rehnquist, writing for the majority, recognized that there is a "diminished expectation of privacy in an automobile" and opined that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, *supra* at 281. However, in *United States v Karo*, 468 US 705, 714;

use of a thermal-imaging device in *Kyllo* and the use of a canine sniff in this case are both forms of sensory-

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104 S Ct 3296; 82 L Ed 2d 530 (1984), the Supreme Court held that the monitoring without a warrant of a beeper (located in a can of ether) in a *home* violated the Fourth Amendment. In *Karo*, Justice White, writing for the majority, opined:

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. . . .
>
> The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. . . .
>
> We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time. Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight. [*Id.* at 714-716.]

While *Knotts* and *Karo* are admittedly factually distinguishable from the instant case because they involve the government monitoring individuals' activities with beepers, in my view, the Supreme Court's holdings in *Knotts* and *Karo* underscore the fact that when sensory-enhancing methods are used to effectuate a search or monitor the activities of an individual or individuals, the location of the search or monitoring, and specifically whether it occurs in the privacy of an individual's home, is critical to the determination whether there has been a Fourth Amendment violation. Thus, just as with a canine sniff, a beeper used to monitor activities that occur in a public place does not constitute a Fourth Amendment violation, *Knotts*, *supra*; however, once the same technology is employed to monitor what goes on inside a private dwelling, the Fourth Amendment precludes their use without first obtaining a search warrant. *Karo*, *supra*.

enhancing technology, and in both this case and *Kyllo*, the government's use of sensory-enhancing technology was used to effect a search of an individual's home. I firmly agree with the *Rabb* court's conclusion that "[a]t the end of the analysis, the Fourth Amendment remains decidedly about 'place,' and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life." *Id.*

IV. RESPONSE TO THE MAJORITY

The majority relies on *United States v Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984), for the proposition that a person has no legitimate privacy interest in possessing contraband. This assertion underscores the fundamental distinction between my view of this issue and the majority's view. In my view, the proper inquiry is whether an individual had a reasonable expectation of privacy in the place or location searched, particularly if the place or location is an individual's home. In the majority's view, the inquiry is whether the individual had a reasonable expectation of privacy in the item searched. Like the court in *Rabb*, I fear the erosion of the Fourth Amendment that will result from any approach that focuses, not on the expectation of privacy that an individual has in the place searched, but on the expectation of privacy that an individual has in the item searched:

> [A] slippery slope portends peril for privacy if the item searched for is the measuring stick. If determining whether law enforcement conduct constitutes a search is solely a function of whether the item searched for is illegal, whether that item be in a vehicle on a public highway or beyond the closed doors of an individual's castle, the Fourth Amendment is rendered meaningless. Nothing would deter law enforcement from marching a dog up to

> the doors of every house on a street hoping the dog sniffs drugs inside. If drugs are detected, then no search has occurred because there is no legitimate expectation of privacy in drugs and the Fourth Amendment is not implicated; if drugs are not detected, then law enforcement cannot charge the individual with a crime and the unfounded search goes undeterred. Such an "ends justifies the means" approach to the Fourth Amendment is simply not what the Founders intended when they embodied a barrier at the door of the home in the Fourth Amendment. [*Rabb*, *supra* at 1190-1191.]

Relying on *Place*, the majority opinion asserts that the "United States Supreme Court has held that a 'canine sniff' does not unreasonably intrude upon a person's reasonable expectation of privacy." *Ante* at 91. The majority opinion also relies on *Place* for the proposition that an individual has no expectation of privacy in contraband. According to the majority, "[t]he heightened expectation of privacy that a person has in his residence is irrelevant under *Place*'s rationale." *Ante* at 94. However, as I explained above, I would conclude that *Place* is distinguishable from the instant case because the canine sniff in that case occurred in a public place and not in an individual's home. Furthermore, the notion that a person has no legitimate interest in possessing illegal contraband and that a search revealing contraband can never be unreasonable and never result in the suppression of the contraband is negated by the Supreme Court's holding in *Kyllo*. In *Kyllo*, the Supreme Court held that the use of a thermal-imaging device to detect the growing of marijuana in a home constituted an unlawful search. *Kyllo*, *supra* at 40. Even though the evidence obtained by the search was contraband, the Supreme Court essentially held that the contraband obtained as a result of the illegal search must be suppressed, ruling that it could not be used to establish probable cause for the search warrant. *Id.* The

Supreme Court's decision rested on "the Fourth Amendment sanctity of the home" and the fact that the thermal-imaging device was capable of detecting lawful intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath . . . ." *Id.* at 37-38. If, as the majority suggests, a person never has an expectation of privacy in contraband, irrespective of the location of the contraband, then it would follow that a search of contraband would never be unreasonable and such evidence would therefore never be suppressed. As evidenced by the Supreme Court's decision in *Kyllo*, this is clearly not the case. In light of *Kyllo*, I would reject any contention that because a person does not have any expectation of privacy in contraband, there is no suppression remedy when an illegal search of a home uncovers contraband.

Citing *Caballes*, the majority asserts that because the use of the canine sniff *only* reveals the possession of narcotics (marijuana), the canine sniff does not compromise any legitimate privacy interest. I am highly suspicious of any claim that canine sniffs are always reliable and only reveal the presence of marijuana. Moreover, I would observe that in *Caballes*, the Supreme Court, in rendering its decision in that case, somewhat defensively noted that its holding was consistent with *Kyllo*. In so noting, the Supreme Court itself noted the distinction between cases involving searches of an individual's home and cases involving a search of an automobile, stating:

> Critical to [the decision in *Kyllo*] was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home . . . . The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. [*Caballes*, *supra* at 409-410.]

Because defendant's contraband was located in his home and was not in plain view, the existence of the contraband was an intimate detail of his home that the government was not entitled to see without a warrant. As the Supreme Court noted in *Kyllo*: "[i]n the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, *supra* at 37 (emphasis in original).

The majority is willing to conclude, primarily on the bases of *Place* and *Caballes*, United States Supreme Court cases involving canine sniffs of contraband in public areas, that a canine sniff of a home similarly does not constitute a search within the meaning of the Fourth Amendment. This, despite the fact that the Supreme Court has never addressed the issue whether a canine sniff of an individual's home amounts to a Fourth Amendment search. See *Rabb*, *supra* at 1192. The fact that this case involves the government's use of sensory-enhancing methods to effectuate a search of defendant's home requires a different analysis because of the historical Fourth Amendment protection that has been afforded to homes. I share the *Rabb* court's fear of the erosion of the Fourth Amendment by the use of sensory-enhancing methods to effectuate searches of individual's homes:

> The Fourth Amendment concern is that the government endeavored at all to employ sensory-enhancing methods to cross the firm line at the entrance of a house. Once that line is violated by a dog's nose or a thermal imager, it brings an onslaught of prying government eyes in its wake, and the formerly intimate details of that house become open to public display. [*Id.* at 1190 (citation omitted).]

V. CONCLUSION

In sum, I would conclude that the canine sniff of defendant's home constituted an unreasonable search

in violation of the Fourth Amendment. I agree with *Rabb* that the outcome of this case is determined by *Kyllo* rather than *Place* or *Caballes* because the search in *Kyllo* involved a home. While *Place* and *Caballes* involved canine sniffs, the sniffs occurred in public places. Given the historical Fourth Amendment protection of the home, I find *Place* and *Caballes* distinguishable on this basis. Moreover, I would note that the Supreme Court has yet to address the intersection of the logic of *Place* and *Caballes* with the historical protection of the home under the Fourth Amendment and *Kyllo*. I agree with the *Rabb* court that "[i]f the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, the most sacred of places under Fourth Amendment jurisprudence." *Rabb*, *supra* at 1189. Because the canine sniff in this case constituted the use of a sensory-enhancing method to effectuate an unreasonable search of defendant's home, any evidence discovered was obtained in violation of the Fourth Amendment and Const 1963, art 1, § 11.[5] I would therefore affirm the order of the trial court suppressing the evidence as fruit of the poisonous tree. *Wong Sun*, *supra* at 484-488.

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[5] The prosecution concedes that absent evidence revealed by the canine sniff, there is insufficient independent and lawfully obtained evidence to establish probable cause.

PEOPLE v BROWN

Docket No. 271164. Submitted November 16, 2007, at Detroit. Decided May 22, 2008, at 9:00 a.m.

Craig G. Brown was convicted by a jury in the Oakland Circuit Court of delivering and manufacturing a controlled substance classified in schedule 1, 2, or 3, MCL 333.7401(2)(b)(*ii*), and possession of a controlled substance classified in schedule 1, 2, or 3, MCL 333.7403(2)(b)(*ii*). The court, John J. McDonald, J., sentenced the defendant to one year of probation, with the first 90 days to be served in jail, and ordered him to pay $4,200 in costs. The defendant appealed, alleging, in part, that Mich Admin Code, R 338.3122(2), which states that an anabolic steroid that is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States Drug Enforcement Administration for such administration is specifically excepted from schedule 3, is unconstitutionally vague because a person of ordinary intelligence cannot read the rule and conclude that it can be illegal to possess in a form intended for nonhuman consumption an anabolic steroid listed in schedule 3.

The Court of Appeals *held*:

1. Rule 338.3122(2) focuses on the possessor's intent, not on the physical form of the anabolic steroid at the time it is possessed. While possession of an anabolic steroid that is intended for administration through implants to cattle is not illegal, possession of an anabolic steroid intended for human consumption is illegal. The overwhelming circumstantial evidence indicates that the defendant had not intended to use the anabolic steroids on cattle or some other nonhuman species but had intended its use for human consumption. The anabolic steroids involved in this case were a controlled substance.

2. Collateral estoppel bars the relitigation of the issues raised by the defendant regarding all but one of the search warrants involved in this matter because the validity of those warrants was upheld in an appeal from a conviction in a different circuit court that arose from some of the defendant's conduct in the instant case. A reasonably cautious person could have concluded, given the

defendant's knowledge of steroids, use of steroids, and likely possession of steroids, that there was a substantial basis for a finding of probable cause that anabolic steroids would be found in the defendant's urine to support the issuance of the search warrant for a urine sample from the defendant.

3. No Fourth Amendment violation occurred when the police, using EnCase forensic software, searched the password-protected files of the defendant that were contained on a computer owned by his landlord, who had allowed the defendant to use the computer and who gave the police her consent to search the computer.

4. The defendant's claims of prosecutorial misconduct are without merit.

5. The trial court properly denied the defendant's motion for a directed verdict.

6. The trial court did not err in imposing costs on the defendant under MCR 771.3 to reimburse the prosecution's expenses with respect to an expert witness at trial.

7. None of the defendant's claims of ineffective assistance of counsel has merit.

8. Although there may be some merit to the defendant's argument that statements that he made during an interview procured under the threat of discharge from his employment as a police officer were improperly used to secure a search warrant for his medical records, the defendant failed to show that the statements or information derived from the statements were used against him.

9. Contrary to the defendant's claim, the trial court did state its reasons for denying the defendant's motion for mistrial.

Affirmed.

WHITE, J., concurring in part and dissenting in part, disagreed with the conclusion that Rule 338.3122(2) plainly and unambiguously provides that the possession of an anabolic steroid in a form that is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States Drug Enforcement Administration for such administration is illegal if the possessor intends the anabolic steroid for human consumption. The word "intended" is directed at the use for which the drug is expressly made and approved, and not the use intended by the possessor.

CONTROLLED SUBSTANCES — ANABOLIC STEROIDS.

The Board of Pharmacy rule that identifies the anabolic steroids that are prohibited schedule 3 controlled substances and that

> exempts from schedule 3 an anabolic steroid that is expressly intended for administration through implants to cattle or other nonhuman species and that has been approved by the United States Drug Enforcement Administration for such administration is not unconstitutionally vague; the rule gives adequate notice that the possession of an anabolic steroid listed in schedule 3 with the intent that it be consumed by a human is illegal while the possession of an anabolic steroid listed in schedule 3 with the intent that it be administered through implants to cattle is not illegal; the legality of such possession is not determined by the physical form of the anabolic steroid at the time it is possessed but by the possessor's intent regarding its use (Mich Admin Code, R 338.3122).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Chief, Appellate Division, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the people.

Robert J. Dunn and Craig G. Brown *in propria persona*.

Before: ZAHRA, P.J., and WHITE and O'CONNELL, JJ.

ZAHRA, P.J. Defendant appeals as of right his jury trial conviction in the Oakland Circuit Court of violating MCL 333.7401(2)(b)(*ii*) (delivery and manufacture of a controlled substance classified in schedule 1, 2, or 3) and MCL 333.7403(2)(b)(*ii*) (possession of a controlled substance classified in schedule 1, 2, or 3).[1] The trial

[1] Some of defendant's alleged conduct in the instant case led to a previous jury trial conviction in the Lapeer Circuit Court. There, a jury convicted defendant of willful neglect of duty, MCL 750.478, but acquitted him of three counts of delivery of a controlled substance, MCL 333.7401(2)(b). He was sentenced to 180 days in jail. This Court affirmed, *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued April 7, 2005 (Docket No. 254476), and on May 31, 2005, our Supreme Court denied defendant's application for leave to appeal. *People v Brown*, 472 Mich 922 (2005).

court sentenced him to one year of probation, the first 90 days to be served in jail, and $4,200 in costs. The most significant issue presented on appeal is whether Mich Admin Code, R 338.3122(2) is unconstitutionally vague. We hold it is not. Rule 338.3122(2) focuses on the possessor's intent. Possession of an anabolic steroid that is "intended for administration through implants to cattle" is not illegal. *Id.* Conversely, possession of an anabolic steroid intended for human consumption is illegal. We affirm.

I. BASIC FACTS AND PROCEEDINGS

Defendant was a police officer with the Almont Police Department and the Brown City Police Department. Lieutenant Timothy Donnellon of the St. Clair County Sheriff's Department testified that in February 2003, he was investigating Brown City Police Officer Albert Geoit for anabolic-steroid use. Donnellon testified that the Geoit investigation led him to investigate defendant. The search warrants issued in this case indicate that Geoit told the police that defendant supplied him anabolic steroids.

Donnellon asked Michael Winters, an inspector with the Postal Inspection Service, to intercept any suspicious parcels addressed to P.O. Box 364, Lakeville, Michigan, which is within Oakland County. The post office box was registered to defendant, and only defendant had access to the post office box. On February 28, 2003, a parcel arrived for defendant's post office box. Winters requested a federal search warrant to inspect the parcel. After obtaining the warrant, Winters executed the search himself. The parcel contained 10 packages of Finaplix-H, which the Michigan State Police laboratory confirmed contained Trenbolone. The package did not contain an applicator for animal injec-

tion. At trial, Winters admitted that defendant did not arrive to pick up the parcel. Winters also admitted that he had previously testified that, in regard to Trenbolone, "[i]f it's for veterinary use, its legal."

On March 1, 2003, Donnellon executed a warrant to search defendant's residence. The owner of the building, Gladys Graves, lived on the second story and defendant rented the first floor. The police found evidence linking defendant to the first floor, including a filled-out employment application and credit cards. In the only first-floor bedroom that appeared to be lived in, the police found a magazine, "Anabolics 2000," laying on the bed. In the first-floor kitchen, the police found a topical anabolic steroid, Testosterone Androgel, which is available by prescription. The police discovered additional anabolic-steroid-related magazines. The police also found defendant's credit-card statements reflecting purchases from Websa Co., the source of the Finaplix-H in the parcel, and Finafarm, a company that sells a kit that makes possible the human consumption of anabolic steroids (kit). Lapeer County Sheriff Detective Nancy Stimson recovered such a kit in a garbage bag from defendant's house. Donnellon ordered a kit from Finafarm, and Stimson testified regarding the similarities between the kit found at defendant's residence and the kit ordered by Donnellon. Donnellon also testified that the kit he received was very similar to the kit found in defendant's residence.

At trial, Stimson also testified that Graves had a computer upstairs that Graves allowed the police to search. Stimson brought the computer to Robert Gottschalk, an expert in electronic-data retrieval, for investigation. Gottschalk removed the hard drive and used EnCase forensic software to make a copy of the hard drive. Gottschalk testified that EnCase software

allows reproduction of all files that have not been overwritten, including Internet files. In particular, he testified that

> it created — it created the image, which is a — refer to as a mirror image, is an exact copy of everything that's on the hard drive; not only the data but everything else that's there. Maybe a file that was deleted at one time. It copies all of the data off of it.

Gottschalk searched the copied hard drive for anabolic-steroid-related terms, and found numerous e-mails relating to defendant's purchases of anabolic steroids.

Donnellon also obtained a warrant to search defendant's urine for anabolic steroids. Defendant refused to provide a urine sample several times, but he eventually did so. The sample was sent to American Institute of Toxicology (AIT). Defendant's urine sample first was tested generally for steroids, but not specifically for Trenbolone. The test was negative, but Michael Evans, founder and director of AIT, later retested defendant's urine specifically for Trenbolone, and it was positive.

Evans, an expert in toxicology, testified that Trenbolone is used in veterinary practices to increase muscle mass in cattle. A special syringe injects a pencil-like Trenbolone pellet into cattle to be slowly released. He testified that Trenbolone can be extracted from the pellets with a kit; specifically, a conversion kit like that received by Donnellon, which is similar to the one found at defendant's residence. Evans testified that each Finaplix-H package in defendant's post office box contained 20,000 milligrams of Trenbolone, which is between 200 and 400 dosages. He testified that this amount is more than one human would require. Evans testified that Trenbolone is inappropriate for use in smaller animals, such as cats and dogs.

Michael Henry, defendant's friend, testified for the defense. Henry testified that he asked defendant to order Finaplix-H for Henry's dog. The jury convicted defendant, and he appeals as of right.

II. CONSTITUTIONALITY OF MICH ADMIN CODE, R 338.3122(2)

Defendant argues that Michigan Board of Pharmacy Rule 338.3122(2) is unconstitutional.

MCL 333.7401(1), provides:

> Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

MCL 333.7401(2)(b)(*ii*) further provides that "[a] person who violates this section as to[,] [a]ny other controlled substance classified in schedule 1, 2, or 3, except marihuana[,] is guilty of a felony punishable by imprisonment for not more than 7 years or a fine of not more than $10,000.00, or both.

Similarly, MCL 333.7403(1), provides that

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

MCL 333.7403(2)(b)(*ii*) further provides that "[a] person who violates this section as to"

> [a] controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance for which a penalty is prescribed in subdivision (a), (b)(*i*), (c), or (d), or a controlled substance analogue is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

Here, the central question is whether Trenbolone, a drug contained in the Finaplix-H, is a controlled substance classified in schedule 1, 2, or 3. Rule 338.3122(1), entitled, "Schedule 3; anabolic steroids; exemptions," states that,

> [u]nless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of an anabolic steroid, including its salts, isomers, and salts of isomers if the existence of such salts of isomers is possible within the specific chemical designation, is included in schedule 3. As used in this rule, the term "anabolic steroid" means any of the following drugs or hormonal substances which are chemically and pharmacologically related to testosterone, other than estrogens, progestins, and corticosteroids, and which promote muscle growth[.]

Rule 338.3122(1)(w) then expressly identifies "Trenbolone."

Rule 338.3122(2) provides that "[a]n anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration is specifically excepted from schedule 3." Trenbolone is an anabolic steroid that has been approved by the United States Secretary of Health and Human Services for administration through implants to cattle or other nonhuman species. 21 CFR 1308.

Defendant argues that Rule 338.3122 is unconstitutionally void for vagueness because it fails to provide

fair notice of prohibited conduct. Specifically, defendant claims that because the Michigan Board of Pharmacy exempted Trenbolone in Rule 338.3122(2), the possession or intent to deliver it became lawful.

" 'To determine whether a statute is void for vagueness, a court examines the entire text of the statute and gives the statute's words their ordinary meanings.' " *People v Pierce*, 272 Mich App 394, 398; 725 NW2d 691 (2006), quoting *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997). A statute is unconstitutionally vague if persons of ordinary intelligence must necessarily guess at its meaning. *Pierce*, *supra* at 398-399, citing *People v Munn*, 198 Mich App 726, 727; 499 NW2d 459 (1993).

Here, the plain and unambiguous language of Rule 338.3122(1)(w) expressly identifies "Trenbolone" as a prohibited schedule 3 controlled substance. Rule 338.3122(2) exempts "Trenbolone" as a schedule 3 controlled substance only if "expressly intended for administration through implants to cattle or other nonhuman species . . . ." There is no guesswork in applying Rule 338.3122 because it plainly and unambiguously identifies Trenbolone as a controlled substance. Trenbolone is excluded from being a controlled substance only if it is expressly intended to be used or administered "through implants to cattle or other nonhuman species . . . ." Thus, defendant's argument that Rule 338.3122 is facially unconstitutional for vagueness is without merit.

The dissent concludes that Rule 338.3122(2) is void for vagueness, reasoning that a person of ordinary intelligence cannot read the pertinent statutory and regulatory provisions and conclude that when Trenbolone is in a form not intended for human consumption, its possession can be illegal. The dissent, in our

view, erroneously focuses on the physical form of the drug, not the possessor's intent when possessing the drug. We do not conclude that such a reading of the regulation is reasonable. None of the pertinent statutory or regulatory provisions supports the conclusion that the legality of possessing Trenbolone turns on its physical form at the time it is possessed. Rather, Rule 338.3122(2) focuses on the possessor's intent. Possession of an anabolic steroid that is "intended for administration through implants to cattle" is not illegal. *Id*. Conversely, possession of an anabolic steroid intended for human consumption is illegal.[2]

Moreover, Rule 338.3122 is not void for vagueness as applied to this case. The trial court here specifically instructed the jury that "the substance at issue in this case is Trenbolone, which is a controlled substance unless it is 'expressly intended for administration through implant[s] to cattle or other non-human species.' " These instructions accord with Rule 338.3122, and, therefore, defendant's challenge must be rejected.

III. SEARCH WARRANTS

Defendant next claims that he was subjected to six search warrants in violation of the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11. The six search warrants provided access to (1) a urine sample, (2) defendant's medical records, (3) defendant's post office box, (4) defendant's residence, (5) records from Websa Co., and (6) records from Finafarm.

[2] The prosecution must establish the possessor's intent, regardless of the physical form of the drug. Here, the overwhelming circumstantial evidence in this case is that defendant was not using Trenbolone on cattle or some other nonhuman species. Rather, the evidence supports the conclusion that defendant was ordering Finaplix-H to extract Trenbolone for human consumption.

Here, several courts have already reviewed all but the search warrant for defendant's urine, which was not raised in the previous appeal. In the instant case, the trial court concluded that collateral estoppel prevented defendant from further challenging the validity of the remaining search warrants. We agree with the trial court.

In *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued April 7, 2005 (Docket No. 254476), this Court expressly rejected defendant's claims that the instant search warrants, except the one for defendant's urine sample, were invalid. Our Supreme Court subsequently denied defendant's application for leave to appeal. *People v Brown*, 472 Mich 922, (2005).

The doctrine of collateral estoppel applies to criminal cases. *Ashe v Swenson*, 397 US 436, 443; 90 S Ct 1189; 25 L Ed 2d 469 (1970). Collateral estoppel bars relitigation of an issue in a subsequent, different litigation between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was both actually litigated and necessarily determined. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). Collateral estoppel only applies if the issue was necessarily determined by the judgment in the prior proceeding. *Id.* at 158. "An issue is necessarily determined only if it is 'essential' to the judgment." *Id*. "Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally." *Id*.

Here, there is no dispute that the validity of the instant search warrants, except the warrant for the urine sample, were previously litigated and necessarily determined. Further, defendant was afforded the opportunity and indeed participated in litigating the search

warrants in the Ingham Circuit Court. In addition, Supreme Court precedent indicates that the Ingham County Prosecutor and the Oakland County Prosecutor are the same party for purposes of collateral estoppel, because they are functionally equivalent and "creatures of the state[,] and thus should be considered to be the same party." See *Gates, supra* at 156.

Defendant also claims that the search of his urine was unconstitutional because the warrant was stale and contained inadequate facts, i.e., "bare bones." " 'A search warrant should be upheld if a substantial basis exists to conclude that there is a fair probability that the items sought will be found in the stated place.' " *People v Whitfield*, 461 Mich 441, 444; 607 NW2d 61 (2000), quoting *People v Whitfield*, unpublished memorandum opinion of the Court of Appeals, issued September 25, 1998 (Docket No. 207229). " 'The reviewing court should ask whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause.' " *Id*. " 'The underlying affidavit must be read in a common sense and realistic manner . . . .' " *Id*. In reviewing a decision to suppress, this Court reviews the trial court's findings of fact for clear error and will uphold those findings unless left with a definite and firm conviction that a mistake was made. *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). This Court reviews de novo the trial court's ultimate ruling on the defendant's motion to suppress. *Id*.

Generally, if evidence is unconstitutionally seized, it must be excluded from trial. Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right to privacy, and preserves judicial integrity. *Terry v Ohio*, 392 US 1, 12-13; 88 S Ct 1868; 20 L Ed 2d 889 (1968). "It is settled law that

probable cause to search must exist at the time the search warrant is issued and that probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched." *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992) (citations omitted). The passage of time is a valid consideration in deciding whether probable cause exists. The measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal, the thing to be seized, the place to be searched, and the character of the crime. *Id*. at 605-606; *People v Sobczak-Obetts*, 253 Mich App 97, 108; 654 NW2d 337 (2002).

Defendant claims that there is no evidence that he had recently used Trenbolone. The affiant averred that on February 19, 2003, Donnellon indicated that Geoit admitted purchasing steroids on three occasions from defendant. Donnellon informed the affiant that defendant instructed Geoit on how to administer anabolic steroids. Further, Donnellon indicated to the affiant that Geoit's home had been searched and that anabolic steroids were found. The affiant also averred that Almont Police Chief Eugene Bruns indicated that he had known defendant for three years, and that during the first year defendant injected himself with insulin to treat diabetes. However, Bruns indicated that defendant later required an internally installed insulin pump to regulate his blood sugar, and that defendant had increased his muscle bulk and experienced mood swings. The affiant learned from Dr. Russell Bush that anabolic-steroid use by a diabetic causes unstable blood sugar and could cause the need for an insulin pump. The affiant averred that she had obtained information indicating that steroids remain in the human body two weeks after use. The affiant last averred that, in her 28

years of police experience, she has observed that drug traffickers also tend to use the drugs that they sell.

Here, a substantial basis existed to conclude that there was a fair probability that anabolic steroids would be found in defendant's urine. Defendant's knowledge of steroids, his sale of steroids, and his promotion of steroid use provided a substantial basis to conclude that defendant was involved with steroids. Defendant's increased muscle mass and mood swings, along with his need of an insulin regulator, which could be related to steroid use, supported the conclusion that defendant had been using steroids for some time. That the police discovered steroids in Geoit's home indicates that defendant may have also had possession of steroids. Given defendant's knowledge of steroids, use of steroids, and likely possession of steroids, a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause.

Moreover, reversal is not required because defendant has failed to show how evidence of his positive urine test affected the outcome of the trial. Consistent with the trial court's jury instruction, the prosecution used the evidence for the limited purpose of challenging defendant's assertion that he purchased the steroids for Henry to give to his dog. However, the prosecution presented evidence that defendant purchased the steroids for personal use. Specifically, the prosecution presented evidence of used steroid kits found in defendant's garbage, numerous e-mails suggesting his steroid use, his statement upon arrest that Finaplix-H was legal, and his sale of steroids to Geoit. Taken independently or in combination, this evidence provides overwhelming evidence that defendant did not purchase Trenbolone for Henry to give to his dog. Thus, assuming that defendant's positive steroid test result was

improperly admitted at trial to impeach Henry, reversal is nonetheless not required because overwhelming evidence was presented to put Henry's credibility in question.

IV. SEARCH OF COMPUTER

Defendant argues that the police violated his Fourth Amendment rights by searching his password-protected e-mail files with the consent of the computer's owner, who had allowed defendant to use the computer.

US Const, Am IV, and Const 1963, art 1, § 11, guarantee the right of the people to be free from unreasonable searches and seizures. *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999). However, this right is personal and may not be invoked by third parties. *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999). For an individual to assert standing to challenge a search, the individual must have had a legitimate expectation of privacy in the place or location searched, which expectation society recognizes as reasonable. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). The defendant has the burden of establishing standing, *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996), and in deciding the issue, the court should consider the totality of the circumstances. *People v Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984). " 'Factors relevant to the determination of standing include ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.' " *Powell, supra* at 563 (citations omitted).

Here, the record reflects that defendant did not own the computer or the residence in which it was located. Although he was allowed access to the computer, there is no evidence that he had a right to use the computer and there is no evidence that he could regulate others' access to the computer. Indeed, Graves's children and grandchildren used the computer.

Further, even if defendant had standing to challenge the police's search of the computer, there is no Fourth Amendment violation because Graves expressly consented to the search.

> Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions. *Schneckloth v Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973); *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).
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> One established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent. *Schneckloth, supra* at 219. [*Borchard-Ruhland*, *supra* at 293-294.]

Generally, that consent must come from the person whose property is being searched or from a third party who possesses common authority over the property. *Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148 (1990). "Common authority" is based "on mutual use of the property by persons generally having joint access or control for most purposes . . . ." *United States v Matlock*, 415 US 164, 171 n 7; 94 S Ct 988; 39 L Ed 2d 242 (1974). Further, a third party without actual authority to consent to a search may render a search valid if the police officer's belief in the authority to consent was objectively reasonable. *Rodriguez, supra*; *People v LaBelle*, 273 Mich App 214, 221-222; 729 NW2d 525 (2006). However, the consent of a third party does not render a search valid if the other

party is present and expressly objects to the search. *Georgia v Randolph*, 547 US 103, 106; 126 S Ct 1515; 164 L Ed 2d 208 (2006); *People v Lapworth*, 273 Mich App 424, 427; 730 NW2d 258 (2006). Although a police officer may not remove someone from the premises for the purpose of preventing an objection, the officer is not required to locate an absent person to obtain the person's consent. *Id*. at 427-428.

Here, there is no dispute that the computer was located in Graves's separate residence. In his brief on appeal and Standard 4 brief, Administrative Order No. 2004-6, Standard 4, defendant indicates that he was handcuffed in his residence when Graves consented to the search of the computer. Thus, defendant was not present in Graves's residence to object, and Graves's consent therefore remains valid.

Defendant also argues[3] that Graves's consent was invalid because his e-mail account was protected by a password. He specifically argues that "even though the files were allegedly accessed using the computer of Ms. Graves the police had no right to enter those password protected files without a search warrant." In making this argument, defendant claims the prosecution misled the trial court by representing that "anyone, anyone can use — open up that computer and found [sic] the information." Defendant concludes that "[t]his ruling could only have been based on the false information that anyone could log onto the computer and view the Defendants e-mail password protected files."

Police Officer Robert Gottschalk, an expert in the field of retrieving electronic data, testified that after he received the computer, he removed the hard drive, and used EnCase forensic software to make a copy of the

[3] Defendant first raised this argument after his conviction.

hard drive. He testified that EnCase software allows reproduction of all files that have not been overwritten, including Internet files. In particular, he testified that

> it created — it created the image, which is a — refer to as a mirror image, is an exact copy of everything that's on the hard drive; not only the data but everything else that's there. Maybe a file that was deleted at one time. It copies all of the data off of it.

He testified that he searched the copied hard drive for steroid-related terms and found several documents, including e-mails that reference the purchase of steroids.

Few cases have discussed the propriety of EnCase software. In *United States v Andrus,* 483 F3d 711 (CA 10, 2007), the defendant's father consented to the search of a computer in the defendant's bedroom. *Id*. at 713. The police used EnCase software to directly access the hard drive without first determining the need for a user name or password. *Id*. at 713-714. There was testimony that someone without forensic equipment would need the defendant's user name and password to access files stored within the defendant's user profile. *Id*. at 714 n 1.

The court indicated that "[t]he critical issue in our analysis is whether, under the totality of the circumstances known to [the police], these officers could reasonably have believed [the defendant's father] had authority to consent to a search of the computer. Phrased in the negative, we must ask 'whether the surrounding circumstances could conceivably be such that a reasonable person would doubt [the defendant's father's consent] and not act upon it without further inquiry.' " *Id*. at 720 (citations omitted). The court then noted that, "[i]f the circumstances reasonably indicated [the defendant's father] had mutual use of or control

over the computer, the officers were under no obligation to ask clarifying questions." *Id*. Here, there is no dispute that Graves had control, if not exclusive control, over the computer. Accordingly, the officers were under no obligation to ask whether defendant's files were protected by a password. Thus, defendant's claim that his Fourth Amendment rights were violated must be rejected.

V. PROSECUTORIAL MISCONDUCT

Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but a trial court's factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Here, however, there was no contemporaneous objection or request for a curative instruction in regard to any alleged error, and thus review is limited to ascertaining whether plain error affected defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007); *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973). The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Defendant first claims that the prosecutor committed misconduct by introducing evidence that defendant's urine tested positive for Trenbolone. However, defendant fails to make clear in the argument section of his brief on appeal that it was a different prosecutor *in a previous trial* who had agreed not to introduce this evidence. Although the lower-court record indicates

that the current prosecutor knew of that agreement, the lower-court record does not indicate that the current prosecutor accepted the previous prosecutor's agreement with defendant. Defendant has not provided a legal basis that would require the current prosecutor to adhere to an agreement reached in a separate trial between the previous prosecutor and defendant. Further, all the cases on which defendant relies to support his claim that he relied to his detriment on the previous prosecutor's agreement involve the prosecution of one case, not a subsequent and independent prosecution. Thus, defendant's claim is rejected in this regard.

Defendant next argues that the prosecutor improperly vouched for expert witness Evans. Specifically, defendant claims that the prosecutor implied that Evans was reputable. Defense counsel had called Evans's credibility into question during closing arguments by suggesting that Evans concocted a positive steroid test in his "fancy lab" after the first test was negative. A prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). Here, the lower-court record indicates that the prosecutor merely responded to defense counsel's claim by arguing that Evans was reputable. Further, because Evans was qualified as an expert witness, the lower-court record supports the prosecutor's argument that Evans was reputable. Accordingly, defendant's claim is without merit.

Defendant also argues that the prosecutor twice improperly told the jury that defendant could be guilty of possession of anabolic steroids because he had the ability to access it. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App

141, 152; 703 NW2d 230 (2005). Viewing the prosecutor's statements in context and as a whole, it is clear that the prosecutor properly argued that evidence presented at trial allowed the jury to draw an inference of defendant's possession. Defendant's claim in this regard is without merit.

VI. DIRECTED VERDICT

Defendant argues that the trial court erred in denying his motion for a directed verdict on the charge of possession with intent to deliver controlled substances. He specifically claims that there was insufficient evidence of possession to submit the charge to the jury.

"When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The element of knowing possession with intent to deliver has two components: possession and intent. *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992). Actual physical possession is not required to meet the possession element. *Id*. at 519-520. Instead, possession may be either actual or constructive. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Constructive possession of an illegal substance signifies knowledge of its presence, knowledge of its character, and the right to control it. *Id*. Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and the reasonable inferences that arise

from the evidence can constitute satisfactory proof of possession. *Nunez, supra* at 615-616. Circumstantial evidence that a defendant had the exclusive control or dominion over property on which contraband narcotics are found is sufficient to establish that the defendant constructively possessed the narcotics. *Wolfe, supra* at 521.

Here, the trial court properly denied defendant's request for a directed verdict on the charge of possession with intent to deliver controlled substances. Sufficient evidence was presented to permit a rational trier of fact to conclude that defendant knew of the Trenbolone, knew of its character, and had the right to control it. Defendant's post office box contained Trenbolone. Donnellon testified that the Finaplix-H sent to defendant's post office box was shipped from Websa Co., a company from which defendant had made credit-card purchases. Winters testified that defendant could control access to his post office box. There were 10 packages of Finaplix-H, but no evidence of any device used to inject animals with Finaplix-H. On the other hand, the police found materials in defendant's garbage used to convert Finaplix-H for human consumption. Further, Donnellon testified that he explained to defendant that "the matter at hand was criminal, and the reason it was criminal was because we had recovered these steroids from his post box." Donnellon testified that defendant responded stating, "Oh, the Fin[a]plix." Defendant then indicated to Donnellon that "he had ordered this material over the Internet and that it was legal."

The evidence indicates that defendant had the Finaplix-H delivered to the post office box and had control of the Finaplix-H. Evidence also indicates that there was no device to inject animals with Finaplix-H, but that defendant had materials to convert Finaplix-H

for human consumption. There is sufficient evidence for a rational jury to conclude that defendant had constructive possession of a controlled substance. The trial court properly denied defendant's motion for a directed verdict.

VII. REIMBURSEMENT OF PROSECUTION COSTS

Defendant argues that the trial court erred in imposing costs under MCL 771.3 to reimburse the prosecution's expense of an expert witness at trial.

Statutory interpretation is a question of law considered de novo on appeal. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

At sentencing, the trial court stated that defendant must pay a "$60.00 criminal victim's rights fee, probation supervision fees at the rate of $40.00 per month for a total of $480.00, state costs of $120.00; court costs of $3000.00." The trial court further stated, "I'm going to require you to make restitution in this case, but the restitution I'm going to set at $5,000.00."

At a later hearing, defendant challenged as improper restitution the $5,000 cost of the prosecution's expert witness. The trial court indicated, "Well, I'm going to deny it under the restitution statute." The trial court then stated, "[B]ut under the probationary statute I think it's allowed. Now, however, I still have a right to look at the, at the request and see if it's reasonable." The trial court then reduced the expert's fees to only include court time. The trial court ordered that "defendant must pay the amount of $4,200.00 as a condition of Probation pursuant to MCL 771.3(5) as representing the costs incurred by the People in hiring an expert witness for Defendant's trial."

MCL 771.3(2)(c) provides that, "[a]s a condition of probation, the court may require the probationer to . . .

[p]ay costs pursuant to subsection (5)." MCL 771.3(5) states that, "[i]f the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer." Here, there is no real dispute that expert witness costs were "expenses specifically incurred in prosecuting the defendant . . . ." Thus, the costs were properly awarded.

Defendant also challenges the amount of the costs imposed.

MCL 771.3(6), provides:

> If the court imposes costs under subsection (2) as part of a sentence of probation, all of the following apply:
>
> (a) The court shall not require a probationer to pay costs under subsection (2) unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs under subsection (2), the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.

Defendant argues, in this regard, that the trial court did not comply with MCL 771.3 because it failed to determine if defendant could afford to pay the costs. However, the trial court had previously addressed defendant's concern. Defendant argued that MCL 771.3 "specifically states the Court must take into account when assessing the fines and fees the person's financial status at that time and during . . . ." The trial court interjected and stated, "Excuse me. And I also can take into consideration your potential for employment." Here, the trial court specifically concluded that defendant's decision not to work full-time but to go to school full-time resulted in his inability to pay. The trial court

properly considered defendant's ability to pay under the statute, and concluded defendant could pay if he chose to do so. Therefore, the trial court did not err in imposing costs under MCL 771.3 to reimburse the prosecution's expense for an expert witness at trial.

VIII. ISSUES RAISED IN DEFENDANT'S STANDARD 4 BRIEF ON APPEAL

A. EFFECTIVE ASSISTANCE OF COUNSEL

Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). [*People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).]

Defendant in his Standard 4 Brief argues defense counsel was ineffective for the following 10 reasons: (1) defense counsel stipulated regarding the "statutory interpretation" of Rule 338.3122(2); (2) defense counsel failed to challenge the trial court's denial of the motion to suppress Graves's computer records; (3) defense counsel failed to introduce exculpatory evidence in the form of a private investigator's report; (4) defense counsel failed to challenge the issue of Graves's consent to search; (5) defense counsel failed to challenge the trial court's disregard of MCR 6.419 and MCR 6.431; (6) defense counsel failed to file postjudgment challenges to the rulings regarding restitution, fines, and fees; (7) defense counsel failed to challenge the trial court's failure to provide defendant the presentence investigation report (PSIR) one day before sentencing; (8) defense counsel failed at the time of sentencing to correct the trial court's failure to provide defendant the PSIR one day before sentencing; (9) defense counsel failed to object to the jury instruction that concluded Finaplix-H was a controlled substance; and (10) defense counsel failed to object to any of the prosecution's egregious conduct.

Defendant's first claim of error is without merit for the reasons stated in part I of this opinion. Defendant's second claim of error is without merit for the reasons stated in part III of this opinion. Defendant's third claim of error is without merit because defendant wholly fails to address the merits of this claim and does not mention the private investigator's report in the argument section of his brief on appeal. A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive the defendant of a fair trial. *Pickens, supra* at 303. Defendant here fails to do so. Defendant's fourth claim of error is without merit because Graves's testi-

mony at the preliminary examination expressly indicates that she consented to the search of the computer by the police. Nothing in the lower-court record indicates otherwise. It is well established that defense counsel is not ineffective for failing to pursue a futile motion. *Mack, supra* at 130. Defendant's fifth claim of error is without merit for the reasons stated in part X of this opinion. Defendant's sixth claim of error is without merit for the reasons stated in part VII of this opinion. Defendant's seventh and eighth claims of error are without merit because defendant fails to address the merits of the claims, and further fails to articulate prejudice arising from him not having a PSIR one day before sentencing. Defendant's ninth claim of error is without merit for the reasons stated in part II of this opinion. Finally, defendant's tenth claim of error is without merit for the reasons stated in part V, of this opinion.

In short, defendant has failed to establish ineffective assistance of counsel in any regard.

B. VIOLATION OF *GARRITY*

Defendant next claims that his rights under *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), were violated.

In *Garrity, supra* at 500, the United States Supreme Court held that self-incriminatory statements from a law-enforcement officer procured under the threat of discharge could not be used in subsequent criminal proceedings against the declarant. Essentially, a *Garrity* hearing allows "the interviewee to answer questions with the knowledge that any statements elicited therein will not be used against him in criminal proceedings." *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 115 n 2; 607 NW2d 742 (1999).

Here, defendant claims that evidence procured during a *Garrity* interview was used as the basis for the affidavit leading to the search warrant to seize defendant's medical records. At the interview, defendant signed a form indicating that "any information discovered as a result of the interview would not be used against [defendant] in any criminal case." During the interview, defendant purportedly identified his physician, Dr. Hartz, and indicated that Dr. Hartz prescribed him Androgel. The search warrant avers:

> Your affiant, in contact with Lt. Donnellon, has learned that the family doctor of Craig Gordon Brown is Dr. Hartz at the Lakeside Medical Group in Oxford. That Craig Brown claims to have seen Dr. Hartz on 2-21-03 and obtained a prescription for the steroid Androgel which he uses for a disorder of Hypogondism.

Specifically, defendant argues that during his *Garrity* interview, under threat of termination of employment, he was required to divulge that his physician, Dr. Hartz, prescribed him a testosterone steroid. Defendant claims that because this information was used as the basis for the affidavit leading to the search warrant to seize defendant's medical records, his *Garrity* rights were violated.

Defendant has failed to show that any evidence procured during his *Garrity* interview was used against him. Defendant admits, in his Standard 4 brief, that his "actual *Garrity* statements were not specifically used against [him], *per-se*, used at trial." Defendant notes that the prosecutor mentioned Androgen at trial, but there was no objection and defendant does not claim error with regard to the prosecutor's mentioning of Androgen.

Defendant's primary argument is that although his *Garrity* "statements were not used against him, *per-se*,

at trial . . . the statements were used as the basis for the affidavit leading to the search warrant to seize [defendant's] medical records for the purpose of introducing evidence derived thereof against [defendant] at a 'criminal proceeding.' " However, defendant fails to identify any evidence presented at trial that resulted from the search warrant to seize defendant's medical records. In other words, defendant fails to identify record evidence gleaned from his medical file that was used as evidence against him. Thus, while defendant's argument that the use of his *Garrity* statements to secure a search warrant may have merit, defendant does not show that any of his *Garrity* statements or, more relevant to his claim, that the fruit of his *Garrity* statements, were used against him in this prosecution.

C. POSTTRIAL MOTIONS

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the result is outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

MCR 6.419(E) states, "The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal and for conditionally granting or denying a motion for a new trial." Likewise, MCR 6.431(B) provides:

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its

> reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

Defendant argues in his Standard 4 brief that the trial court erred in not stating on the record its reasons for denying defendant's motion for mistrial.

At the May 17, 2004, motion hearing, defendant, acting pro se, essentially presented the same argument presented in defendant's brief on appeal addressing the constitutionality of Rule 338.3122(2), which we addressed in part II of this opinion. The trial court denied the motion without further comment; however, the record of the motion hearing indicates that the trial court had previously considered and rejected all of defendant's arguments related to this issue. Further, the trial court's reasons for denying defendant's motion can be inferred from its jury instructions in regard to Trenbolone, which state in relevant part that the substance at issue in this case is Trenbolone, which is a controlled substance "unless it is expressly intended for administration through implant to cattle or other non-human species." Accordingly, the trial court stated its reasons on the record in regard to the legality of Trenbolone, and reversal is not required.

D. REMAINING ISSUES

Defendant next reiterates in his Standard 4 brief that the search of his apartment was unconstitutional. This issue has, however, previously been addressed in part IV, of this opinion and we conclude defendant is not entitled to relief.

Lastly, defendant argues that he was denied a fair trial through the effect of cumulative errors. We review this issue to determine if the combination of alleged errors denied defendant a fair trial. *Knapp*, *supra* at 387-388.

> The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted. *People v LeBlanc*, 465 Mich 575, 591: 640 NW2d 246 (2002). Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). [*People v Dobek* 274 Mich App 58, 106; 732 NW2d 546 (2007).]

Here, defendant has failed to show any error, and, thus, his claim of cumulative error must be rejected.

Affirmed.

O'CONNELL, J., concurred.

WHITE, J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's conclusion that Mich Admin Code, R 338.3122(2) plainly and unambiguously provides that possession of Trenbolone in a form that is "expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration" is illegal if the possessor intends the Trenbolone for human consumption.

Defendant was convicted of possession and delivery of Trenbolone in a form that was expressly intended for administration through implants to nonhuman animals. The question is whether the Trenbolone defendant possessed is a controlled substance. Mich Admin Code, R 338.3122(1) states:

> Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of an anabolic steroid, including

> its salts, isomers, and salts of isomers if the existence of such salts of isomers is possible within the specific chemical designation, is included in schedule 3. As used in this rule, the term "anabolic steroid" means any of the following drugs or hormonal substances which are chemically and pharmacologically related to testosterone, other than estrogens, progestins, and corticosteroids, and which promote muscle growth[.]

Mich Admin Code, R 338.3122(1)(w) expressly identifies "Trenbolone." Thus, unless specifically excepted, a mixture containing Trenbolone is included in schedule 3.

Rule 338.3122(2) states:

> An anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration is specifically excepted from schedule 3.

Trenbolone is an anabolic steroid that has been approved by the United States Secretary of Health and Human Services for administration through implants to cattle or other nonhuman species. 21 CFR 1308. Defendant possessed Trenbolone in implant form.

Read in conjunction, subsection 1 of Michigan Board of Pharmacy Rule 338.3122 lists Trenbolone as a schedule 3 substance, making any mixture containing Trenbolone a schedule 3 substance, but subsection 2 of the rule then excepts from schedule 3 any anabolic steroid which is "expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration . . . ."

The majority concludes that the rule clearly and unambiguously focuses on the possessor's intent with

respect to the substance, rather than the intent of the manufacturer or the seller. The majority concludes that although the Trebolone at issue is expressly intended for administration through implants to cattle, and would therefore not be a controlled substance in the hands of someone who intended to administer it to an animal, it is nevertheless a controlled substance in the hands of someone who does not intend to use it for this purpose.

I do not agree that no guesswork is required in applying Rule 338.3122, or that it plainly and unambiguously identifies Trenbolone as a controlled substance and only exempts its possession if the possessor expressly intends that the drug be administered through implants to cattle or other nonhuman species. Rule 338.3122 does not unambiguously so provide. Rather, it identifies Trenbolone as a schedule 3 controlled substance and then states that if it is expressly intended for administration through implants to animals, it, the Trebolone, rather than its use, is excepted from schedule 3. The focus is on the substance and whether it is a controlled 3 substance. The clause "and which has been approved by the United States drug enforcement administration for such administration" supports this interpretation. The United States Drug Enforcement Administration does not approve the possession and use of a drug by individuals, rather it approves the manufacture and use of a drug for specific purposes in specific forms. The phrase "which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the United States drug enforcement administration for such administration" strongly implies that the word "intended" is directed at the use for which the drug is expressly made and approved, and not the use intended by the possessor. A person of ordinary

intelligence would not be on notice that Trenbolone that is in a form expressly intended for administration through implants to cattle is a schedule 3 substance.

WEISHUHN v CATHOLIC DIOCESE OF LANSING

Docket No. 273117. Submitted April 1, 2008, at Detroit. Decided May 22, 2008, at 9:05 a.m.

Madeline Weishuhn brought an action in the Genesee Circuit Court against the Catholic Diocese of Lansing and St. Mary's Catholic Church, alleging violations of the Whistleblowers' Protection Act, MCL 15.361 *et seq*., and the Civil Rights Act, MCL 37.2101 *et seq*., in connection with the termination of her employment at St. Mary's, where she had taught mathematics and religion classes and performed other duties. The court, Archie L. Hayman, J., granted the defendants' motion for summary disposition of the claim asserting violation of the Whistleblowers' Protection Act and denied the defendants' motion for summary disposition of the claim alleging retaliatory termination under the Civil Rights Act. The defendants appealed by leave granted from the denial of the motion regarding the claim under the Civil Rights Act.

The Court of Appeals *held*:

1. The ministerial exception, which precludes subject-matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, exists in Michigan. The ministerial exception has its roots in the Establishment Clause and the Free Exercise of Religion Clause of the First Amendment of the United States Constitution. The exception bars discrimination claims where religious employers employ or have employed plaintiffs with religious positions. Application of the exception is not inherently complex. It requires courts to determine only whether the resolution of a plaintiff's claim would limit a religious institution's right to choose who will perform particular spiritual functions. The exception does not apply to all employment decisions by religious institutions nor does it apply to all claims by ministers.

2. The trial court erred in holding that the motion under MCR 2.116(C)(4) for summary disposition of the claim under the Civil Rights Act, which asserted that the court lacked subject-matter jurisdiction over the claim because of the application of the ministerial exception, might create a question of fact for the jury. A determination that there is no genuine issue of material fact can

play a part in ruling on a motion for summary disposition under MCR 2.116(C)(4) and this may involve an evaluation of the factual elements of the case. However, this evaluation is for the trial court, not the jury, to make.

3. In determining whether the ministerial exception applies, courts must first determine whether the employer is a religious institution and next determine whether the employee is a ministerial employee. There is no question here that St. Mary's is a religious institution. The order denying the motion for summary disposition of the claim under the Civil Rights Act must be vacated and the matter must be remanded for a determination by the trial court whether the plaintiff was a ministerial employee. The claim must be dismissed if it is determined that the plaintiff was a ministerial employee, and proceedings as necessary for a trial must be scheduled if it is determined that the plaintiff was not a ministerial employee.

Vacated and remanded.

1. CONSTITUTIONAL LAW — MINISTERIAL EXCEPTION — ESTABLISHMENT OF RELIGION — FREE EXERCISE OF RELIGION.

Michigan allows the application of the ministerial exception, which precludes subject-matter jurisdiction by a court over claims involving the employment relationship between a religious institution and its ministerial employees where the resolution of the employee's claim would limit the religious institution's right to choose who will perform particular spiritual functions; however, the exception does not apply to all employment decisions by religious institutions or all claims by ministers.

2. MOTIONS AND ORDERS — SUBJECT-MATTER JURISDICTION — ISSUES OF MATERIAL FACT.

A determination that there is no genuine issue of material fact may play a part in a trial court's ruling on a motion for summary disposition that alleges that the court lacks jurisdiction of the subject matter; the determination regarding whether there is a genuine issue of material fact is for the trial court, not the jury, in regard to the motion for summary disposition (MCR 2.116[C][4]).

Law Offices of Julie A. Gafkay, PLC (by *Julie A. Gafkay* and *Sandra D. Hanshaw*), and *Joliat, Tosto, McCormick & Bade, PLC* (by *Michael T. Joliat*), for the plaintiff.

Foster, Swift, Collins & Smith, P.C. (by *Thomas R. Meagher* and *Stephen J. Rhodes*), for the defendants.

Before: ZAHRA, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM. Defendants Catholic Diocese of Lansing (the Diocese) and St. Mary's Catholic Church (St. Mary's) appeal by leave granted the trial court's order denying their motion for summary disposition in this Civil Rights Act retaliatory-termination case. We vacate and remand for further proceedings.

I. OVERVIEW

This case involves the "ministerial exception." The ministerial exception is a nonstatutory, constitutionally compelled exception to the application of employment-discrimination and civil rights statutes to religious institutions and their "ministerial" employees. The ministerial exception has its roots in the Establishment and Free Exercise of Religion clauses of the First Amendment and generally bars inquiry into a religious institution's underlying motivation for a contested employment decision.

We first conclude that the ministerial exception exists in Michigan. We next conclude that the trial court erred when it concluded that the motion before it—which sought summary disposition of plaintiff Madeline Weishuhn's retaliatory-termination claim on the ground that the trial court lacked jurisdiction of the subject matter because of the ministerial exception—might create a question for the jury. We therefore remand to the trial court for an analysis of, and conclusions regarding, whether Weishuhn was a "ministerial" employee. We direct the trial court, in undertaking that

analysis and reaching those conclusions, to focus on the totality of Weishuhn's duties and responsibilities, her position, and her function.

II. BASIC FACTS AND PROCEDURAL HISTORY

A. WEISHUHN'S BACKGROUND

In 1992, Weishuhn obtained her Bachelor of Science degree in elementary education from the University of Michigan. For more than 10 years, until 1999, Weishuhn worked for St. Charles and Helena Catholic Church in Clio, Michigan. She was that church's director of religious education for its "parish religious ed[ucation] program" for approximately eight years. In 2001, she obtained her master's degree in teaching from Marygrove College.

B. WEISHUHN'S EMPLOYMENT AND DUTIES AT ST. MARY'S

In August 1999, Weishuhn began teaching at St. Mary's Elementary School in Mount Morris, Michigan. Weishuhn taught mathematics for the fifth through the eighth grades and carried out religious responsibilities that included teaching religion for the sixth through the eighth grades. Initially, Weishuhn taught two mathematics classes and four religion classes each day, but she later taught four mathematics classes and three religion classes each day. And in her final year at St. Mary's (2004-2005), she taught four mathematics classes and two religion classes each day.

At her deposition, Weishuhn explained that her religious-education duties entailed teaching sixth-, seventh-, and eighth-grade religion classes. She was also responsible for planning Masses for those grades, as well as assisting a fourth-grade teacher with student liturgies. Weishuhn and the St. Mary's pastor discussed

the subject matter of the Masses. Weishuhn also prepared her seventh- and eighth-grade students for the sacrament of confirmation, and she developed reconciliation (penance) services twice a year. At her deposition, Weishuhn agreed that her responsibilities were ministerial in the sense that she provided religious direction for her students. She also testified that religion was an integral part of the school's curriculum and her lesson plan.

C. THE PROCEEDINGS BELOW

After a series of employment-related incidents, none of which involved the subject of religion, St. Mary's terminated Weishuhn's employment in the spring of 2005. Weishuhn later filed a two-count complaint against defendants, alleging violations of the Whistleblowers' Protection Act[1] and the Civil Rights Act[2] for retaliatory termination. Defendants then moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that both of Weishuhn's claims failed as a matter of law. The trial court granted the motion with respect to the Whistleblowers' Protection Act claim, but it denied the motion with respect to the retaliation claim under the Civil Rights Act.

In June 2006, defendants moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that the trial court lacked subject-matter jurisdiction over Weishuhn's employment-discrimination claim because of the ministerial exception. Defendants asserted that "[b]ecause [Weishuhn's] duties while employed by St. Mary's School included a 'spiritual function,' the First Amendment of the United States Constitution pre-

[1] MCL 15.361 *et seq*.

[2] MCL 37.2101 *et seq*.

cludes application of the Elliott Larsen Civil Rights Act . . . to [her] employment relationship with St. Mary's School." The trial court denied defendants' motion, ruling that there was a question of fact for the jury in terms of whether Weishuhn's primary function was spiritual in nature. In reaching its conclusion, the trial court noted that the caselaw cited by the parties used the word "primary." The trial court also acknowledged that there appeared to be some overlap between Weishuhn's duties in terms of secular and spiritual teaching, and opined that "this is a case that maybe could create some new law in this area, at least maybe get some clarification as to whether or not there needs to be an analysis by the court with respect to this primary or secondary purpose." The trial court gave effect to its ruling in a subsequent written order. The trial court also denied defendants' motion for reconsideration of this matter. Defendants now appeal.

III. THE MINISTERIAL EXCEPTION

A. STANDARD OF REVIEW

This Court reviews de novo a motion for summary disposition pursuant to MCR 2.116(C)(4).[3] "When viewing a motion 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."[4] This Court also reviews constitutional issues de novo on appeal.[5]

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[3] *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000).

[4] *Id*.

[5] *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007).

B. THE CIVIL RIGHTS ACT

As noted above, Weishuhn alleged a violation of the Civil Rights Act. One purpose of that act is "to eradicate particular forms of discrimination in the workplace."[6] The act provides in pertinent part that "a person shall not . . . [r]etaliate or discriminate 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."[7]

C. THE FIRST AMENDMENT

The First Amendment of the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"[8] The First Amendment applies to the states through the Fourteenth Amendment.[9] "[T]he state and federal provisions of the Establishment Clause and the Free Exercise Clause of the First Amendment of the United States Constitution[] are subject to similar interpretation."[10] The Establishment Clause guarantees governmental neutrality with respect to religion[11] and guards against excessive governmental entanglement with re-

[6] *Elezovic v Ford Motor Co*, 274 Mich App 1, 6; 731 NW2d 452 (2007).

[7] MCL 37.2701(a).

[8] US Const, Am I.

[9] *Assemany v Archdiocese of Detroit*, 173 Mich App 752, 759; 434 NW2d 233 (1988), citing *Cantwell v Connecticut*, 310 US 296, 303; 60 S Ct 900; 84 L Ed 1213 (1940).

[10] *Scalise v Boy Scouts of America*, 265 Mich App 1, 11; 692 NW2d 858 (2005). See also *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82, 105; 180 NW2d 265 (1970).

[11] *Scalise*, *supra* at 14-15, citing *Good News Club v Milford Central School*, 533 US 98, 106; 121 S Ct 2093; 150 L Ed 2d 151 (2001).

ligion.[12] And the Free Exercise Clause generally prohibits governmental regulation of religious beliefs.[13]

D. THE CONTOURS OF THE MINISTERIAL EXCEPTION

The ministerial exception has its roots in the First Amendment's guarantees of religious freedom[14] and, generally, it "bars any inquiry into a religious organization's underlying motivation for [a] contested employment decision."[15] More specifically, the ministerial exception "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees[.]"[16] Federal courts have held that the ministerial exception bars employment-discrimination claims under the federal Civil Rights Act,[17] the Americans with Disabilities Act,[18] the Age Discrimination in Employment Act,[19] and common-law claims.[20] Courts applying the ministerial exception to employment-discrimination claims base such application on a religious "institution's constitutional right to be free from judicial interference in the selection of . . . employees."[21] And one state supreme court has described the ministerial exception as a

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[12] *Lemon v Kurtzman*, 403 US 602, 612-613; 91 S Ct 2105; 29 L Ed 2d 745 (1971).

[13] *Wisconsin v Yoder*, 406 US 205, 220; 92 S Ct 1526; 32 L Ed 2d 15 (1972); *Sherbert v Verner*, 374 US 398, 402; 83 S Ct 1790; 10 L Ed 2d 965 (1963); *Assemany*, *supra* at 759.

[14] *Hollins v Methodist Healthcare, Inc*, 474 F3d 223, 225 (CA 6, 2007).

[15] *Petruska v Gannon Univ*, 462 F3d 294, 304 (CA 3, 2006).

[16] *Hollins*, *supra* at 225.

[17] 42 USC 2000e *et seq*.

[18] 42 USC 12101 *et seq*.

[19] 29 USC 621 *et seq*.

[20] *Hollins*, *supra* at 225.

[21] *Id*.

"nonstatutory, constitutionally compelled" exception to federal civil rights laws.[22]

We note that "[w]ith respect to questions of federal law, this Court is not bound by precedent from federal courts except the United States Supreme Court."[23] "However, where the United States Supreme Court has not resolved an issue, a state court may choose among conflicting lower federal court decisions . . . to adopt the rule it determines to be most appropriate."[24] And, in applying the ministerial exception to state civil rights laws, one state appellate court has noted that "there is . . . no reason why an exemption carved by the courts from federal civil rights laws should not also apply to their state analogs."[25]

However, the United States Court of Appeals for the Fourth Circuit has cautioned that "[t]he ministerial exception does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes."[26] The United States Court of Appeals for the Third Circuit explained that the ministerial exception "requires federal courts to determine only whether the resolution of the plaintiff's claim would limit a church's right to choose who will perform particular spiritual functions."[27] The Third Circuit then continued as follows:

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[22] *Catholic Charities of Sacramento, Inc v Superior Court*, 32 Cal 4th 527, 543-544; 10 Cal Rptr 3d 283; 85 P3d 67 (2004).

[23] *Moore v Moore*, 266 Mich App 96, 102; 700 NW2d 414 (2005).

[24] *Id*.

[25] *Hope Int'l Univ v Superior Court*, 119 Cal App 4th 719, 734; 14 Cal Rptr 3d 643 (2004).

[26] *Equal Employment Opportunity Comm v Roman Catholic Diocese of Raleigh*, 213 F3d 795, 801 (CA 4, 2000); see also *Hartwig v Albertus Magnus College*, 93 F Supp 2d 200, 211 (D Conn, 2000) ("the Free Exercise Clause does not shield all employment decisions by religiously-affiliated institutions").

[27] *Petruska*, *supra* at 305 n 8.

> [W]e agree with the implied findings of our sister circuits that Congress would prefer a tailored exception to Title VII than a complete invalidation of the statute. Finally, our remedy is limited: It does not apply to *all* employment decisions by religious institutions, nor does it apply to *all* claims by ministers. It applies only to claims involving a religious institution's choice as to who will perform spiritual functions.[28]

Therefore, "[w]hile the ministerial exception promotes the most cherished principles of religious liberty, its contours are not unlimited and its application in a given case requires a fact-specific inquiry."[29] As the United States Court of Appeals for the Sixth Circuit has succinctly stated, the ministerial exception applies when (1) the employer is a religious institution, and (2) the employee is a ministerial employee.[30] When the employer's " 'mission is marked by clear or obvious religious characteristics,' " this satisfies the first prong.[31] Thus, courts have held that "religiously affiliated schools, corporations, and hospitals . . . come within the meaning of a 'religious institution' " for purposes of the ministerial exception.[32]

Under the second prong, the scope of the ministerial exception depends on the individual's position. The Sixth Circuit previously "applied the ministerial exception only to ordained ministers"; however, it later extended the exception to a nonordained plaintiff who fulfilled a pastoral role in a hospital.[33] Therefore, rather than focusing on the fact of ordination, the function of

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[28] *Id*. (emphasis in original).

[29] *Roman Catholic Diocese of Raleigh*, *supra* at 801.

[30] *Hollins*, *supra* at 225.

[31] *Id*. at 226, quoting *Shaliehsabou v Hebrew Home of Greater Washington, Inc*, 363 F3d 299, 310 (CA 4, 2004).

[32] *Id*. at 225.

[33] *Id*. at 226.

an individual's employment position has generally been dispositive of the question whether that position was "ministerial."[34] Accordingly, the ministerial exception applies when "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship . . . ."[35] Under those circumstances, the employee is considered clergy.[36] Indeed, the United States District Court for the District of Connecticut stressed the primacy of the employee's religious duties and responsibilities:

> Courts are required to examine the duties and responsibilities of the particular employee and examine whether they are ministerial or secular in nature. It is only when the Court concludes that the employee had *primarily religious duties and responsibilities* that the employment decision made by the religiously-affiliated institution is barred from review by the Free Exercise Clause.[37]

In *McClure v Salvation Army*,[38] the plaintiff commenced an action alleging retaliation by the defendant Salvation Army after the plaintiff initiated a gender-discrimination claim. The United States Court of Appeals for the Fifth Circuit first stated that the Salvation Army was a church and that the plaintiff, as a denominated officer, was one of the Salvation Army's clergy.[39] The court then concluded that the First Amendment exempted the Salvation Army from federal civil rights laws under the circumstances, because its "ministers"

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[34] *Id*., citing *Rayburn v Gen Conference of Seventh-Day Adventists*, 772 F2d 1164, 1168 (CA 4, 1985).

[35] *Rayburn*, *supra* at 1169 (citation and quotation marks omitted).

[36] *Id*.

[37] *Hartwig*, *supra* at 211 (emphasis added).

[38] *McClure v Salvation Army*, 460 F2d 553, 555 (CA 5, 1972).

[39] *Id*. at 554.

were "the chief instrument by which the church seeks to fulfill its purpose."[40]

Other jurisdictions have consistently applied the ministerial exception in cases where the plaintiffs' positions were inherently or exclusively religious, as in the case of clergy members and the like.[41] Additionally, courts have applied the ministerial exception to cases where the plaintiffs' functions were essentially liturgical, that is, related to worship.[42] Yet other courts have also applied the ministerial exception to cases where the plaintiffs' functions were inextricably intertwined with a religious institution's doctrine[43] and where the plaintiffs' positions entailed proselytizing on the defendant church's behalf.[44] But foreign jurisdictions have not

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[40] *Id*. at 559.

[41] See, e.g., *Petruska*, *supra* at 299, 305 (chaplain); *Williams v Episcopal Diocese of Massachusetts*, 436 Mass 574, 577; 766 NE2d 820 (2002) (ordained priest); *Gellington v Christian Methodist Episcopal Church, Inc*, 203 F3d 1299, 1304 (CA 11, 2000) (minister); *Combs v Central Texas Annual Conference of United Methodist Church*, 173 F3d 343, 350 (CA 5, 1999) (clergy member); *Sanchez v Catholic Foreign Society of America*, 82 F Supp 2d 1338, 1345 (MD Fla, 1999) (ordained priest seeking to be rehired as priest); *Bell v Presbyterian Church*, 126 F3d 328, 332-333 (CA 4, 1997) (ordained minister); *Young v Northern Illinois Conference of United Methodist Church*, 21 F3d 184, 187 (CA 7, 1994) (probationary minister); *Natal v Christian & Missionary Alliance*, 878 F2d 1575, 1576, 1578 (CA 1, 1989) (clergyman); *Rayburn*, *supra* at 1167 (applicant for pastoral position at church).

[42] See, e.g., *Tomic v Catholic Diocese of Peoria*, 442 F3d 1036, 1037, 1042 (CA 7, 2006) (church music director and organist); *Egan v Hamline United Methodist Church*, 679 NW2d 350, 354 (Minn App, 2004) (church music director); *Miller v Bay View United Methodist Church*, *Inc*, 141 F Supp 2d 1174, 1181-1182 (ED Wis, 2001) (church music and choir director); *Roman Catholic Diocese of Raleigh*, *supra* at 802 (director of music ministry and part-time music teacher at religious school); *Starkman v Evans*, 198 F3d 173, 174, 177 (CA 5, 1999) (church choir director).

[43] See, e.g., *Shaliehsabou*, *supra* at 301, 309 (a kosher supervisor for the defendant nonprofit religious and charitable corporation).

[44] *Alicea-Hernandez v Catholic Bishop of Chicago*, 320 F3d 698, 703 (CA 7, 2003) (communications manager for the Archdiocese of Chicago).

extended the ministerial exception to cases where the plaintiffs' positions have no connection with the religious institution's doctrinal mission.[45]

E. THE MINISTERIAL EXCEPTION AND THE TEACHING FUNCTIONS

(1) CASES APPLYING FIRST AMENDMENT RATIONALE

We first note that there are cases in which courts have concluded that the ministerial exception applied to teachers, but then disposed of those cases on a broader First Amendment rationale. For example, in *Stately v Indian Community School of Milwaukee, Inc*,[46] although the United States District Court for the Eastern District of Wisconsin found that the plaintiff filled a ministerial position, it ultimately concluded that her claim must fail under Establishment Clause grounds because her claim "would result in excessive entanglement both procedurally and substantively." Similarly, in *Curay-Cramer v Ursuline Academy of Wilmington*,[47] the United States District Court for the District of Delaware concluded that the ministerial exception applied to the plaintiff, who taught English and religion classes, but ultimately dismissed the plaintiff's case on application of the Free Exercise Clause. And in *Powell v Stafford*,[48] the United States District Court for the District of Colorado also concluded that the ministerial

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[45] See, e.g., *Archdiocese of Washington v Moersen*, 399 Md 637, 639; 925 A2d 659 (2007) (organist); *Smith v Raleigh Dist of North Carolina Methodist Church*, 63 F Supp 2d 694, 706 (ED NC, 1999) (receptionist or secretary); *Lukaszewski v Nazareth Hosp*, 764 F Supp 57, 60-61 (ED Pa, 1991) (plant operations director).

[46] *Stately v Indian Community School of Milwaukee, Inc*, 351 F Supp 2d 858, 870 (ED Wis, 2004).

[47] *Curay-Cramer v Ursuline Academy of Wilmington*, 344 F Supp 2d 923, 926, 932, 935 (D Del, 2004), aff'd 450 F3d 130 (2006).

[48] *Powell v Stafford*, 859 F Supp 1343, 1348 (D Colo, 1994).

exception applied to a theology teacher at a Catholic high school but, instead of barring the plaintiff's claim on the basis of the ministerial exception, the court then provided an analysis under the Free Exercise Clause, concluding that "the balance of values does not favor the government's interference with the [defendant's] decision as to the appropriate individual to teach its theology" classes.[49]

(2) CASES CONSTRUING THE MINISTERIAL EXCEPTION

However, there are a number of cases in which the courts have directly applied the ministerial exception to teachers. For example, in *Equal Employment Opportunity Comm v Catholic Univ of America*,[50] it was clear that the ministerial exception applied to a nun teaching canon law. And the Fourth Circuit has applied the ministerial exception to a director of music ministry and part-time music teacher at a religious school.[51] In reaching its conclusion, the Fourth Circuit noted that the plaintiff's "positions are bound up in the selection, presentation, and teaching of music, which is an integral part of Catholic worship and belief."[52] According to

[49] But see *Longo v Regis Jesuit High School Corp*, unpublished order of the United States District Court for the District of Colorado, entered January 25, 2006 (No. 02-CV-001957-PSF-OES), see 2006 US Dist LEXIS 4142, in which the district court reached an opposite conclusion. In that case, the plaintiff was also employed as a theology teacher, but the court concluded that the defendant was not entitled to summary judgment under the ministerial exception. Pp *2, *19. The district court opined that "it cannot be said that there are no disputed material facts that show that plaintiff's duties were 'exclusively religious' as in the *Powell* case, or even primarily religious in that they consisted of spreading the faith, or supervising or participating in religious ritual or worship." P * 19.

[50] *Equal Employment Opportunity Comm v Catholic Univ of America*, 317 US App DC 343; 83 F3d 455, 461-465 (1996).

[51] *Roman Catholic Diocese of Raleigh*, *supra* at 802.

[52] *Id*.

the court, "[a]t the heart of [the] case [was] the undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred."[53]

Conversely, there are cases in which courts have ruled that the ministerial exception did not apply to teachers. For example, in *Redhead v Conference of Seventh-Day Adventists*,[54] the United States District Court for the Eastern District of New York ruled that the plaintiff, who taught one hour of Bible study each school day and spent the remainder of the school day on secular subjects, was not covered by the exception. In *Hope Int'l Univ v Superior Court*,[55] the California Court of Appeals found that the defendant had failed as a matter of law to establish that the plaintiffs, two professors who taught psychology, were covered by the ministerial exception. In *Hartwig v Albertus Magnus College*,[56] the United States District Court for the District of Connecticut found that there was a genuine issue of material fact regarding whether the plaintiff's duties were "primarily religious." And in *Guinan v Roman Catholic Archdiocese of Indianapolis*,[57] the United States District Court for the Southern District of Indiana concluded that the application of the ministerial exception to nonministers, like the plaintiff, was generally reserved to positions that were "close to being exclusively religious based, such as a chaplain or a pastor's assistant." The court also noted that "the

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[53] *Id*.

[54] *Redhead v Conference of Seventh-Day Adventists*, 440 F Supp 2d 211, 220-222 (ED NY, 2006).

[55] *Hope Int'l Univ*, *supra* at 724.

[56] *Hartwig*, *supra* at 211.

[57] *Guinan v Roman Catholic Archdiocese of Indianapolis*, 42 F Supp 2d 849, 853 (SD Ind, 1998).

secular nature of [the plaintiff's] position [was] underscored by the fact that the [defendant] did not require teachers at [its school] to be Catholic . . . ."[58]

Finally, in *Welter v Seton Hall Univ*,[59] the New Jersey Supreme Court expressly rejected the proposition that "an employee's status as a cleric within a religious organization, standing alone, justifie[d] judicial abstention from enforcement of rights in job security . . . ." Ultimately, the court concluded that the plaintiffs did not perform any ministerial duties.[60] Significantly, the plaintiffs, in their roles as computer-science instructors, did not act as intermediaries between a church and its congregation.[61] Indeed, rather surprisingly, the defendant acknowledged that, but for the plaintiffs' status as nuns, "this case presents a purely secular issue cognizable in the civil courts."[62]

F. MICHIGAN AND THE MINISTERIAL EXCEPTION

(1) *McLEOD*

In *McLeod v Providence Christian School*,[63] a panel of this Court avoided applying the ministerial exception directly. Rather, the panel utilized a broader First Amendment analysis along the lines of *Stately*, *Curay-Cramer*, and *Powell*. In *McLeod*, the plaintiff filed an employment-discrimination action against a school that the members of the Netherlands Reformed Congrega-

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[58] *Id*. at 852-853.

[59] *Welter v Seton Hall Univ*, 128 NJ 279, 294; 608 A2d 206 (1992).

[60] *Id*. at 298.

[61] *Id*. at 299.

[62] *Id*. at 298.

[63] *McLeod v Providence Christian School*, 160 Mich App 333; 408 NW2d 146 (1987).

tion owned.[64] The plaintiff alleged that the school had a discriminatory policy of precluding employment for women with preschool-age children on the basis of the school's religious doctrine. The trial court denied the school's motion for summary disposition, concluding in part that the First Amendment had not been violated after "balancing the state's interest in eradicating sex discrimination against the burden placed upon [the school]'s First Amendment free exercise rights . . . ."[65]

On appeal, the school argued, among other things, that the antidiscrimination law violated its "First Amendment right to free exercise of religion."[66] The *McLeod* panel framed the issue as "whether the prohibition against employment discrimination on the basis of sex imposed by [MCL 37.2101 *et seq*.] impinges upon [the school] employer's First Amendment right of free exercise of religion."[67] In resolving this question, the panel employed the balancing test articulated by *Yoder* and *Sherbert*:

> "First, the belief, or conduct motivated by the belief, must be religious in nature. Second, the party complaining of a free exercise clause violation must show that the regulations under review impose a substantial burden on the exercise of religion. Third, if the complaining party demonstrates that it is burdened by the regulations, the state must have a compelling state purpose for its laws. Relevant to this prong is an inquiry into whether there exists a less restrictive alternative to the regulation."[68]

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[64] *Id*. at 336.

[65] *Id*. at 342.

[66] *Id*.

[67] *Id*.

[68] *Id*. at 343-344, quoting *Dep't of Social Services v Emmanuel Baptist Pre-School*, 150 Mich App 254, 262; 388 NW2d 326 (1986), citing *Sherbert*, *supra* at 403-407.

Applying the test, the *McLeod* panel concluded that the fact that religious beliefs motivated the school's conduct satisfied the first prong of the test.[69] The panel also concluded that the regulation imposed a burden on the school's exercise of religion, satisfying the second prong of the test. However, the panel concluded that the act's prohibition against sex discrimination did not constitute an undue burden on the school's religious beliefs. In reaching that conclusion, the panel noted that the act did not present the school with the type of " 'hard choice' " that an undue burden generally creates for such a religious institution.[70] Significantly, the act provided that an employer might apply for an exemption from the act on the basis of religious beliefs. Ultimately, the panel concluded that "the state's interest in eradicating employment discrimination renders the burden upon [the school]'s free exercise of religion a constitutionally permissible one."[71]

The *McLeod* panel also rejected the school's argument that the act violated the Establishment Clause, determining that the act did not "foster[] excessive entanglement between religion and government."[72] In reaching its conclusion, the panel noted that "[t]he act constitutes a restriction or a penalty upon certain hiring practices by providing a statutory right to those who are discriminated against to sue for money damages."[73] And the panel concluded that such a private cause of action would not "give rise to ongoing interference with the religious practices of the church[,]" or "result in any ongoing scrutiny of [the school]'s operations."[74]

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[69] *McLeod*, *supra* at 344.

[70] *Id*.

[71] *Id*. at 345.

[72] *Id*. at 346.

[73] *Id*.

[74] *Id*.

(2) *ASSEMANY*

Shortly thereafter, however, in *Assemany v Archdiocese of Detroit*,[75] a panel of this Court implicitly adopted the ministerial exception. In *Assemany*, the plaintiff filed an employment-discrimination suit against the defendant.[76] On appeal, the plaintiff argued that "a factual dispute existed as to whether plaintiff should be classified as a secular (layman) or nonsecular (religious) employee," and, therefore, the trial court improperly engaged in fact-finding when it granted the defendants summary disposition.[77] The plaintiff asserted that he was merely the church's organist and "a secular employee who supported defendants' religious activities but did not engage in the propagation of religious doctrine or faith."[78] The *Assemany* panel disagreed, concluding that the plaintiff's characterization of his position was oversimplified. In its analysis, the panel concentrated on the plaintiff's duties and responsibilities:

> Plaintiff was required to have a working knowledge of the Catholic religion and liturgy. He was responsible for the selection and teaching of all liturgical music in the parish. His primary responsibility was to enable and encourage the [defendants'] choir and congregation to participate in the Catholic liturgy through song. Plaintiff assumed a pastoral-liturgical leadership role in the parish.
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> On the basis of the facts of this case, we conclude that, while employed [by the defendants], plaintiff was more than just an organist. He was the head of the musical branch of the Catholic liturgy there. Plaintiff was intimately involved in the propagation of Catholic doctrine and

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[75] *Assemany*, *supra*.

[76] *Id*. at 758.

[77] *Id*.

[78] *Id*. at 763.

> the observance and conduct of Catholic liturgy by the [defendants'] congregation.[79]

The *Assemany* panel concluded that based on the " 'function of his position,' " the plaintiff was "clergy" as defined in *Rayburn*[80] and that the Free Exercise Clause barred his discrimination claim.[81] The panel, therefore, held that the plaintiff "failed to establish the existence of a dispute concerning an issue of material fact as to his role at [the defendant church]" and that "[t]he trial court did not engage in fact finding when it held that plaintiff performed a nonsecular function at" the church.[82]

In its discussion, the *Assemany* panel noted cases where courts have "held that employment decisions by religious bodies regarding lay teachers in church-run schools whose duties include teaching religion directly or indirectly are protected by the Free Exercise Clause from claims under Title VII."[83] However, the panel also noted that "[i]n cases involving church employees who are not involved in the propagation of religious faith or religious doctrine, courts have held that Title VII actions against religious employers are not barred by the Free Exercise Clause notwithstanding the employers'

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[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] *Id*. at 761, citing *EEOC v Southwestern Baptist Theological Seminary*, 651 F2d 277, 283 (CA 5, 1981) (seminary instructors not entitled to Title VII coverage); *Maguire v Marquette Univ*, 627 F Supp 1499 (ED Wis, 1986) (Title VII sex discrimination suit by the plaintiff denied employment as associate professor of theology barred by First Amendment); *Miller v Catholic Diocese of Great Falls*, 728 P2d 794 (Mont, 1986) (the plaintiff's suit for breach of the covenant of good faith and fair dealing in employment following her discharge for failure to maintain discipline in the classroom barred by the Free Exercise of Religion Clause of the United States and Montana constitutions).

arguments that their employment decisions were founded on religious beliefs."[84]

The *Assemany* panel also noted a line of cases that barred employment-discrimination claims by employees performing religious functions at religious institutions.[85] Specifically, the *Assemany* panel cited *McClure*, the seminal ministerial-exception case, for the proposition that "the Free Exercise Clause precludes judicial review of decisions by religious bodies concerning discipline or employment of ministers."[86] Additionally, the *Assemany* panel noted that the " 'ministerial exception,' " as articulated by *McClure* and *Rayburn*, "does not depend upon ordination 'but upon the function of the position.' "[87] The *Assemany* panel then directly quoted the *Rayburn* holding:

> "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.' . . . This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church."[88]

Thus, the *Assemany* panel disposed of the case using

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[84] *Assemany*, *supra* at 762, citing *Southwestern Baptist Theological Seminary*, *supra* (support and administrative staff of seminary covered by Title VII); *EEOC v Pacific Press Publishing Ass'n*, 676 F2d 1272 (CA 9, 1982) (editorial secretary for nonprofit publisher of religious books); *EEOC v Mississippi College*, 626 F2d 477 (CA 5, 1980) (assistant professor of psychology at private college owned and operated by the Mississippi Baptist Convention); *EEOC v Fremont Christian School*, 781 F2d 1362 (CA 9, 1986), and *McLeod*, *supra* (lay teacher at private school owned and operated by church).

[85] *Assemany*, *supra* at 760-762.

[86] *Id*, *supra* at 760, citing *McClure*, *supra* at 560-561.

[87] *Assemany*, *supra* at 760-761, quoting *Rayburn*, *supra* at 1168.

[88] *Assemany*, *supra* at 761, quoting *Rayburn*, *supra* at 1169 (internal quotation marks and citation omitted).

the ministerial exception, although it did not expressly state as much. Indeed, the *Assemany* panel's disposition of the plaintiff's claim directly relied on the *Rayburn* rationale and was certainly consistent with the Fourth Circuit's disposition of *Roman Catholic Diocese of Raleigh*.[89] As noted previously, the court there found that the plaintiff's "positions are bound up in the selection, presentation, and teaching of music, which is an integral part of Catholic worship and belief."[90]

(3) *PORTH*

In *Porth v Roman Catholic Diocese of Kalamazoo*,[91] the plaintiff was a Protestant and former teacher at the defendant's Catholic school. The school terminated her employment after it did not renew her contract on the basis of a new school policy that provided that it would employ only Catholics as teachers. The plaintiff filed suit, arguing that the defendant's policy discriminated against her on the basis of religion, which was contrary to the Michigan Civil Rights Act.[92] The trial court granted summary disposition in favor of the defendant pursuant to MCR 2.116(C)(10), basing its ruling on the Free Exercise Clause and the ministerial exception.[93] The *Porth* panel affirmed, but on different grounds.[94] It stated that it was resolving the conflict between the free exercise of religion and the Michigan Civil Rights Act "in favor of religious liberty."[95] The panel then held that

[89] *Roman Catholic Diocese of Raleigh*, *supra* at 802.

[90] *Id*.

[91] *Porth v Roman Catholic Diocese of Kalamazoo*, 209 Mich App 630, 632; 532 NW2d 195 (1995).

[92] MCL 37.2101 *et seq*.

[93] *Porth*, *supra* at 632-633.

[94] *Id*. at 633.

[95] *Id*. at 632.

the Religious Freedom Restoration Act of 1993[96] barred application of the Michigan Civil Rights Act to the defendants' conduct.[97]

We note that the Religious Freedom Restoration Act of 1993 (the RFRA) "prohibit[ed] the government from substantially burdening a person's exercise of religion, even by means of a generally applicable, religion-neutral law, unless the government could demonstrate that the burden imposed furthers a compelling governmental interest and that it constitutes the least restrictive means of furthering such interest."[98] However, the United States Supreme Court later nullified the RFRA, holding that Congress exceeded its power in enacting that statute as applied to state laws.[99] Consequently, much of the reasoning of the *Porth* panel is no longer applicable.

The only mention of the ministerial exception in *Porth* comes in a footnote. There, the *Porth* panel stated that it "question[ed], but [did] not decide, the applicability of the 'ministerial exception.' "[100] The panel went on to state, "For purposes of defendants' motion for summary disposition, we accept plaintiff's factual assertion that her primary duties were secular in nature."[101]

Reading the *Porth* decision in its entirety, we conclude that in its footnote, the *Porth* panel did not question whether the ministerial exception *existed* in Michigan. Rather, particularly in light of the second

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[96] 42 USC 2000bb *et seq*.

[97] *Porth*, *supra* at 640.

[98] *Greater Bible Way Temple v City of Jackson*, 478 Mich 373, 380-381; 733 NW2d 734 (2007).

[99] *City of Boerne v Flores*, 521 US 507, 519-520; 117 S Ct 2157; 138 L Ed 2d 624 (1997).

[100] *Porth*, *supra* at 633 n 1.

[101] *Id*.

sentence in the footnote, we conclude that the *Porth* panel merely questioned—but did not decide because it resolved the case on other grounds—whether the exception *applied* to the plaintiff's circumstances in light of her factual assertion that her primary duties were secular in nature. Therefore, we conclude that *Porth* does not control with respect to the question whether the ministerial exception exists in Michigan.

(4) CONCLUSION

We conclude that under *Assemany* and the cases on which that decision relied, the ministerial exception exists in Michigan. This exception bars discrimination claims where religious employers employ or have employed plaintiffs with religious positions.[102] It precludes subject-matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees.[103] The exception "provides maximum protection of the First Amendment right to the free exercise of religious beliefs."[104] Moreover, "the ministerial exception . . . is robust where it applies . . . preclud[ing] any inquiry whatsoever into the reasons behind a church's ministerial employment decision."[105] However, the ministerial exception does not shield *all* employment decisions by a religious employer from antidiscrimination laws.[106]

We agree with the Third Circuit when it concluded that the application of the ministerial exception is not "inherently complex."[107] It requires our courts to deter-

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[102] See *Assemany*, *supra* at 763.

[103] *Hollins*, *supra* at 225.

[104] *Rayburn*, *supra* at 1169.

[105] *Roman Catholic Diocese of Raleigh*, *supra* at 801.

[106] See *Petruska*, *supra* at 305 n 8; *Hartwig*, *supra* at 211.

[107] *Petruska*, *supra* at 305 n 8.

mine only whether the resolution of a plaintiff's claim would limit a religious institution's right to choose who will perform particular spiritual functions. It is a tailored exception to the application of employment-discrimination and other similar statutes, not an invalidation of such statutes. And the remedy is limited, because it does not apply to *all* employment decisions by religious institutions nor does it apply to *all* claims by ministers.[108] The question here, then, is whether, under the circumstances of this case, the ministerial exception applies to Weishuhn's Civil Rights Act retaliation claim.

IV. APPLYING THE MINISTERIAL EXCEPTION TO WEISHUHN'S CLAIM

A. THE BASIS FOR THE EXCEPTION AND THE CLAIM BEFORE US

We observe, as is apparent from our discussion above, that the ministerial exception is grounded in the First Amendment. We further observe that, in their statement of the issues presented, defendants stated that the issue here was whether the "ministerial exception" precluded Weishuhn's claim pursuant to the Civil Rights Act. Thus, defendants explicitly based their appeal on the ministerial exception. In their reply brief to this Court, the defendants, however, now appear to be broadening their argument. The defendants state that

> [Weishuhn] suggests . . . that [d]efendants are attempting to hide behind the ministerial exception in order to circumvent her [Civil Rights Act] claim. *To the contrary, [d]efendants broadly maintain that they have a constitutional prerogative to make employment decisions with respect to teachers of religion, free from state interference*. [Emphasis supplied.]

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[108] *Id*.

We reject defendants' invitation to broaden our inquiry here. We are cognizant that courts, including the panel in *McLeod*, have decided cases with somewhat similar facts on the basis of the First Amendment without explicitly utilizing the ministerial exception.[109] However, we have concluded above that the ministerial exception exists in Michigan, and we confine our discussion and decision here to the question whether, and how, that exception should apply to this case.

B. THE PROCEDURAL POSTURE AND THE RULING BELOW

As we have noted, defendants moved for summary disposition below under MCR 2.116(C)(4), asserting that the trial court had no jurisdiction over Weishuhn's Civil Rights Act retaliatory-termination claim because of the ministerial exception. The trial court denied this motion from the bench, stating, among other things:

> [A]t this point, I'm gonna deny the motion because I do believe that, if you look at the cases, that there does seem to be—at least the words primary are used and—so it's possible, but at least that analysis should be taken; *and, if that is the case, then it creates a fact question for a jury;* and, therefore, I don't think it would be appropriate to grant summary disposition at this time; and, therefore, I'm gonna deny it. [Emphasis supplied.]

On the basis of our review de novo, we conclude that the trial court erred when it stated that the motion before it might create a fact question *for the jury*. A motion under MCR 2.116(C)(4) relates to the subject-matter jurisdiction of the court. This is a question of law for the judge, not a question of fact for the jury.[110] We note, however, that the trial court's confusion on

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[109] See *Stately*, *supra*, *Curay-Cramer*, *supra*, and *Powell*, *supra*.

[110] *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567(2002).

this point is certainly understandable. In *Sargent v Browning-Ferris Industries*[111] and subsequent cases,[112] we have determined that trial courts have properly granted summary disposition under MCR 2.116(C)(4) "if the pleadings showed that defendant was entitled to judgment as a matter of law, *or the affidavits and other proofs showed that there was no genuine issue of material fact*."[113]

Thus, the question whether there is a genuine issue of material fact—a phrase normally associated with a motion under MCR 2.116(C)(10)—is germane to a motion under MCR 2.116(C)(4). This is so because under MCR 2.116(G)(2), a party may submit affidavits, depositions, admissions, or other documentary evidence to support or oppose the ground asserted in various types of motions, including motions under MCR 2.116(C)(4). Further, under MCR 2.116(I)(1), "If the pleadings show that a party is entitled to judgment as a matter of law, *or if the affidavits or other proofs show that there is no genuine issue of material fact*" (emphasis supplied), then the court must render judgment without delay.

Thus, under the court rules, a determination that there is no genuine issue of material fact can play a part in ruling on a motion for summary disposition under MCR 2.116(C)(4), and this may, of necessity, involve the evaluation of the factual elements of a case. However, contrary to the trial court's comment, this evaluation is for the judge, not the jury, to undertake.

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[111] *Sargent v Browning-Ferris Industries*, 167 Mich App 29, 33; 421 NW2d 563 (1988).

[112] See *Faulkner v Flowers*, 206 Mich App 562, 564; 522 NW2d 700 (1994); *Steele v Dep't of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996); *Cork*, *supra* at 315.

[113] *Sargent*, *supra* at 33 (emphasis supplied).

C. THE TWO-PRONGED INQUIRY

(1) THE ELEMENTS OF THE INQUIRY

We adopt the Sixth Circuit's succinct description of the inquiry that courts must undertake with respect to the ministerial exception.[114] First, courts must determine whether the employer is a "religious institution."[115] Second, courts must determine whether the employee is a "ministerial employee."[116]

(2) ST. MARY'S STATUS

Here, there is no question that St. Mary's, the employer, is a religious institution. As the trial court observed, St. Mary's school exists not only for educational purposes "but also for the purpose of disseminating the Catholic doctrine."

(3) WEISHUHN'S STATUS

The salient question then is whether Weishuhn was a ministerial employee. On the basis of our review de novo, we are unable to determine whether the trial court reached a conclusion on whether Weishuhn was a ministerial employee. The trial court did engage in some discussion about whether Weishuhn's teaching functions were primarily religious in nature. But ultimately the trial court concluded that this was a fact question for the jury and therefore denied defendants' motion for summary disposition.

As we have stated above, this conclusion was erroneous. We recognize, however, that the trial court was

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[114] *Hollins*, *supra*.

[115] *Id*. at 225.

[116] *Id*.

acting at a considerable disadvantage because there was no explicit holding that the ministerial exception existed in Michigan and no guidance from Michigan appellate courts regarding how to apply that exception. We therefore remand to the trial court for an analysis of, and conclusions with regard to, whether, in light of this opinion, Weishuhn was a ministerial employee. In this regard, the trial court shall consider the affidavits, depositions, admissions, or other documentary evidence that the parties have submitted. In undertaking that analysis and reaching these conclusions, the trial court should focus on the totality of Weishuhn's duties and responsibilities, her position, and her functions. More specifically, the trial court should consider the following non-exhaustive list of factors:

(1) Whether Weishuhn had primarily religious *duties* and *responsibilities* in the sense that her primary *duties* consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship;

(2) Whether Weishuhn's *duties* had religious significance;

(3) Whether Weishuhn's *position* was inherently, primarily, or exclusively religious, whether that *position* entailed proselytizing on behalf of defendants, whether that *position* had a connection to defendants' doctrinal mission, and whether that *position* was important to defendants' spiritual and pastoral mission; and

(4) Whether Weishuhn's *functions* were essentially liturgical, that is, related to worship, and whether those *functions* were inextricably intertwined with defendants' religious doctrine in the sense that Weishuhn was intimately involved in the propagation of defendants' doctrine and the observance and conduct of defendants' liturgy by defendants' congregation.

If, after consideration of these factors, the trial court determines that Weishuhn's position and function were such that she was a ministerial employee, then the trial court shall enter an order dismissing Weishuhn's discrimination claim. But if after this inquiry the trial court concludes that Weishuhn was not a ministerial employee, it should schedule further proceedings as necessary for trial.

Vacated and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

In re APPLICATION OF CONSUMERS ENERGY COMPANY

Docket Nos. 275135 and 275198. Submitted April 1, 2008, at Detroit. Decided April 10, 2008. Approved for publication May 27, 2008, at 9:00 a.m.

Consumers Energy Company filed an application in the Public Service Commission (PSC) seeking the authority to increase its rates for the distribution of natural gas and for other relief related to natural gas rates. In connection with the application, the PSC and Consumers agreed that Consumers would contribute two percent of its revenues to the Low-Income and Energy Efficiency Fund (LIEEF). The Association of Businesses Advocating Tariff Equity (ABATE) and the Attorney General, among others, intervened, arguing that the PSC lacked the authority to fund the LIEEF from natural gas utilities because LIEEF funding, by statute, could derive only from electric utilities that securitize costs. The hearing referee disagreed, ruling that the PSC could fund the LIEEF from gas utilities under its general ratemaking authority, and the PSC affirmed the ruling. ABATE and the Attorney General appealed this ruling, and the Attorney General separately appealed the PSC's approval of an equalization mechanism for post-employment benefits on the ground that it constituted improper retroactive ratemaking. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The PSC's interpretation of its clear and unmistakable authority to administer the LIEEF as encompassing the power to secure funding was a reasonable interpretation of the administrative power conferred on it by the Legislature and is consistent with its ratemaking authority under MCL 460.6. Although MCL 460.10d(7) delineates excess securitization savings as a source of funding for the LIEEF, it would have been inconsistent for the Legislature to have mandated the creation of the LIEEF and supported its continuation while restricting its funding to only those securitization savings that exceed a specified level.

2. The purpose of the LIEEF is to provide shut-off and other protection to low-income customers and to promote energy efficiency by all customer classes, which clearly indicates that the

Legislature did not intend to restrict the LIEEF's benefits to electric ratepayers. Furthermore, continued funding of the LIEEF was recommended in part because of increasing natural gas prices. As a result, it would be inequitable to preclude Consumers from contributing to the LIEEF when both Consumers and its low-income ratepayers will benefit from it.

3. The Attorney General has not overcome the presumption that the PSC's approval of an equalization mechanism by which post-employment benefit expenses were deferred to a subsequent year was lawful and reasonable. This Court has held that deferred expenses are prospective, not retroactive, because they are considered an expense of the year to which they were deferred.

Affirmed.

PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — RATEMAKING AUTHORITY.

The Public Service Commission has the general authority to fund the Low-Income and Energy Efficiency Fund from both electric and natural gas utilities and is not limited to the excess securitization savings indicated in the statute that created the fund (MCL 460.10d[7]).

H. Richard Chambers for Consumers Energy Company.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *David A. Voges*, *Michael A. Nickerson*, and *Kristin M. Smith*, Assistant Attorneys General, for the Public Service Commission.

Michael A. Cox, Attorney General, and *Susan I. Leffler* and *Donald E. Erickson*, Assistant Attorneys General, for the Attorney General.

Clark Hill, PLC (by *Robert A. W. Strong* and *Leland R. Rosier*), for the Association of Businesses Advocating Tariff Equity.

Before: FORT HOOD, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM. In Docket No. 275135, the Attorney General appeals as of right an opinion and order issued

by the Public Service Commission (PSC). The Attorney General asserts that the PSC was not authorized to approve a natural gas rate increase of $80,804,000 a year for Consumers Energy Company (CECo) where the rate enabled CECo to recover $17,427,000 from natural gas ratepayers for contributions to the Low-Income Energy Efficiency Fund (LIEEF). Further, the Attorney General asserts that the order impermissibly enabled implementation of an equalization mechanism for pension benefits and "other post employment benefits." In Docket No. 275198, the Association of Businesses Advocating Tariff Equity (ABATE) appeals as of right, also challenging CECo's right to recover $17,427,000 from natural gas ratepayers for contributions to the LIEEF. The appeals were consolidated for this Court's review.[1] We affirm.

I. BACKGROUND AND FACTUAL HISTORY

A short history regarding interpretation and administration of the LIEEF is useful to understand both the objections raised by the Attorney General and ABATE and the factors that guide our review of the PSC's decision.

On June 3, 2000, the Customer Choice and Electricity Reliability Act (CCERA), MCL 460.10 *et seq*., was enacted into law. 2000 PA 141.[2] A stated purpose of the act was to "ensure that all persons in this state are afforded safe, reliable electric power at a reasonable rate." MCL 460.10(2)(d). Part of the methodology implemented to achieve this goal included the imposi-

[1] *Attorney General v Pub Service Comm,* unpublished order of the Court of Appeals, entered February 8, 2007 (Docket Nos. 275135 and 275198).

[2] Concurrently, the Legislature enacted the securitization act, MCL 460.10h through 460.10cc, which allowed electric utilities to refinance or retire debt through the use of lower cost secured bonds. 2000 PA 142. See specifically MCL 460.10i.

tion of a rate freeze for the larger electrical utilities with one million or more retail customers until December 31, 2003. MCL 460.10d(1). In addition, the CCERA created the LIEEF, which was intended "to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes." MCL 460.10d(7). Section 10d(7) specifically provided that the LIEEF would receive as a source of its funding monies derived from securitization savings:

> *If* securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then, for a period of 6 years, 100% of the excess savings, up to 2% of the electric utility's commercial and industrial revenues, shall be allocated to the low-income and energy efficiency fund administered by the commission. [MCL 460.10d(7) (emphasis added).]

Consistently with this statutory directive, on November 20, 2001, the PSC issued an opinion and order discussing hearings conducted regarding the development of policies and procedures for administration of the LIEEF. The PSC recognized MCL 460.10d(6) as requiring "a portion of the cost savings from the issuance of securitization bonds to be used as a source of funding" for the LIEEF in addition to "Public Act 119 of 2001," an appropriations bill, which provided "the current fiscal year's appropriation for the Fund." *In re Administration and Operation of the Low-Income and Energy Efficiency Fund,* opinion and order of the PSC, issued November 20, 2001 (Case No. U-13129), p 1. At this time, the PSC indicated that annual disbursements from the LIEEF would encompass "three broad categories: (1) energy assistance for low-income customers, (2) conservation and energy efficiency measures targeted toward reducing the usage and bills of low-income customers, and (3) the development of energy efficiency

programs that benefit all customer classes." *Id*. at 4. The PSC went further and indicated an intention "to create an endowment-type fund to finance programs that assist low-income customers and energy efficiency projects with a time horizon extending beyond the six-year period in Section 10d(6)." *Id*. Notably, the PSC explained that it interpreted the statutory provision "to provide the basis for funding programs that affect all types of energy assistance and efficiency, not merely electricity, and to cover programs that extend throughout the entire state, not merely Detroit Edison's service territory" and asserted that "[t]he wording of Section 10d(6) does not support a more restrictive interpretation." *Id*. at 5-6.

ABATE objected and sought a rehearing. The PSC rejected the petition, reasoning that its status as a "quasi-legislative/quasi-judicial decision-making body" permitted it to "implement policy through a case-by-case approach as well as through the rulemaking process set forth in the [Administrative Procedures Act, MCL 24.201 *et seq*.]." *In re Administration and Operation of the Low-Income and Energy Efficiency Fund,* order of the PSC, issued October 23, 2003 (Case No. U-13129), p 2. The PSC opined that its November 20, 2001, order "was a proper exercise of its ratemaking and policymaking authority" and that "[s]ection 10(d) does not require the [PSC] to adopt rules or standards." *Id*. at 3. Citing the broad discretion bestowed on the PSC by the Legislature "to select the beneficiaries of the Fund," the PSC minimized the legitimacy of ABATE's expressed concerns regarding administration of the LIEEF, noting:

> Given that the [PSC] must periodically report on the [LIEEF] to the Legislature and that the Legislature annually appropriates the funding for the program, any concern

> that the implementation of the [LIEEF] by the [PSC] could be inconsistent with the intent of the Legislature rings hollow. [*Id*. at 3.]

The PSC has submitted periodic reports to the Governor and the Legislature as mandated by MCL 460.10d(7). In its initial report, the PSC advised that Detroit Edison was the sole contributor to the LIEEF because it was the only electric utility able to meet the criteria established for contribution through securitization savings. Further, the PSC reasserted its intent to create a program like the LIEEF indefinitely for both electric and gas consumers, consistently with its opinion and orders in Case No. U-13129. It also noted that actual funds had fallen short of estimated amounts that were used to set the appropriations. This information was reiterated in subsequent reports to the Governor and the Legislature.

In 2004, the PSC reported that the lifting of the rate freeze on December 31, 2003, MCL 460.10d(1), effectively eliminated securitization savings as a source of funding for the LIEEF. Commensurate with its grant of interim rate relief to Detroit Edison, the PSC "rolled the LIEEF funding requirement into base rates for Edison's electric customers and continued funding the LIEEF as part of the utility's cost of service." *In re Administration and Operation of the Low-Income and Energy Efficiency Fund,* opinion and order of the PSC, issued August 21, 2007 (Case No. U-13129), p 1.

Notably, the Legislature has maintained yearly appropriations for the LIEEF program. Through 2004 PA 354, § 105, the Legislature appropriated $45 million for the LIEEF, which required the PSC to provide reports on the distribution of these funds. 2004 PA 354, § 335. In 2005 PA 156, § 117, the Legislature made a $60 million appropriation for the LIEEF and again required a report on distribution of the funds. The PSC

subsequently approved similar electric rate orders for CECo.[3]

On July 1, 2005, CECo filed an application in the PSC addressing, among other issues, rates for the distribution of natural gas but *not* rates relative to electricity. CECo proposed that it contribute $15 million to the LIEEF. When the PSC staff proposed increasing the contribution to $17.25 million, CECo agreed. The PSC rejected the Attorney General's and ABATE's arguments that LIEEF funding could only derive from *electric* users, and not from natural gas ratepayers as part of operations and maintenance expenses. Quoting its opinion and order in Case No. U-14346, the PSC held:

> The [PSC] agrees with the [hearing referee] and the Staff that under its general ratemaking authority, the [PSC] may authorize the funding of LIEEF through mechanisms in addition to that described in MCL 460.10d(7). As the [PSC] found in Case No. U-14347, pp 44-45:
>
> "The Legislature's intent in enacting MCL 460.10d was to have the [PSC] undertake a broad approach to funding and administering low-income and energy efficiency programs. For example, MCL 460.10s requires the [PSC] to monitor the extent to which federal funds are available for low-income and energy assistance programs and, if there is a reduction in federal funds, to hold a hearing to determine the amount of funds available and the need for supplemental funding. Section 10s thus expresses the Legislature's intent that the [PSC] take the necessary steps to assure that low income and energy efficiency funds are available."
>
> The [PSC] observes that LIEEF funds are an essential means to reduce bad debt and uncollectible expenses, which are expenses borne by all ratepayers of both gas and electric utilities. Moreover:

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[3] "The Consumers Energy Company's orders issued on December 22, 2005 in Case No. U-14347 and November 21, 2006 in Case No. U-14547, have also made provisions for funding the LIEEF." *In re Low-Income and Energy Efficiency Fund,* order of PSC, issued October 23, 2003 (Case No. U-13129), p 2.

> "The [PSC] notes that [the] circumstances . . . where the utility voluntarily offered to include contributions to the LIEEF as part of its operations expenses, are analogous to those in *The Detroit Edison Co v Public Service Comm,* 127 Mich App 499; 342 NW2d 273 (1983), where the Court of Appeals held that it was within the [PSC]'s discretion to allow or disallow operating expense items for charitable contributions. Id. at 524 . . . . Thus, if [CECo chose to contribute directly to certain nonprofits engaged in providing energy assistance to low and fixed-income customers, it would clearly be within the [PSC]'s discretion to permit such expenditures as part of the utility's operating costs." [December 22, 2005, order in Case No. u-14347, p 45.]
>
> Finally, the positions taken by the Attorney General and ABATE regarding the [PSC]'s alleged lack of statutory authority to fund and administer the LIEEF, directly conflict with the fact that the Legislature appropriated $60,000,000 to fund LIEEF for the fiscal year ended September 30, 2006 in Section 117 of 2005 PA 156. Likewise, in Section 117 of 2006 PA 345, the Legislature appropriated an additional $60,000,000 for LIEEF grants for the fiscal year ended September 30, 2007. By appropriating the funds for the LIEEF program, the Legislature has expressed its intent that the program continue at that funding level. As our Supreme Court held in *Regents of the University of Michigan v Michigan,* 395 Mich 52, 66; 235 NW2d 1 (1975), "The Legislature has the right to state its advice or wishes through an expression of intent" in an appropriations bill. The [PSC] therefore adopts $17,427,000 in expense for [CECo's] contribution to the LIEEF. [*In re Application of Consumers Energy Co,* opinion and order of the PSC, issued November 21, 2006 (Case No. U-14547), pp 51-52.]

II. ISSUES ON APPEAL

The arguments made by the Attorney General and ABATE in this appeal are: (1) contributions to the LIEEF cannot benefit natural gas ratepayers and rates collected from natural gas ratepayers therefore cannot

be used for the fund; (2) funding for the LIEEF was statutorily authorized for only six years and was limited to excess securitization savings of electric utilities that securitized costs, precluding other sources of funding; and (3) because there is no clear and unmistakable statutory authority permitting the PSC to force natural gas ratepayers to contribute through natural gas rates to a program created by a statute relating to electric utilities, it was error to order contribution by CECo and then allow CECo to recover the contribution plus taxes through operation and maintenance expenses that were built into rates. In addition, the Attorney General challenges the PSC's approval of an equalization mechanism for pension and other post-employment benefits as comprising improper retroactive ratemaking.

III. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Pub Service Comm,* 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint,* 460 Mich 396, 427; 596 NW2d 164 (1999). And, of course, an order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Service Comm,* 377 Mich 259, 279; 140 NW2d 515 (1966). In sum, a final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub*

Service Comm, 165 Mich App 230, 235; 418 NW2d 660 (1987).

Consistently with the law regarding appellate review of an administrative agency's decisions, we give due deference to the PSC's administrative expertise and will not substitute our judgment for that of the PSC. *Attorney General v Public Service Comm No 2,* 237 Mich App 82, 88; 602 NW2d 225 (1999). Importantly, we "give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer," *Champion's Auto Ferry, Inc v Pub Service Comm,* 231 Mich App 699, 708; 588 NW2d 153 (1998), but we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros v Pub Service Comm,* 180 Mich App 227, 232; 446 NW2d 640 (1989). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Michigan,* 254 Mich App 675, 682; 658 NW2d 849 (2003). [*In re Application of Detroit Edison Co,* 276 Mich App 216, 224-225; 740 NW2d 685 (2007).]

IV. ANALYSIS

We first address the arguments pertaining to whether funding of the LIEEF through operation and maintenance expenses is authorized by statute, including the more specific assertion that contributions to the LIEEF cannot benefit natural gas ratepayers and, therefore, that rates collected from them cannot be used for the fund. The PSC asserts that its authority for both of these challenged decisions is derived from its general ratemaking authority. MCL 460.6.[4] In order to determine the propriety of permitting CECo's contribution to the LIEEF, we must first deal with the assertion that

[4] MCL 460.6(1) states, in relevant part: "The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state . . . . The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities."

funding for the LIEEF is exclusively confined to the availability of securitization savings as delineated in MCL 460.10d(7).

The PSC has no common-law powers and, therefore, the sole source of its power is statutory. *Union Carbide Corp v Pub Service Comm,* 431 Mich 135, 146; 428 NW2d 322 (1988); *In re Detroit Edison Application, supra* at 225. The statutes that confer authority on the PSC must be strictly construed, and a power may only be exercised if it is conferred by clear and unmistakable language. *Union Carbide Corp, supra*; *In re Detroit Edison Application, supra*.

The LIEEF was created by MCL 460.10d(7), which provides:

> If securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then, for a period of 6 years, 100% of the excess savings, up to 2% of the electric utility's commercial and industrial revenues, shall be allocated to the low-income and energy efficiency fund administered by the commission. The commission shall establish standards for the use of the fund to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes. The commission shall issue a report to the legislature and the governor every 2 years regarding the effectiveness of the fund.

This Court has previously acknowledged that MCL 460.10d created the LIEEF and conferred authority on the PSC to administer the fund. *In re Detroit Edison Application, supra* at 229. We defer to an agency's interpretation of a statute outlining its powers, *In re Canales Complaint,* 247 Mich App 487, 496; 637 NW2d 236 (2001), as long as the interpretation is supported by the record and is reasonable. *In re Application of Indiana Michigan Power Co,* 275 Mich App 369, 373-374; 738 NW2d 289 (2007). We conclude that the PSC's interpretation of its clear and unmistakable authority to administer the LIEEF, as encompassing the power to

secure funding, was a reasonable interpretation of the administrative power conferred on it by the Legislature and is consistent with its ratemaking authority pursuant to MCL 460.6.

The primary goal of statutory interpretation is to ascertain and give effect to legislative intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). We enforce clear and unambiguous statutory language as written. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005). MCL 460.10d(7) delineates a source for funding the LIEEF, but does not *restrict* funding of the LIEEF to excess securitization savings. We find it inconsistent for the Legislature to have mandated the creation of the LIEEF and yet, using appellants' logic, to have restricted the funding source to securitization savings "if" they exceeded a specified level. MCL 460.10d(7). The LIEEF obviously could not be administered if there were no monies in it, and the PSC therefore had to take measures to secure funding in order to fulfill its statutorily imposed duty to administer the LIEEF.

In addition, the Legislature has indicated its intent for the continuation of the LIEEF through the provision of ongoing appropriations beyond the initial six-year period. Thus, the absence of specific statutory language regarding the authority to secure funds for the LIEEF through operation and maintenance expenses does not serve to preclude the PSC from funding the LIEEF by these means. Moreover, we have found no construction of the "clear and unmistakable" requirement that would necessitate a separate legislative endorsement for each action taken in the course of administering the fund. The Legislature conferred broad authority on the PSC to administer the LIEEF. The Legislature is not required to micromanage the PSC by statutorily delineating every aspect of its administrative power given the initial grant of authority

to manage and oversee this fund.

Having determined that the PSC had the authority to develop a structure and mechanism for funding of the LIEEF, we next address the contention of appellants that funding and distribution was restricted only to electric utilities and their customers. Our previous ruling addressing Detroit Edison's contention that a 2004 PSC order was unlawful and unreasonable because "it requires Edison's customers to provide monies for the LIEEF that will not be used in Edison's service territory which serves no rational purpose" is both instructive and applicable to the circumstances of this appeal. *In re Detroit Edison Application, supra* at 230. We previously rejected Detroit Edison's argument regarding territorial limitations for use of LIEEF funds, noting that the CCERA had created only one fund for low-income and energy-efficiency programs, which we interpreted as confirming the PSC's determination that the distribution of LIEEF funds was not restricted or defined by territorial contributions. The Court stated that "no statutory language limits the use of a utility's funds to that utility's service territory." *Id.* at 230. Further, we noted that Detroit Edison and CECo were the only utilities with enough customers to qualify to contribute securitization savings to the LIEEF and concluded that this supported the PSC's determination that LIEEF funds could be used throughout the state, without regard for the location of those contributing to the fund. *Id*.

First and foremost, this Court will generally defer to an agency's interpretation of a statute it is charged with interpreting where it is supported by the record and is reasonable. *In re Application of Indiana Michigan Power Co, supra* at 373-374. The CCERA does not provide that only electric customers will benefit from the LIEEF. While initial funding for the program was designed to originate from electric utilities' securitiza-

tion savings, MCL 460.10d(7) provides that the fund has a broader reach and purpose, designating that it is intended to be used "to provide shut off and other protection to low-income customers and to promote energy efficiency by all customer classes." Clearly, this statutory language does not restrict the intended beneficiaries of the LIEEF solely to electric ratepayers. Testimony at the hearing indicated that continued funding of the LIEEF was being recommended in part because of increasing natural gas prices, and that the fund was intended to benefit "Michigan's low income citizens," not just electric utility customers. As a result, it would be inequitable to preclude CECo from contributing to this fund because both the utility and its low-income customers will reap a benefit.

We note that appellants cite *Attorney General v Pub Service Comm,* 269 Mich App 473; 713 NW2d 290 (2006), which is distinguishable from the issue presented here. Although the Court held that the PSC could not charge customers for a renewable energy program from which they did not directly benefit, the ruling focused on the fact that the PSC was authorizing a charge to consumers for a program that was not statutorily mandated. In contrast, the LIEEF was created by statute. Moreover, this Court held that the Legislature intended that participation in green power programs to be voluntary. *Id.* at 482. In contrast, there exists no evidence of a legislative intent that funding of the LIEEF was to be so restricted or compartmentalized.

The final issue concerns Docket No. 275135 only. The Attorney General asserts that the PSC had no clear and unmistakable statutory or other authority to approve an equalization mechanism it described as follows:

> The trackers would allow the annual difference between the pension expenses included in rates, and the actual

> annual pension expense recorded by Consumers, to be deferred. Consumers claimed that if the annual pension expense is greater than the expense authorized in rates, the difference would be recognized as a regulatory asset for future recovery. Similarly, if the annual pension expense is less than that approved in rates, Consumers would recognize a regulatory liability for distribution to customers.

The Attorney General asserts that approval of this equalization mechanism constituted prohibited retroactive ratemaking. The PSC concluded that pursuant to its general ratemaking powers it was authorized to adopt a ratemaking formula that included this equalization mechanism, which was designed to ensure, to the extent possible, that rates would match expenses. We note that the rate is presumed, prima facie, to be lawful and reasonable. *In re Detroit Edison Application, supra* at 224. The Attorney General has failed to overcome this presumption. In *Attorney General v Pub Service Comm,* 262 Mich App 649, 656; 686 NW2d 804 (2004), this Court held that deferred expenses were an expense of the year to which they were deferred, and were therefore prospective. Specifically, this Court noted that " 'when capitalized expenditures are amortized, the amortization becomes a current expense even though it reflects expenditures that were capitalized in the past.' " *Id*., quoting *Ass'n of Businesses Advocating Tariff Equity v Pub Service Comm*, 208 Mich 248, 261; 527 NW2d 533 (1994). There is no sound basis for distinguishing the equalization mechanism approved by the PSC in this case from deferred expenses affirmed in prior caselaw. Accordingly, the deferral of pension and other post-employment benefit expenses to a subsequent year did not constitute retroactive ratemaking.

Affirmed.

MOORE v DETROIT ENTERTAINMENT, LLC

Docket No. 275157. Submitted April 8, 2008, at Detroit. Decided May 27, 2008, at 9:05 a.m. Leave to appeal sought.

Douglas Moore brought an action in the Wayne Circuit Court against Detroit Entertainment, L.L.C., doing business as Motor City Casino, and Jose O. Martinez, a casino security manager licensed as a private security officer under MCL 338.1079, alleging various intentional torts under state law and a violation of 42 USC 1983, which states that any person who experiences the deprivation of any rights, privileges, or immunities secured by the United States Constitution and laws because of the actions of another person acting under color of any statute, ordinance, regulation, custom, or usage of any state may file an action seeking relief against the party that caused the deprivation. The plaintiff had been denied entry into the casino on the basis of his alleged inebriation. He then left the premises after he was accused of assaulting Martinez. Several of the casino's security personnel, some of whom were licensed under MCL 338.1079, along with two Detroit police officers, confronted the plaintiff off the casino's premises and offered him the choice of returning to the casino to discuss the alleged assault or placing himself in the custody of the Detroit Police Department. The plaintiff elected to allow himself to be escorted back to the casino's security office, where he was detained in a locked room for about 2½ hours until he signed a form that permanently banned him from the casino. He was subsequently arrested as a result of warrants alleging assault and battery, and was acquitted of the charges in a jury trial in the 36th District Court. At the conclusion of a jury trial of the plaintiff's action in the Wayne Circuit Court, the jury returned a special verdict in favor of the plaintiff, and the court, Michael J. Callahan, J., entered a judgment consistent with the verdict. The casino appealed various aspects of the judgment, including the ruling that the casino, through the conduct of its security officers licensed under MCL 338.1079, acted under color of state law in detaining the plaintiff. The plaintiff cross-appealed from the court's pretrial order that granted summary disposition for the defendants on the plaintiff's claims of abuse of process and malicious prosecution.

The Court of Appeals *held*:

1. The determination whether private security police officers acted under color of state law for purposes of an action under 42 USC 1983 must be based on the facts of each specific case. Here, the facts show that the licensed private security officers acted under color of state law in detaining the plaintiff. The casino's employees arrested and detained the plaintiff because they suspected that he had committed an assault and battery. Those employees' ability to arrest the plaintiff derived solely from their special state licensure. Detroit police officers expressly approved the actions of the casino's employees, who exercised powers traditionally exclusively reserved to the state and did so with the encouragement and approbation of the state.

2. The holding in this matter is entirely inconsistent with the notion that licensed, private security guards are always state actors or that the mere performance of a task specifically authorized by a state statute confers state-actor status. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment.

3. A succinct principle that aids in the analysis of the state-action requirement in § 1983 cases is that the court must ask whether the state provided a mantle of authority that enhanced the power of the harm-causing individual actor. Here, the state provided a mantle of authority that constrained the plaintiff to subject himself to detention.

4. The defendants' joint engagement with the Detroit police in the arrest and detention of the plaintiff satisfies the symbiotic relationship or nexus test of action under color of state law.

5. The jury's rejection of the plaintiff's false-arrest claim does not alter the fact that the casino's security officers restricted the plaintiff's freedom of movement for $2\frac{1}{2}$ hours on the basis of the authority provided to them by MCL 338.1080. The licensing statute, MCL 338.1079, provided the mantle of authority for the casino's security personnel, and imbued them with virtually the same powers as the Detroit police officers who explicitly approved the decision to escort the plaintiff back to the casino.

6. The trial court correctly distinguished this case from *Grand Rapids* v *Impens*, 414 Mich 667 (1982), on the basis of the facts involved in both cases.

7. The trial court did not err in denying the defendants' motions for a new trial based on alleged defective jury instructions or inconsistent special verdicts by the jury. The verdicts were not inconsistent.

8. The trial court properly denied the defendants' motion for a directed verdict of the plaintiff's false-imprisonment claim. The jury received proper instructions regarding the claims of false arrest, false imprisonment, and the concept of probable cause necessary to render a search or seizure reasonable and lawful.

9. The jury's award of noneconomic compensatory damages was supported by the evidence. The defendants' request for remittitur regarding that award was properly denied.

Affirmed.

O'CONNELL, P.J., dissenting, stated that the trial court erred by failing to follow the Supreme Court's decision in *Impens* because the logic behind that decision is controlling and dispositive of the issue whether the private security guards were acting under color of state law. *Impens* impliedly determined that private security guards are not state actors simply because they are certified under MCL 338.1079. MCL 338.1080 provides for a limited power of arrest to those security guards licensed under MCL 338.1079. Because the power to arrest under MCL 338.1080 is conferred solely by licensure under MCL 338.1079, if licensure alone does not constitute state action, then acknowledgement that licensure confers an arrest power is similarly insufficient. Here, the security guards never exercised any power to arrest. The mere existence of arrest authority under MCL 338.1080 did not confer state-actor status on the security officers. *Romanski v Detroit Entertainment, LLC,* 428 F3d 629 (CA 6, 2005), is inapplicable to this case and does not control the determination of the plaintiff's claim under 42 USC 1983. The decision of the trial court, which was based on *Romanski*, should be reversed.

CIVIL RIGHTS — STATE ACTION — LICENSED PRIVATE SECURITY OFFICERS.

The determination whether actions of a state-licensed private security officer are actions under color of state law for purposes of a claim under 42 USC 1983 is a fact-specific determination; state action may be found in the exercise by a private entity of powers traditionally exclusively reserved to the state; of assistance in the analysis of the state-action requirement in § 1983 cases is a determination whether the state provided a mantle of authority that enhanced the power of the harm-causing individual actor; to act under color of state law does not require that the defendant be an officer of the state, it is enough if the defendant is a willful participant in joint action with the state or its agents.

Gary R. Blumberg, P.C. (by *Gary R. Blumberg*), and *Warner Norcross & Judd LLP* (by *John J. Bursch* and *Gaëtan E. Gerville-Réache*) for the plaintiff.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh*, *Rosalind Rochkind*, and *Robert F. MacAlpine*), for the defendants.

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

GLEICHER, J. Plaintiff commenced this action alleging multiple state-law intentional torts and a violation of 42 USC 1983 after Detroit Entertainment, L.L.C., doing business as Motor City Casino,[1] through several casino employees, denied plaintiff entry into the casino, thereafter detained him inside the casino, and ultimately banned him permanently from the casino. Defendant appeals as of right, challenging various aspects of a final judgment entered by the trial court after a jury trial, at the conclusion of which the jury returned a special verdict in plaintiff's favor. Plaintiff cross-appeals, contesting the trial court's pretrial order granting summary disposition of his abuse-of-process and malicious-prosecution claims. We affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

Plaintiff and five companions traveled to the Motor City Casino on the evening of September 14, 2002, to take advantage of a complimentary meal and to gamble. When the group's Metro car arrived at the casino's valet entrance, some members of the group, including plaintiff, held cups containing alcoholic beverages, but dis-

[1] The singular "defendant" in this opinion hereinafter refers to defendant-appellant Detroit Entertainment.

posed of the cups when advised that they could not enter the casino with them. Much trial testimony disputed whether (1) plaintiff stumbled while alighting from the group's Metro car and approaching the valet lobby, (2) plaintiff's speech was slurred, (3) plaintiff's eyes appeared glassy, or (4) plaintiff's breath smelled of alcohol.

There is no dispute, however, that in the valet lobby, defendant Jose Oscar Martinez, a casino security manager who had obtained "PA 330 certification" under MCL 338.1079,[2] barred plaintiff's entry on the basis that he appeared inebriated and thus constituted a potential liability to the casino. Plaintiff and some of his companions expressed disbelief, denied that plaintiff was intoxicated, and asked to speak with a manager. But the evidence diverged concerning the extent of plaintiff's physical reaction to Martinez's announcement: some testimony described that while protesting his exclusion and demanding a manager, plaintiff may have made "nonchalant" gestures with his arm or hand, although this testimony varied regarding plaintiff's proximity to Martinez at the time of the gestures, while other testimony recounted that plaintiff seemed to have intentionally pointed a finger or directed an open hand that made contact with Martinez's chest. Many witnesses recalled seeing Martinez step backward.[3]

Other nearby casino security personnel announced that an assault had occurred, which prompted plaintiff and his companions to depart from the valet lobby and

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[2] The "PA 330" shorthand refers to 1968 PA 330, which enacted the current Private Security Business and Security Alarm Act. MCL 338.1051 *et seq*.

[3] Martinez immediately underwent examination by an emergency medical technician, who detected no obvious signs of injury. Martinez did not seek additional medical attention.

walk across the street. A group consisting of several casino security officers, at some point accompanied by two Detroit police officers, eventually confronted plaintiff and his companions. Another PA 330-certified casino security manager, John Grzadzinski, offered plaintiff the choice to either return to the casino to discuss the alleged assault, or to place himself in the custody of the Detroit Police Department. At trial, Grzadzinski replied affirmatively to plaintiff's counsel's inquiry whether the Detroit police officers present likewise "suggested to [plaintiff] that he go back with [Grzadzinski] into the casino, is that right?" Richard Novak, one of plaintiff's companions and his longtime business attorney, recounted at trial that after Grzadzinski announced the two choices "loud enough for everybody to hear," Novak spoke with the Detroit police officers present in the group, and "asked the DPD" whether they agreed with Grzadzinski's two alternative proposals. According to Novak, the officers "said we don't care, it's your call." Plaintiff, who initially declined to return to the casino, ultimately elected, on Novak's advice, to allow himself to be escorted back to the casino's security office.

In a detention room, pursuant to casino policies and applicable administrative rules, plaintiff underwent a pat-down search and the removal and inventory of his personal property, before being left alone in the locked detention room. At plaintiff's request, someone later escorted him to a bathroom. On returning to the detention room, against plaintiff's expressed wishes, security personnel locked him back inside the detention room. Ultimately, Grzadzinski obtained plaintiff's signature on an "86 form" permanently banning him from the casino, although Grzadzinski denied plaintiff's requests that Novak review the form or that plaintiff receive a copy of the form.

The trial evidence established that plaintiff's detention period was about 2½ hours. Plaintiff then left the Motor City Casino with his companions, and everyone went to the Greektown Casino.

In May 2003, a Wayne County Sheriff's deputy arrested plaintiff at Detroit Metropolitan Airport when he learned plaintiff had outstanding assault and battery warrants arising from the September 14, 2002, incident at the Motor City Casino. The criminal proceedings against plaintiff were temporarily terminated in September 2003, when the 36th District Court dismissed the charge without prejudice because no prosecution witnesses appeared. Sometime in 2005, plaintiff discovered the existence of resurrected arrest warrants relating to September 14, 2002. After a December 2005 trial in the 36th District Court, a jury acquitted plaintiff.[4]

II. CHALLENGES TO 42 USC 1983 SPECIAL VERDICT

Defendant first contends that the trial court erred by denying its motion for a directed verdict regarding plaintiff's § 1983 claim. Defendant specifically challenges the trial court's ruling as a matter of law that the casino, through the conduct of its PA 330-certified security officers, acted under color of state law during the September 14, 2002, detention of plaintiff.

A

This Court reviews de novo a trial court's ruling on a litigant's motion for a directed verdict. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). In reviewing the trial court's ruling, this Court examines the evidence presented and all legiti-

[4] Plaintiff commenced this action in 2004, between the two 36th District Court criminal proceedings.

mate inferences arising therefrom in the light most favorable to the nonmoving party. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 668; 591 NW2d 438 (1998). "A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ." *Candelaria*, *supra* at 71-72. "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). The "appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

B

According to 42 USC 1983, any person who experiences "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" because of the actions of another person acting "*under color of any statute, ordinance, regulation, custom, or usage, of any State*" may file an action seeking relief against the party that caused the deprivation. (Emphasis added.) The dispute in this appeal focuses on the "under color of state law" element of a § 1983 claim.

The United States Court of Appeals for the Sixth Circuit recently examined, in relevant part as follows, the contours of the requisite state-action element:

> The issue in this appeal is whether Plaintiffs can demonstrate that Defendant acted "under color of state law" by showing that Defendant's conduct constituted state action. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942, 102 S.

> Ct. 2744; 73 L. Ed. 2d 482 (1982) . . . . Section 1983 does not, as a general rule, prohibit the conduct of private parties acting in their individual capacities. . . . However, "[a] private actor acts under color of state law when its conduct is 'fairly attributable to the state.' " *Romanski* [*v Detroit Entertainment, LLC*, 428 F3d 629, 636 (CA 6, 2005)] (quoting *Lugar* [*supra* at 937]).
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> "What [conduct] is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood* [*Academy v Tennessee Secondary School Athletic Ass'n*, 531 US 288, 295; 121 S Ct 924; 148 L Ed 2d 807 (2001)]. The Supreme Court and this Court, however, have provided several significant milestones to guide our inquiry as to whether Defendant's conduct constitutes state action. As we recognized in *Chapman* [*v Higbee Co*, 319 F3d 825, 833 (CA 6, 2003),] "[t]he Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." Of these three tests, the only one relevant to the instant case is the public function test. Under the public function test, courts have found "state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352; 95 S. Ct. 449; 42 L. Ed. 2d 477 (1974). The Supreme Court has found this requirement satisfied where the state permitted a private entity to hold elections, allowed a private company to own a town, or established private ownership of a municipal park. However, the Supreme Court has explicitly declined to decide the question of "whether and under what circumstances private police officers may be said to perform a public function for purposes of § 1983." *Romanski*, 428 F.3d at 636. [*Lindsey v Detroit Entertainment, LLC*, 484 F3d 824, 827-828 (CA 6, 2007) (some citations omitted).]

C

The trial court in this case invoked *Romanski*, *supra*, when finding that Martinez, Grzadzinski, and other casino security personnel acted under color of state law

in detaining plaintiff. Because the parties argue at length concerning the propriety of the trial court's application of *Romanski*, we now turn to a careful examination of *Romanski*.

Romanski involved a casino patron's claim against the instant defendant. In *Romanski*, the plaintiff, age 72, "took a walk around the gaming floor," during which she "noticed a five cent token lying in a slot machine's tray. Seeing no chair at the machine, she picked up the token and returned to the machine at which she had earlier played, intending to use the token there." *Romanski, supra* at 632. Several casino security officers descended on the plaintiff and advised her that the casino had a "policy not to permit patrons to pick up tokens, which appeared to be abandoned, found at other slot machines, a practice known as 'slot-walking,' " despite the fact that the casino had not posted notice of such a policy. *Id*. at 633. One defendant security officer, Marlene Brown, recalled that because Romanski "became loud and belligerent," several security personnel escorted her to the casino's "small and windowless" security office "located off the casino's floor." *Id*. at 633.

> According to Romanski, once they had taken their seats, Brown accused Romanski of stealing the token, whereupon Brown counted Romanski's money and removed one nickel from Romanski's winnings. [Brown's supervisor JoEtta] Stevenson asked Romanski to turn over her social security card and driver's license; Romanski complied and these items were photocopied. Romanski was then photographed. Romanski testified that she acquiesced to these requests because Brown said she was a police officer, had a badge, and appeared to have handcuffs. . . . [A] uniformed casino security officer stood just outside the room for the duration of the questioning.
>
> Romanski was ejected from the casino for a period of 6 months; Stevenson made the final decision to eject, or "86," Romanski. . . . Although unknown to Romanski at the

time, it is now undisputed that Brown and some of her colleagues on the casino's security staff were licensed under state law as "private security police officer[s]." [MCL 338.1079].[5] By virtue of being so licensed, a private security police officer has "the authority to arrest a person without a warrant as set forth for public peace officers . . . when that private security police officer is on the employer's premises." [MCL 338.1080].[6] The statute additionally

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[5] In its entirety, MCL 338.1079 provides as follows:

(1) The licensure of private security police shall be administered by the department of state police. The application, qualification, and enforcement provisions under this act apply to private security police except that the administration of those provisions shall be performed by, and the payment of the appropriate fees shall be paid to, the department of state police. The director of the department may jointly promulgate rules with the department of state police under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to facilitate the bifurcation of authority described in this subsection.

(2) This act does not require licensing of any private security guards employed for the purpose of protecting the property and employees of their employer and generally maintaining security for their employer. However, any person, firm, limited liability company, business organization, educational institution, or corporation maintaining a private security police organization may voluntarily apply for licensure under this act. When a private security police employer as described in this section provides the employee with a pistol for the purpose of protecting the property of the employer, the pistol shall be considered the property of the employer and the employer shall retain custody of the pistol, except during the actual working hours of the employee. All such private security people shall be subject to the provisions of sections 17(1) and 19(1).

[6] In its entirety, MCL 338.1080 provides as follows:

A private security police officer, as described in section 29, who is properly licensed under this act has the authority to arrest a person without a warrant as set forth for public peace officers in section 15 of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15, when that private security police officer is on the employer's premises. Such authority is limited to his or her hours

> requires that private security police officers make arrests only when they are on duty and in "the full uniform of the[ir] employer." *Id*. It is undisputed that Brown was on duty during the events of this case. It is also undisputed that Brown was not wearing the uniform worn by some of the other security guards, but Defendants have never contended that this rendered Brown out of uniform for purposes of [MCL 338.1080]; indeed, *Defendants have conceded from the beginning that the statute applies in this case*. *Their argument is simply that the power admittedly conferred on Brown by the statute did not make her actions under color of state law*. *See* 42 U.S.C. 1983. [*Romanski*, *supra* at 633 (emphasis added).]

The plaintiff filed an amended complaint that contained several state-law tort claims and "a claim under 42 U.S.C. § 1983 that Defendants had violated Romanski's Fourth Amendment rights," specifically "that Defendants, acting under color of state law, had arrested her without probable cause because the token she picked up was abandoned, i.e., not the casino's property." *Romanski, supra* at 634.

When the defendants sought summary judgment of Romanski's § 1983 claim on the basis that they had not acted under color of state law, the district court denied the motion, ruling "as a matter of law that Defendants had acted under color of state law . . . because Brown, the defendant who initiated Romanski's detention, did so while on duty in her capacity as a licensed private security police officer empowered with the same arrest authority as a public police officer." *Romanski*, *supra* at 635. A jury found in the plaintiff's favor regarding her § 1983 claim that the defendants violated her Fourth Amendment rights, and consequently awarded "$500 in

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of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer.

punitive damages against Brown, and $875,000 in punitive damages against the casino." *Id*. The district court denied a motion for a judgment notwithstanding the verdict, and the defendants appealed. *Id*. at 635-636.

The Sixth Circuit affirmed in *Romanski*, rejecting the defendants' contention that they did not qualify as state actors. The Sixth Circuit commenced its analysis by surveying federal caselaw that had considered whether private security officers acted under color of state law, including *Payton v Rush-Presbyterian-St Luke's Med Ctr*, 184 F3d 623, 627-630 (CA 7, 1999), in which "the Seventh Circuit held that private police officers licensed to make arrests could be state actors under the public function test." *Romanski*, *supra* at 637. In discussion highly relevant to the instant case, the Sixth Circuit ascertained and applied the following guiding principles:

> [T]he crucial fact in [*Payton*]—assumed to be true there but indisputable here—was that by virtue of their status as on-duty special police officers, licensed by the city of Chicago, the defendants enjoyed "virtually the same power as public police officers." *Id*. at 629. Indeed, the defendants in *Payton* operated under an ordinance which provided that special police officers licensed under it "shall possess the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged." *Id*. at 625.
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> * * *
>
> *Payton* illustrates a line that has been drawn in the case law. *The line divides cases in which a private actor exercises a power traditionally reserved to the state, but not exclusively reserved to it, e.g., the common law shopkeeper's privilege, from cases in which a private actor exercises a power exclusively reserved to the state, e.g., the police power*.

Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test. . . . The rationale of these cases is that when the state delegates a power traditionally reserved to it alone—the police power—to private actors in order that they may provide police services to institutions that need it, a "plaintiff's ability to claim relief under § 1983 [for abuses of that power] should be unaffected." *Payton* [*supra* at 629].

On the other side of the line illustrated by *Payton* are cases in which the private defendants have some police-like powers but not plenary police authority. . . . A subset of these cases are cases in which a private institution's security employees have been dispatched to protect the institution's interests or enforce its policies. The canonical example here is when a store avails itself of the common law shopkeeper's privilege . . . .

Like the district court, we think this case falls on the *Payton* side of the line. It is undisputed that Brown (and some of her colleagues) were private security police officers licensed under [MCL 338.1079]. This means that Brown's qualifications for being so licensed were vetted by Michigan's department of state police, *id*. § (1), and that Brown was subject to certain statutes administered by that department. *Id*. § (2); *see* [MCL 338.1067, MCL 338.1069]. More critical for present purposes are the undisputed facts that Brown was on duty and on the casino's premises at all times relevant to this case. *These undisputed facts lead to an inescapable conclusion of law—namely, that at all times relevant to this case, Brown "had the authority to arrest a person without a warrant as set forth for public peace officers . . . ."* [*MCL 338.1080*.] *One consequence of Brown's possession of this authority, the authority to make arrests at one's discretion and for any offenses, is clear: at all times relevant to this case, Brown was a state actor as a matter of law*.

Unlike the common law privileges at issue in *Wade* [*v Byles*, 83 F3d 902 (CA 7, 1996)] (the use of deadly force in self-defense, the right to detain for trespass, and the right

to carry a weapon) and *Chapman* [*supra* at 825] (the shopkeeper's privilege), which may be invoked by any citizen under appropriate circumstances, the plenary arrest power enjoyed by private security police officers licensed pursuant to [MCL 338.1079] is a power traditionally reserved to the state alone. . . .

Defendants contend that *Wade* ought to control here because, as in that case, private security police officers' power to make arrests is subject to spatial or geographic limits. *See* [MCL 338.1080]. But the spatial or geographic limitation in *Wade* was profound—it prohibited housing authority security guards from exercising their (already minimal) powers anywhere except in the lobbies of buildings operated by the housing authority. *See Wade* [*supra* at 906]. By contrast, [MCL 338.1080] invests private security police officers with full arrest authority on the entirety of their employer's premises, which makes this case distinguishable from *Wade* and similar to *Payton* and *Henderson* [*v Fisher*, 631 F2d 1115 (CA 3, 1980)], each of which involved a statute or ordinance that imposed or contemplated some spatial or geographic limits on the private defendants' police powers. *See Payton* [*supra* at 625] (special police officers "shall possess the powers of the regular police patrol *at the places for which they are respectively appointed*") (emphasis added) . . . ; *Henderson* [*supra* at 1117-1119] (authority of the university police was limited to the university campus in question). *Furthermore, as we have discussed, private security police officers in Michigan are endowed with plenary arrest authority, see* [*MCL 338.1080*], while the defendant in *Wade* was permitted to exercise only what were in effect citizens' arrests. [*Romanski*, *supra* at 637-639 (emphasis added; some citations omitted).]

D

The Sixth Circuit subsequently addressed § 1983 claims filed by several plaintiffs who underwent similar detentions by Motor City Casino security personnel in *Lindsey*, *supra* at 826. The *Lindsey* court did not

question or criticize the legal principles espoused or the conclusion reached by the court in *Romanski*, which it reviewed in detail. *Lindsey*, *supra* at 828-831. The Sixth Circuit held, however, that the defendants in *Lindsey* had not acted under color of state law, citing the following factual distinction:

> Plaintiffs argue that *Romanski* supports a finding that Defendant's security personnel were likewise state actors in this case. We disagree. Unlike *Romanski*, where it was undisputed that Defendant's security personnel were licensed under [MCL 338.1079], *here, exactly the opposite appears to be the case*. Plaintiffs' complaint alleges that: "At the time of the seizure[s] and detention[s] . . . , none of [Defendant's] security guards were authorized to make misdemeanor arrests. . . ."
>
> If Defendant's security personnel had in fact been licensed pursuant to [MCL 338.1079], they would have had misdemeanor arrest authority at the time that they seized and detained Plaintiffs. Hence, Plaintiffs' allegation that Defendant's security personnel lacked such authority is by implication an assertion that Defendant's security personnel were not licensed under [MCL 338.1079]. Moreover, at oral argument, Plaintiffs were asked to point the Court to any information in the record that suggested that Defendant's security personnel were licensed pursuant to [MCL 338.1079] at the time of Plaintiffs' arrests, and Plaintiffs could point to no such information. *Plaintiffs have therefore not carried their burden of demonstrating that any of Defendant's security guards were licensed under [MCL 338.1079], and we must proceed under the assumption that all of Defendant's security personnel who interfaced with Plaintiffs were not so licensed*.
>
> The fact that Defendant's security personnel were *not* licensed in this case means that, under the facts of this case, Defendant's conduct in detaining Plaintiffs was not "fairly attributable to the state." . . .

* * *

> This analysis [in *Romanski*] demonstrates that the fact that Michigan delegated a part of the police power to licensed private security guards, which it had traditionally and exclusively reserved for itself, was the key fact that justified finding state action in *Romanski*. Although the police power that Michigan bestowed upon licensed security guards pursuant to [MCL 338.1080] was limited in certain respects, the plaintiff in *Romanski* could point to an identifiable police power—the power of arrest—which was not possessed by the citizens of Michigan at large, but instead resided only in the state, its agents, and those persons who the state empowered and regulated by statute. By contrast, Plaintiffs here cannot point to any powers above and beyond those possessed by ordinary citizens that the state of Michigan had delegated to Defendant's unlicensed security personnel at the time of Plaintiffs' arrests. The instant case is thus squarely within the rule of *Chapman*, where this Court held that a merchant exercising the "shopkeeper's privilege" was not a state actor under the public function test. [*Chapman, supra* at 834]. Because Plaintiffs cannot demonstrate that Defendant's security personnel were licensed under [MCL 338.1079], they cannot show that Defendant engaged in action attributable to the state. Plaintiffs therefore cannot demonstrate that Defendant deprived them of their rights secured by the Constitution by acting under color of state law, and their § 1983 claim must fail. [*Lindsey*, *supra* at 829-831 (emphasis added; some citations omitted).]

E

After reviewing the record in this case, we find that it falls squarely within the facts and legal analysis presented in *Romanski*, which properly concluded as a matter of law that the state-licensed private security officers involved in the casino detention acted under color of state law. Here, the parties do not dispute that at the time of plaintiff's detention on September 14, 2002, Martinez, security manager Chenine McDowell, and Grzadzinski had obtained certification pursuant to

MCL 338.1079. During trial, Martinez, McDowell, and Grzadzinski elaborated on the training they had received, under the tutelage of a Detroit police officer and through the Michigan State Police, to obtain their statutory certifications, which they understood to invest them with the authority to make certain arrests inside the casino. Because the record indisputably establishes that Martinez and others involved in plaintiff's detention on September 14, 2002, primarily Grzadzinski and McDowell, had obtained state licensure pursuant to MCL 338.1079, and, consequently, pursuant to MCL 338.1080, Martinez, Grzadzinski, and McDowell all possessed the power to arrest plaintiff on casino premises for his alleged assault ("a part of the police power" that the state "had traditionally and exclusively reserved for itself," *Lindsey*, *supra* at 831, citing *Romanski*, *supra* at 637), and Martinez, Grzadzinski, and McDowell arranged for plaintiff to be held within the casino's security detention room on the basis of this statutory authority, we conclude that the trial court correctly ruled as a matter of law that defendant, through Martinez, Grzadzinski, and McDowell, acted under color of state law for purposes of § 1983.

We stress that ours is decidedly a fact-specific holding, in accordance with the United States Supreme Court's observations in *Lugar*, *supra* at 939, that the state-action inquiry is "necessarily fact-bound," and that a court's approach to the inquiry must be closely tailored to the evidence before it. We further emphasize that our holding is entirely inconsistent with the notion that licensed, private security guards are always state-actors, or that the mere performance of a task specifically authorized by a state statute confers state actor status. Contrary to the dissent's hyperbolic and dire prophesy, Michigan's day-care providers, plumbers,

barbers, beauticians, electricians, and cab drivers need not fear an onslaught of litigation triggered by our ruling today. Those licensed professionals obviously do not qualify as state actors because they do not exercise powers "traditionally exclusively reserved to the State." *Jackson*, *supra* at 352. No portion of our opinion conflicts with the oft-repeated principle, first articulated in *Jackson*, that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Id*. at 350.

In the instant case, the casino's employees arrested and detained a casino customer because they suspected that he had committed an assault and battery. Those employees' ability to arrest plaintiff derived solely from their special state licensure. Officers of the Detroit Police Department expressly approved the casino employees' actions. These facts conclusively demonstrate that the casino's employees exercised powers "traditionally exclusively reserved to the state," and did so with the encouragement and approbation of the state.

Indeed, the record of state action here far exceeds the state action involved in *Romanski*. Here, licensed security guards effectuated an arrest to investigate a violent crime, while Mrs. Romanski's detention arose from a suspected larceny. The power to arrest and detain a larcenous customer does not rest exclusively with the state of Michigan, but resides in all Michigan security guards by virtue of MCL 338.1079(2). Furthermore, the city police officers here watched and helped direct the security personnel's decision to take plaintiff into custody, while the security personnel in *Romanski* acted in the absence of any police presence. We therefore reject as completely unfounded the dissent's suggestion that our decision unreasonably expands state-action concepts.

Although defendant urges that we reject *Romanski* as a nonbinding intermediate federal appellate court decision, this Court plainly may adopt as persuasive a "lower federal court decision[]" involving federal law. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Furthermore, as noted, we view the similar relevant facts and applicable legal analysis in *Romanski* as persuasive in this case, and defendant has not identified, and we have not located, any United States Supreme Court decision casting doubt on the state-actor conclusion in *Romanski*. The Supreme Court declined to consider the holding in *Romanski*, denying certiorari at ___ US ___; 127 S Ct 209; 166 L Ed 2d 257 (2006).

F

We additionally note that the United States Supreme Court has provided a succinct principle to aid in the analysis of the state-action requirement in § 1983 cases, which we view as instructive to our state-action conclusion in this case. "[I]n the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Nat'l Collegiate Athletic Ass'n v Tarkanian*, 488 US 179, 192; 109 S Ct 454; 102 L Ed 2d 469 (1988). The instant record establishes indisputably that plaintiff's detention within the locked casino security room commenced immediately after a combined force of Detroit police officers and casino security personnel confronted plaintiff, his attorney, and his other companions as they attempted to leave the casino grounds. Both Grzadzinski and Richard Novak testified that the Detroit police officers authorized, and indeed encouraged, defendant's security personnel to seize plaintiff and escort him back to the casino. This evidence strongly supports our

conclusion that the state "provided a mantle of authority" that constrained plaintiff to subject himself to detention by defendant.

> [T]o act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. [*Dennis v Sparks*, 449 US 24, 27-28; 101 S Ct 183; 66 L Ed 2d 185 (1980).]

In *Chapman*, *supra*, at 835, the Sixth Circuit, sitting en banc, concluded that a customer's detention by a store security guard could qualify as an act "that may fairly be attributed to the state." The security guard, an off-duty, armed, uniformed sheriff's deputy, initiated a strip search of the customer, and store policy mandated "police intervention in strip search situations . . . ." *Id*. at 835. Utilizing the "symbiotic or nexus test," the Sixth Circuit held that a genuine issue of material fact existed "as to whether the security officer acted under 'color of state law' " when he initiated the search. *Id*. at 834-835. The Sixth Circuit explained that a § 1983 claimant could satisfy the symbiotic or nexus test by demonstrating "that there is a sufficiently close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself." *Chapman, supra*. at 834.[7]

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[7] See also *Murray v Wal-Mart, Inc*, 874 F2d 555, 558-559 (CA 8, 1989) (noting the general proposition that a § 1983 plaintiff may obtain relief by demonstrating that a private party acted as "a willful participant in joint activity with the State or its agents which activity deprived the plaintiff of a constitutional right," and the more specific principle that "state action is present when private security guards and police officers act in concert to deprive a plaintiff of his civil rights") (internal quotation marks and citation omitted).

The testimony in the instant case established not only a close working relationship between defendant's security personnel and the Detroit police officers posted near the casino, but a joint and cooperative effort to detain plaintiff either in a city jail cell or its casino equivalent. We therefore hold, in conformity with the *Chapman* majority, that defendants' joint engagement with the Detroit police in the arrest and detention of plaintiff also satisfies the symbiotic relationship or nexus test of action "under color of state law."[8]

G

We do not find persuasive defendant's suggestion that the "private detention" of plaintiff could not constitute state action. According to this argument, defendant's employees' "conduct in detaining, processing and eventually 86'ing Plaintiff, constituted, at most, an 'arrest' for purposes of state civil liability," and the jury's rejection of plaintiff's false-arrest claim eliminated defendant's "state action" liability. In our view, this distinction lacks a meaningful difference, particularly under the circumstances presented here. Defendant's security personnel restrained plaintiff's freedom

[8] We cannot ignore the dissent's characterization of our holding as "absurd," *post* at 237, and choose to observe simply that we have walked precisely the same decisional path as the Sixth Circuit judges who decided *Romanski* and *Chapman* (an en banc panel), the Seventh Circuit judges who decided *Payton*, *supra*, and the Eighth Circuit judges who decided *Murray*, *supra*.

In response to defendant's protestation on appeal that in the trial court plaintiff never proposed the symbiotic relationship or nexus test as a potential basis for finding state action, we observe that we have the authority to consider this question of law for the first time on appeal because all facts necessary for its resolution appear in the existing record. *Royce v Chatwell Club Apartments*, 276 Mich App 389, 399; 740 NW2d 547 (2007), application for leave to appeal held in abeyance 743 NW2d 213 (2008).

of movement because they believed he assaulted and battered Martinez. Defendant's employees' entitlement to detain plaintiff—either momentarily or for two hours and 15 minutes—derived directly from their state licensure. Their conduct, therefore, qualified as state action, and deprived plaintiff of a right "secured by the Constitution." See *Davis v Mississippi*, 394 US 721, 726-727; 89 S Ct 1394; 22 L Ed 2d 676 (1969), in which the United States Supreme Court observed that "the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions,' " and *Dunaway v New York*, 442 US 200, 216; 99 S Ct 2248; 60 L Ed 2d 824 (1979) (observing that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest").

The trial testimony here shows that when plaintiff and his companions were surrounded by casino security personnel and Detroit police officers, Grzadzinski offered plaintiff two choices, go with the police or return to the casino security office to discuss the matter; at no time was plaintiff advised he could simply continue his departure from casino property. Although plaintiff's testimony suggested that he returned to the casino voluntarily,[9] other trial testimony shows that after Grzadzinski escorted plaintiff to the casino detention room, plaintiff remained there against his will for more than two hours. Under these circumstances, the jury reasonably could have found a violation of § 1983.

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[9] Even if plaintiff initially consented to a form of administrative reprimand or casino exclusion process, the evidence of record clearly demonstrates that his detention ceased to be consensual when he requested that the door not be locked and that his attorney be summoned.

The dissent also asserts that "[t]he security guards never exercised any power to arrest," *post* at 235, and points to the jury's verdict that "no false arrest occurred in this case." *Post* at 235 n 2. Although defendants did not *falsely* arrest plaintiff, the evidence demonstrates that he was detained, placed into custody, and thereafter subjected to the will of defendant's security personnel. In *People v Gonzales*, 356 Mich 247, 253; 97 NW2d 16 (1959), our Supreme Court adopted the following definition of "arrest":

> An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested. [Internal quotation marks and citation omitted.]

The jury's rejection of plaintiff's false-arrest claim does not alter the fact that defendant's security officers restricted plaintiff's freedom of movement during the two hours and 15 minutes of his detention,[10] and did so on the basis of the authority provided by MCL 338.1080 to the security officers. The dissent has identified no basis other than MCL 338.1080 that would have permitted plaintiff's arrest and detention, and we are unaware of any. The licensing statute provided the mantle of authority for defendant's security personnel,

[10] Michigan's regulations governing casinos permit them to physically detain persons "suspected of criminal activity" and to secure such persons "in [a] temporary holding area for purposes of detention or arrest . . . ." Mich Admin Code, R 432.11003(1), (3). The regulations further provide, "As a general rule, a person shall not be detained in a temporary holding area awaiting transport for more than 2 hours." Mich Admin Code, R 432.11003(4).

and imbued them with virtually the same powers as the Detroit police officers who explicitly approved defendants' decision to escort plaintiff back to the casino.

H

We also find unpersuasive defendant's related suggestion that no state action existed here because, although several of its officers had certification under MCL 338.1079 and the authority to arrest pursuant to MCL 338.1080, they routinely did not employ their authority to arrest casino patrons. We agree with the following portion of *Romanski*, in which the Sixth Circuit rejected this precise contention:

> Finally, we address Defendants' repeated representation that, although empowered to make arrests under [MCL 338.1080], Brown and the other casino employees licensed under the statute are, as a matter of casino policy, not permitted to exercise this statutory authority to effectuate arrests. For this argument Defendants again rely on *Wade*, in which the very document that was the source of the defendant's police-type powers, his contract with the public housing authority, at the same time imposed profound limits on those powers. *See Wade* [*supra* at 905-906]. Here the source of Brown's power to make arrests is a statute that includes no qualitative limits on that power, so *Wade* is inapplicable. Defendants do not cite a case in which a private security officer licensed to make arrests as under [MCL 338.1080] was held not to be a state actor on the ground that the officer's employer substantially circumscribed the arrest power conferred on the officer by having been licensed. [*Romanski*, *supra* at 639-640.]

I

We additionally reject that *Grand Rapids v Impens*, 414 Mich 667; 327 NW2d 278 (1982), on which defendant and the dissent rely heavily, controls the state-

actor analysis in this case. In *Impens*, the Michigan Supreme Court considered "whether a signed statement procured by private security guards, one of whom was an off-duty deputy sheriff, may be admitted into evidence against a defendant even though no *Miranda* warnings were given." *Id*. at 670 (citation omitted). The Supreme Court surveyed several decisions holding "that private security guards who receive direct assistance from public police officers or who work in close connection with the police may be acting under color of state law, subject to constitutional restrictions." *Id*. at 674. The Supreme Court concluded, in relevant part, as follows:

> We do not believe that the activities of the store security guards and the city police in this case demonstrated the coordinated effort necessary to constitute state action. The Meijer security personnel were working with the view of furthering their employer's interest only; they were not acting as police agents. Their role may be viewed as an extension of the common-law shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay. There was no complicity with the police department or any indication that their acts were instigated or motivated by the police.
>
> * * *
>
> Defendant also contends that Meijer security personnel qualified as law enforcement officers because state action has granted them greater authority than that possessed by private citizens. . . . [D]efendant believes that the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law, subject to constitutional restraints. See MCL 338.1051 *et seq*. . . . . We disagree. We do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings. . . .

* * *

> Our statute specifically states that "private security police employed for the purpose for guarding the property and employees of their employer and generally maintaining plant security for their employer" need not be licensed. MCL 338.1079. . . . This language speaks to the exact function performed by Meijer's security personnel. We do not believe that qualification for such licensing exclusion equates the actions of private security guards with those of law enforcement officers. [*Impens*, *supra* at 675-677 (citation omitted).]

The Supreme Court did not elaborate regarding whether the defendant security officers had obtained state licensing, thus investing them with the authority to make arrests pursuant to MCL 338.1080. The Supreme Court made no reference whatsoever to MCL 338.1080.

As reflected in the following portion of *Romanski*, which we also find persuasive, the Sixth Circuit likewise considered the effect of the Michigan Supreme Court's decision in *Impens* on the question of state action in the context of a § 1983 action:

> The dissent's repeated reliance on *City of Grand Rapids v. Impens* . . . is misplaced. There, private security officers suspected the defendant and two others of shoplifting. *Id*. at 279. The officers *asked* the three individuals to come to the security office. *Id*. The officers searched the three and found merchandise on one of the other individuals. *Id*. The officers then elicited information from the defendant to complete a "Loss Prevention Department Voluntary Statement." *Id*. The officers read the statement to the defendant and asked the defendant to sign it, which he did. *Id*. "There was no indication that defendant would not be released if the statement were not signed." *Id*. Prior to his trial, the defendant moved to suppress the signed statement, arguing that it was obtained in violation of *Miranda*. *Id*. The

> Michigan Court held that the private security officers were not required to give *Miranda* warnings. *Id*. at 282.
>
> *One obvious distinction between the instant case and Impens is that Impens did not involve an arrest in any form*. There, the defendant was not held against his will. He was asked to go to the security office; he was asked to sign a form. There was no indication of arrest.
>
> *The key distinction, however, is that the security officers did not exercise power exclusively reserved to the states*. The contested conduct was the security officers' elicitation of the defendant's statements. Simply put, asking questions in a non-custodial setting is a power not within the exclusive province of the state. [*Romanski*, *supra* at 638 n 2 (some emphasis added).]

The dissent asserts that *Impens* should control the outcome of this case because it held that "the simple fact of licensure would not transform a private security guard into a state actor." *Post* at 235. As we have emphasized, however, "the simple fact of licensure" did not "transform" defendant's security guards into state actors. Rather, their licensure triggered the security guards' exercise of a power traditionally and exclusively reserved to the state. And unlike the security guards in *Impens*, defendant's security personnel here employed a "coordinated effort" with police officers, thus unquestionably acting as "police agents." These distinctions are not "immaterial," as the dissent claims, *post* at 234, but central to the *Impens* decision, at least according to the justices who wrote and joined that opinion.

We conclude that, irrespective of whether the trial court may have employed incorrect logic, the court correctly distinguished *Impens* from the instant case. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007) (observing that this Court "will not reverse if the right result is reached, albeit for the wrong reason").

J

Defendant alternatively maintains that the trial court should have ordered a new trial, in light of the defective jury instructions concerning plaintiff's § 1983 claim. This Court reviews for an abuse of discretion a trial court's ultimate decision whether to grant a new trial, but considers "de novo any questions of law that arise." *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

> This Court reviews claims of instructional error de novo. MCR 2.516(D)(2) states that the trial court must give a jury instruction if a party requests such instruction and it is applicable to the case. We review for abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurate. The trial court's jury instructions must include all the elements of the plaintiffs' claims and should not omit any material issues, defenses, or theories of the parties that the evidence supports. . . . If, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs. Reversal based on instructional error is only required where the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A) . . . . [*Lewis v LeGrow*, 258 Mich App 175, 211-212; 670 NW2d 675 (2003) (citations omitted).]

1

Defendant first complains that the trial court erred by failing to explain to the jury that the casino could only face vicarious liability for any constitutional violation by its employees "pursuant to a custom, policy or practice of th[e] employer." (Defendant's brief, p 33.) Before instructing the jury, the trial court agreed, over plaintiff's objection, to instruct the jury regarding the concept of respondeat superior. But when instructing the jury, the trial court failed to incorporate any refer-

ence to vicarious liability. After the jury retired to deliberate, defense counsel apprised the trial court that it had "omitted instructing on private security officer, MCL 338[.1079]." Plaintiff's counsel replied that he had no objection to the private-security-officer instruction, and the following exchange then occurred:

> *The Court*: Alright, I'll give it. Anything else?
>
> *Defense Counsel*: No, we've been through it all.

The jury returned and received instruction with respect to the authority of private security officers, after which the parties again discussed the propriety of the instructions:

> *The Court*: Gentlemen, are the, is the Plaintiff satisfied with the instructions and form of the verdict?
>
> *Plaintiff's Counsel*: Your Honor, other than the previously positions [sic], yes your Honor.
>
> *The Court*: And the Defendant.
>
> *Defense Counsel*: Ditto.

The above-quoted exchanges reflect defendant's forfeiture ("No, we've been through it all") and waiver of a vicarious-liability-instruction objection, because defense counsel ultimately and affirmatively expressed satisfaction with the instructions to the jury. Defendant's expression of satisfaction with the instructions, which omitted the vicarious-liability instruction, constitutes a waiver that extinguishes any error concerning vicarious liability. *Grant v AAA Michigan/ Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006).[11]

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[11] Even assuming that defendant only forfeited its objection to the trial court's omission of a vicarious-liability instruction, this error did not substantially prejudice the defense. MCR 2.613(A). During closing arguments, opposing counsel repeatedly acknowledged the trial testimony

Defendant next maintains that the trial court insufficiently defined for the jury the parameters of a Fourth Amendment violation, but we once again conclude that defendant waived any claim of error. After the jury began deliberating, it requested clarification regarding the Fourth Amendment, prompting the following exchange:

> *The Court*: And then they say re-read Fourth Amendment, Fourteenth Amendment parameters. Well technically it's not in evidence. What I propose to do is just tell them what the Fourth Amendment is, that citizens of the United States shall be protected against unlawful searches and seizures. And the Fourteenth Amendment applies that to Michigan. Any objections?
>
> *Plaintiff's Counsel*: No your Honor.
>
> *Defense Counsel*: I do your Honor. I think you've read the illegal search and seizure instruction. And I think to instruct them in something different at this point may even cause greater confusion.
>
> *The Court*: Well shall I simply—
>
> *Plaintiff's Counsel*: Reread that instruction.
>
> *The Court*: Reread that instruction[?][12]

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and documentary evidence substantiating the casino's adherence to various detention-related policy provisions relevant to this case. The trial court's neglect to additionally instruct the jury that the casino could only face liability for actions that its agents took pursuant to casino rules or policies thus had no adverse effect on the jury's determination of the casino's liability under § 1983.

[12] Contrary to defendant's suggestion that the trial court did not supply the jury with "an articulable standard by which to" consider a Fourth Amendment violation, the trial court did instruct the jury in detail regarding the § 1983 claim, in relevant part, as follows:

> Ladies and gentlemen, I'm now going to begin a series of instructions on . . . . unlawful search. Under the Constitution of the United States, that is the Fourth Amendment, every person has the right not to be subjected to unreasonable searches and

Defense Counsel: Yes, I think that's the way it should be done.

The trial court proceeded to reiterate to the jury the two constitutional elements of § 1983, but did not include the detailed paragraph regarding probable cause that initially had followed the § 1983 elements. Nonetheless, when the trial court inquired whether "[d]efendant [was] satisfied," his counsel affirmatively replied, "Yes your Honor." To the extent that the trial court's reinstruction—at defense counsel's request—qualified as erroneous, defense counsel's affirmative expression of satisfaction with the trial court's charge extinguished any error. *Grant*, *supra* at 148.

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seizures. In order to prove this claim, Plaintiff must prove by a preponderance of evidence each of the following elements. First, the Defendant intentionally violated Plaintiff's constitutional right by conducting an unreasonable search and seizure. Second, that the Defendant's acts were the proximate cause of damages sustained by the Plaintiff.

Additional instructions. . . .

It is also a statement of our law that any person who assaults or assaults and batters an individual shall be guilty of a misdemeanor. This is the definition of probable cause. If an arrest is lawful when made, there has not been a false arrest or false imprisonment. Instead, claims of false arrest and false imprisonment require Plaintiff prove that the arrest or detention lacked probable cause. Probable cause that a particular person has committed a crime is established by a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant the cautious person in the belief that the accused is guilty of the offense. If you find the Defendants had probable cause to believe that Plaintiff committed an assault on the Motor City Casino security officer, then you decide, you must decide that Motor City Casino personnel were entitled to detain Plaintiff.

After reviewing these instructions in their entirety, we conclude that they adequately describe the legal principles governing a determination whether defendants unlawfully searched or seized plaintiff, in violation of the Fourth Amendment. *Lewis*, *supra* at 211-212.

III. CHALLENGES TO PUNITIVE-DAMAGES AWARD

Defendant next contends that the trial court should have granted a new trial on the issue of § 1983 punitive damages because the jury's award was inconsistent with its rejection of plaintiff's counts alleging false arrest, assault and battery, and intentional infliction of emotional distress, and with plaintiff's request for exemplary damages.

Our review of the record leads us to conclude, however, that the entirety of the jury's special verdict comports with the trial evidence and the trial court's careful and extended delineation of the distinctions between, and components of, compensatory damages, exemplary damages, and punitive damages. As this Court has observed, "The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, even [if] it is arguably inconsistent, if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." *Allard v State Farm Ins Co*, 271 Mich App 394, 407; 722 NW2d 268 (2006) (internal quotation marks omitted). Furthermore, a reviewing court must make "every attempt . . . to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." *Id*. (internal quotation marks omitted).

The jury's finding that defendants unlawfully detained plaintiff (special verdict question 1), its somewhat similar finding that defendants falsely imprisoned plaintiff (special verdict question 3), coupled with its rejections of plaintiff's other proffered tort claims, namely false arrest, assault and battery, and intentional infliction of emotional distress (special verdict questions 2, 4, and 5), suggest that the jury viewed defendants' initial arrest or seizure of plaintiff and the

placement of plaintiff in the casino's security office as premised on probable cause that plaintiff may have unlawfully touched Martinez, but concluded that defendants eventually detained plaintiff against his will, or extended the seizure's duration for too long. The jury's special verdicts 1 through 5 find support in the evidence and appear to be at a minimum reasonably consistent.

Regarding defendant's specific challenge to the jury's awards of damages, in special verdict question 6 the jury found that defendant had caused plaintiff $125,000 in "non-economic loss compensatory damages," which the trial court explained should "fairly and adequately compensate[] him" "for mental anguish, fright and shock and embarrassment." The jury then rejected the claim that plaintiff would sustain future compensatory damages. (Special verdict question 7.) In special verdict question 8, the jury considered and rejected the claim that plaintiff had endured exemplary damages, which the trial court defined as "injury to Plaintiff's feelings," in this case "humiliation, outrage or indignity." Lastly, the jury found that defendants had violated "plaintiff's right to be free from unreasonable searches and seizures under the Fourth and Fourteenth [a]mendments to the U.S. Constitution" (special verdict question 9), and awarded plaintiff $400,000 in punitive damages (special verdict question 10), which the trial court described as an amount "appropriate to punish the Defendants or to deter the Defendants and others from like conduct in the future."[13]

In summary, we fail to detect any manner by which the jury rendered an inconsistent verdict regarding

[13] The trial court carefully and at length distinguished for the jury the three types of damages at issue in this case.

defendant's liability or plaintiff's entitlement to the three distinct types of damages he sought. *Allard*, *supra* at 407.

IV. CHALLENGES TO FALSE-IMPRISONMENT SPECIAL VERDICT

Defendant additionally asserts that the trial court erred by denying its motion for a directed verdict with respect to plaintiff's false-imprisonment count because Grzadzinski indisputably had probable cause to detain plaintiff. The trial testimony plainly reflects that plaintiff and the several members of his group offered recollections of the September 14, 2002, confrontation that differed markedly from the testimony of Martinez, Grzadzinski, McDowell, and Jeanne Snyder, plaintiff's former fiancée, regarding the important issues whether (1) plaintiff made nonchalant arm gestures, (2) plaintiff might have been close to or distant from Martinez at the time plaintiff gestured, and (3) plaintiff intentionally poked, punched, struck, or otherwise touched Martinez's chest. Given the widely contradictory testimony offered in these areas, which were central to a determination whether defendant possessed probable cause through its security personnel to arrest or detain plaintiff, it was the jury's prerogative to resolve this issue of fact, including the inherent credibility questions. *Zeeland Farm*, *supra* at 195; *Hunt*, *supra* at 99. Consequently, the trial court properly denied a directed verdict on plaintiff's false-imprisonment count.

Alternatively, defendant suggests that the trial court should have granted a new trial because it inadequately explained to the jury the elements of false imprisonment, and that the instructions given did not support the jury's rejection of the false-arrest claim while finding liability for false imprisonment. The trial court read to the jury four paragraphs of instructions differentiat-

ing the elements of false arrest from false imprisonment. As defendant acknowledges, these instructions very closely tracked Michigan Model Civil Jury Instructions 116.01 ("False Arrest—Definition"), 116.02 ("False Imprisonment—Definition"), 116.20 ("False Arrest—Burden of Proof"), and 116.21 ("False Imprisonment—Burden of Proof"). Defendant also concedes that within the next two to four paragraphs, the trial court fleshed out, in the context of plaintiff's § 1983 claim, the concept of probable cause necessary to render a search or seizure reasonable and lawful.

We conclude that, taken as a whole, the trial court's extended and indisputably accurate recitation of the relevant legal principles regarding false arrest, false imprisonment, and probable cause fully and fairly set forth for the jury the elements of false arrest and false imprisonment. *Lewis*, *supra* at 211-212. And as discussed in part III of this opinion, applying the false-arrest and false-imprisonment instructions to the facts of this case demonstrates that the jury likely, and reasonably, viewed the casino's initial detention of plaintiff in its security area as supported by probable cause that he assaulted Martinez, but deemed plaintiff's more than two-hour detention locked in the casino's security office as unsupported by any legal basis, and therefore amounting to false imprisonment.

V. REMITTITUR REQUEST CONCERNING NONECONOMIC-DAMAGES AWARD

Defendant lastly complains that the trial court should have remitted the jury's award of $125,000 in compensatory damages, which lacked support in the trial evidence, especially given that the jury rejected that defendants had intentionally inflicted emotional distress.

> In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. The power of remittitur should be exercised with restraint. If the award for economic damages falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. A trial court's decision regarding remittitur is reviewed for an abuse of discretion. We review all of the evidence in the light most favorable to the nonmoving party. [*Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008) (citations omitted).]

Plaintiff testified that he endured extreme embarrassment on multiple occasions because of defendants' detention of him for more than two hours on September 14, 2002, their decision to eject and ban him from the casino, and Martinez's pursuit of criminal assault and battery charges against him. Specifically, plaintiff averred that on a daily basis he experienced extreme feelings of upset and embarrassment because of (1) the casino's treatment of him on September 14, 2002; (2) his May 2003 Metro Airport arrest on an outstanding assault and battery warrant while attempting to pick up his girlfriend; (3) his September 2003 appearance in the 36th District Court for a scheduled criminal trial; (4) his 2005 discovery of the existence of more arrest warrants stemming from September 14, 2002; (5) the 2005 jury trial for assault and battery that ultimately ended in his acquittal, and (6) his testimony in the instant civil case. Although plaintiff did not substantiate that he experienced any significant change in the course of his daily activities, his testimony that defendants' conduct caused him extreme upset and embarrassment on multiple occasions, especially when viewed

in the light most favorable to plaintiff, amply supports the jury's award of $125,000 in noneconomic compensatory damages.[14]

Affirmed.

BORRELLO, J., concurred.

O'CONNELL, P.J. (*dissenting*). I respectfully dissent. In my opinion, the trial court erred when it failed to grant defendant's motion for directed verdict regarding plaintiff's 42 USC 1983 claim because private security guards are not state actors. The trial court also erred by adopting federal precedent as persuasive and rejecting the Michigan Supreme Court's reasoning in *Grand Rapids v Impens*, 414 Mich 667, 670; 327 NW2d 278 (1982). I would reverse the decision of the trial court.

In order to maintain an action under § 1983, a plaintiff is required to establish that he or she was "deprived of a right secured by the Constitution or laws of the United States" and that the defendant was a "state actor," i.e., acting under color of state law at the relevant time. *American Mfrs Mut Ins Co v Sullivan*, 526 US 40, 49; 119 S Ct 977; 143 L Ed 2d 130 (1999). "[M]erely private conduct, no matter how discriminatory or wrongful" will not support a § 1983 claim. *Id.* at 50 (internal quotation marks and citations omitted). The plaintiff bears the burden to show state action because it is an element of the claim. *Brentwood Academy v Tennessee Secondary School Athletic Ass'n*, 531 US 288, 308-309; 121 S Ct 924; 148 L Ed 2d 807 (2001).

[14] Because we are affirming the jury's special verdict, we need not consider the questions raised in plaintiff's "contingent" brief on cross-appeal, which repeatedly sets forth that he wishes this Court to consider the cross appeal only "in the unlikely event that the jury's verdict is disturbed and this matter is remanded for further proceedings." (Brief on cross-appeal, pp 1, 16.)

Accordingly, in order for plaintiff to maintain his § 1983 claim, he was required to establish that the casino's private security officers were state actors.

The trial court held as a matter of law that the casino's private security guards were acting under color of state law by virtue of the fact that they were certified under MCL 338.1079, relying on *Romanski v Detroit Entertainment, LLC*, 428 F3d 629, 636 (CA 6, 2005). "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citations omitted). On the other hand, Michigan Supreme Court cases on point are binding on lower courts, regardless of whether the lower courts agree with the decision. *Detroit v Vavro*, 177 Mich App 682, 685; 442 NW2d 730 (1989). In my opinion, it is clear that the trial court erred by not following the Michigan Supreme Court decision in *Impens*, because the logic behind the decision is controlling and dispositive of the issue.

In *Impens*, our Supreme Court impliedly determined that private security guards are not state actors simply because they are certified under MCL 338.1079. Indeed, at least one federal district court recognized this fact:

> Plaintiff here has not identified any state or local legislation that confers broad police powers upon security personnel. In fact, Michigan's security guard licensing statute limits the powers of security guards. Pursuant to the statute, upon obtaining a license, a private security officer is granted "the authority to arrest a person without a warrant" to the same extent possessed by public police officers, but only when this officer "is on the employer's premises." Mich. Comp. Laws § 338.1080. This authority is further limited to the security guard's "hours of employment as a private security police officer and does not

> extend beyond the boundaries of the property of the employer." Mich. Comp. Laws § 338.1080.
>
> The limited powers conferred under this statute do not convert private security guards into state actors. This has been confirmed by the definitive arbiter of the proper meaning of this statute, the Michigan Supreme Court. . . .
>
> [In *Impens*, t]he Michigan Supreme Court held that the defendant had not identified any state action that would trigger the requirement of *Miranda* warnings. In so ruling, the Court specifically rejected the defendant's contention that "the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law, subject to constitutional restraints." 327 N.W.2d at 281. Instead, the Court concluded that "we do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings." 327 N.W.2d at 281. This Court, of course, is bound by the views of Michigan's highest court as to the extent of authority conferred under the Michigan security guard licensing statute. [*Smith v Detroit Entertainment, LLC*, 338 F Supp 2d 775,780-781 (ED Mich, 2004) (emphasis added).]

In my opinion, this is the better analysis, because it recognizes the implications of the logic behind *Impens* and gives the ruling of our state's highest court the deference the law requires. It is this case, and not *Romanski*, on which the trial court should have relied.

The majority attempts to avoid the application of *Impens* with immaterial distinctions. Specifically, the majority notes that our Supreme Court did not determine whether the security officers in the *Impens* case had been licensed and that the opinion made no reference to MCL 338.1080. A review of the opinion indicates that it was unnecessary for the *Impens* Court to determine whether the security officers were licensed. The Court "[did] not believe that the mere licensing of

security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings." *Impens, supra* at 676. Accordingly, it was unnecessary for the Court to determine, or even mention, whether the security guards were licensed because the simple fact of licensure would not transform a private security guard into a state actor.[1]

Similarly, the Court's failure to reference MCL 338.1080 does not render *Impens* inapposite. MCL 338.1080 provides for a limited power of arrest to those security guards licensed under MCL 338.1079. Because the power to arrest under MCL 338.1080 is conferred solely by licensure under MCL 338.1079, if licensure alone does not constitute state action, then acknowledgment that licensure confers an arrest power is similarly insufficient. Importantly, in the instant case, plaintiff was not arrested, but voluntarily went with the security officers back to the casino's security office. The security guards never exercised any power to arrest.[2] Accordingly, it must be simply the existence of this limited power of arrest pursuant to MCL 338.1080 that gave the security officers in the present case a police power traditionally and exclusively reserved to the state. Such

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[1] If state licensing were, in fact, all that was necessary to transform private individuals into state actors, state licensure of plumbers, beauticians, electricians, and even attorneys would transform their conduct into state action subject to a § 1983 claim. Our courts would be inundated with civil-rights litigation concerning bad haircuts, leaky plumbing, and faulty wiring.

[2] Both the jury verdict and the plaintiff's testimony confirm that no false arrest occurred in this case. Plaintiff testified that he voluntarily went with the casino's private security guards, and the jury found no cause of action on plaintiff's false-arrest claim. The private security guards also testified that plaintiff was not under arrest. These facts are conclusive that no false arrest occurred, and, absent a false arrest, plaintiff's allegation that defendants abused their statutory arrest powers is clearly meritless.

a conclusion broadly confers "state actor" status to all security guards who are licensed under MCL 338.1080 and is at odds with *Impens*.

One of the men who aided in the apprehension in *Impens* was an off-duty deputy sheriff. The Court held that his presence did not constitute "color of law," in part because he was off-duty and identified himself as a store employee. *Impens*, *supra* at 677. If the mere existence of arrest authority under MCL 338.1080 were sufficient to confer "state actor" status, there would be no logical basis for our Supreme Court's holding that the off-duty deputy sheriff in *Impens* was not acting under color of law, because even off-duty, he still had the power to arrest. The holding of the United States Court of Appeals for the Sixth Circuit, sitting en banc, in *Chapman v Higbee Co*, 319 F3d 825 (CA 6, 2003), is similarly irreconcilable with the majority's broad conclusion. The security guard in *Chapman* was "an off-duty sheriff's deputy, wearing his official sheriff's department uniform, badge, and sidearm." *Id.* at 834. As a police officer, the security guard possessed plenary police power. Yet the *Chapman* court did not conclude that mere possession of that authority resulted in state action. Instead, it examined the specific actions taken by the security officer, which included a strip search, and noted that store policy mandated police involvement for such an action. *Id.* at 834-835. If the security guards in *Impens* and *Chapman* were not state actors, despite having been licensed by the state as police officers with full arrest powers, it is clear that licensure under MCL 338.1079 alone cannot transform the casino's private security guards into state actors in the present case.

The majority argues that because the security guards were licensed under MCL 338.1079, they had the power

to arrest plaintiff pursuant to MCL 338.1080, and that because plaintiff was held in a room on the basis of this authority, the security guards acted under color of state law. Application of such reasoning to other Michigan statutes would result in absurd and unintended outcomes that would destroy the "state actor" requirement of § 1983 altogether. Under MCL 764.16, private persons are given the authority to make arrests under certain situations. Every security guard who is unlicensed and, therefore, without authority under MCL 338.1080, still has the limited power given to all private persons under MCL 764.16. Having received authority from the state to arrest, any security guard who locked someone in an office pursuant to that authority becomes a state actor, notwithstanding all the prior caselaw that finds such actions to be that of private individuals. See, e.g., *Lindsey v Detroit Entertainment, LLC*, 484 F3d 824, 827-828 (CA 6, 2007). The fact that a private person has the power to arrest does not transform the person into a state actor. Rather, it would be the exercise of that power that would create state action. That is why the presence of state action is "fact-specific, and . . . determined on a case-by-case basis." *Chapman, supra* at 834.

It takes very little imagination to envision the havoc that would result from the application of the majority's holding. Whether it is the licensed day-care provider who places a four-year-old child in "time-out" for hitting another child, or the licensed cab driver who refuses to let a passenger leave the cab until the fare is paid, the majority would conclude that because MCL 764.16 gives these private persons the power to arrest, they are state actors. Thousands of everyday private actions would be distorted into state action for which plaintiffs will seek monetary remedies from taxpayer funds and overwhelm our already burdened courts.

Because I find *Impens* controlling, *Romanski* is inapplicable, and the trial court erred in relying on it to deny defendant's motion for directed verdict. The simple fact of licensure under MCL 338.1079 cannot, does not, and should not transform private security guards into state actors. To hold otherwise expands state action to a point that strains credulity.

I would reverse the decision of the trial court.

REED v BRETON

Docket No. 276057. Submitted May 6, 2008, at Grand Rapids. Decided May 27, 2008, at 9:10 a.m.

Lawrence Reed, as personal representative of the estate of decedent Lance N. Reed, brought a wrongful-death and dramshop action in the Jackson Circuit Court against Frederick Breton, personal representative of the estate of decedent Curtis J. Breton, and two dramshops. Dennis Hurst & Associates represented the plaintiff pursuant to a contingent-fee agreement under which Hurst was to be paid one-third of monies collected. The agreement expressly provided that it did not apply to appellate proceedings. The court granted summary disposition to one dramshop. That decision was reversed in the Court of Appeals, 264 Mich App 363 (2004). The Supreme Court reversed the Court of Appeals and affirmed the dismissal of the dramshop, 475 Mich 531 (2006). In the Supreme Court appeal, the plaintiff had additional counsel who was hired on an hourly fee basis. After those appeals, the plaintiff reached a settlement with the remaining parties. The plaintiff then filed a motion for the entry of a settlement order and the approval of the proposed distribution of funds. The proposed distribution included one-third of the recovery as Hurst's fee for the proceedings in the circuit court, an additional amount for Hurst's fee in the appellate proceedings, and a fee for additional counsel in the Supreme Court appeal. The proposed attorney fees exceeded one-third of the plaintiff's recovery. The court, Chad C. Schmucker, J., rejected the proposed attorney fees as being excessive. The plaintiff appealed by delayed leave granted.

The Court of Appeals *held*:

The circuit court properly concluded that the proposed distribution of proceeds in this wrongful-death action violated MCR 8.121 to the extent that it allocates to Hurst attorney fees in excess of one-third of the plaintiff's net recovery.

1. MCR 8.121(B) sets the maximum contingent attorney fee in a personal-injury or wrongful death action at one-third of the amount recovered.

2. The reasoning of State Bar of Michigan Formal Ethics Opinion R-011 (July 26, 1991) is adopted by this panel of the Court

of Appeals to support the conclusion that the total contingent fee for all lawyers of a party in a personal-injury or wrongful-death case may not exceed one-third of the recovery and that, if the fee agreement provides for a one-third fee, the trial lawyer may not charge an additional amount for pursuing an appeal.

Affirmed.

ATTORNEY AND CLIENT — PERSONAL INJURY — WRONGFUL DEATH — CONTINGENT FEES — APPEALS.

The total contingent fee for all lawyers of a plaintiff in a personal-injury or wrongful-death action at trial and on appeal may not exceed one-third of the plaintiff's net recovery (MCR 8.121[A], [B]).

Dennis Hurst & Associates (by *Dennis Hurst*) for the plaintiff.

Before: JANSEN, P.J., and ZAHRA and GLEICHER, JJ.

JANSEN, P.J. In this wrongful-death case, plaintiff appeals by delayed leave granted the circuit court's denial of his motion to approve the proposed distribution of attorney fees following a settlement. The circuit court declined to approve the proposed distribution to the extent that it provided for total attorney fees in excess of one-third of plaintiff's net recovery. We affirm.

Plaintiff's son was killed in an automobile accident involving an intoxicated driver. Plaintiff, as personal representative of his son's estate, retained Dennis Hurst & Associates to represent the estate in a wrongful-death lawsuit against the responsible parties. Plaintiff and Hurst entered into a contingency fee agreement whereby plaintiff agreed to pay Hurst "one-third (1/3) of all monies collected." The agreement expressly provided that it did not apply to appeals.

An action was subsequently filed against the intoxicated driver and two dramshop defendants, the Beach Bar and the Eagle's Nest. The circuit court granted

summary disposition in favor of the Beach Bar and plaintiff appealed that decision. This Court reversed the circuit court's decision and reinstated the claim against the Beach Bar. *Reed v Breton*, 264 Mich App 363, 364-365; 691 NW2d 779 (2004). Upon further appeal, however, our Supreme Court reversed this Court's decision and affirmed the grant of summary disposition in favor of the Beach Bar. *Reed v Breton*, 475 Mich 531, 543-544; 718 NW2d 770 (2006).

Because the original contingency-fee agreement did not cover appeals, plaintiff entered into a new fee agreement with the Hurst law firm for representation before this Court. Additionally, plaintiff entered into a separate hourly fee agreement with the law firm of Honigman, Miller, Schwartz & Cohn for representation before the Supreme Court. After all appeals were concluded, plaintiff reached a settlement with the remaining parties for the net amount of $120,065.41.

Plaintiff thereafter filed a motion in the circuit court for entry of a settlement order and approval of the proposed distribution of funds. The motion sought a distribution of total attorney fees in the amount of $82,073.87, consisting of $40,021.80 (one-third of the net settlement) for Hurst's representation in the circuit court, $14,578.29 for Hurst's representation before this Court, and $27,473.78 for the Honigman law firm's representation before the Supreme Court. The circuit court, observing that the total requested attorney fees exceeded one-third of plaintiff's net recovery, refused to approve the proposed distribution.

A circuit court's decision concerning the distribution of settlement proceeds in a wrongful-death matter is reviewed for clear error. *McTaggart v Lindsey*, 202 Mich App 612, 615-616; 509 NW2d 881 (1993). "A finding is clearly erroneous when, although there is evidence to

support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 616. "[I]nterpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo." *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). The "rules governing the construction of statutes apply with equal force to the interpretation of court rules." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999).

Initially, we note that the Michigan Rules of Professional Conduct address the subject of attorney fees in MRPC 1.5(a), which provides that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee," and sets out factors to be considered in determining the reasonableness of a fee. Further, MRPC 1.5(c) refers to MCR 8.121 "for additional requirements applicable to some contingency-fee agreements."

"Under the Michigan wrongful death act, the trial court is required to hold a hearing and approve the distribution of the proceeds of any settlement." *In re Guardian Ad Litem Fees*, 220 Mich App 619, 624; 560 NW2d 76 (1996); see also MCL 600.2922(9). MCR 8.121 addresses allowable attorney fees in personal-injury and wrongful-death actions. The rule provides in pertinent part:

> (A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is

> in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of MRPC 1.5(a).
>
> (B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in subrule (A) is one-third of the amount recovered.
>
> (C) Computation.
>
> (1) The amount referred to in subrule (B) shall be computed on the net sum recovered after deducting from the amount recovered all disbursements properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed and any interest included in or upon the amount of a judgment shall be deemed part of the amount recovered.

We agree with the circuit court that MCR 8.121 limits the total allowable attorney fee payable to Hurst in this case to one-third of the net amount recovered by plaintiff. This conclusion is supported by State Bar of Michigan Formal Ethics Opinion R-011 (July 26, 1991), which states in relevant part:

> May the lawyer charge a fee beyond the originally agreed contingent fee for taking an appeal? MCR 8.121(B) states:
>
> "The maximum allowable fee for the claims and actions referred to in subrule (A) is one-third of the amount recovered."
>
> * * *
>
> Is the appeal part of the same "claim and action" as the trial so as to be limited to the original fee agreement? We are aware of no authority or reasoning which would conclude that the trial of a matter is a "claim" or "action" different and distinguishable from an appeal, removing the fee from the limitation imposed by MCR 8.121(B). As noted in MCR 8.121(A), a fee in excess of one-third is deemed a clearly excessive fee in violation of MRPC 1.5(a). Therefore, in personal injury and wrongful death cases, if the fee

> agreement provided for a one-third fee, the trial lawyer could not charge an additional fee for pursuing the appeal.
>
> * * *
>
> The total contingent fee for all lawyers of a party in a personal injury or wrongful death case may not exceed one-third of the recovery; in other cases the total fee may not be in excess of a reasonable fee.[1]

Although state bar ethics opinions are not binding on this Court, they may be considered instructive. *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000); *Barkley v Detroit*, 204 Mich App 194, 202; 514 NW2d 242 (1994). We find the reasoning of Ethics Opinion R-011 persuasive, as it is supported by the clear language of MCR 8.121. We therefore adopt the ethics opinion's reasoning as our own.

The circuit court properly concluded that the proposed distribution of proceeds in this wrongful-death action violated MCR 8.121 to the extent that it allocates to Hurst attorney fees in excess of one-third of the amount of plaintiff's net recovery.[2] The court did not clearly err by declining to approve the proposed distribution on this ground. *McTaggart*, *supra* at 615-616.

Affirmed.

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[1] Because MCR 8.121(A) applies only to actions for personal injury or wrongful death, the ethics opinion concludes that "[i]f the claim or action is not personal injury or wrongful death, and therefore not limited to the one-third recovery, a lawyer is guided by MRPC 1.5(a) in setting fees."

[2] We wish to make clear that the fees payable to the Honigman law firm were not incurred pursuant to the original contingent-fee agreement between plaintiff and Hurst, but were incurred pursuant to a *separate* fee agreement, which covered proceedings before the Michigan Supreme Court only. Consequently, these separate, non-contingent fees payable to Honigman were not barred by the one-third rule of MCL 8.121(B). See, e.g., *Morris v Detroit*, 189 Mich App 271, 277-278; 472 NW2d 43 (1991).

PRIME FINANCIAL SERVICES LLC v VINTON

Docket No. 273264. Submitted May 13, 2008, at Grand Rapids. Decided June 3, 2008, at 9:00 a.m.

Prime Financial Services LLC brought an action in the Kent Circuit Court against Casey Vinton, an employee of Bedford Financial, Inc., alleging that Vinton had discharged without authorization several mortgages that had been assigned to Prime as security for credit that Prime extended to Bedford for use in Bedford's construction loan business. Prime, in turn, had secured a short-term credit facility from Bank One, NA, to enable it to fund Bedford. Bedford subsequently entered into a $15 million facility directly with Bank One under which Bedford took on Prime's debt to Bank One. This facility was secured by Bedford's mortgages and notes—some of which had been funded solely by Prime—and the personal guaranty of investor Richard Baidas. When Bedford defaulted under its agreement with Bank One, Bank One accepted a cash settlement from Baidas, in return for which Bank One transferred to Baidas the collateral it held under its agreement with Bedford. This collateral included 23 notes that Bedford originated using funds provided solely by Prime. Prime's amended complaint included claims against Bank One of conversion, unjust enrichment, and aiding and abetting Bedford's conversions or breaches of fiduciary duty in connection with Bank One's assignment of Prime's interest in the 23 notes and mortgages to Baidas. A jury returned a verdict against Vinton for more than $60,000 and a verdict against Bank One for an amount equal to the value of 17 of the 23 notes at issue. The court, George S. Buth, J., entered orders granting Prime interest and attorney fees. Bank One appealed.

The Court of Appeals *held*:

1. The previous version of Article 9 of Michigan's Uniform Commercial Code governed the creation of the security interests in the notes at issue in this case. A note secured by a mortgage is personal property, not real property, and prior Article 9 applied to the creation of a security interest in instruments.

2. Bedford did not transfer ownership of the notes at issue to Prime; rather, Bedford merely pledged the notes and mortgages at issue as security, as indicated by the documents memorializing the

terms of the facility that Prime extended to Bedford. Bedford's agreement to indorse and deliver the notes to Prime and to assign the mortgages underlying the notes to Prime are merely the steps that Bedford agreed to take to ensure that Prime's security interest in the collateral was fully protected.

3. Prime's security interest in the notes was unperfected because Bedford retained possession of the notes during all relevant periods. Under prior Article 9, a secured party could perfect its interest in instruments only by taking and retaining possession of them. Although a secured party could take possession through an agent, the debtor or a person controlled by the debtor could not qualify as an agent for the secured party for this purpose because the debtor's possession would establish an opportunity for fraud. Accordingly, Bedford could not possess the notes on Prime's behalf.

4. Bedford's assignment of the mortgages did not alter the nature of Prime's unperfected security interest in the notes underlying them. Under Michigan real property law, a secured party cannot obtain a greater security interest in a mortgage than it has in the note underlying the mortgage by recording an assignment of mortgage incident to a secured transaction. Because prior Article 9 governed Prime's security interest in the notes at issue, Bedford's assignment of the mortgages to Prime had no legal effect on Prime's security interest in the corresponding notes, and a mortgage without an underlying obligation is a nullity. Although there were valid notes underlying the mortgages at issue, Bedford did not transfer ownership of those notes to Prime, and Prime did not otherwise obtain ownership of the notes. Instead, Bank One took ownership of the notes by asserting its right to dispose of them after Bedford's default, and the underlying mortgages transferred to Bank One by operation of law.

5. Although Prime's security interest preceded Bank One's interest, Bank One's interest was superior because Prime's interest was unperfected. Under the plain, unambiguous terms of the pledge from Bedford to Bank One, Bank One was to take a security interest in any note and mortgage delivered under the pledge, and Bank One asked Bedford to bring all its notes and mortgages, which included those at issue, to the closing to secure the funds that Bank One advanced. By entering into the agreements and bringing the notes to the closing, Bedford gave Bank One a perfected security interest in the notes at issue. The fact that Bedford had already granted a security interest in these notes to Prime and agreed not to further pledge them as security did not defeat Bedford's ability to grant a security interest in them to Bank One.

6. Bank One's dispositions of the notes and mortgages were specifically authorized under prior Article 9, which gave Bank One's interest in the notes priority over Prime's interest, and therefore could not have constituted conversion or unjust enrichment. Further, Bank One cannot be liable for aiding and abetting conversion or for breach of fiduciary duty in connection with Bedford's grant of a security interest to Bank One because Bedford owned the notes at issue and did not owe Prime a fiduciary duty. Accordingly, the trial court should have granted Bank One's motion for judgment notwithstanding the verdict on these claims.

Reversed and remanded for entry of judgment in favor of Bank One.

SECURED TRANSACTIONS — UNIFORM COMMERCIAL CODE — NOTES SECURED BY MORTGAGES.

An interest in a note secured by a mortgage constitutes an interest in personal property, not real property, under the version of Article 9 of Michigan's Uniform Commercial Code in effect before July 1, 2001 (MCL 440.9101 *et seq*.).

Drew, Cooper & Anding (by *John E. Anding*, *Bridget C. Kehoe*, and *Thomas V. Hubbard*) for Prime Financial Services LLC.

Dickinson Wright PLLC (by *Jeffery V. Stuckey*, *Rock A. Wood*, *Geoffrey A. Fields*, and *Erin E. Gravelyn*) for Bank One, NA.

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

SMOLENSKI, J. In this collateral dispute involving priority to notes secured by mortgages, defendant Bank One, NA (Bank One),[1] appeals as of right the jury

[1] Bank One, NA, is the successor to Bank One, Michigan, which in turn was the successor to NBD. After Prime sued Casey Vinton, Bank One, NA, merged with JPMorgan Chase Bank, NA. However, for ease of reference, we will use "Bank One" or "bank" throughout this opinion to refer to the various incarnations of the bank involved in the dealings at issue.

verdict in favor of plaintiff Prime Financial Services LLC (Prime) premised on conversion, unjust enrichment, aiding and abetting conversion, and aiding and abetting breach of fiduciary duty. On appeal, the primary issues are whether prior Article 9 of the Uniform Commercial Code (UCC)[2] governed the creation of a security interest in a note secured by a mortgage and, if it did, whether a properly recorded assignment of mortgage could give the assignee greater rights to the note than the assignee had under Article 9. We conclude that Article 9 governed the creation of the security interests at issue and that an assignment of mortgage can give no greater rights to the assignee than it has in the note underlying the mortgage. We further conclude that, after applying Article 9 to the undisputed facts of this case, Bank One's interest in the notes was superior to that of Prime. Finally, because Bank One's dispositions of the notes and mortgages were specifically authorized under Article 9, we conclude that those actions cannot—as a matter of law—constitute conversion, unjust enrichment, or aiding and abetting conversion or breach of fiduciary duty. Accordingly, we reverse the trial court's decision to deny Bank One's motion for judgment notwithstanding the verdict (JNOV) and remand for entry of judgment in favor of Bank One on all of Prime's claims.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of the failure of Bedford Financial, Inc. (Bedford), which did business under the name

[2] Throughout this opinion we cite both the current revised version and the prior version of Article 9. In order to distinguish between the applicable versions, we will cite the current version with the year that it became effective (2001). Citations without the year refer to the prior version of Article 9. All citations to other articles of the UCC are to the current version.

of Apex Financial. Bedford was in the business of making short-term subprime loans to consumers to cover the cost of constructing modular homes. In a typical transaction, a consumer would arrange to finance the purchase and construction of a modular home through Bedford. The consumer would execute a note for the balance of the construction loan and grant Bedford a mortgage on the real property to secure repayment of the note. Once the home was complete, the consumer would obtain permanent financing—referred to as a "takeout loan" or "end-mortgage"—and pay off the loan from Bedford. Under ideal circumstances, the consumer would pay off the construction loan with Bedford in 60 to 90 days.

Because Bedford did not have the cash reserves to fund its lending activities, it had to secure funding from outside sources.[3] Patrick Hundley, who was the owner of Bedford, initially obtained funding for Bedford through First of America Bank. At some point before December 1997, Hundley's loan officer from First of America approached Arthur Bott, who was a business owner and investor, about funding Bedford's business. Bott began to fund Bedford's loan activities through his trust, which eventually became Bedford's primary source of funds. Bott was attracted to Bedford by the 15 percent rate of return on the loans.

In the summer of 1997, Bott organized Prime with Hundley. Sometime thereafter, Bank One[4] approached Bott about assisting him with his business activities,

[3] Such lenders are often referred to as "warehouse lenders." See *Regions Bank v Provident Bank, Inc*, 345 F3d 1267, 1270 (CA 11, 2003) (describing a typical warehouse lending arrangement); *Provident Bank v Community Home Mortgage Corp*, 498 F Supp 2d 558, 561 n 2 (ED NY, 2007) (defining warehouse lending).

[4] At the time, the actual bank was NBD.

and Bott suggested that the bank help him fund Bedford. Bott testified that he and Hundley agreed that Bott would take over Prime after talks with Bank One began. Eventually, Bott's trust became the sole member of Prime, with Bott as the sole officer. After the formation of Prime, Bott began to fund Bedford through Prime, but also continued to provide some funding through his trust.

In November 1997, Bank One agreed to provide a "short-term construction loan facility" to Prime in the amount of $5 million. Under the terms of the facility, the bank would fund 72 percent of the lesser of the cost or appraised value of the project. Apparently Prime was supposed to fund an additional eight percent, and the remaining 20 percent represented the consumer's equity. The loan payments were interest-only until the consumer obtained end-mortgage financing. Once the consumer obtained an end-mortgage and paid Prime through Bedford, Prime was required to pay Bank One the principal associated with that particular consumer's loan. However, the facility also provided that, if the consumer did not obtain an end-mortgage within nine months of the initial advance, Prime had to pay the principal associated with that particular consumer's loan. As part of the facility, Bott gave his personal guaranty and that of his trust to Bank One. Prime closed on the facility with Bank One on January 9, 1998.

Prime entered into a $10 million credit facility with Bedford on January 28, 1998. This facility was similar to the credit facility between Prime and Bank One. Under this facility, Prime took a security interest in all the loans originated by Bedford with funds supplied by Prime, required payment of the principal associated with a given loan when the consumer obtained end-

financing, and, if the consumer did not obtain an end-mortgage within nine months of the initial disbursement, required Bedford to repay the principal associated with that particular project. Likewise, under the terms of the agreement, Bedford granted a security interest in the notes, which it was required to deliver to Prime along with the corresponding mortgages. In addition, Bedford was required to assign the mortgages to Prime. Despite the delivery requirement, Prime permitted Bedford to retain the notes in its possession.

After these agreements, Prime funded some loans originated by Bedford jointly with its own funds and funds drawn on its facility with Bank One. In the case of the jointly funded loans, Prime funded more than the contemplated eight percent. In other cases, Prime funded the loans entirely without drawing on the credit facility with Bank One.

At some point after Bank One entered into the facility with Prime, Bott apparently received information that there were concerns with Bedford's loan practices. Bott's attorney wrote a letter to Hundley expressing concern over his "cavalier" attitude toward the loans and "lack of documentation." Bott also had problems with another bank related to his interests in Bedford loans. Some time in March 1999, Bott told Hundley to find another lender "besides me[;] I would like out." In the past, Hundley had had dealings with Richard Baidas, who owned several businesses, including one that manufactured modular homes. Baidas expressed interest in purchasing an interest in Bedford.

In June 1999, Bank One entered into a new $15 million facility agreement with Bedford. Under this new facility, Bank One would directly fund Bedford's lending. As part of the deal, Bank One would pay off the

amount currently owed by Prime to Bank One under the $5 million facility between Prime and Bank One. This effectively transferred the debt from Prime to Bedford and relieved Bott and his trust of their liability under their guaranties. This new facility was made possible in part by the personal guaranty of Baidas.

Under the terms of the $15 million facility, Bedford granted Bank One a security interest in certain property "now owned, or at any time hereafter acquired," including "all Mortgage Notes and Mortgages . . . which from time to time are delivered, or caused to be delivered, to the Bank . . . pursuant hereto or in respect of which an extension of credit has been made by the Bank under the Credit Agreement." Bank One instructed Bedford to bring all its notes and mortgages to the closing, which included some notes that were funded solely by Prime. In addition, Bank One had Bedford obtain UCC termination statements from several lenders, including Prime. These termination statements purported to terminate the respective lenders' security interests in Bedford's instruments. However, at trial, Bott testified that he signed the UCC termination statement in blank with the understanding that it only terminated his security interest in those notes and mortgages that were jointly funded using funds from Prime and Bank One, as opposed to those notes and mortgages funded solely by Prime.

By spring 2000, Bedford was no longer sending principal payments to Bank One. Indeed, Bank One became aware that Bedford had conducted end-mortgage closings and discharged many of the notes and mortgages securing its facility with Bedford. As a result, Bank One's loan to Bedford was seriously undercollateralized. In addition, Bank One learned that Bedford had ceased operations and was liquidating its

assets in violation of the credit agreement. For these reasons, in May 2000, Bank One informed Bedford by letter that it considered Bedford to be in default on the $15 million facility.

After Bedford defaulted, Bank One examined its exposure and, rather than try to liquidate Bedford's assets, it decided to call on the guaranty of Baidas. The bank determined that the total debt owed was approximately $6.5 million. After some negotiations, Bank One settled with Baidas in June 2000. The bank accepted payment of approximately $5.5 million in full settlement of Baidas's guaranty. As part of the settlement, Bank One agreed to transfer the collateral it held under its agreement with Bedford to Baidas. This collateral included 23 notes that were originated by Bedford using funds provided solely by Prime.

In addition to the millions of dollars that Bedford owed Bank One, Bedford owed Prime almost $1.7 million. In May 2001, Prime settled this debt with Bedford and Hundley, who had personally guaranteed the loan with his wife, for $825,000. Although Prime released Hundley and his wife from their guaranties, Prime did not receive any of the settlement. Instead, the agreement provided that Hundley would apply the $825,000 to reduce debts owed to the Bott trust.

In October 2001, Prime sued Casey Vinton for conversion. In its complaint, Prime alleged that Vinton, who was an employee of Bedford, had discharged several mortgages that had been assigned to Prime. Prime alleged that Vinton had signed the discharges as an "officer of Prime," but had never been an officer and was not authorized by Prime to discharge the mortgages.

In May 2002, Prime amended its complaint to include claims against Bank One. In the amended complaint,

Prime alleged that Bank One converted the "Edwards" check and converted or mishandled other checks that were payable to Prime but deposited into Bedford's account. Prime later filed a second amended complaint, which alleged additional counts claiming that Bank One converted the proceeds of certain loans in which Prime had a superior interest to Bank One. Prime amended its complaint for a third time in March 2004.

In the third amended complaint, Prime alleged 10 counts against Bank One. Prime alleged that Bank One (1) converted Prime's interest in notes and mortgages by assigning them to Baidas, (2) was unjustly enriched when it "conveyed" to Baidas loans that were originated by Bedford with money from Prime, (3) was unjustly enriched when it assigned to Baidas numerous loans that were jointly funded by Prime and Bank One, (4) aided and abetted Bedford's breach of fiduciary duty or conversion of loans funded solely by Prime, (5) aided and abetted Bedford's breach of fiduciary duty or conversion of loans funded jointly by Prime and Bank One, (6) converted the "Edwards" check, (7) converted other checks payable to Prime, (8) negligently mishandled the "Edwards" check, and (9) mishandled other checks. In addition to these counts, Prime asked the court to impose a constructive trust to the extent that Bank One received the proceeds of loans to which Prime had a superior interest.

Prime's complaint eventually proceeded to trial. The trial court submitted five claims against Bank One to the jury: (1) conversion, (2) unjust enrichment, (3) aiding and abetting conversion, (4) aiding and abetting breach of fiduciary duty, and (5) conversion of the "Edwards" check. The first four claims were all related to the 23 notes and mortgages originated by Bedford using funds from Prime and eventually turned over to

Bank One as collateral for the $15 million facility. The jury ultimately returned a verdict in favor of Prime against Bank One in the amount of $1,180,358.16.[5] As the parties agree, this amount appears to be the face amount of the 23 notes at issue minus the value of five notes for which Prime admitted that Bedford never assigned the mortgage and minus the value of one other note that the proofs demonstrated had been paid before Bank One received any notes as collateral. Hence, the verdict represented the face value of 17 of the 23 notes at issue during trial; the verdict did not include the value of the "Edwards" check. After the judgment in favor of Prime against Bank One, the trial court entered several orders, including orders granting Prime interest and awarding attorney fees to Prime in the amount of $269,716.74.

This appeal followed.

II. JUDGMENT NOTWITHSTANDING THE VERDICT

Because we find it dispositive of this appeal, we shall first address Bank One's argument that the trial court should have granted Bank One's motion for JNOV.

A. STANDARD OF REVIEW FOR JNOV

This Court reviews de novo a trial court's denial of a motion for JNOV. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). In determining the propriety of the trial court's decision, we review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). "Only if the evidence, when

[5] The jury also returned a verdict against Vinton in an amount in excess of $60,000. However, that judgment is not at issue on appeal.

viewed in this light, fails to establish a claim as a matter of law should a motion for . . . JNOV be granted." *Reed*, *supra* at 528.

B. THE PARTIES' INTERESTS IN THE NOTES AND MORTGAGES

In order to determine whether Bank One's actions with regard to the notes and mortgages can support Prime's claims, one must first determine the nature and extent of the interests that the parties held in the notes and mortgages at issue.

1. BEDFORD'S INTERESTS IN THE NOTES AND MORTGAGES

It is undisputed that Bedford originated all the notes and mortgages at issue. As part of its financing activities, Bedford lent money to consumers to assist them in purchasing and constructing modular homes on real property. In exchange for this financing, the consumers executed a promissory note by which they agreed to pay Bedford the principal plus interest and fees. In addition, to secure the payment of the note, the consumers created a mortgage in favor of Bedford.

Under Michigan law, a mortgage is not an estate in land, *Foote v City of Pontiac*, 161 Mich App 60, 65; 409 NW2d 756 (1987), citing *Plasger v Leonard*, 312 Mich 561, 564; 20 NW2d 296 (1945); it is a lien on real property intended to secure performance or payment of an obligation. *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 670; 5 NW2d 524 (1942). But, although a mortgage is a contingent interest in real property, a note secured by a mortgage is itself personal property. *Union Guardian Trust Co v Nichols*, 311 Mich 107, 115; 18 NW2d 383 (1945). And the owner of a note secured by a mortgage may transfer the note to third parties. See *Ginsberg v Capitol City*

Wrecking Co, 300 Mich 712, 717; 2 NW2d 892 (1942), citing *Ladue v Detroit & M R Co*, 13 Mich 380 (1865). Consequently, after the individual consumers executed the notes and mortgages at issue in favor of Bedford, Bedford owned those notes as personal property, which it could in turn transfer or pledge to third parties.

However, Bedford could not transfer the mortgages separately from the underlying notes. A mortgage is a mere security interest incident to an underlying obligation, and the transfer of a note necessarily includes a transfer of the mortgage with it. *Ginsberg*, *supra* at 717. For the same reason, a transfer of a mortgage without the underlying obligation "is a mere nullity." *Id.*; see also *Cummings v Continental Tool Corp*, 371 Mich 177, 183; 123 NW2d 165 (1963) (noting that a mortgage without an underlying enforceable obligation fails as a matter of law). Thus, the interests held by Prime and Bank One must be ascertained by determining whether and to what extent Bedford granted an interest in the notes to Prime and Bank One.

2. PRIME'S INTEREST IN THE NOTES AND MORTGAGES

a. PRIOR ARTICLE 9 OF THE UCC APPLIED TO THE CREATION OF THE SECURITY INTERESTS IN THE NOTES AT ISSUE

On appeal, the parties dispute whether Article 9 of Michigan's Uniform Commercial Code applied to the interests at issue. Bank One contends that Article 9 clearly applied and is dispositive of the entire case. In contrast, Prime argues that Article 9 of the UCC did not apply because an interest in a note secured by a mortgage constitutes an interest in real property. Therefore, we shall first address whether and to what extent Article 9 of the UCC applied to the interests at issue.

We note that the actions taken by Bank One, which Prime alleges to have been unlawful, all occurred before the enactment of the current version of Article 9, which became effective on July 1, 2001. See 2000 PA 348. Although the current version of Article 9 generally applies to actions commenced after its effective date, even when the liens at issue were created before the effective date, see MCL 440.9702(1) and (3) (2001); but cf. *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 17; 718 NW2d 827 (2006) (concluding, without analyzing MCL 440.9702 [2001], that § 5 of prior Article 9 governed the default at issue because the agreements and actions at issue were made before 2001—even though the plaintiff did not sue until after 2001), because Prime's claims are common-law claims premised on the propriety of Bank One's actions under the prior version of Article 9, we conclude that Bank One's actions must be analyzed in light of its rights and duties under the prior act. Furthermore, where the relative priorities of parties were established before the effective date of revised Article 9, the article "as in effect before this amendatory act takes effect determines priority." MCL 440.9709(1) (2001). Hence, to the extent that prior Article 9 applied and established the respective priorities of the parties in the notes at issue, that priority governs the parties' security interests.

Prior Article 9 applied to "any transaction (regardless of its form) which is intended to create a security interest in *personal property* or fixtures . . . ." MCL 440.9102(1)(a) (emphasis added); cf. MCL 440.9109(1)(a) (2001); see also *Shurlow v Bonthuis*, 456 Mich 730, 735; 576 NW2d 159 (1998) (noting that Article 9 provides a "comprehensive scheme" of regulation that governs "[a]ll transactions intended to create a security interest in personal property and fixtures"). Furthermore, MCL 440.9104(j) provided that prior Article 9 did not apply "to the creation or transfer of an interest in or lien on real estate . . . ."

Hence, to the extent that the transactions at issue purported to create or transfer a lien on *real property*, prior Article 9 did not apply to the transaction. See *In re Moukalled Estate*, 269 Mich App 708, 715-719; 714 NW2d 400 (2006) (holding that prior Article 9 did not apply to the creation of a security interest in a land contract vendee's interest in real estate); cf. MCL 440.9109(4)(k) (2001).

However, even before the enactment of Michigan's UCC, our Supreme Court determined that a note secured by a mortgage is *personal property*. *Union Guardian Trust Co*, *supra* at 115. Furthermore, by its plain terms, prior Article 9 applied to the creation of a security interest in instruments. See MCL 440.9102(1)(a). An instrument means "a negotiable instrument as defined in [MCL 440.3104] or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment." MCL 440.9105(1)(i); cf. MCL 440.9102(1)(uu) (2001). Further, "[t]he application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply." MCL 440.9102(3); cf. MCL 440.9109(2) (2001). A comment to prior Article 9 illustrated application of this rule:

> The owner of Blackacre borrows $10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to

> other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee's interest. [MCL 440.9102, comment 4.][6]

In the present case, Bedford originated the loans and obtained a security interest—a mortgage—in the consumer's real property. Because the mortgage created a lien on real property, prior Article 9 did not apply to the creation of that interest. MCL 440.9104(j). However, the transactions between Bedford and Prime did not create a new lien or transfer or create an interest in property. Instead, the transactions involved the pledge of existing notes, which were secured by existing mortgages. And by its plain terms, prior Article 9 applied to the creation of a security interest in those notes—even though the notes were secured by mortgages. MCL 440.9102(3). Consequently, prior Article 9 clearly applied to the creation of the security interests in the notes at issue. See *In re SGE Mortgage Funding Corp*, 278 BR 653, 657-659 (Bankr MD Ga, 2001) (holding that prior Article 9 applied to the creation of security interests in notes secured by mortgages and listing authorities holding the same); see also *In re Atlantic Mortgage Corp*, 69 BR 321, 324 (Bankr ED Mich, 1987) (interpreting Michigan's prior Article 9 to require courts to separately analyze a secured party's interest in the note under the UCC and in the mortgage under real property law).

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[6] Each comment cited in this opinion is the official comment prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute for the section of the prior or revised version of Article 9 that corresponds to the Michigan UCC section cited. Although the official comments do not have the force of law, they are useful aids to interpretation and construction of the UCC. Further, the comments were intended to promote uniformity in the interpretation of the UCC. Therefore, it is appropriate for this Court to consider the official comments when interpreting Michigan's UCC. See *Yamaha Motor Corp, USA v Tri-City Motors & Sports, Inc*, 171 Mich App 260, 271; 429 NW2d 871 (1988).

b. PRIME HAD A SECURITY INTEREST IN THE NOTES RATHER THAN AN OWNERSHIP INTEREST

In its pleadings before the trial court and at trial, Prime's counsel often used imprecise language when referring to the loans and mortgages at issue and suggested that Prime actually owned the notes at issue. Further, at oral argument Prime's counsel continued to assert that Prime had an ownership interest in the notes at issue by virtue of its security interest. Hence, we will next address whether Bedford actually transferred ownership of the notes at issue to Prime or whether Bedford merely pledged the notes and mortgages at issue as security.[7]

The intent of the parties to an agreement concerning an interest in property determines whether the agreement transfers ownership of the property or whether the parties merely intended the property to secure performance of an obligation. MCL 440.9102(1)(a); *Yamaha Motor Corp, USA v Tri-City Motors and Sports, Inc*, 171 Mich App 260, 276; 429 NW2d 871 (1988); *Shurlow*, *supra* at 735 ("[T]he determinative factor is not the form of the transaction as much as it is the intent of the parties in entering into the transaction."). The parties' intent can best be discerned by examining the language actually used in the governing agreement. *Rory v Continental Ins Co*, 473 Mich 457, 469 n 21; 703 NW2d 23 (2005). If an agreement is unambiguous, its provisions are a matter of law for the court. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003) ("[A]n unambigu-

[7] Prior Article 9 did not apply to a true sale of notes as opposed to a transfer intended merely to provide security. See MCL 440.9102, comments 1 and 4. In addition, if Bedford no longer had any interest in the notes by reason of sale to Prime, Bedford could not have granted a security interest in the notes to Bank One. See MCL 440.9203(1)(c).

ous contractual provision is reflective of the parties' intent as a matter of law.").

In January 1998, Prime agreed to extend a $10 million facility to Bedford in order to help Bedford originate loans for the purchase and construction of modular homes. Several documents memorialized the terms of the facility. And when these documents are read as a whole, it is clear that the parties unambiguously agreed that Prime would have only a security interest in the notes and mortgages funded by Prime.

In the credit agreement, the parties defined the term "mortgage" to mean "a security agreement or other similar security device or arrangement from a Mortgagor to [Bedford] creating a valid first mortgage lien on a Project" and defined "mortgage note" to mean "a mortgage note or other evidence of indebtedness from a Mortgagor to [Bedford], evidencing Mortgagor's obligation to make repayment of a Construction Loan . . . ." The parties also defined the term "collateral" to mean "the collateral . . . described in the Pledge and Security Agreement . . . and such other collateral as shall be given from time to time to secure the Indebtedness, including . . . the Mortgages and Mortgage Notes relating to Projects." The credit agreement also required Bedford to execute a UCC-1 financing statement "granting a valid first position security interest in the Collateral." Moreover, in addition to other required documentation, Bedford agreed to obtain an original note and mortgage from the consumer and deliver the mortgage to Prime before it obtained an advance from Prime to fund the note.

In the "Pledge and Security Agreement," Bedford granted Prime a security interest in collateral, which included "[a]ll instruments now owned and hereafter acquired by [Bedford], including but not limited to all

mortgage notes . . . together with all other related documents, including but not limited to mortgages, security agreements or other similar security devices or arrangements securing such mortgage notes . . . which instruments are financed with the proceeds of loans from [Prime] to [Bedford] . . . ." Bedford also warranted that the notes were properly endorsed and assigned to Prime, as required by the credit agreement, and that the mortgages securing the notes were valid first liens that were duly recorded. Bedford also warranted that the assignments of the mortgages in favor of Prime were properly recorded with the office of the county in which the real estate was located. Finally, Bedford agreed to protect the collateral, to not encumber or transfer the collateral to third parties, and to "deliver physical possession of any Instrument, including . . . any Mortgage Note and . . . mortgage, to [Prime] or an agent of [Prime]."

These agreements, when read together, unambiguously provide that Bedford granted a security interest to Prime in the notes and mortgages that it originated with funds drawn on the facility with Prime. Bedford's agreement to indorse and deliver the notes to Prime and to assign the mortgages underlying the notes to Prime are merely the steps that Bedford agreed to take to ensure that Prime's security interest in the collateral was fully protected. Hence, the assignment of the mortgages by Bedford did not, as a matter of law, effect a transfer in the ownership of the notes and mortgages from Bedford to Prime. *Quality Products & Concepts Co*, *supra* at 375; *Yamaha Corp*, *supra* at 276.

c. PRIME'S SECURITY INTEREST IN THE NOTES WAS UNPERFECTED UNDER PRIOR ARTICLE 9

Under prior Article 9, in relevant part, a security interest is not enforceable against the debtor or third

parties with respect to the collateral unless (1) the secured party has obtained possession of the collateral under an agreement or the debtor has signed a security agreement that describes the collateral, (2) value has been given, and (3) the debtor has rights in the collateral. MCL 440.9203(1). The security interest attaches "when it becomes enforceable against the debtor with respect to the collateral." MCL 440.9203(2). Under the agreements in the facility between Prime and Bedford, Prime had an enforceable security interest in the notes and mortgages originated by Bedford using funds drawn on the facility. Although Prime had a security interest in the notes and mortgages, until Prime perfected its security interest in the notes and mortgages, Prime's rights were subordinate to the rights of certain third parties. See MCL 440.9301(1).

Under prior Article 9, a security interest typically became perfected when the secured party filed a UCC-1 financing statement covering the collateral to which the security interest attached. MCL 440.9302(1). However, under prior Article 9, a secured party could perfect its interest in instruments only by taking possession of the instruments. MCL 440.9304(1).[8] And the perfected status remained only as long as the secured party retained possession. MCL 440.9305. Although a secured party could take possession through an agent, "the debtor or a person controlled by him cannot qualify as such an agent for the secured party." MCL 440.9305, comment 2; cf. MCL 440.9313 (2001), comment 3 (stating that the "debtor cannot qualify as an agent for the secured party for purposes of the secured party's taking possession").[9]

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[8] But a secured party's interest was automatically perfected for 21 days after the security interest attached to an instrument. See MCL 440.9304(4).

[9] Under revised Article 9, a secured party can perfect its security interest in instruments either by filing or by taking possession. MCL

On appeal, Prime contends that comment 2 to MCL 440.9305 does not accurately reflect the law. However, the majority of courts that have examined the issue have rejected the notion that a secured party can perfect its security interest by designating the debtor as its agent. See, e.g., *Edibles Corp v West Ontario Street Ltd Partnership*, 273 Ill App 3d 550; 653 NE2d 45 (1995); *In re Rolain*, 823 F2d 198 (CA 8, 1987); *In re Atlantic Mortgage Corp*, *supra* at 331; *Heinicke Instruments Co v Republic Corp*, 543 F2d 700 (CA 9, 1976); *In re Copeland*, 531 F2d 1195 (CA 3, 1976); see also 1A-6A Worley & McDonnell, Secured Transactions Under the UCC, § 6A.04 (noting that there are "important limitations to the general principle of possession-by-agency" and stating that the "most important of these limitations is that the secured party cannot perfect its security interest by designating as its agent the debtor or someone closely associated with the debtor"). A debtor cannot qualify as the agent for a secured party for purposes of taking possession of collateral because the continued possession by the debtor establishes the opportunity for fraud:

> The point of requiring possession of collateral in the secured party is to provide notice to prospective third party creditors that the pledgor no longer has unfettered use of the collateral. (See *Ingersoll-Rand Financial Corporation v. Nunley* (4th Cir. 1982), 671 F.2d 842, 844-45.). Although never defined, "possession" is used in article 9 to establish a filing scheme and allow perfection by means other than filing, such as possession in the third party. Under pre-code law, a security interest was invalid if the debtor retained control of the collateral. That control could perpetrate fraud on potential creditors who, unaware of another

440.9312(1) (2001); MCL 440.9313(1) (2001). Thus, under revised Article 9, Prime could have allowed Bedford to retain the notes without jeopardizing its perfected status by filing a financing statement. See also MCL 440.9312 (2001), comment 2.

> creditor's security interest, would assume the collateral belonged to the debtor. See *Benedict v. Ratner*, 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991 (1925). [*Edibles Corp*, *supra* at 554.]

Further, although Prime and Bedford could have varied the provisions of the UCC by agreement, see MCL 440.1102(3), the "meaning of the statute itself . . . cannot be varied by agreement." MCL 440.1102, comment 2; see also *Becker v Nat'l Bank and Trust Co*, 222 Va 716, 719-721; 284 SE2d 793 (1981) (noting that parties are not able to vary the concepts and definitions of the UCC by agreement and, therefore, the parties before the court could not agree to permit an assignee to negotiate notes because that would necessarily alter the meaning of the terms "holder," "due negotiation," and "holder in due course"). Hence, the meaning of "possession" for purposes of perfection under prior Article 9 must be understood in light of comment 2 and cannot be varied by the agreement of the parties. MCL 440.1102, comment 2.

In addition, the rights of third parties under Article 9 cannot be "destroyed by a clause in the security agreement." MCL 440.1102, comment 2. Because the provisions governing the manner in which a secured party obtains a perfected security interest in collateral directly affects the rights of third parties in the same collateral, the parties to a security agreement cannot vary the manner in which the secured party may obtain perfection of its security interest through possession; the secured party must have and retain possession consistent with the requirements of MCL 440.9305, as explained in comment 2. For these reasons, we reject Prime's contention that it could designate Bedford as its agent for purposes of possessing the notes.

In the present case, notwithstanding the requirements of the credit and security agreements, it is

undisputed that Bedford retained possession of the notes at issue during all relevant periods. And Bedford could not possess the notes at issue on Prime's behalf. MCL 440.9305, comment 2. Consequently, under prior Article 9, Prime only had an unperfected security interest in the notes.

d. BEDFORD'S ASSIGNMENT OF THE MORTGAGES DID NOT ALTER THE NATURE OF PRIME'S UNPERFECTED SECURITY INTEREST IN THE NOTES

On appeal, Prime contends that the recorded assignments of the original mortgages gave it a perfected security interest that was superior to that of Bank One. We do not agree.

First, it must be reiterated that, under the plain language of the agreements governing the relationship between Bedford and Prime, the assignment of the mortgages at issue did not effect a transfer in ownership from Bedford to Prime. Hence, this is not a case where the parties intended to evidence a transfer of ownership of the note and mortgage through the recording of an assignment of the mortgage. See *In re SGE Mortgage Funding Corp*, *supra* at 662 (noting that the assignments at issue did not transfer an interest in land). Rather, because the parties only intended Prime to have a security interest in the notes and mortgages, prior Article 9 clearly governed the security interest in the notes.[10] See MCL 440.9102(1)(a) and (3). Nevertheless, courts have struggled with the effect, if any, that real estate law has on the perfection of a security interest under prior Article 9 in a note that was itself

[10] We note that, unlike prior Article 9, revised Article 9 applies to the sale of notes. However, under revised Article 9, a purchaser automatically obtains a perfected security interest when the security interest attaches, see MCL 440.9309(d) (2001); there is no need to file a financing statement or take possession of the note.

secured by a mortgage. See 1C-16 McDonnell, Secured Transactions Under the UCC, § 16.09 (examining how courts have handled the problem of perfecting an instrument secured by a mortgage); see also *In re SGE Mortgage Funding Corp*, *supra* at 659-662.

As already noted, prior Article 9 encompassed the creation of a security interest in an instrument, even if that instrument was itself secured by an underlying mortgage. See MCL 440.9102, comment 4. However, comment 4 also left "to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee's interest." *Id.* This commentary has led some courts to use a bifurcated approach in determining a secured party's interest in a note and mortgage. See *In re Maryville Loan & Savings Corp*, 743 F2d 413 (CA 6, 1984), clarified on reconsideration 760 F2d 119 (CA 6, 1985); *In re Atlantic Mortgage Corp*, *supra* at 324 (relying on *In re Maryville* for the proposition that Michigan's UCC must be read to require a bifurcated approach); *Provident Bank v Community Home Mortgage Corp*, 498 F Supp 2d 558, 565 (ED NY, 2007). Under the bifurcated approach, prior Article 9 would govern priorities in the note, but real property law would govern priorities in the mortgage. *In re Maryville*, *supra* at 415-417. Hence, where two parties have a security interest in a single note, which is secured by a mortgage, one party could have priority in the note under prior Article 9 and the other could have priority in the mortgage under real property law.

> But other courts have recognized that separately analyzing the perfected status of the note and mortgage is simply inconsistent with the basic principle that the note controls the mortgage. In their view, this inconsistency means that Comment 4 must be either ignored or limited in

> its application to contexts other than determination of the perfection of the assignee's interest. In this view, the creditor gains a perfected security interest in the note and mortgage and their proceeds so long as it is perfected as to the note, and it is not necessary to consult real estate law to determine whether the creditor's interest in the mortgage is perfected. [1C-16 McDonnell, Secured Transactions Under the UCC, § 16.09(2)(c).]

We reject the notion that, under Michigan real property law, by recording an assignment of mortgage incident to a secured transaction, a secured party can obtain a greater security interest in a mortgage than it has in the note underlying the mortgage. This can best be illustrated by applying Michigan's real property law to the facts of this case.

Prior Article 9 governed Prime's security interest in the notes at issue. MCL 440.9102(1)(a) and (3). Hence, Bedford's assignment of the mortgages to Prime had no legal effect on Prime's security interest in the corresponding notes. And as already noted, a mortgage without an underlying obligation is a nullity. *Ginsberg*, *supra* at 717. Although Prime correctly observes that there were valid notes underlying these mortgages, Bedford did not transfer ownership of those notes to Prime. For that reason, the effectiveness of the assignments to Prime—if they had any legal effect at all—was contingent on Prime's obtaining ownership of the notes. *Id.* But Prime never obtained ownership of the notes. Instead, Bank One asserted its right to dispose of the notes after Bedford's default. See MCL 440.9504(1); cf. MCL 440.9610(1) (2001). When Bank One asserted this right, it took ownership of the notes, the underlying mortgages transferred to Bank One by operation of law, and the assignments to Prime of the mortgages securing these notes became nullities. *Ginsberg*, *supra* at 717. Hence, under Michigan's real property law—the

"other law" of comment 4 to MCL 440.9102—the assignment of a mortgage securing a note as part of a secured transaction does not give the assignee any greater rights to the note than the assignee would have had under prior Article 9. And, because the mortgage follows the note, *Ginsberg*, *supra* at 717, the assignee of a mortgage cannot have a greater security interest in the mortgage than it has in the underlying note. Cf. *In re Atlantic Mortgage Corp*, *supra* at 325 (interpreting Michigan's prior Article 9 and real property law and concluding that, "if an investor's interest in the underlying debt is subordinate to the trustee's, the investor's superior interest in the mortgage does not give the investor any right to collect the debt," and, consequently, "an investor without possession of the underlying note retains no rights incident to either the note or the mortgage").

We note that this approach is consistent with the approach adopted by Michigan's Legislature with the enactment of revised Article 9. Revised Article 9 explicitly provides that the "attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien," MCL 440.9203(7) (2001), and "[p]erfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral," MCL 440.9308(4) (2001). Further, although revised Article 9 continues to provide that the "application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply," MCL 440.9109(2) (2001), the commentary no longer leaves it to "other law" to determine the effect "on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an

assignment of the mortgagee's interest." MCL 440.9102, comment 4. Instead, MCL 440.9109 (2001), comment 7, provides:

> Subsection (b) is unchanged in substance from former Section 9-102(3). The following example provides an illustration.
>
> Example 1: O borrows $10,000 from M and secures its repayment obligation, evidenced by a promissory note, by granting to M a mortgage on O's land. This Article does not apply to the creation of the real-property mortgage. However, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this Article applies to the security interest thereby created in favor of X. The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien likewise is perfected. See Sections 9-203, 9-308.
>
> It also follows from subsection (b) that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, *as by an assignment of record of a real-property mortgage*, would be ineffective. Finally, it is implicit from subsection (b) that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation. *This Article rejects cases such as In re Maryville Savings & Loan Corp., 743 F2d 413 (CA 6, 1984), clarified on reconsideration, 760 F2d 119 (1985).* [3 ULA 108-109 (emphasis added).]

Thus, under revised Article 9, Bedford's assignment of the mortgages securing the notes at issue to Prime would also have had no effect on its security interest.

Prime did not obtain any greater rights to the notes at issue by recording assignments of the underlying mortgages than it had under prior Article 9. Conse-

quently, notwithstanding Bedford's assignment of mortgages to Prime, Prime had only unperfected security interests in the notes at issue, which could be subordinate to the rights of other secured creditors.

3. BANK ONE'S INTEREST IN THE NOTES AT ISSUE

Although Bank One refers to Prime's unperfected security interests in the notes as unenforceable, under prior Article 9, even an unperfected security interest could have priority over the interests of some third parties. See MCL 440.9312(6)(b); MCL 440.9301(1). Hence, in order to ascertain whether Bank One had a superior interest in the notes and mortgages, it will be necessary to first determine what, if any, interest Bank One had in the notes and mortgages.

Under the terms of the pledge and security agreement executed as part of the $15 million facility between Bank One and Bedford, Bedford agreed to grant Bank One a security interest in certain specified "property now owned, or at any time hereafter acquired . . . ." The property included "all Mortgage Loans, including all Mortgage Notes and Mortgages evidencing such Mortgage Loans and the related Mortgage Loan Documents, which from time to time are delivered, or caused to be delivered, to the Bank . . . pursuant hereto or in respect of which an extension of credit has been made by the Bank under the Credit Agreement . . . ." Therefore, under the plain unambiguous terms of the pledge, Bedford granted Bank One a security interest in all loans—regardless of when they were originated—that were delivered to Bank One "pursuant" to the pledge.

Although the pledge contemplated that the majority of the loans would be delivered after Bank One funded the loan, the pledge also provided for the delivery of "additional Mortgage Loans" whenever the "Borrowing

Base, as reflected in any Borrowing Base Certificate or as otherwise determined by the Bank, shall, at any time, fall below the aggregate amount outstanding under the Credit Agreement or the Note . . . ." Hence, the pledge clearly contemplated that Bank One would take a security interest in *any* note and mortgage delivered under the pledge, not just the notes and mortgages originated with funds drawn on the $15 million facility. Because these provisions are unambiguous, Prime's reliance on trial testimony that Bank One actually only intended to take a security interest in notes that had been funded with Bank One's money is inapposite. *Quality Products & Concepts Co*, *supra* at 375. Rather, it is clear that any note delivered to Bank One under the terms of the pledge constituted collateral.

It is undisputed that Bank One asked Bedford to bring all its notes and mortgages, which included the notes at issue, to the closing to secure the funds advanced by Bank One. Consequently, by entering into the agreements and bringing the notes to the closing, Bedford gave Bank One a perfected security interest in the notes at issue. MCL 440.9304(1).

Moreover, the fact that Bedford had already granted a security interest in the notes to Prime and agreed not to further pledge them as security did not defeat Bedford's ability to grant a security interest in them to Bank One. See MCL 440.9311 ("The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."); cf. MCL 440.9401(2) (2001). As comment 1 to MCL 440.9311 states, the purpose of this statutory provision is to "make clear that in all security transactions under this Article," the debtor retains "an interest (whether legal title or an equity) which he can

dispose of and which his creditors can reach."[11] Likewise, because prior Article 9 was—with some exceptions not relevant here—a "pure race" statute, see MCL 440.9312(6); *Yamaha Corp*, *supra* at 275, the fact that Bank One may have known that Bedford had already pledged the notes to Prime did not affect Bank One's ability to obtain and perfect a security interest in the notes. See also Example 2 to MCL 440.9312 ("Whichever secured party first perfects his interest (by taking possession of the collateral or by filing) takes priority and it makes no difference whether or not he knows of the other interest at the time he perfects his own."); cf. MCL 440.9322 (2001), comment 3 ("The rules may be regarded as adaptations of the idea, deeply rooted at common law, of a race of diligence among creditors.").

For these reasons, as of the June 1999 closing, Bank One had a perfected security interest in all the notes at issue. Although Prime's security interest in the notes was prior in time to Bank One's security interest in the same notes, because Prime's interest was unperfected, Bank One had a superior interest in the notes. MCL 440.9312(6)(a); cf. MCL 440.9322(1)(b) (2001). And, after Bedford's default, Bank One could lawfully "sell, lease or otherwise dispose of any or all of the collateral . . . ." MCL 440.9504(1).

C. PRIME'S CLAIMS AGAINST BANK ONE FAIL AS A MATTER OF LAW

Having clarified the nature of the interests held by each of the parties in the notes and mortgages, we will now examine Prime's claims in light of these interests.

[11] For this reason, we reject Prime's contention that Bedford did not have "rights in the collateral" within the meaning of MCL 440.9203(1)(c). We also reject Prime's contention that Bank One did not provide value in exchange for the security interest in these notes and mortgages; the promise to lend Bedford up to $15 million coupled with an actual advance of several million dollars clearly met the requirements of MCL 440.9203(1)(b).

1. CONVERSION AND UNJUST ENRICHMENT

Conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). As already noted, the notes and mortgages at issue were personal property under Michigan law. *Union Guardian Trust Co*, *supra* at 115. However, Prime did not own the notes; Bedford did. Prime only had a security interest in the notes. And Bedford could, consistent with prior Article 9, grant a security interest in the notes to Bank One notwithstanding the fact that it had already granted a security interest in the same notes to Prime. MCL 440.9311. Further, because prior Article 9 gave Bank One's interest in the notes priority over Prime's interest, Bank One's disposition of the notes could not—as a matter of law—constitute a wrongful act of dominion that was inconsistent with Prime's rights.[12] *Foremost Ins*, *supra* at 391. For the same reason, Bank One's actions could not constitute unjust enrichment: Prime's interests in the notes were subordinate to Bank One's interests under prior Article 9. Therefore, Prime was not entitled to the collateral and Bank One's disposition of the notes did not result in an inequity to Prime.[13] See *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003)

[12] Because the mortgages follow the notes by operation of law, see *Ginsberg*, *supra* at 717, when Bank One lawfully disposed of the notes it necessarily lawfully disposed of the corresponding mortgages.

[13] We note that there is no evidence that this case involves a situation where the disposition of the collateral could have resulted in a surplus had it been conducted in a commercially reasonable manner. See MCL 440.9502(2) (noting that the debtor has the right to surplus), MCL 440.9504(1)(c) (requiring the secured party to dispose of collateral in a commercially reasonable manner and to pay any surplus to junior lienholders) and MCL 440.9507(1) (granting other secured parties the

(noting that unjust enrichment involves the receipt of a benefit by the defendant from the plaintiff and an inequity resulting to the plaintiff because of the retention of the benefit by the defendant).

Prior Article 9 did not require Bank One to act in Prime's best interests; rather, it required Prime to protect itself by taking the necessary steps to perfect its security interests, *Yamaha Corp*, *supra* at 274-275 (noting that a secured creditor is not required to act in the best interests of other secured creditors and is entitled to rely on compliance with the UCC's requirements for perfection), which Prime did not do. And the provisions for default under Article 9 governed any rights that Prime may have had as a result of Bank One's handling of the disposition of the notes. See MCL 440.9501 *et seq.* and MCL 440.9601 (2001) *et seq*. Consequently, when prior Article 9 is properly applied to the facts of this case, Prime's claims for conversion and unjust enrichment necessarily fail.

2. AIDING AND ABETTING CONVERSION AND BREACH OF FIDUCIARY DUTY

A person may be liable for conversion "by actively aiding or abetting or conniving with another in such an act. Indeed, one may be liable for assisting another in a conversion though acting innocently." *Trail Clinic, PC v Bloch*, 114 Mich App 700, 706; 319 NW2d 638 (1982); see also *Bush v Hayes*, 286 Mich 546, 549-550; 282 NW 239 (1938). Hence, Bank One could be liable for aiding and abetting Bedford's conversion of the notes at issue. But Bedford owned the notes at issue, and it could not convert its own property. See *Foremost Ins*, *supra* at 391. Likewise, because it owned the notes, Bedford could

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right to hold a secured party liable for losses occasioned by the failure to comply with the provisions for default).

pledge them as security for a further extension of credit, even though such a pledge might have been a breach or default of its agreements with Prime. See MCL 440.9311. Hence, Bedford's grant of a security interest in the notes to Bank One was not wrongful and cannot support a claim for conversion. *Belle Isle Grill*, *supra* at 478.

Finally, although Bank One could be liable for participating in the breach of a fiduciary duty owed to Prime by Bedford, *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 187; 364 NW2d 609 (1984), in order to establish liability, Prime had to first demonstrate that Bedford had a fiduciary relationship with Prime. On appeal, Prime argues that Bedford was its agent for purposes of possessing the notes and, therefore, had a fiduciary duty to act in Prime's best interest with regard to the notes. However, as noted above, a debtor cannot qualify as an agent for purposes of perfecting a security interest. MCL 440.9305, comment 2. Hence, to the extent that Prime claims that Bedford was an agent for this purpose, that agency relationship was invalid. Further, examining the agreements between Bedford and Prime as a whole, it is clear that the agreements established a simple debtor-creditor relationship rather than an agency relationship with its accompanying fiduciary duties. See *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (noting that an agency relationship may arise "when there is a manifestation by the principal that the agent may act on his account"); see also *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981) (noting that fiduciary duties arise from "the relation subsisting between two persons of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith"). And prior Article 9 specifi-

cally contemplated that a debtor's interest in secured property could be voluntarily or involuntarily transferred to third parties notwithstanding an agreement—even an agency agreement—to the contrary. MCL 440.9311. Thus, Bedford did not have a fiduciary duty to refrain from further pledging the notes at issue.

Even if Bedford had some fiduciary duty toward Prime, Bank One had the right to rely on the provisions of Article 9 governing the creation and perfection of security interests in collateral. *Yamaha Corp*, *supra* at 275. Hence, under prior Article 9, Bank One could properly assume that Bedford's possession of the notes gave it the right to grant a security interest in those notes. See MCL 440.9311. And Bank One had no obligation to determine whether Bedford's decision to grant Bank One a security interest in the notes was consistent with its contractual obligations or fiduciary duties to Prime. To hold otherwise would be to inject inefficiency and uncertainty into secured transactions, because potential creditors would have to weigh the possibility that a debtor might have contractual or fiduciary duties to another creditor, which may be impaired by the creation of a new security interest in the debtor's property, against the benefits of extending credit to the debtor. See *Yamaha Corp*, *supra* at 274-275 (noting that the aim of prior Article 9 was to provide a simple and unified structure to enable secured transactions to go forward with less cost and greater certainty). For these reasons, we conclude that the claim that Bank One aided and abetted Bedford's breach of fiduciary duty also fails as a matter of law.

3. CONCLUSION

Because Prime's claims of conversion, unjust enrichment, aiding and abetting conversion, and aiding and

abetting breach of fiduciary duty against Bank One were untenable as a matter of law, these claims should never have been submitted to the jury. For the same reason, the trial court should have granted Bank One's motion for JNOV on these claims. Therefore, we reverse the trial court's denial of Bank One's motion for JNOV on these claims. Given our resolution of this issue, we need not address any of the remaining issues raised on appeal.

III. GENERAL CONCLUSION

There were no factual disputes concerning the nature of the interests held by the parties in the notes at issue. Likewise, there were no factual disputes about the actual actions taken by each of the parties. Because Bank One's actions could not constitute conversion, unjust enrichment, or aiding and abetting conversion or breach of fiduciary duty under the undisputed facts of this case, the trial court should have granted Bank One's motion for JNOV. *Reed*, *supra* at 528. Therefore, we reverse the trial court's denial of Bank One's motion for JNOV and remand for entry of judgment in favor of Bank One on these four claims. Further, because the parties agree that the jury verdict did not reflect an award based on an alleged conversion of the "Edwards" check, we instruct the trial court to enter judgment in favor of Bank One on this claim too.

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

MALONE v MALONE

Docket No. 272327. Submitted January 8, 2008, at Detroit. Decided June 3, 2008, at 9:05 a.m.

Erika Malone obtained a divorce from Roy E. Malone in the Wayne Circuit Court, which awarded the plaintiff custody of the parties' child and ordered the defendant to pay child support. Two years after the child began living with the defendant, the defendant sought modification of income withholding for his child-support obligation, a reduction in his child-support arrearage, and an award of custody. The court, Kathleen M. McCarthy, J., relying on a recommendation by a friend of the court referee and on MCR 2.612 (the court rule on relief from judgment), terminated income witholding and eliminated the defendant's child-support arrearage. The plaintiff appealed by leave granted.

The Court of Appeals *held*:

MCR 2.612 may not be used to set aside accrued child support under the facts presented in this case.

1. A conflict exists between MCL 552.603(2) and MCR 2.612(C). MCL 552.603(2) expressly provides that a child-support order is not subject to retroactive modification except with respect to the period during which there is a properly filed and served petition for support modification, while MCR 2.612(C) gives a trial court the authority to grant a party relief from judgment on multiple grounds. The statute reflects the public policy of ensuring the enforceability of support orders for the protection of children. Where, as in this case, a court rule contravenes a legislatively declared principle of public policy, the court rule must give way to the statute.

2. The defendant is entitled to partial retroactive modification under MCL 552.603(2) from the date he filed his motion to modify the income-witholding order and adjust the child-support arrearage. However, because it is unclear whether the defendant paid support after he filed his motion or how much he paid if he did so, the case must be remanded for a determination of the defendant's support arrearage.

Reversed and remanded for further proceedings.

DIVORCE — CHILD SUPPORT — RETROACTIVE MODIFICATION.

As long as the minimum protections of due process are afforded to the party ordered to pay child support, the child-support obligation is, by statute, not subject to retroactive modification, except with respect to the period during which these is a properly filed and served petition for support modification, and the circuit court may not rely on the court rule governing relief from judgment to retroactively modify the child-support order (MCL 552.603[2]; MCR 2.612[C]).

Richard Smutek for the plaintiff.

Mary Beth Leija and *Scott Bassett* for the defendant.

Before: TALBOT, P.J., and ZAHRA and METER, JJ.

ZAHRA, J. Plaintiff appeals by leave granted the circuit court's order vacating defendant's outstanding child-support arrearage of $5,647.27. This case requires us to determine whether MCR 2.612, the relief-from-judgment court rule, may be used to set aside accrued child support. We hold that under the facts presented in this case, MCR 2.612 cannot be so used. MCL 552.603 expressly provides that a child-support order is not subject to retroactive modification except with respect to the period during which there is a properly filed and served petition for support modification. For reasons more fully stated in this opinion, we reverse the order of the trial court and remand this case for further proceedings.

I. BASIC FACTS

The parties were divorced on October 7, 1988, and, in a judgment entered by the Wayne Circuit Court, plaintiff was awarded custody of their only child. Defendant was initially ordered to pay $40 a week in child support. In 1994, on plaintiff's motion, the circuit court in-

creased child support to $80 a week. Defendant was also required to pay an additional amount toward a child-support arrearage he had accrued.[1] The parties continued to live together from 1988 until they separated in 1992. The child lived with plaintiff between 1992 and 2004.

Defendant alleged that plaintiff and the child began experiencing serious problems in 2004, and domestic violence charges were filed against the child in the family division of the Macomb Circuit Court after an alleged altercation with plaintiff. As a result of those charges, the child lived with defendant in February and March 2004, but then returned to live with plaintiff from April 2004 to July 15, 2004. Defendant alleged that the child was released to his care and custody by the Macomb Circuit Court on July 15, 2004, and that the child has resided with him since that date.

Defendant alleged that financial hardship prevented him from filing in the Wayne Circuit Court a motion to change custody or modify support after the child was placed with him. Defendant nonetheless continued to pay support. Nearly two years passed before defendant filed in the Wayne Circuit Court his March 7, 2006, motion to modify child support. Defendant requested that the trial court modify his support obligation pending further investigation and also adjust the support arrearage dating back to February 2004, to give him credit for child-support payments he alleged that plaintiff fraudulently received on behalf of the child when the child was no longer in the custody of plaintiff. Along

[1] Plaintiff claims in her brief on appeal that defendant was ordered to pay $20 a week toward his child-support arrearage. Defendant claimed in his March 2006 motion to modify income withholding and adjust support arrearage that he was paying $80 a week to reduce his arrearage. We are unable to determine from the record the amount defendant was ordered to pay or the amount defendant actually paid toward his arrearage.

with his motion to modify support, defendant also filed a motion seeking a formal award of custody of the child to him.

At the hearing on defendant's motion, plaintiff agreed that the child was living with defendant. The central issue concerned whether the support obligation and arrearage could be retroactively adjusted. The parties also disagreed on the dates the child began living with defendant. At the conclusion of the hearing, the friend of the court (FOC) referee in the Wayne Circuit Court indicated on the record that she believed that the Macomb Circuit Court "erred in not stopping [defendant's] child support and ordering mom to pay." "So, I think under those circumstances the court can rectify it." "It was the court's error."

At a second hearing the referee again stated on the record that the Macomb Circuit Court should have ended defendant's child-support obligation once the child was placed with defendant. The referee believed that support should have been abated 100 percent at that time and that the court should be able to correct its own mistakes. The hearing then focused on the dates the child began living with defendant. Later, the referee made the following recommendation:

> That the arrears owed to Erika Malone be set at zero as of 6-13-06. The FOC records show $5647.27 owed to Ms. Malone. This referee calculates that Dad had the child for a period of approximately 19 months due to juvenile court involvement. He was still charged support, assessed surcharges and he paid support.

Plaintiff appealed the referee's recommendation in the Wayne Circuit Court. Plaintiff argued that the recommendation "retroactively and ambiguously calculated 100% abatement of child support based on random dates of the child living with both parents and contrary

to MCL 552.603 and the appellate case of *Waple vs Waple*, 179 Mich App 673, [sic] (1989)." The circuit court entertained plaintiff's objections to the referee's recommendation at a hearing, but ultimately agreed with the FOC referee. The circuit court entered an order adopting the FOC referee's recommendation and stated "that arrears owed to Plaintiff be set at zero as of 6-13-06. Income withholding order against Defendant shall be terminated. Referee Recommendation of 6-13-06 shall be adopted. Relief granted per MCR 2.612 by Court."

II. RETROACTIVE MODIFICATION OF CHILD SUPPORT

A. STANDARD OF REVIEW

In *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007), this Court summarized the applicable standard of review as follows:

> Generally, this Court reviews child support orders and orders modifying support for an abuse of discretion. *Peterson v Peterson*, 272 Mich App 511, 515; 727 NW2d 393 (2006). Whether the trial court properly acted within the child support guidelines is a question of law that this Court reviews de novo. *Id*. at 516. This Court also reviews questions of statutory construction de novo. *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 65; 729 NW2d 500 (2007).

B. ANALYSIS

At issue is MCL 552.603, which provides in relevant part:

> (1) A support order issued by a court of this state shall be enforced as provided in this act.
>
> (2) Except as otherwise provided in this section, a support order that is part of a judgment or is an order in a

> domestic relations matter is a judgment on and after the date the support amount is due as prescribed in [MCL 552.605c], with the full force, effect, and attributes of a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification. Retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.

The interpretation of the above statute is at the heart of this case.

> When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted. [*Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007) (citations omitted).]

In *Waple v Waple*, 179 Mich App 673, 675-677; 446 NW2d 536 (1989), this Court held that an earlier version of MCL 552.603, which substantially corresponds to the current version, barred the defendant from abating a child-support arrearage.[2] This Court held that, "[b]y the unequivocal terms of this statute,

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[2] That prior version of MCL 552.603, provided in pertinent part:

> (1) A support order issued by a court of this state shall be enforced pursuant to the requirements of this section.
>
> (2) Except as otherwise provided in this section, a support order that is part of a judgment or is an order in a domestic relations matter as that term is defined in section 31 of the friend of the court act, Act No. 294 of the Public Acts of 1982, being section 552.531 of the Michigan Compiled Laws, is a judgment on and after the date each support payment is due, with the full force,

retroactive modification of support for periods prior to the September 23, 1987, date of notice of the petition is prohibited." *Id*. at 676. This Court also noted:

> The end result—that defendant is precluded by statute from seeking a reduction in support arrearages for periods when the intended beneficiary of the support resided with him—seems particularly unfair when the law prior to the enactment of MCL 552.603 . . . is considered. Previously, past-due support installments were subject to modification due to a change in circumstances. *Talbot v Talbot*, 99 Mich App 247, 252; 297 NW2d 896 (1980), lv den sub nom *Talbot v Burns*, 410 Mich 903 (1981). Cf. *Dresser v Dresser*, 130 Mich App 130, 136-137; 342 NW2d 545 (1983). A change in physical custody is a change in circumstances. See *Rohloff v Rohloff*, 161 Mich App 766, 769; 411 NW2d 484 (1987), lv den 429 Mich 869 (1987). [*Id*. at 676-677.]

This Court also indicated that equitable circumstances should not be considered because the Legislature intended, "consistent[ly] with overriding federal directives enforceable by a loss of funding, to remove entirely the discretion of the circuit court to consider a change in circumstances." *Id*. at 677. In subsequent published cases, this Court has followed the rule from *Waple* and refused to allow any retroactive modification of support orders, except as provided in MCL 552.603. See *Fisher*, 276 Mich App at 428-431; *Adams v Linderman*, 244 Mich App 178, 185-186; 624 NW2d 776 (2000); *Harvey v Harvey*, 237 Mich App 432, 437-439;

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effect, and attributes of a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification.

(3) Retroactive modification of a support payment due under a support order is permissible with respect to any period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.

603 NW2d 302 (1999). Here, however, the Wayne Circuit Court did not follow *Waple*, but held that it could grant defendant relief and retroactively modify the support arrearage pursuant to MCR 2.612. The circuit court specifically granted relief under MCR 2.612(C), which provides, in relevant part:

> (C) Grounds for Relief From Judgment.
>
> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.
>
> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

Although this Court has consistently held that MCL 552.603(2) does not permit the retroactive modification of child support, this Court has never directly addressed whether MCR 2.612 allows a court to grant a party

relief from a support order by retroactively modifying court-ordered support. We hold that as long as the minimum protections of due process are afforded to a party ordered to pay child support, that party cannot receive retroactive abatement of accrued child-support obligations.

There exists a conflict between MCR 2.612(C) and MCL 552.603(2) regarding authority to grant retroactive relief from a support order. MCL 552.603(2) plainly states that a support order "is not . . . subject to retroactive modification," except in the limited circumstances prescribed in the statute. In contrast, MCR 2.612(C) gives a trial court the authority to grant a party relief from a judgment on multiple grounds.

To decide if a statute and a court rule conflict, each must be read according to its plain meaning. If a conflict exists, a reviewing court must assess whether there are substantive policy reasons for the legislative enactment. A statute is considered substantive if it concerns a matter that has as its basis something other than court administration. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 191; 732 NW2d 88 (2007). " ' "If a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield." ' " *People v Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006), quoting *McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999), quoting Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making*, 55 Mich L R 623, 635 (1957).

We hold that MCR 2.612(C) and MCL 552.603(2) conflict and may not be reconciled. We further conclude that MCL 552.603(2) was drafted to reflect the public policy of ensuring the enforceability of support orders

for the protection of children. See *Fisher*, 276 Mich App at 429-430; *Hall v Novik*, 256 Mich App 387, 398; 663 NW2d 522 (2003); *Harvey*, 237 Mich App at 438-439. Therefore, we conclude that MCL 552.603(2) represents a clear expression of legislative policy on a substantive matter and, as a result, MCR 2.612(C) must give way to MCL 552.603(2). Accordingly, the trial court erred in concluding that MCR 2.612(C) allowed it to abate defendant's child-support arrearage.

Furthermore, there simply is no basis for allowing equity to intervene in this case. The juvenile proceedings that effectively changed custody of the minor child occurred in Macomb County. Defendant argues that the Macomb County Prosecutor's Office was obligated pursuant to MCR 3.205 to give the Wayne Circuit Court notice of the juvenile proceedings pending in Macomb County. Assuming without deciding that MCR 3.205 applied to the Macomb juvenile proceedings here at issue, this rule does not vest the Macomb Circuit Court with authority to modify the orders of the Wayne Circuit Court. Defendant cites no authority to support the proposition that the Macomb Circuit Court could modify, vacate or in any way alter the order of child support issued by the Wayne Circuit Court. The divorce judgment ordering support was rendered in Wayne County. Defendant should have promptly filed a motion in the Wayne Circuit Court to change custody and abate child support as soon as the child was placed with him.[3]

MCL 552.603(2) allows for the retroactive modification of child support from the date that notice was given to the recipient of the support payments of the petition to modify support. Here, defendant is entitled to a

[3] In light of our disposition, plaintiff's argument that defendant failed to establish with any reasonable certainty the dates on which he had physical custody of the child since 2004 is moot.

partial retroactive modification of child support, effective March 7, 2006, the date he filed his motion to modify the income-withholding order and adjust support arrearages. Because it is not clear from the record whether defendant paid support since then or how much he paid if he did so, the case is remanded for a determination of defendant's child-support arrearage.

Finally, we express no opinion on whether defendant can pursue a civil remedy from plaintiff for her wrongful acceptance of support when she did not have physical custody of her minor child. Our opinion is strictly limited to whether MCR 2.612(C) allows for retroactive modification of child support. We further observe that wholly apart from the relief available under MCR 2.612, there may be very rare circumstances in which constitutional due-process protections require a retroactive modification of child support. See *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 9-11; 732 NW2d 458 (2007). One example might be where a support order was entered against a person not legally obligated to pay support and that party was denied notice of the issuance of the support order. However, the factual situation presented here would not mandate such relief.

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

WRIGHT v WRIGHT

Docket No. 281918. Submitted April 8, 2008, at Detroit. Decided April 22, 2008. Approved for publication June 3, 2008, at 9:10 a.m.

Charles Wright brought an action for divorce from Monica M. Wright in the Washtenaw Circuit Court. The court, Nancy C. Francis, J., divided the marital property contrary to the terms of a postnuptial agreement regarding property, awarded the defendant legal and physical custody of the parties' minor children, and ordered the plaintiff to pay child support, alimony, and some of the defendant's attorney fees. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not clearly err by finding that the postnuptial agreement contemplated and encouraged the separation and divorce of a married couple and therefore was void as against public policy.

2. No merit lies in the plaintiff's argument that the trial court's child-custody consideration and final order are void because the trial court did not advise him of the meaning of "joint custody." The plaintiff cannot claim ignorance with respect to the availability of joint custody in light of the fact that he was granted joint custody in ex parte and temporary orders.

3. The trial court did not find against the great weight of the evidence regarding several of the statutory best-interest factors, MCL 722.23, and did not abuse its discretion when it awarded full custody to the defendant and limited visitation rights to the plaintiff.

4. When determining child support, the trial court did not clearly err with respect to its finding regarding plaintiff's annual salary, nor did it misapply the Michigan Child Support Formula, as the plaintiff contended, given the absence of a demonstration by the plaintiff of a deviation from the formula.

5. The trial court did not abuse its discretion by awarding to the defendant a portion of her general attorney fees and all the attorney fees she incurred to defend against the postnuptial agreement. The trial court justifiably determined that the assertion of the postnuptial agreement in the face of contrary legal

precedent amounted to unreasonable conduct and that the property division envisioned by the agreement was plainly unjust and inequitable.

6. The trial court did not abuse its discretion by awarding alimony to the defendant, considering the parties' financial circumstances.

Affirmed.

DIVORCE — CONTRACTS.

A contract that anticipates and encourages a future separation or divorce is against public policy in Michigan and is not enforceable.

Benjamin Whitfield, Jr. & Associates, PC (by *Benjamin Whitfield, Jr.*, and *Cynthia J. Gaither*), for the plaintiff.

Reed Law Group, P.C. (by *Steven A. Reed*), for the defendant.

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

PER CURIAM. Plaintiff appeals as of right the trial court's order dividing the parties' marital property contrary to a postnuptial contract, granting defendant legal and physical custody of the parties' three minor children, and ordering plaintiff to pay child support, alimony, and defendant's attorney fees. We affirm.

Plaintiff first met defendant when she was working as a cashier at a fast-food restaurant. She was a 17-year-old high-school student and single mother of a male toddler, Anthony, and an infant daughter, Janae (born June 5, 1994), from a different relationship. Plaintiff was a corrections officer with a house, a solid career, and no children. He was 10 years older than defendant and had recently divorced his second wife. The couple started seeing each other, and when defendant turned 18 years old, she moved in with plaintiff.

She did not graduate from high school and had never lived outside her parent's home. The couple and defendant's children spent the next year living together at plaintiff's house on Rosewood in Inkster, and defendant gave birth to plaintiff's son, Charles Tyler, on March 1, 1996. About five months later, the couple was married in an informal ceremony in Toledo. Defendant went back to school and obtained her GED (general equivalency diploma), but it was clear that plaintiff was the family's breadwinner. He brought substantial assets into the marriage, including savings, investment properties, and the Rosewood house. Defendant did not bring any assets into the marriage. Plaintiff worked a substantial amount of overtime, and defendant managed the household.

In 1998, the couple sold the Rosewood house and plaintiff put a substantial amount of the proceeds into buying the family a new house on Thornhill in Ypsilanti Township, which was deeded to the parties in both their names. Around this time, plaintiff adopted Janae as his daughter. Although Anthony also lived with them, plaintiff had a much more contentious relationship with the boy, who was older and retained ties with his biological father and the paternal side of his family. In 2001, plaintiff and defendant decided that it would be a good idea for defendant to run a day-care operation at the Thornhill house. Plaintiff undertook an expensive renovation of the home to make it functional, and defendant received her license in 2002.

Also in 2002, Anthony confessed to his mother that he had touched Janae inappropriately. Needless to say, the ensuing ordeal strained Anthony's relationship with plaintiff even more, and defendant initially thought it might be best for all involved if she simply reported the incident to the authorities so Anthony and Janae could get some professional help. The couple

decided, instead, that they would monitor the children closely and deal with the problem without involving the authorities. On October 4, 2003, defendant gave birth to the parties' youngest daughter, Emma. In 2004, plaintiff went back to college to obtain his MBA (master's degree in business administration). At some point during the marriage, he also started a side business as a private investigator. Defendant, too, went back to school, and entered a nursing program at a local community college. However, tensions again mounted between Anthony and plaintiff, and by mid-2004, plaintiff gave defendant the option of sending Anthony to live with his biological father or reporting his improper conduct toward Janae to the authorities. Anthony moved out on July 2, 2004.

About one year later, the marriage was under strain. Although the parties were not separated, plaintiff had his attorney draw up a postnuptial agreement that protected all his rights to his premarital property, his retirement accounts, the marital home, and every other article of marital property requiring a substantial financial investment from him. In the attachments listing the specified properties that the parties claimed and would retain as their own separate property, plaintiff listed his retirement accounts, his vacant lots, and any property "purchased after the marriage for which I paid more than 90% of the purchase price." The agreement provided that it would supplant any property settlement or distribution that would ordinarily follow from one of the parties obtaining a divorce or dying, and it specifically provided that the parties knew that their respective financial positions would be worse because of the agreement but that their love for one another surpassed material concerns. Defendant signed the agreement on July 29, 2005. About eight months later, plaintiff filed for divorce. He did not first separate from

defendant or leave the marital home, and he did not even tell defendant that he had filed for divorce; instead, defendant was informed by an unfamiliar attorney who discovered the divorce in the court records and blindly offered to represent her.

Plaintiff remained in the Thornhill house and obtained a temporary order to maintain the status quo of joint custody for the children, just as his attorney had requested. He began taking candid photographs of defendant and her day-care business, and, unbeknownst to defendant, he also began secretly recording defendant's actions and the day care's activities. On the basis of what he recorded, he filed several complaints with Children's Protective Services and defendant's licensing bureau. Plaintiff also started becoming intensely involved in therapy for Charles Tyler and Janae. The children's therapist testified that the children would often tell her "bad" things about their mother that their father had told them to tell her. Plaintiff would later ask the therapist if she would report the matters to Children's Protective Services. The therapist never felt obliged to report any of the incidents. Plaintiff also called the sheriff's department to report statements Janae had made about a physical altercation between Janae and her mother. Interestingly, this report arose on the same day that the trial court ordered plaintiff to move out of the Thornhill home. Two days before trial, plaintiff took Charles Tyler and Janae to two different hospitals, raising allegations that the children had told them that defendant had been neglecting them. Again, he asked hospital staff to file a report with Children's Protective Services on the matter. Plaintiff failed to demonstrate at trial that any of these reported incidents, when removed from the glare of his blatant exaggeration, were nearly as severe as he originally made them out to be.

Against this backdrop, the trial court heard evidence that an anonymous tipster telephoned Children's Protective Services in late May 2006 and informed caseworkers that Anthony had inappropriately touched Janae. The report came four years after the alleged contact had occurred, two years after Anthony had been totally removed from Janae's household, and about two months after plaintiff had filed for divorce. Nothing in the record indicated that Anthony had gotten into any further trouble since he left plaintiff's household. The trial court reasonably inferred, without a hint of clear error, that plaintiff was responsible for informing the authorities, contrary to his previous arrangement with defendant. Of course, the matter was investigated, and Anthony was prosecuted, but the incident destroyed plaintiff's credibility as a caring father who was solely looking out for his children's best interests. He never reestablished the tremendous loss to his credibility. The trial court found, on the basis of strong supporting evidence, that plaintiff did not zealously pursue custody, closely monitor defendant, and scrupulously report defendant's most minor transgressions because of any paternal assiduousness, but because he wanted to hurt and defeat defendant. Certainly, his instigation of confrontation in the marital home, his alteration of the children's school arrangements for the sake of investigatory interviews, and his injection of rancorous griping against defendant in the children's therapy sessions all support the inference that plaintiff was willing to sacrifice the children's stability and well-being so that he might obtain a tactical advantage in the divorce litigation.

Ultimately, the trial court's poor opinion of plaintiff's veracity adversely affected its assessment of him under the best-interest factors, and the trial court granted defendant sole legal and primary physical custody of the

children. Having set aside the postnuptial agreement as void, the trial court divided the marital property fairly evenly and ordered plaintiff to pay defendant child support, spousal support, and her attorney fees.

Plaintiff first argues that the trial court erred by declaring the postnuptial agreement void. We disagree. This Court reviews de novo a trial court's interpretation of a contract and its resolution of any legal questions that affect a contract's validity, but any factual questions regarding the validity of the contract's formation are reviewed for clear error. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 157; 719 NW2d 553 (2006). Although plaintiff goes to great lengths to demonstrate how the parties consented to the agreement, under Michigan law, a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages a future separation or divorce. *Day v Chamberlain*, 223 Mich 278; 193 NW 824 (1923). As our Supreme Court stated in *Randall v Randall*, 37 Mich 563, 571 (1877): "It is not the policy of the law to encourage such separations, or to favor them by supporting such arrangements as are calculated to bring them about. It has accordingly been decided that articles calculated to favor a separation which has not yet taken place will not be supported . . . ." In the case at bar, the trial court correctly determined that the postnuptial agreement at issue was calculated to leave plaintiff in a much more favorable position to abandon the marriage. The contract plainly had, as one of its primary goals, defendant's total divestment of all marital property in the event of a divorce. The couple was not separated at the time and had never separated during the marriage, but plaintiff filed for divorce roughly eight months after defendant signed the agreement.

Plaintiff relies extensively on this Court's recent opinion in *Lentz v Lentz*, 271 Mich App 465; 721 NW2d 861 (2006), but he fails to acknowledge that *Lentz* is fundamentally distinguishable from the case at bar. *Lentz* dealt with a couple that had separated and wanted to divide marital assets in anticipation of their imminent divorce. *Id*. at 467, 473. The Court in *Lentz* specifically distinguished cases that involved postnuptial agreements that were not entered into by separated parties, and it specifically recognized that those cases met with much stricter legal scrutiny than postnuptial, postseparation agreements that essentially settled property issues arising in ongoing or imminent divorce litigation. *Id*. at 473-474 & n 5. The higher scrutiny was applied to cases that involved the property rights in a spouse's inheritance, and courts in those cases generally conditioned the enforceability of the provisions on a finding that each party, and the contract itself, expressed a desire to maintain the marital covenant. *Id*.; see *Rockwell v Estate of Rockwell*, 24 Mich App 593, 597-598; 180 NW2d 498 (1970). Therefore, the trial court did not clearly err by finding that the agreement contemplated and encouraged the separation and divorce of a married couple, and it correctly ruled that the agreement was void as against public policy. *Day*, *supra*.

Plaintiff next argues that the trial court erred by awarding defendant sole custody without first explaining to him, on the record, what it meant to have joint custody. We disagree. We review de novo questions of law and issues of statutory interpretation. *Lash v Traverse City*, 479 Mich 180, 186; 735 NW2d 628 (2007).

Plaintiff essentially argues that the trial court's child-custody consideration and final order are void on a legal technicality. He argues, without citing any authority directly supporting the proposition, that the

trial court's custody determination was automatically void because the court did not advise him of the meaning of "joint custody," as required by MCL 722.26a. That statute states, in part, "In custody disputes between parents, the parents shall be advised of joint custody." MCL 722.26a(1). In this case, however, plaintiff was more than "advised" of joint custody; he was actually granted joint custody in both the invalidated ex parte order he filed and in the replacement temporary order to maintain the custodial status quo. Plaintiff filed the initial ex parte order maintaining joint custody, and it was entered the day after he filed his complaint for divorce. During court proceedings, the trial court directly referred to the parties scheduling an equal split of parenting time so that the couple could maintain their equal division of the children's care and custody. Therefore, plaintiff's claims of ignorance regarding the concept or availability of joint custody are totally belied by the record, and his spurious arguments regarding the validity of the trial court's final custody determination have no factual or legal support.

Plaintiff next argues that the trial court's findings regarding several of the best-interest factors were contrary to the great weight of the evidence. MCL 722.28; *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451; 705 NW2d 144 (2005). We disagree. Because this case was heard as a bench trial, the court was obligated to determine the weight and credibility of the evidence presented. *Gorelick v Dep't of State Hwys*, 127 Mich App 324, 333; 339 NW2d 635 (1983). Also, the record reflects a deep-seated animosity between the parties and an irreconcilable divergence in their opinions about how to foster each child's well-being. This antagonism even affected their ability to make civil parenting exchanges. Therefore, joint custody was not an option, because the record reflected that the parties

would not "be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b).

The best interests factors are found at MCL 722.23, and plaintiff challenges the trial court's findings regarding factors b, c, f, g, h, i, and j:

Factor b: "The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). At the time of trial, plaintiff had filed three reports with day-care licensing authorities against defendant and at least two complaints with Children's Protective Services, all of which were "verified" by footage clandestinely captured on DVD by plaintiff while he was still in the home. Plaintiff admitted running a video camera and taping "dangerous" situations in the day care without providing any assistance to the "endangered" children. The record reflects that plaintiff took extensive footage of defendant's activities without her knowledge, and that he openly took an irritating number of still photos of her, too. Throughout the divorce, plaintiff filed three police reports, two attorney grievances, and a motion to disqualify the trial judge. On the basis that Children's Protective Services and law-enforcement officials wanted to interview the children, plaintiff picked up Janae and Tyler from school without telling defendant. One of the children's therapists testified that plaintiff used therapy sessions as "a vehicle for the children to report all the bad things their mother did. Daddy said to tell us. Daddy said to tell you this."

The trial court determined, with adequate justification, that plaintiff was willing to act as though he was interested in the children just to "win" custody from their mother. In contrast, defendant did not appear

intent on exaggerating any wrongdoing, and she credibly answered questions regarding both parties' interest in the children and their love for them, mentioning only that plaintiff's interests in monitoring their lives had intensified significantly with the litigation. She was the primary caregiver for years and was able to answer specific questions about Charles Tyler's needs, Janae's interests, and even young Emma's personality. In light of the trial court's valid findings of manipulation by plaintiff, the trial court did not decide contrary to the great weight of the evidence when it found that this factor, and all the others that hinged on a sincere concern for the children's general well-being, favored defendant.

Factor c: "The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). The trial court correctly found that the parties' financial status, once adjusted, would not create a significant advantage to either party. It also correctly determined that plaintiff's health-care coverage provided him with a superficially better position on this factor. However, the trial court was concerned about how plaintiff had attempted to "misuse health care providers" to interfere with defendant's custody and parenting time, so it found that this factor favored defendant, too. Given plaintiff's misuse of the hospitals before trial and his undue influence over therapists, the trial court's determination of this factor does not run contrary to the great weight of the evidence.

Factor f: "The moral fitness of the parties involved." MCL 722.23(f). Plaintiff adamantly argues that the trial court had no evidence linking him to Anthony's prosecution, which was the primary factor weighing against

him on this issue. However, the inference was a reasonable one in light of plaintiff's other conduct in the case, which made him appear manipulative and generally vindictive. In fact, the only issues plaintiff raises in support of his claim on this factor are greatly exaggerated, and somewhat repugnant, accusations he made against defendant at trial. Interestingly, plaintiff does not spend much effort building his side of the case with evidence of his moral merit. The trial court's determination on this issue was not against the great weight of the evidence.

Factor g: "The mental and physical health of the parties involved." MCL 722.23(g). The trial court found that this factor did not favor either party. Contrary to plaintiff's unverified claims, a psychologist testified that defendant did not have any suicidal tendencies or harbor suicidal thoughts. The psychologist confirmed that defendant had a mild and treatable form of depression called dysthymia. Plaintiff's second argument exaggerates an incident in which defendant shook a fork in Janae's face and told her to stop her inappropriate behavior. In the end, plaintiff tried to influence a therapist into reporting the behavior as abuse, but the therapist did not see any evidence of abuse and refused to yield to plaintiff's pressure. In turn, plaintiff demonstrated unusual patterns of thought and an evasive attitude about his mental makeup. Ultimately, the trial court did not find against the great weight of the evidence when it found that the parties had no physical or mental health issues that inhibited their ability to parent.

Factor h: "The home, school, and community record of the child." MCL 722.23(h). The trial court determined that defendant had a sincere interest in each child's general well-being at home, in school, and in the

child's other activities. The trial court clearly attributed a portion of each child's success to defendant's involvement. In contrast, the trial court did not believe that plaintiff's intensified interest in his children would extend beyond winning custody from their mother. On appeal, plaintiff merely reiterates the self-serving and largely superficial testimony that the trial court rejected as insincere at trial. Therefore, the trial court did not contravene the great weight of the evidence when it determined that this factor favored defendant.

Factor i: "The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). The trial court interviewed all three children, and it did not reveal which party was favored. However, plaintiff argues that the trial court should not have considered Charles Tyler's preference because of his language disabilities. Without any citation of authority, see *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959), plaintiff argues that the trial court abused its discretion by not first holding a competency hearing on Charles Tyler's ability to comprehend the trial court's inquiries. However, the statute leaves the discretion to conduct an in camera interview to the trial court, and plaintiff fails to provide any indication, beyond the bare argument, that Charles Tyler's disability was so severe that the trial court could not have rationally decided that the interview could achieve its intended purpose. Therefore, plaintiff fails to demonstrate any abuse of discretion in the trial court's decision that the in camera interview would prove useful. See *Duperon v Duperon*, 175 Mich App 77, 81-82; 437 NW2d 318 (1989). The trial court's capacity and willingness to exercise sound discretion is apparent from its decision that Emma was too young to provide any helpful information. Plaintiff fails to establish any error in the trial court's decision.

Factor j: "The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). Finally, the trial court correctly found that the evidence in this case established that plaintiff showed a winner-take-all approach to custody, and that he used the children's problems to make him look more favorable and manipulate the custody award. Ironically, plaintiff cites excerpts from his two biggest critics to support his argument that the trial court overlooked evidence that favored him. The therapist plaintiff cites repeatedly testified that plaintiff would prompt the children to bring in "tattletale information" and that defendant was not as eager to resort to those tactics. Likewise, plaintiff cites a portion of defendant's testimony in which defendant claimed that shared custody of Charles Tyler was still possible if plaintiff would correct his behavior. However, plaintiff fails to cite any corresponding testimony that he ever believed that he could collaborate with defendant enough to make shared custody a viable option, so the cited testimony actually reinforces the trial court's determination that plaintiff was the individual responsible for the impossibility of maintaining joint custody. The trial court's findings on this factor did not expressly favor one side over the other, but the trial court unmistakably decided in accordance with the great weight of the evidence when it found that the parties did not have the capacity to facilitate the other parent's relationship with the children. Under the circumstances, the trial court did not find against the great weight of the evidence regarding any of the best-interest factors, and it did not abuse its discretion when it awarded full custody to defendant, with plaintiff receiving fairly limited visitation rights. *MacIntyre*, *supra*.

Plaintiff next argues that the trial court erred in its determination of the child-support award. We disagree. We review for clear error a trial court's factual findings underlying a particular child-support award. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). Plaintiff fails to establish any error in the trial court's determination of his income or in its final determination of the child-custody award. Plaintiff only raises two generic challenges without pointing to any legitimate error in the trial court. First, plaintiff argues that the trial court should have taken an average of his gross incomes from 2005 (which he claims on appeal was $52,764) and 2006 (which he claimed was $53,513.67), leaving a claimed average of $53,138.84. However, plaintiff does not offer any evidence regarding his gross income from 2005 except his trial testimony that it was "around 60." His calculation of his "gross" income from 2006 fails to account for a rather large $10,819.94 exclusion from his taxable income in Box 12 of his State of Michigan W-2. The Medicare and Social Security portions of his W-2 suggest that his "gross" income was actually $64,333.81 for 2006. Given that the trial court's estimate took into consideration plaintiff's habit of taking overtime, plaintiff has not demonstrated clear error in the trial court's use of a $64,901 annual salary as the basis for calculating his child-support obligation.

Second, plaintiff also argues that the trial court misapplied the Michigan Child Support Formula, but he does not specify where the trial court's application went astray, and he does not present an alternative application of the formula. Plaintiff may not merely "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." *Mitcham*, *supra* at 203. Without demonstrating that the trial court deviated from the guidelines, plaintiff fails to demonstrate that the trial court neglected to explain its deviation in accordance with MCL 552.605(2). See *Burba v Burba* (*After Remand*), 461 Mich 637, 645-646; 610 NW2d 873 (2000).

Next, plaintiff argues that the trial court should not have awarded defendant any attorney fees. We disagree. "This Court reviews a trial court's grant of attorney fees for an abuse of discretion." *Stallworth*, *supra* at 288. The trial court did not abuse its discretion by awarding defendant a portion (30 percent) of her general attorney fees and all the attorney fees she incurred to defend against the postnuptial agreement. "Necessary and reasonable attorney fees may be awarded to enable a party to carry on or defend a divorce action." *Id*. Clearly, the trial court deemed that the assertion of the postnuptial agreement in the face of contrary legal precedent amounted to unreasonable conduct. The property distribution envisioned by the agreement was plainly unjust and inequitable, so this finding was adequately supported by the record and justified the trial court's award of all the attorney fees related to the void agreement. See *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Moreover, defendant testified that she had incurred more than $22,500 in attorney fees, and she made only $30,000 a year. Plaintiff made twice as much each year, but the trial court exercised its discretion and awarded defendant only 30 percent of her general attorney fees. Under the circumstances, plaintiff fails to demonstrate that the trial court abused its discretion by awarding defendant a limited amount of her attorney fees. See *Stallworth*, *supra* at 288-289.

Finally, plaintiff argues that the trial court erred by granting defendant alimony. We disagree. This Court

reviews a trial court's award of alimony for abuse of discretion. *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). "The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. Alimony is to be based on what is just and reasonable under the circumstances of the case." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000) (citations omitted). An appellate court should affirm a dispositional ruling, like an award of alimony, "unless the appellate court is left with a firm conviction that the decision was inequitable." *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003).

A brief comparison of the parties' financial circumstances adequately demonstrates ample justification for the relatively modest award of $200 a month in alimony. Plaintiff has a master's degree in Business Administration, which he obtained after the marriage, and defendant has a GED. Plaintiff earns more than $64,000 a year, excluding income from his investigation business and two vacant properties, and defendant earns an estimated $30,000 a year from the day care. During the marriage, defendant was a stay-at-home mom, and plaintiff worked a lot of overtime. Defendant moved into plaintiff's home at the age of 18. Plaintiff was 10 years older and already had established himself in a career. Plaintiff fails to demonstrate that the trial court neglected to consider any of the factors presented in *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991). Instead, plaintiff complains about the amount of debt defendant accumulated and the fact that she was awarded an inordinate portion (half) of the interest in the marital home. However, the trial court assigned defendant all of her $43,000 worth of debt and ruled that any sale of the marital home, including a buyout by plaintiff, would warrant revisiting the award

of spousal support. Under the circumstances, plaintiff fails to demonstrate anything inequitable in the trial court's award of spousal support, and the trial court did not abuse its discretion by awarding defendant $200 a month in spousal support until she remarried, sold the marital home, or died. *Korth*, *supra*.

Affirmed.

TAYLOR v MOBLEY

Docket No. 274628. Submitted January 9, 2008, at Detroit. Decided June 3, 2008, at 9:15 a.m.

Brittany Taylor brought an action in the Lenawee Circuit Court against Jeffrey Mobley and others, seeking damages for injuries she sustained when bitten by the defendants' dog. A jury returned a verdict in favor of the plaintiff, awarding her damages for medical expenses incurred, but not noneconomic damages for pain and suffering and other alleged mental injuries. The court, Harvey A. Koselka, J., denied the plaintiff's motion for a new trial or additur. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by denying the plaintiff's motion for a new trial or additur. Although, the plaintiff argued that a new trial was warranted because the verdict was clearly or grossly inadequate, MCR 2.611(A)(1)(d), or was against the great weight of the evidence, MCR 2.611(A)(1)(e), she did not establish that the jury ignored evidence of noneconomic damages. The jury was free to disbelieve the plaintiff's testimony on noneconomic damages and to credit all countervailing evidence on this issue. The fact that the jury awarded damages based on physical injury did not obligate it to also award damages for pain and suffering.

2. The trial court did not abuse its discretion by not allowing the plaintiff to present at trial evidence that the defendant's dog was a pit bull. The trial court correctly ruled that while the size of the dog was relevant, the fact that it was a pit bull was irrelevant to the issue of damages and was more prejudicial than probative, MRE 403.

Affirmed.

GLEICHER, J., dissenting, stated that a new trial is required because the jury's verdict on noneconomic damages was against the great weight of evidence that established that the plaintiff suffered pain, fright, and shock during and after the dog's unprovoked attack, MCR 2.611(A)(1)(e). No law or legal theory permits a jury to entirely disregard uncontroverted evidence of pain and

> suffering in a strict-liability case like this one, and the court rules unambiguously call for a new trial when a verdict is against the great weight of the evidence. Additionally, the trial court abused its discretion by excluding evidence of the dog's breed. Evidence of the breed had strong probative value in substantiating the plaintiff's fear and shock during the attack, and the risk of undue prejudice was minimal and did not outweigh the probative value of that evidence. MRE 403.

Morgan & Meyers, PLC (by *Courtney E. Morgan, Jr.*, and *Brian J. Nagy*), for the plaintiff.

DeLoof, Hopper, Dever & Wright, PLLC (by *Thomas M. Wright*), for the defendants.

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

SAAD, C.J. In this statutory dog-bite action,[1] plaintiff appeals the judgment entered in her favor because she claims the trial court erred when it denied her motion for a new trial or additur. In her view, the jury's damages award, which failed to award her noneconomic damages for pain and suffering, was either (1) against the great weight of the evidence or (2) clearly inadequate because the jury ignored uncontroverted evidence of pain and suffering. Plaintiff also says that the trial court's evidentiary ruling that precluded plaintiff from identifying the dog's breed denied her a fair trial. For the reasons set forth below, we affirm the trial court's rulings.

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[1] Michigan's dog-bite statute, MCL 287.351, provides, in part:

> (1) If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

I. INADEQUATE MONETARY AWARD/GREAT WEIGHT OF THE EVIDENCE

Plaintiff contends that the trial court should have granted her motion for a new trial or additur because the jury ignored uncontroverted evidence of noneconomic damages, specifically, her pain and suffering in encountering the attack. In analyzing this contention, we are mindful that the adequacy of the amount of damages awarded is ordinarily within the province of the jury and that awards for pain and suffering rest within the sound judgment of the trier of fact.[2] Yet, despite this significant deference we must pay to the jury's determinations, there is room for limited appellate review. MCR 2.611(A).[3]

Plaintiff asserts that the jury award is "inadequate" under MCR 2.611(A)(1)(d) because the jury simply ignored evidence that the dog bite resulted in some measure of pain and suffering, and fright and shock. She argues that the evidence of these damages was uncontroverted because defendants never argued that the dog bite was not frightening or painful, but confined their defense to the extent or amount of the damages. In plaintiff's view, because the jury awarded her past

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[2] *Kelly v Builders Square, Inc*, 465 Mich 29, 35; 632 NW2d 912 (2001); *Bosak v Hutchinson*, 422 Mich 712, 736; 375 NW2d 333 (1985).

[3] MCR 2.611(A) provides, in part:

> (1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
>
> * * *
>
> (d) A verdict clearly or grossly inadequate or excessive.
>
> (e) A verdict or decision against the great weight of the evidence or contrary to law.

medical expenses only, this establishes that the jury ignored this uncontested evidence of other damages. While plaintiff's argument has some surface merit, it does not withstand closer scrutiny, for several reasons, one of which is contained in the verdict form. The verdict form, which, significantly, was prepared by plaintiff, reads:

> *If you find* that Ms. Taylor's injuries resulted in noneconomic damages for pain and suffering; mental anguish; fright and shock; denial of social pleasure and enjoyments; embarrassment; humiliation or mortification; and scarring on her leg, what is the total amount of Ms. Taylor's noneconomic damages to the present date? [Emphasis added.]

Because of the conditional nature of the inquiry posed by the verdict form, plaintiff cannot demonstrate that the jury ignored evidence of noneconomic damages by simply pointing to the jury's entry of zero on the verdict form. The plain language of the verdict form does not compel the conclusion that the jury ignored uncontested evidence of damages, but instead leaves open other plausible explanations. For example, the jury may have considered plaintiff's testimony and either disbelieved plaintiff's testimony regarding pain and suffering or determined that plaintiff's noneconomic damages were insufficiently serious to be compensable, or both. The verdict form asks the trier of fact to decide whether plaintiff sustained noneconomic damages, and, if so, to assign a dollar amount to the damages. The jury could have reasonably considered and properly assigned weight to the evidence presented, and concluded that plaintiff lacked credibility regarding her testimony about pain and suffering or that plaintiff experienced a minimal amount of pain and suffering that was insufficient to warrant compensation.

Moreover, though plaintiff testified that she experienced pain and suffering, the jury may have both disbelieved her and credited and given great weight to countervailing evidence that undermined plaintiff's credibility and spoke to the lack of "seriousness" of this component of damages. The jury may have credited and relied on evidence that plaintiff waited three days before she sought medical attention for the dog bite and, when she did go to the hospital, her treatment was limited to the administration of antibiotics and a prescription for pain medication and did not involve stitches or other surgical procedures. And, though plaintiff did meet with a cosmetologist and a plastic surgeon, these consultations occurred about 18 months after the incident, and plaintiff viewed the $25 treatments offered by the cosmetologist as too expensive. Testimony also revealed that plaintiff appeared to be only in "a little bit of pain" immediately after the "little" dog bite. Of course, most importantly, the jury, and not this Court, had the opportunity to weigh the credibility of plaintiff.[4]

In *Kelly v Builders Square, Inc*, 465 Mich 29, 38-39; 632 NW2d 912 (2001), the Michigan Supreme Court held:

> The grounds for granting a new trial, including a verdict contrary to the great weight of the evidence, are now codified at MCR 2.611(A)(1). The court rule provides the only bases upon which a jury verdict may be set aside . . . . A jury's award of medical expenses that does not include damages for pain and suffering does not entitle a plaintiff to a new trial unless the movant proves one of the grounds articulated in the court rule.

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[4] "[W]here reasonable minds could differ regarding the level of certainty to which damages have been proved, this Court is careful not to invade the fact finding of the jury and substitute its own judgment." *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995).

* * *

> In short, the jury is free to credit or discredit any testimony. It may evaluate the evidence on pain and suffering differently from the proof of other damages. No legal principle requires the jury to award one item of damages merely because it has awarded another item.

Plaintiff and the dissent totally ignore that the jury could have simply disbelieved and discredited plaintiff's testimony regarding pain and suffering.

In light of the jury's unique role in determining plaintiff's credibility and weighing the other evidence that supports the jury's verdict,[5] plaintiff has failed to demonstrate that the verdict was grossly inadequate under MCR 2.611(A)(1)(d) or against the great weight of the evidence under MCR 2.611(A)(1)(e). Thus, plaintiff has not shown that the trial court abused its discretion when it declined to grant her a new trial or additur.[6]

Here, the jury was free to disbelieve plaintiff's testimony regarding noneconomic damages and to credit all countervailing evidence on this issue. *Kelly, supra* at

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[5] The question of credibility is generally for the fact-finder to decide. See *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). Furthermore, the jurors' prerogative to disbelieve testimony, including uncontroverted testimony, is well established. *Strach v St John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987), citing *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948). See also *Harvey v Office of Banks & Real Estate*, 377 F3d 698, 712 (CA 7, 2004); *Kasper v St Mary of Nazareth Hosp*, 135 F3d 1170, 1173 (CA 7, 1998).

[6] Our appellate courts substantially defer to trial courts in their determination to grant or deny a motion for new trial, and, thus, we review for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). Our deference to trial courts rests in large measure on the trial court's opportunity to hear the witnesses and its consequent position to assess credibility. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

38-39. The fact that it awarded damages based on physical injury did not obligate it to also award damages for her pain and suffering. *Id.* at 39. Hence, the trial court properly declined to disturb the jury's award.

II. EVIDENTIARY RULING ON TYPE OF DOG

Plaintiff contends, and the dissent agrees, that the trial court abused its discretion when it excluded evidence that her injuries were caused by a pit bull. Under well-established Michigan law, the decision to admit or exclude evidence is within the discretion of the trial court, and this Court will not disturb the ruling on appeal in the absence of an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). And, though we may have ruled differently, the level of deference we must give to the trial court under well-established Michigan law prohibits reversal if we merely disagree with the trial court. Moreover, a trial court clearly does not abuse its discretion where its decision falls within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Thus, the question before us is not whether we agree with the trial court. Instead, the only question before us is whether the trial court's decision is within the range of principled outcomes.

Though relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. Unfair prejudice exists where there is danger that the evidence will be given undue or preemptive weight by the trier of fact or when it would be inequitable to allow the use of such evidence.

Here, the trial court ruled that while the size of the dog is relevant, the fact that the dog is a pit bull is

irrelevant to the issue of damages and is more prejudicial than probative. The trial court held that there was danger that the jury could give undue weight to evidence that the dog was a pit bull. The trial court's reasoning suggests that, if plaintiff introduced evidence that she was bitten by a pit bull, the jury could confuse or conflate the issues of liability and damages. The trial court expressed concern that the jury could have given undue weight to the reputation of pit bulls as being vicious. Plaintiff is correct in her assertion that there is a difference between being attacked by a pit bull and a chihuahua. However, the trial court recognized and allowed for this difference by permitting plaintiff to describe the size of the dog and the nature and specifics of the attack. We view this evidentiary ruling as a close question, and precisely because this is a close question, we hold that the trial court's evidentiary ruling does not constitute an abuse of discretion. *Maldonado, supra* at 388.

Affirmed.

BORRELLO, J., concurred.

GLEICHER, J. (*dissenting*). I respectfully dissent. The jury's failure to award noneconomic damages irreconcilably conflicted with unrebutted, unchallenged, and undeniable evidence that plaintiff suffered pain, fright, and shock during and after the unprovoked attack by defendants' dog. Because the jury's verdict on noneconomic damages was against the great weight of the evidence, I believe that a new trial is required. MCR 2.611(A)(1)(e).

A new trial may be granted whenever the "substantial rights" of a party are "materially affected" by a verdict or decision that is "against the great weight of

the evidence or contrary to law." MCR 2.611(A)(1)(e). If the record reveals evidence that preponderates so heavily against a verdict that it would be a miscarriage of justice to allow the verdict to stand, a new trial is required. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). This is such a case.

The record evidence demonstrates that the dog's attack was both shocking and painful. Plaintiff drove to defendants' home at the invitation of a friend, who was dating defendant Ryan Mobley and wanted plaintiff to meet him. The parties did not dispute that when plaintiff arrived at Ryan's home and attempted to get our of her car, defendants' pit bull suddenly jumped into the vehicle and bit her abdomen and right inner thigh. Plaintiff screamed and struggled to free herself from the dog's teeth. The dog refused to loosen its grip on plaintiff's leg until Ryan punched it in the head several times. Plaintiff did not know that defendants owned a dog and had no reason to anticipate that the dog would leap at her as soon as she opened her car door. Defendants admitted liability pursuant to a strict-liability statute, which states, in pertinent part, that "the owner of the dog shall be liable for *any* damages suffered by the person bitten . . . ." MCL 287.351(1) (emphasis supplied).

At no time during trial did defendants challenge the obvious fact that plaintiff, a 16-year-old girl suddenly, unforeseeably, and viciously attacked by a pit bull, had suffered fright, shock, and pain. To the contrary, defense counsel admitted in his opening statement that although plaintiff continued to engage in normal activities after the attack, "this isn't to say that she wasn't bitten, that it didn't hurt, or that she didn't have some discomfort during the healing process."

The majority opinion does not address defendants' implicit and explicit trial admissions that plaintiff suf-

fered pain, fright, and shock occasioned when their dog lunged at plaintiff and twice bit her. Rather than acknowledging that the jury patently disregarded its duty to "reasonably, fairly and adequately"[1] compensate plaintiff for her unchallenged injuries, the majority seeks to justify the verdict by using the wording of the jury verdict form to construct a hypothesis that the jury "either disbelieved plaintiff's testimony regarding pain and suffering or determined that plaintiff's noneconomic damages were insufficiently serious to be compensable, or both." *Ante* at 312. In my view, the jury verdict form and the hypothesis advanced by the majority have nothing to do with a correct application of MCR 2.611(A)(1)(e).

A jury is certainly entitled to "disbelieve" a witness's testimony. In this case, however, no evidence contradicted plaintiff's testimony regarding the pain that attended the dog's bites and that she suffered fright and shock during the dog's unforeseen attack. Simply put, no rational or evidentiary basis existed for the jury's "disbelief" of this testimony. The majority apparently concludes that the jury decided that this vicious attack caused neither pain nor fear. If the jury so concluded, it did so against the great weight of uncontroverted evidence.

The majority's suggestion that perhaps the jury decided that plaintiff's noneconomic damages "were insufficiently serious to be compensable" is similarly flawed, both logically and legally. The jury did not conclude that plaintiff sustained *de minimis* damages; it awarded *nothing* for her pain and suffering, despite unchallenged evidence of both. Additionally, no law or legal theory permits a jury to entirely disregard uncontroverted evidence of pain and suffering in a strict-

[1] M Civ JI 50.01.

liability case, on the basis of a finding that these damages qualify as "insufficiently serious to be compensable." The law mandates that the jury compensate an injured plaintiff for his or her injuries, and a jury that refuses to do so nullifies the law.

Similarly, this Court may not abdicate its legal responsibility to carefully and fairly examine the evidence under MCR 2.611(A)(1)(e) when requested to so. The court rule requires us to weigh the evidence actually submitted to the jury and to determine whether the great weight of that evidence preponderated in plaintiff's favor. The verdict form's question regarding noneconomic damages does not, and cannot, alter the nature of the proofs presented at trial. The court rules do not contemplate the construction of hypotheses intended to rehabilitate an unfounded jury verdict that obviously contravenes the great weight of the evidence. Although I agree with the majority that appellate courts owe due deference to a jury verdict, the Michigan Court Rules unambiguously call for a new trial when a verdict is against the great weight of the evidence, and I have difficulty imagining a more appropriate application of that court rule than to this case.

In denying plaintiff's motion for a new trial, the trial court committed an error of law because it did not weigh the evidence of plaintiff's pain, fright, and shock, all compensable elements of damages pursuant to M Civ JI 50.02.[2] Instead, the trial court focused on the fact

[2] Regarding pain, suffering, fright, and shock, the trial court cited only a witness's statement that after the attack, plaintiff "appeared only in a little bit of pain . . . ." The actual witness testimony reflects the following exchange:

Q. Was she crying?

A. She was scared, yeah.

that plaintiff's scarring appeared to be minimal and that she did not see a doctor until three days after the dog had bitten her.[3] Had the trial court followed MCR 2.611(A)(1)(e) and weighed the evidence supporting and refuting plaintiff's claim for noneconomic damages, it would have been forced to concede that *no* evidence contradicted plaintiff's testimony that she suffered pain, fright, and shock and that no reasonable juror could find that the dog's attack was a painless, nonthreatening event. Because the damages verdict went against the great weight of that evidence, the trial court abused its discretion in failing to grant plaintiff's motion for a new trial.

My analysis is entirely consistent with the Michigan Supreme Court's decision in *Kelly v Builders Square, Inc*, 465 Mich 29; 632 NW2d 912 (2001). In that case, a large box fell on the plaintiff's head and shoulder, and the plaintiff sued under a premises-liability theory. The jury awarded the plaintiff economic damages, but nothing for her pain and suffering. *Id*. at 31-32. The plaintiff asserted in a posttrial motion that the jury's awards of economic and noneconomic damages were fundamentally inconsistent, requiring a new trial. *Id*. at 32-33. The trial court granted the motion, and the Supreme Court reversed. The *Kelly* majority held that the trial court improperly awarded a new trial on the basis of verdict inconsistency because MCR 2.611(A) does not include inconsistency as a ground for a new trial. *Id*. at

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Q. Did she appear to be in pain?

A. A little bit. She was bitten by a dog.

[3] The emergency room record introduced at trial states that plaintiff complained of "increased red/pain" at the site of her wounds since the date of the attack and that she received an injection of an antibiotic, as well as a prescription for Tylenol with codeine.

38-39. Notably, the Supreme Court expressly declined to address whether the jury's finding of zero dollars for noneconomic damages contravened the great weight of the evidence under MCR 2.611(A)(1)(e) because the Court determined that the plaintiff failed to preserve that argument. *Id*. at 40. The essence of the *Kelly* decision is that a party is not entitled to a new trial "unless the movant proves one of the grounds articulated in [MCR 2.611(A)(1)]." *Id*. at 38. Plaintiff in the instant case followed our Supreme Court's instruction in *Kelly* and moved for a new trial under MCR 2.611(A)(1)(e).

The majority reasons that "the jury was free to disbelieve plaintiff's testimony regarding noneconomic damages and to credit all countervailing evidence on this issue." *Ante* at 314. Aside from the fact that no countervailing evidence exists in this record, the majority's argument proves too much. If the majority is correct, we must sustain all verdicts challenged on appeal as being against the great weight of the evidence because in every case a jury remains free to ignore overwhelming and uncontroverted evidence. In *Kelly*, the Supreme Court directed courts to follow MCR 2.611(A), not to strip the rule of all meaning. Indeed, the Supreme Court instructed that "[a] jury's award of medical expenses that does not include damages for pain and suffering does not entitle a plaintiff to a new trial *unless the movant proves one of the grounds articulated in the court rule*." *Id*. at 38 (emphasis supplied). A determination whether a verdict contravenes the great weight of the evidence requires careful analysis of the actual evidence, not formulaic rationalizations.

Moreover, our Supreme Court has firmly rejected the notion that judicial review is properly constrained by a jury's ability to accept or reject evidence. In the

summary-disposition context, for example, a nonmoving party may not rely on the potential for jury disbelief to supplant its duty to produce evidence demonstrating the existence of a genuine issue of material fact. MCR 2.116(G)(4). The argument that a jury may simply reject a movant's proffered evidence amounts to nothing more than an impermissible "mere denial," and cannot erase the requirement that a court actually review the evidence when deciding whether to grant summary disposition. See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). Indisputably, a jury remains free to accept or reject any testimony at any time. That truism, however, cannot absolve this Court of its court-rule-imposed responsibility to conduct an evidentiary review in the context of MCR 2.611(A)(1)(e).

In my view, the plain language of MCR 2.611(A)(1)(e) mandates that this Court review and analyze the actual trial evidence. Had the majority done so, it would have concluded that when fairly weighed against the countervailing evidence, the jury's award of zero for plaintiff's noneconomic damages went against the great weight of the record evidence. If MCR 2.611(A)(1) has any true meaning and relevance, I believe a new trial must be ordered.

Finally, I believe that the trial court in the instant case also abused its discretion when it excluded evidence of the dog's breed. MRE 403 "does not prohibit prejudicial evidence; only evidence that is unfairly so." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Only when marginally probative evidence will be afforded undue or preemptive weight should the court exclude it under MRE 403. *Id*. Plaintiff was attacked by a pit bull, not a toy poodle. The breed of the dog had strong probative value in substantiating plain-

tiff's fear and shock during the attack, and the risk of any undue prejudice was minimal; any risk of unfair prejudice did not *substantially* outweigh the high probative value of evidence regarding the dog's breed. The trial court's improper exclusion of the dog's breed contributed to the evisceration of plaintiff's claim for fright and shock damages. In my view, this error was not harmless and, in combination with the jury's unsupported verdict, requires a new trial.

HAYFORD v HAYFORD

Docket No. 276176. Submitted June 4, 2008, at Detroit. Decided June 10, 2008, at 9:00 a.m.

Dirk Hayford petitioned the Cass Circuit Court, Family Division, for a personal protection order (PPO) against his father, Mark Hayford. The court, Susan L. Dobrich, J., issued the PPO and subsequently continued it. The respondent appealed, seeking a *nunc pro tunc* order declaring the PPO invalid.

The Court of Appeals *held*:

1. The PPO did not impermissibly modify the custody of respondent's son. The respondent argued that the trial court could only modify custody under the Child Custody Act, MCL 722.21 *et seq*. The petitioner was 18 years old when he sought the PPO, however, so the Child Custody Act did not apply. While the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*., allows a court to order child support until the child is 19 years and 6 months old if the child is still in high school, the Child Custody Act contains no similar provision allowing custody orders or modifications after the child reaches the age of 18. The trial court did not abuse its discretion by issuing the PPO.

2. The record showed that the respondent had engaged in sufficient acts of harassment to justify issuing the PPO. The trial court's findings on the issues of harassment and emotional distress were not clearly erroneous.

3. Conduct that is constitutionally protected or serves a legitimate purpose is not "unconsented contact," as that term is defined in the stalking statute, MCL 750.411h, and thus cannot amount to harassment. Even if the respondent had a partially legitimate motive for contacting the petitioner—obtaining medical information about the petitioner—the trial court was entitled to conclude from the evidence that the respondent was not acting for a legitimate purpose.

Affirmed.

Laurie S. Longo for the respondent.

Before: WHITBECK, P.J., and O'CONNELL and KELLY, JJ.

PER CURIAM. Respondent Mark Hayford appeals as of right the trial court's decision to issue and continue a personal protection order (PPO) against him at the request of petitioner Dirk Hayford, his son, who was 18 years of age at the time. We affirm.

In November 2006, petitioner, a high school senior, was diagnosed with a potentially cancerous tumor that required surgery. Respondent was contacted for insurance purposes. Petitioner's parents were divorced, and the divorce judgment stipulated that respondent was required to support petitioner and provide medical care until he graduated from high school. Petitioner turned 18 on December 5, 2006.

Although the PPO has been terminated since the filing of this appeal, this appeal is not moot. Before the court issued the PPO, respondent earned a living building rifles and other firearms. Because entry of a PPO may affect eligibility for a federal firearms license, respondent may stand to permanently lose his license and livelihood. Respondent maintains that the PPO should never have been issued and seeks a *nunc pro tunc* order declaring it invalid.

We review for an abuse of discretion a trial court's determination whether to issue a PPO because it is an injunctive order. *Pickering v Pickering*, 253 Mich App 694, 700-701; 659 NW2d 649 (2002); MCL 600.2950(30)(c). An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). We review a trial court's findings of fact for clear error. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). We review de novo questions of statutory interpretation. *State Farm*

Fire & Cas Co v Corby Energy Services, Inc, 271 Mich App 480, 483; 722 NW2d 906 (2006).

Under MCL 600.2950(4), the trial court must issue a PPO if it finds that "there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1)." The relevant acts include:

> (a) Entering onto premises.
>
> * * *
>
> (g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs petitioner's employment or educational relationship or environment.
>
> * * *
>
> (i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.
>
> (j) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence. [MCL 600.2950(1).]

The petitioner bears the burden of establishing reasonable cause for issuance of a PPO, *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999), and of establishing a justification for the continuance of a PPO at a hearing on the respondent's motion to terminate the PPO, *Pickering*, *supra* at 699; MCR 3.310(B)(5). The trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts. MCL 600.2950(4).

Respondent argues that the PPO impermissibly modified the custody of his son and that the Child

Custody Act is the exclusive means through which the custody of his son may be modified. We disagree.

Because petitioner reached majority age before seeking the PPO, the Child Custody Act was inapplicable with respect to custody issues, although it was still applicable regarding child support. The Child Custody Act defines "child" as "minor child and children. Subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, for purposes of providing support, child includes a child and children who have reached 18 years of age." MCL 722.22(d). MCL 552.605b permits the entry of a child-support order in certain circumstances for a child who has reached 18 years of age. If the child is still in high school, MCL 552.605b provides that support may be ordered until he or she reaches 19 years and 6 months of age. Otherwise, as used in the Child Custody Act, "child" means a minor. While the Child Custody Act and the Support and Parenting Time Enforcement Act may provide an age extension for purposes of child support for a child who has reached majority age but has not graduated from high school, no extension exists for custody and visitation orders for a child who has reached majority age but is still in high school. Generally, once the family division of the circuit court exercises jurisdiction over a child and issues an order under the Child Custody Act, "the court's jurisdiction continues until the child is eighteen years old, MCL 722.27(1)(c)[.]" *Bowie v Arder*, 441 Mich 23, 53; 490 NW2d 568 (1992). As this Court explained in *Bert v Bert*, 154 Mich App 208, 211; 397 NW2d 270 (1986), "[j]urisdiction in divorce cases is purely statutory and every power exercised by the circuit court must have its source in a statute or it does not exist. . . . The divorce court's jurisdiction over child custody and visitation matters continues until the parties' children reach age eighteen."

Further, this Court has recognized that a PPO need not comply with the Child Custody Act under certain circumstances. In *Brandt v Brandt*, 250 Mich App 68, 70; 645 NW2d 327 (2002), this Court upheld the trial court's issuance of a PPO prohibiting the respondent from contacting his children without first holding a hearing to assess the "best interests of the child" under the Child Custody Act. The trial court was not making a custody determination when it issued a PPO, but "was simply issuing an emergency order, which was essentially an award of temporary custody of the children to petitioner, while granting respondent parenting time until the divorce proceeding was initiated so that the children might be protected from physical violence or emotional violence or both inflicted on them by respondent." *Id.* This Court further determined that the trial court in *Brandt* had authority under the PPO "catch-all" provision, MCL 600.2950(1)(j), to issue the PPO and prohibit contact. *Id.*

In the instant case, petitioner made it clear to respondent that he did not wish further contact. However, respondent's behavior demonstrated his inability to honor those wishes. He continued to place telephone calls to petitioner's cellular telephone and residence. Respondent attended a band concert at petitioner's school. He placed an advertisement in the newspaper with petitioner's name, the names of his family members, and other personal information, prompting coworkers of both petitioner and his mother to question them about the advertisement. Respondent contacted the office of petitioner's physician sufficient times to cause the doctor to be wary of treating petitioner, and respondent visited the hospital on the day of petitioner's surgery, causing him stress immediately beforehand. At most, the PPO merely temporarily modified respondent's custody rights in order to prevent contin-

ued harassment of petitioner and his family by respondent as petitioner dealt with his difficult medical condition. Moreover, contrary to respondent's assertion, the trial court did not, as part of the PPO, prohibit the exchange of medical information or modify the custody order. Accordingly, the trial court's decision to issue and continue a PPO against respondent fell within the range of principled outcomes. *Woodard*, *supra* at 557.

Respondent additionally argues that there were insufficient acts of harassment or stalking on record to support the PPO. MCL 600.2950(1)(i) prohibits stalking, which MCL 750.411h(1)(d) defines as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

"Harassment" is defined in MCL 750.411h(1)(c) as

> conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

"Unconsented contact" is defined as

> any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:
>
> (*i*) Following or appearing within the sight of that individual.

(*ii*) Approaching or confronting that individual in a public place or on private property.

(*iii*) Appearing at that individual's workplace or residence.

(*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual.

(*v*) Contacting that individual by telephone.

(*vi*) Sending mail or electronic communications to that individual.

(*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual. [MCL 750.411h(1)(e).]

There must be evidence of two or more acts of unconsented contact that caused the victim to suffer emotional distress and that would cause a reasonable person to suffer emotional distress. MCL 750.411h(1)(a).

Against petitioner's wishes and despite the fact that he was facing a difficult health ordeal, respondent appeared at petitioner's high school and at the hospital, repeatedly attempted contact by means of petitioner's cellular and home telephones, contacted petitioner's treating physician at least three times, and placed an advertisement containing personal information about petitioner in the newspapers. Further, respondent also told petitioner that "I'll be everywhere you go and in your back pocket." The record shows that there were sufficient acts of harassment to justify the issuance of a PPO, and the trial court's finding that respondent's behavior was harassing and emotionally abusive was not clearly erroneous.

We also conclude that the record sufficiently supported the trial court's findings regarding the events at the hospital and the letter sent to petitioner's oral surgeon. The trial court's findings regarding the events at the hospital on the day of petitioner's surgery were

based on respondent's own testimony that he went to the hospital in an attempt to give his son and the doctor medical-history information. As for the letter, the trial court's ruling did not specifically find that respondent had composed the letter, but did attribute the letter and its tone to respondent. Although respondent testified that his wife sent the letter, he also testified about the contents of the letter without indicating any disagreement with its tone or content. Respondent failed to object or correct the trial court when it asked him questions referring to respondent as the letter's author: "So this is a letter that you wrote to the dentist?"; "Why didn't you say Dirk's mother [rather than identifying her as petitioner's legal guardian]?"; "You're writing this to the dentist?"; and "And so at this point in time you're writing this kind of letter rather than saying, 'I am Dirk's father. I'm responsible for health—his health insurance.' " Given this testimony, it was not erroneous to conclude that respondent, at the minimum, knew and approved of the letter's contents and tone.

We further conclude that the trial court did not err in holding that petitioner experienced emotional distress, as set forth in the stalking statute, MCL 750.411h, and that the statute does not require a showing of fear. Respondent offers no support for his assertions that the level of emotional distress required under MCL 750.411h is a "heightened" standard or that the distress must manifest itself as fear. The relevant portion of the statute does not require that the petitioner feel afraid, nor does it mention fear. MCL 750.411h(1)(b) defines "emotional distress" as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." The harassment must have caused the petitioner to feel emotional distress and must be conduct that would cause a reasonable person to feel emotional distress, but

MCL 750.411h(1)(c) does not specify that this distress must present itself as fear. Presumably, emotional distress can manifest itself in more forms than fear. Furthermore, the statute lists several emotional reactions that the petitioner may have in response to stalking: feeling terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(1)(d). While many of them do in fact involve fear, the inclusion of "harassed" and "molested" demonstrate that fear is not necessarily required.

Petitioner explained that respondent's behavior caused him to feel stressed, embarrassed, and harassed. Respondent's actions penetrated petitioner's school, work, and family life and affected other members of petitioner's family, which caused further distress. Petitioner and his family had to resort to such lengths as changing their home telephone number in order to avoid contact with respondent. Considering all the evidence presented at the hearing, the trial court correctly concluded that petitioner did in fact experience, and a reasonable person would also have experienced, significant mental stress as a result of respondent's conduct. In sum, the trial court's findings of fact were not clearly erroneous, and this Court is not convinced that a different conclusion should have been reached. See *Sweebe*, *supra* at 154.

Respondent next argues that his conduct was protected because it served a legitimate purpose. Conduct that is constitutionally protected or that serves a legitimate purpose does not constitute "unconsented contact" and thus cannot amount to harassment. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005); MCL 750.411h(1)(c). The Michigan Supreme Court has interpreted the phrase "conduct that serves a legitimate purpose" to mean "conduct that contributes to a valid purpose that would

otherwise be within the law irrespective of the criminal stalking statute." *Nastal*, *supra* at 723.

Respondent's chosen method for obtaining medical information about petitioner—posting an advertisement in the newspaper—was not necessarily to "serve" a legitimate purpose. It was a highly unusual and extraordinary method for obtaining the information, especially by a father who was aware that his 18-year-old son was facing a frightening medical condition. Further, MCL 750.411h(4) provides that a rebuttable presumption arises that the victim was caused "to feel terrorized, frightened, intimidated, threatened, harassed, or molested" if a person continued to engage in unconsented contact even after the victim asked the person to discontinue this behavior or any further unconsented contact. There was evidence that petitioner asked respondent to stop calling or contacting him and to refrain from attending his school functions and the operation at the hospital; nonetheless, respondent continued to engage in these behaviors. Even if respondent had a partially legitimate motive for the contact, the trial court was entitled to conclude from the evidence that respondent was not acting for a legitimate purpose.

Affirmed.

PSYCHOSOCIAL SERVICE ASSOCIATES, PC v
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 276193. Submitted June 3, 2008, at Detroit. Decided June 19, 2008, at 9:00 a.m.

Psychosocial Service Associates, P.C., brought an action in the 52-4 District Court against State Farm Mutual Automobile Insurance Company, seeking payment of no-fault personal protection insurance (PIP) benefits for neurobiofeedback (NBF) services rendered to an insured of the defendant. The defendant moved for partial summary disposition, arguing that because of violations of the Public Health Code (PHC), MCL 333.1101 *et seq*., and the Professional Service Corporation Act (PSCA), MCL 450.211 *et seq*., by the plaintiff, PIP benefits for the NBF services were precluded under MCL 500.3157 as not having been "lawfully rendered." The district court, William E. Bolle, J., denied the motion. The Oakland Circuit Court, Rudy J. Nichols, J., reversed. The plaintiff appealed, and the defendant cross-appealed.

The Court of Appeals *held*:

1. The primary-jurisdiction doctrine, under which initial resolution of issues within the special competence of an administrative agency is required for a claim in court, does not apply in this case to preclude consideration by the judiciary, instead of by the Board of Psychology, of whether the plaintiff's facility and staff members are properly licensed to provide NBF services. The courts are just as capable as the board of interpreting the statutes governing licensure of the practice of psychology when deciding whether the services fall within the practice of psychology and whether the plaintiff falls within an exception to the licensing requirement.

2. The district court properly denied the defendant's motion for partial summary disposition, and the circuit court improperly reversed that decision. There remains a question for the district court's determination regarding whether the NBF procedure used in this case was solely a biofeedback technique falling exclusively within the scope of psychology such that a licensed psychologist was required, or whether it can be characterized as the systematic application of knowledge derived from behavioral sciences that is within the scope of nursing, as psychotherapy that is within the

scope of social work, or as behavior modification that is within the scope of counseling such that those on the plaintiff's staff who were nurses, social workers, or counselors could have rendered the NBF services in question pursuant to MCL 333.18214(4) or (5), which provides exemptions from the licensing requirement to practice psychology. There also remains a genuine issue for the district court regarding whether the plaintiff's sole shareholder was required to be a licensed psychologist to determine whether there was a violation of the PSCA.

Reversed and remanded for further proceedings in the district court.

1. COURTS — JURISDICTION — ADMINISTRATIVE AGENCIES — PRIMARY JURISDICTION.

When determining whether the doctrine of primary jurisdiction applies in a given case, a court should consider to what extent the agency's specialized expertise makes it a preferable forum for resolving the issue, the need for uniformity and consistency in resolution of the issue, and whether the judicial resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities.

2. COURTS — JURISDICTION — ADMINISTRATIVE AGENCIES — PRIMARY JURISDICTION — PSYCHOLOGY.

Courts are just as capable as the Board of Psychology of interpreting the statutes governing licensure of the practice of psychology (MCL 333.18201[1][b]).

Craig S. Romanzi & Associates, PC (by *Craig S. Romanzi*), for the plaintiff.

Scarfone & Geen, PC (by *Joseph T. Longo*) (*Gross, Nemeth & Silverman, P.L.C.*, by *Mary T. Nemeth*, of counsel), for the defendant.

Before: WHITBECK, P.J., and O'CONNELL and KELLY, JJ.

O'CONNELL, J. In this no-fault case involving repayment for services rendered, plaintiff appeals by leave granted a circuit court order that reversed a district court order denying defendant's motion for partial summary disposition. We reverse the circuit

court order, reinstate the district court order, and remand to the district court for further proceedings.

We address plaintiff's jurisdictional question first. Plaintiff argues that whether plaintiff's facility and staff members are properly licensed to provide the services rendered is a regulatory matter that should be considered first by the Board of Psychology, because it has specialized knowledge and, therefore, is better suited to decide whether the services fall within the practice of psychology and whether plaintiff falls within an exception to the licensing requirement. We disagree.

We review de novo the applicability of the primary-jurisdiction doctrine because it is a question of law. *SPECT Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 580; 633 NW2d 461 (2001). Primary jurisdiction is applicable "when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197; 631 NW2d 733 (2001) (citation omitted). Although the doctrine's applicability is determined by "its own facts" on a case-by-case basis, we utilize the following three-pronged test:

> First, a court should consider to what extent the agency's specialized expertise makes it a preferable forum for resolving the issue. Second, the court should consider the need for uniformity and consistency in resolution of the issue. Third, it should consider whether judicial resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities. [*SPECT*, *supra* at 580 (quotation marks and citation omitted.]

In the present case, we find that the district court was not required to defer to the board. The district court, not the board, has original subject-matter jurisdiction over a claim for no-fault benefits. *Id.* Defendant

was not seeking to have plaintiff and its staff members' licenses revoked, an issue squarely within a regulatory agency's sole discretion, see *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 610-611; 327 NW2d 805 (1982), but rather sought the interpretation and application of a statute regarding no-fault benefits. The board does not have specialized knowledge that would make it the preferable forum. The Legislature defined the scope of psychology and the scope of the other fields in which plaintiff's staff members are licensed to practice. The courts are just as capable of interpreting those statutes as the board. Additionally, "requiring the lower court to decide whether these individuals violated the Public Health Code to the extent that plaintiff is unable to recover expenses under the no-fault act would not result in a 'pervasive regulatory scheme' being 'thrown out of balance.' " *SPECT*, *supra* at 581.

Because we find that the district court properly exercised jurisdiction, we move on to plaintiff's claim that the circuit court improperly reversed the district court's order and granted partial summary disposition to defendant to the extent any service fell with the definition of "biofeedback techniques." We agree.

We review de novo a trial court's grant of summary disposition. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 725; 613 NW2d 378 (2000). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* at 725-726. Summary disposition is only appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 726. "In reviewing the trial court's decision, we must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, and, giving the benefit of the doubt to the

nonmoving party, we must determine whether a genuine issue of material fact exists to warrant a trial." *Id.* Issues of statutory construction are also reviewed de novo. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396; 605 NW2d 685 (1999).

Under the no-fault act, an injured insured is entitled to the payment of personal protection insurance (PIP) benefits for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). However, PIP benefit payments are limited under MCL 500.3157: "A physician, hospital, clinic or other person or institution *lawfully rendering treatment* to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered." (Emphasis added.) The issue is whether the services provided by plaintiff were "lawfully rendered" given plaintiff's alleged violations of the Public Health Code (PHC), MCL 333.1101 *et seq*., and the Professional Service Corporation Act (PSCA), MCL 450.211 *et seq*.

"[O]nly treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit." *Cherry v State Farm Mut Automobile Ins Co*, 195 Mich App 316, 320; 489 NW2d 788 (1992). However, services might be lawfully rendered even if a particular service is "excluded" from the scope of the provider's licensed field: " 'The purpose of the licensing statute is not to prohibit the doing of those acts that are excluded from the definition of [the field of practice], but to make it unlawful to do without a license those things that are within the definition.' " *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 65;

535 NW2d 529 (1995), quoting *Attorney General v Beno*, 422 Mich 293, 303; 373 NW2d 544 (1985). An excluded activity would be considered unlawful if it constituted the practice of another field without a license. *Hoffman, supra* at 65. However, "merely because [certain] activities may constitute the practice of [one specialized field, or even several], . . . does not thereby inevitably mean that they are not within the scope of [another]." *Beno*, *supra* at 332. Indeed, the PHC provides that its provisions "shall be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2).

To determine if the circuit court properly determined that neurobiofeedback (NBF) falls exclusively within the scope of psychology, we must examine the various statutes under which plaintiff and its staff are licensed and compare them with other provisions of the PHC. Under the PHC, those licensed to practice medicine have the broadest grant of authority and provide services related to a patient's physical or mental health. MCL 333.17001(d). The following parameters are provided with respect to the practice of psychology:

> (a) "Psychologist" means an individual licensed under this article to engage in the practice of psychology.
>
> (b) "Practice of psychology" means the rendering to individuals, groups, organizations, or the public of services involving the application of principles, methods, and procedures of understanding, predicting, and influencing behavior for the purposes of the diagnosis, assessment related to diagnosis, prevention, amelioration, or treatment of mental or emotional disorders, disabilities or behavioral adjustment problems by means of *psychotherapy, counseling, behavior modification, hypnosis, biofeedback techniques, psychological tests, or other verbal or behavioral means*. The practice of psychology shall not include the practice of medicine such as prescribing drugs, performing

> surgery, or administering electro-convulsive therapy. [MCL 333.18201(1) (emphasis added).]

Although several of the staff members at plaintiff's clinic have master's degrees in psychology and limited licenses, the statute specifically provides for two limitations placed on such a license, one of which is "supervision by a psychologist who has a license other than a limited license." MCL 333.18223(2). As there are no fully licensed psychologists at plaintiff's clinic to supervise the staff members, no staff member, even those with a master's degree in psychology and a limited license, may practice psychology. Therefore, NBF can only be "lawfully rendered" if it falls within the scope of the other licenses of plaintiff's staff and is not exclusively within the scope of psychology.

None of the "means" enumerated in MCL 333.18201(b) is defined in the statutes or administrative rules, so we may consult dictionary definitions of those terms. *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006). " '[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.' " *Id.*, quoting MCL 8.3a. Because the terms involve the provision of health care and the terms may have acquired a "peculiar and appropriate meaning" in fields involving health care, it is appropriate to look to medical dictionaries. *Woodard*, *supra* at 561.

"Psychotherapy" is defined in *The American Heritage Medical Dictionary* (2007) as "the treatment of mental and emotional disorders through the use of psychological techniques designed to encourage communication of conflicts and insight into problems, with the goal being personality growth and behavior modification." "Behavior modification" is defined as "the use

of basic learning techniques, such as conditioning biofeedback, reinforcement, or aversion therapy, to teach simple skills or alter undesirable behavior." *Id.* "Biofeedback," to which NBF is related, given its name, is defined as follows:

> The process of making involuntary and unconscious bodily functions (as the heartbeat) perceptible to the senses (of vision and hearing) in order to control them by conscious mental effect. [Bender, *Attorneys' Dictionary of Medicine* (2000).]
>
> [A] method of learning to modify a particular body function, as temperature, by monitoring it with the aid of an electronic device. [*Random House Webster's College Dictionary* (1997).]

There are also specific definitions for NBF, also known as neurotherapy and EEG biofeedback:

> Neurofeedback . . . , also called neurotherapy, neurobiofeedback or EEG biofeedback (EEGBF) is a therapy technique that presents the user with realtime feedback on brainwave activity, as measured by electrodes on the scalp, typically in the form of a video display, sound or vibration. The aim is to enable conscious control of brainwave activity. If brain activity changes in the direction desired by the therapist, a positive "reward" feedback is given to the individual, and if it regresses, either a negative feedback or no feedback is given (depending on the protocol). Rewards can be as simple as a change in the pitch of a tone or as complex as a certain type of movement of a character in a video game. This experience could be called operant conditioning for internal states. [*The Free Encyclopedia* <http://encyclopedia.thefreedictionary.com/Neurofeedback> (accessed May 23, 2008).]

Under this definition, it may be that the NBF procedure utilized by plaintiff is a "biofeedback technique." But, under the various additional definitions, it is also clear that "biofeedback" is a subset of "behavior modi-

fication," which in turn is a subset of "psychotherapy." We find that NBF clearly falls within the practice of psychology because it falls within the definitions of several different "means" in MCL 333.18201(b). However, this does not answer the question whether NBF is *exclusively* within the scope of the practice of psychology. Indeed, we find nothing in the statutory language that specifically restricts NBF to the practice of psychology. "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998).

Initially, we note that MCL 333.18214 provides several exemptions from the licensing requirement to practice psychology:

> (4) This part does not prohibit a certified, licensed, registered, or otherwise statutorily recognized member of *any profession including* a lawyer, *social worker*, school counselor or marriage counselor from practicing his or her profession as authorized by law.
>
> (5) This part does not prohibit a clergyman, professional educator, or *professional counselor*, including an alcoholism or drug abuse counselor, *whose practice may include preventative techniques, counseling techniques, or behavior modification techniques* from practicing his or her profession consistent with his or her training and with a code of ethics for that respective profession. [Emphasis added.]

Both Steven White and James White are licensed registered nurses, and James White is also a licensed nurse practitioner. The practice of nursing is defined as

> the systematic application of substantial and specialized knowledge and skill, derived from the biological, physical and *behavioral sciences*, to the care, treatment, counsel, and health teaching of individuals who are experiencing

> changes in the normal health processes or *who require assistance in the* maintenance of health and the prevention or *management of illness, injury, or disability*. [MCL 333.17201(1)(a) (emphasis added).]

James White is also a licensed social worker, and Donald Deering is a licensed social service technician. MCL 333.18501(1) defines the practice of social work:

> (g) "Practice of social work at the master's level" means, subject to subsection (5), all of the following applied within the scope of social work values, ethics, principles, and advanced skills:
>
> (*i*) The advanced application of the knowledge of human development and behavior and social, economic, and cultural institutions.
>
> (*ii*) The advanced application of macro social work processes and systems to improve the social or health services of communities, groups, or organizations through planned interventions.
>
> (*iii*) The application of specialized clinical knowledge and advanced clinical skills in the areas of *assessment, diagnosis, and treatment of mental, emotional, and behavioral disorders, conditions, and addictions*. Treatment methods include the provision of advanced social work case management and casework and individual, couple, family, or group counseling and *psychotherapy* whether in private practice or other settings.
>
> (h) "Social service technician" means an individual registered under this article who is specially trained to practice only under the supervision of a licensed master's social worker or a licensed bachelor's social worker. [Emphasis added.]

MCL 333.18501(5) provides:

> The practice of social work at the master's level does not include the practice of medicine or the practice of osteo-

> pathic medicine and surgery, including, but not limited to, the prescribing of drugs or administration of electroconvulsive therapy.

Additionally, both nurses and social workers are required to take continuing education courses in pain and pain-symptom management, which may include courses regarding "behavior modification" or "behavior management." See Mich Admin Code, R 338.2908m(1) and 338.10601(2)(a).

Deering is also a licensed counselor who, pursuant to MCL 333.18101(b), is authorized "to engage in the practice of counseling." The practice of counseling is defined, in relevant part, as

> the application of clinical *counseling principles, methods, or procedures* . . . . The practice of counseling *does not include the practice of psychology except for* those preventative techniques, counseling techniques, or *behavior modification techniques for which the licensed counselor or limited license counselor has been specifically trained.* [MCL 333.18101(d) (emphasis added).]

"Counseling principles, methods, or procedures" include the application of behavioral modification techniques. MCL 333.18101(a)(*ix*). As the definitions and statutory provisions above provide, the NBF procedure utilized by plaintiff can be characterized as "psychotherapy," which is within the scope of social work, or "behavior modification," which is within the scope of counseling. Because James White is certified by the Biofeedback Certification Institute of America for EEG biofeedback, he arguably meets the requirements under MCL 333.18101(d) of being specifically trained in what is potentially a "behavior modification technique." Accordingly, we conclude that there remains a question for the district court regarding how NBF should be characterized. Depending on how NBF is characterized, the

services provided by plaintiff and its staff may indeed have been "lawfully rendered."[1] Therefore, the district court properly denied defendant's motion for partial summary disposition, and the circuit court improperly reversed that decision.

Because we determine that there is a genuine issue for the district court regarding whether the NBF procedure utilized was solely a biofeedback technique falling exclusively within the scope of psychology, there also remains an issue of fact regarding whether plaintiff's sole shareholder was required to be a licensed psychologist before it can be determined if there was a violation of the PSCA. Accordingly, defendant was not entitled to summary disposition on this issue, regardless of the outcome of the pending appeal before our Supreme Court in *Miller v Allstate Ins Co* (*On Remand*), 275 Mich App 649; 739 NW2d 675 (2007), lv gtd 480 Mich 938 (2007).

We reverse the circuit court order granting defendant's motion for partial summary disposition, reinstate the district court's dismissal of defendant's motion for partial summary disposition, and remand to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[1] We note that the district court intended to take "some evidence from people to educate [it]." We agree that "an evidentiary hearing at which experts from the licensing board or other qualified individuals could render their decision" would be appropriate in this situation and is consistent with the trial court's gatekeeping function under MRE 702. See *Chapin v A & L Parts, Inc*, 274 Mich App 122, 126; 732 NW2d 578 (2007).

DEPARTMENT OF ENVIRONMENTAL QUALITY v WATEROUS CO

Docket No. 272968. Submitted March 11, 2008, at Lansing. Decided April 15, 2008. Approved for publication June 24, 2008, at 9:00 a.m.

The Department of Environmental Quality (DEQ) brought an action in the Ingham Circuit Court against Waterous Co., as corporate successor to Traverse City Iron Works (TCIW), for alleged soil, groundwater, surface water, and sediment pollution caused by TCIW at its former foundry and manufacturing operation adjacent to the Boardman River in Traverse City. The DEQ sought monetary, declaratory, and injunctive relief, including investigation and remediation of the contamination under parts of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*., and MCL 324.20101 *et seq*., and common-law nuisance relief. The DEQ alleged that it had already expended more than $1.6 million in public funds for response-activity costs. The court, Joyce Draganchuk, J., denied Waterous's motions for summary disposition and also denied a motion for reconsideration of its denial. The court did determine that clarification of its determinations regarding cleanup costs was appropriate and entered an order stating that the court's opinion shall reflect that a genuine issue of material fact remains regarding whether Waterous is liable for remediation costs under residential/commercial criteria or an industrial criterion. The parties stipulated dismissal of the claims asserting natural-resources damage, costs related to natural-resources-damage assessment, and liability for injuries to natural resources. The claims against Waterous for all response activity costs, including attorney fees and interest, as sought in paragraph C of the "relief requested" portion of the complaint, were resolved before trial by stipulation and order, which required Waterous to pay $1.25 million. Following a bench trial, the court held that the site was a "facility" under the NREPA and that the sand, slag, and core material on the site were a "hazardous substance." The court concluded that there had been a direct discharge of hazardous materials into the river, that such materials are or may become injurious to the public health, safety, or welfare, and that the conditions at the site constituted a public nuisance. The court determined that Waterous, as TCIW's successor in interest, was responsible for the environmental liabilities by

operation of law. The court noted that the due-care obligations of the present owner and developer of the site did not extinguish any of Waterous's liability and that, with respect to the governing remediation criteria, the remedial action should be consistent with the current zoning of the site rather than the zoning at the time of TCIW's discharge of hazardous materials. The court also held that it was the responsibility of Waterous to investigate and remediate with regard to the extent of any groundwater contamination. The court also entered a permanent, mandatory injunction ordering Waterous to perform the required response activities. Waterous moved to amend or clarify the judgment and for reconsideration, and the court denied the motion. Waterous appealed.

The Court of Appeals *held*:

1. The trial court properly determined that the proper cleanup criteria should be consistent with the current zoning and use of the property at the time of remedial action.

2. The parties' stipulation only operated to dismiss the DEQ's claims for natural-resources damage and left for the trial court the determination of the issues concerning injunctive and declaratory relief.

3. The trial court properly ordered Waterous to perform the required response activities of investigating and remedying all the possible hazardous-substances contamination in the soils, groundwater, and river sediments of the facility even though only certain substances had been alleged to exceed the applicable criteria and evidence was only introduced concerning those substances.

4. The trial court did not err in finding that Waterous was the liable party under the NREPA and that Waterous therefore was obligated to perform the requisite remediation at the site. Waterous, as the prima facie liable party, bore the burden of showing that it was not actually liable for the contamination at issue. Failing to make that showing renders a liable party jointly and severally liable. If Waterous believes that other potential contributors are responsible, its proper remedy is to seek redress under MCL 324.20129.

5. The trial court properly determined that, pursuant to the merger agreement between TCIW and Waterous, which specifically incorporated the terms of the Business Corporation Act, MCL 450.1101 *et seq.*, Waterous, as TCIW's successor in interest, stood in TCIW's shoes for the purposes of liability.

6. The trial court did not abuse its discretion in admitting the testimony of the DEQ's expert witness and the evidence on which the witness based his testimony.

7. Where a nuisance is temporary, that is, one that is abatable by reasonable curative or remedial action, damage to property affected by the nuisance is recurrent, and monetary damages may be recovered from time to time until the nuisance is abated. The claims here involve a temporary nuisance. The trial court did not err in holding that, because the nuisance was continuing, the claim was not barred by the statute of limitations.

8. A DEQ administrative rule, Mich Admin Code, R 299.5115, provides that the DEQ has no obligation to notify a party until the DEQ determines that an identifiable party is liable. The DEQ had no duty to notify Waterous when Waterous was only a potentially liable party.

9. There is no merit to Waterous's spoliation-of-evidence claim.

Affirmed.

1. ENVIRONMENT — ENVIRONMENTAL CONTAMINATION — REMEDIAL ACTION PLANS — CLEANUP CRITERIA.

The Natural Resources and Environmental Protection Act provides that the proper environmental-cleanup criteria applicable to a remedial-action plan for property should be consistent with the current zoning and use of the property at the time of the remedial action (MCL 324.20120a[6]).

2. ENVIRONMENT — ENVIRONMENTAL CONTAMINATION — RESPONSE ACTIVITY.

A party who is liable for the performance of response activity under the Natural Resources and Environmental Protection Act has the responsibility to perform all necessary response activities, including investigating and evaluating the full nature and extent of contamination at the subject facility (MCL 324.20101[1][m] and [ee]; MCL 324.20118[1]).

3. ENVIRONMENT — ENVIRONMENTAL CONTAMINATION — LIABILITY.

A party who is the prima facie liable party for environmental contamination bears the burden of showing that it is not actually liable for the contamination; failing to make that showing renders the liable party jointly and severally liable; however, if the liable party believes that other contributors are responsible, its proper remedy is to seek relief under MCL 324.20129 (MCL 324.20126[6]; MCL 324.20126a[1]; MCL 324.20129[3]).

4. NUISANCE — TEMPORARY NUISANCES — DAMAGES.

Damage to property affected by a temporary nuisance, that is, one that is abatable by reasonable curative or remedial action, is

recurrent, and monetary damages may be recovered from time to time until the nuisance is abated.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Robert P. Reichel*, Assistant Attorney General, for the plaintiff.

Varnum, Riddering, Schmidt & Howlett LLP (by *Charles M. Denton* and *Joshua M. Wallish*) and *Burr & Forman LLP* (by *J. Ross Forman, III*), for the defendant.

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

PER CURIAM. Defendant Waterous Co. (Waterous) appeals as of right the judgment in favor of plaintiff Michigan Department of Environmental Quality (DEQ) entered after a bench trial. This case arises out of the DEQ's claim for damages and injunctive relief against Waterous for alleged contamination of certain property and the adjoining Boardman River. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. FACTS

This case stems from the use of certain property located adjacent to the Boardman River in Traverse City, Michigan. Traverse City Iron Works (TCIW) used the property at issue (the Site) for a foundry operation from the early 1900s until 1974, when TCIW moved its foundry operation. While TCIW was using the Site as a foundry, sand used as molds for the molten iron (core/mold sand) and slag were discarded on the Site, along the bank of the Boardman River. Environmental studies later revealed that approximately 80,000 cubic yards of foundry waste were present on the Site, in some places in direct contact with the water table and the river sediments.

TCIW merged with Waterous in 1978, and the Site was conveyed to Waterous in July 1980. However, it is undisputed that Waterous never performed any industrial operations on the Site or made any changes or improvements to the Site.

Waterous then sold the Site to a developer, TCI Associates, in February 1982. At the request of Traverse City (the City), all existing structures were torn down. TCI Associates later combined the Site with other adjoining parcels for the purpose of redevelopment. However, TCI Associates never actually redeveloped the Site; instead, TCI Associates sold the Site and adjoining parcels to another developer, Northern Rock Holdings, L.L.C. (Northern Rock) (doing business as River's Edge Development), in February 1997.

In June 1997, the City sought a Site Reclamation Program Grant (SRP Grant)[1] from the DEQ to remediate the Site so that Northern Rock could redevelop it for commercial and residential use. The SRP Grant was approved in September 1997 in the amount of $1,582,975, and remediation and redevelopment work began shortly thereafter. Under the SRP Grant, the DEQ paid the City for certain costs, including installing a retaining wall along the bank of the adjoining Boardman River and backfilling behind the wall.

In December 2002, the DEQ formally notified Waterous that it was liable for contamination at the Site and responsible for the release of hazardous substances that exceeded the residential cleanup requirements of the National Resources and Environmental Protection Act (NREPA).[2] The DEQ noted that, in accordance with state law, it had already spent state funds to perform

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[1] MCL 324.19506 *et seq*.

[2] See MCL 324.20120a(1)(a) and (17).

response activities at the Site. The DEQ demanded that Waterous undertake necessary response activities, as well as provide reimbursement for past and future response activities by the state.

B. THE COMPLAINT

In October 2003, the DEQ filed this lawsuit against Waterous, as corporate successor to TCIW, for alleged soil, groundwater, surface water, and sediment pollution caused by TCIW at its former foundry and manufacturing operation adjacent to the Boardman River in Traverse City. The DEQ sought monetary, declaratory, and injunctive relief, including investigation and remediation of the contamination under the NREPA,[3] and common-law public nuisance relief. The DEQ alleged in its complaint that the state had expended more than $1.6 million in public funds for response-activity costs.

C. WATEROUS'S PRETRIAL MOTIONS

In February 2004, Waterous filed a Notice of Fault of Non-Parties, identifying numerous other parties who were or may be wholly or partially at fault for the damage alleged in the DEQ's complaint. Waterous claimed that each of the named parties was located in Grand Traverse County and had emitted contaminants into the environment, in varying amounts and over various periods, in proximity to the Site. In December 2004, Waterous filed a supplemental Notice of Fault of Non-Parties.

In February 2005, Waterous filed three motions for summary disposition. In its first motion, Waterous

[3] MCL 324.3101 *et seq*. and MCL 324.20101 *et seq*. (parts 31 and 201 of the NREPA).

sought dismissal of the DEQ's NREPA claims, arguing that the DEQ had failed to meet its burden of proof to show that TCIW's foundry operations caused contamination of the Boardman River. Waterous pointed out that its environmental expert stated that any contamination of the Boardman River "did not originate from the TCIW Site, but likely originated from other properties around the lake." Waterous also pointed out that DEQ project manager John Vanderhoof conceded that there were multiple potential contributors to the Boardman River sediment contamination. The DEQ responded to this motion, arguing that undisputed deposition testimony established that TCIW systematically dumped foundry waste along and into the river; thus, there was at least a genuine issue of material fact regarding the extent of the contamination that TCIW caused. The DEQ pointed out that the fact that other parties might be liable was not a defense to Waterous's joint and several liability.

In its second motion, Waterous argued, in pertinent part, that the three-year period of limitations set forth in MCL 600.5805(10) time-barred the DEQ's nuisance claim. Waterous noted that, according to the complaint, operations at the property ceased in 1981. The DEQ responded to this motion, arguing that MCL 600.5805(10), which applies to *recovery of damages* for injury to a person or property, did not apply under the circumstances. The DEQ asserted that because it was seeking *injunctive relief* to abate a public nuisance, the six-year period of limitations set forth in MCL 600.5813 was the applicable period governing its claim. The DEQ further asserted that because the nuisance was continuing, the period of limitations was tolled.

In its third motion, Waterous argued that many of the costs for which the DEQ sought reimbursement

were not environmental-cleanup costs necessary under part 201 of the NREPA, but were instead costs incurred as a result of residential redevelopment of the Site. Waterous argued that the costs for which the state could be reimbursed did not include costs incurred to clean up a site according to more stringent criteria than those that are consistent with the Site's historical industrial use.[4] Waterous also argued that at the time the SRP Grant was filed in June 1997, the DEQ knew about Waterous's prior ownership of the land, yet it failed to notify Waterous of the claimed contamination at the site until December 2002, in violation of DEQ Administrative Rule 299.5115, Mich Admin Code, R 299.5115.[5] Waterous further pointed out that John Vanderhoof's testimony indicated that the failure to notify Waterous was intentional and politically motivated. Therefore, Waterous argued that the DEQ did not want Waterous coming in and performing work and testing that might slow down the redevelopment and the achievement of goodwill that the DEQ hoped would be generated with the completion of the project. Waterous further noted that many of the costs sought to be reimbursed were actually for development and construction rather than environmental cleanup. Finally, Waterous argued that included in the costs

[4] See *Detroit v Simon*, 247 F3d 619 (CA 6, 2001).

[5] Mich Admin Code, R 299.5115 provides, in pertinent part:

> (1) Except as provided in subrule (3) of this rule, before beginning response activity at a facility with public funds, the department shall provide notice to persons who are liable who have been identified, as described in this rule.
>
> * * *
>
> (3) The requirements of this rule shall not apply when the department has not determined that a person is liable or when the notice process would unreasonably delay the response.

sought to be reimbursed were costs associated with the developer's part 201, § 20107a "Due Care" obligations.[6]

The DEQ responded to this motion, arguing that it had no obligation to notify Waterous of its liability until the DEQ actually made a determination that Waterous was liable. The DEQ further argued that, even assuming that it had failed to properly notify Waterous, such noncompliance was no defense to Waterous's liability. The DEQ argued that all the assessed costs were for response activities under part 201. The DEQ also argued that it was entitled to reimbursement under the commercial/residential criteria because that was how the land was zoned in 1997 when state-funded response activities commenced. Lastly, the DEQ argued that under the NREPA, Waterous was jointly and severally liable for the costs incurred.

After hearing oral arguments on Waterous's motions for summary disposition, the trial court denied all three motions, ruling that the nuisance alleged was a continuing wrong and, therefore, not barred by the statute of limitations. The trial court further concluded that there were material factual disputes on the issue of sediment contamination and agreed with the DEQ that the fact that there may have been other contributors to the contamination did not relieve Waterous of its liability. Turning to the notification issue, the trial court concluded that the DEQ was not required to notify a party until it determined that the party was liable. The trial court reasoned that even if the chain of title did mention Waterous, such mention did not necessarily equate with liability. The trial court further found that there were questions of fact regarding whether the

[6] MCL 324.20107a.

costs that the DEQ sought to have reimbursed were actually associated with environmental-cleanup costs or were for construction purposes. Turning to the criteria used to assess the costs, the trial court noted that the historical use of the Site was not purely industrial; the trial court explained, "Where the industrial use ceased in 1981, the site was not used until 1997 when it was developed for a mixed residential and commercial use, and I cannot find that the wrong historical use criteria are being used here."

Waterous moved for reconsideration of the trial court's denial of its motions for summary disposition. With respect to the nuisance claim, Waterous first conceded that the proper period of limitations was the six-year period of limitations set forth in MCL 600.5813. However, Waterous argued that the trial court erroneously relied on *Bielat v South Macomb Disposal Auth*[7] in determining that the alleged contamination constituted a continuing nuisance because that case was not only unpublished, but also materially distinguishable. In that case, and the cases relied on therein, the tortious acts were ongoing, as opposed to merely the harmful effects of completed conduct. Waterous pointed out that it was undisputed that the operations on the Site here ceased by 1981; therefore, the wrong was not continuing, and the period of limitations expired in 1987. Waterous further argued that, even assuming that the nuisance was continuing, the DEQ's claim was limited to those events that occurred within six years of when the suit was filed. With respect to the notice issue, Waterous argued that the trial court ignored evidence supporting a finding that the DEQ

[7] *Bielat v South Macomb Disposal Auth*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 249147).

knew of Waterous's potential liability as early as 1980. Waterous further sought clarification of the trial court's decision regarding the historical use of the Site. Waterous conceded that in 1981 a small portion of the Site was rezoned residential, but Waterous contended that the appropriate focus should be on the prior use, not just zoning.

On April 12, 2005, the trial court entered an order stating that reconsideration of its denial of the motions for summary disposition was not warranted. The trial court concluded, however, that clarification on the cleanup-costs issue was appropriate. Therefore, the trial court granted Waterous's motion to clarify and ordered that "[t]he Court's opinion shall hereby reflect that a genuine issue of material fact remains on whether [Waterous] is liable for remediation costs under the residential/commercial criteria or the industrial criterion."

D. PRETRIAL STIPULATIONS

On March 11, 2005, the parties stipulated the dismissal of the DEQ's natural resources claims. The stipulated order provided, *in toto*:

> The parties, by their individual counsel, hereby stipulate, pursuant to MCR 2.504(A)(1)(b), that the portion of [the DEQ]'s Complaint asserting State claims for natural resources damages, natural resources damages assessment costs, and liability for injuries to natural resources, which were or could have been asserted herein be dismissed with prejudice, and without costs.

Further, the DEQ's claims against Waterous for "all response activity costs, including attorneys' fees and interest, as sought in Paragraph C of the Relief Requested portion of [the DEQ]'s complaint" were later

resolved before trial by stipulation and order, which required Waterous to pay $1.25 million.

E. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

After a two-week trial, the distinguished trial court issued a well-reasoned and comprehensive 31-page opinion detailing its findings of fact and conclusions of law in July 2006.

According to the trial court,

> [a]t the time of trial, the issues to be decided were whether a declaratory judgment should issue finding [Waterous] liable for future response activity costs under Parts 31 and 201 of NREPA, whether [the DEQ] should receive injunctive relief and whether [Waterous] is responsible for abatement of a public nuisance.

With respect to part 201 of the NREPA, the trial court concluded that the Site was a "facility," which MCL 324.20101(1)(o) defines as "any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of [MCL 324.20120a(1)(a) or (17)] or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located." The trial court based this conclusion on testimony from former TCIW employees, who testified about the dumping of sand, slag, and core material, and the testimony of Roger Mawby, a geotechnical engineer, who testified that soil and groundwater samples taken from the Site exceeded the "generic residential clean-up criteria." The trial court also concluded that the sand, slag, and core material were a "hazardous substance," which MCL 324.20101(1)(t)(*i*) defines as "[a]ny substance that the department demonstrates, on a case by case basis, poses an unacceptable risk to the public health, safety, or welfare, or the environment, consid-

ering the fate of the material, dose-response, toxicity, or adverse impact on natural resources." The trial court based this conclusion on soil-sampling data collected in 1998 that demonstrated that the soil on the Site "contained arsenic, cadmium, copper, lead and zinc at levels above the generic residential criteria." The trial court noted that Vanderhoof had opined that there was contamination in the soil and groundwater at the Site that posed a risk of harm to either human health or the environment.

Turning to part 31 of the NREPA, the trial court concluded that the DEQ had proven by a preponderance of the evidence that there was direct and indirect discharge of the sand, slag, and core material into the Boardman River.[8] Further, having already concluded that the materials were hazardous, the trial court concluded that it was proved that the materials are or may become injurious to the public health, safety, or welfare. The trial court then went on to conclude that the conditions at the Site constituted a public nuisance, noting that "[i]t is difficult to imagine a right more common to the public than the right to a safe and healthy environment."

The trial court further concluded that, even though Waterous never owned the Site while any release of contamination took place, Waterous was indeed liable for the discharge because, as TCIW's successor in interest, Waterous stood in TCIW's shoes for the purposes of liability. The trial court based this decision on the merger agreement between TCIW and Waterous and the Michigan Business Corporation Act,[9] which both stated that a surviving corporation, like Waterous, assumed all the liabilities of the other corporate parties

[8] See MCL 324.3109.

[9] MCL 450.1724(1).

to the merger. The trial court acknowledged that article 4.1(g) of the Waterous/TCIW Plan of Reorganization and Agreement of Merger indicated that Waterous was not intended to be liable for any obligations not stated in TCIW's balance sheets at the time of merger, but nevertheless concluded that Waterous was responsible for the environmental liabilities by operation of law. The trial court found it significant that Waterous failed to comply with MCL 324.20126(1)(c), which allows certain innocent purchasers to avoid liability. The trial court refused to allow Waterous to create its own innocent-purchaser exception not provided by statute.

Turning to the remediation efforts, the trial court concluded that the developer's due-care obligations did not extinguish any liability of Waterous. The trial court further noted that the effect of the developer's activities on the land, for example, the exacerbation of the contamination, was not at issue in this case. Nevertheless, the trial court explained that any such exacerbation was not an intervening cause to extinguish Waterous's liability. With respect to the governing remediation criteria, the trial court concluded, on the basis of the language of part 201 of the NREPA, that remedial action should be consistent with current zoning, not historical use of the property: "The property is now zoned as a Developmental District and a mixed residential/commercial use is allowed. Thus, the use of the property necessitates any future clean-up be conducted to meet residential zoning requirements."

The trial court concluded that the testimony revealed that the extent of any groundwater contamination had yet to be determined; thus, further potential remedial action was necessary. The trial court further concluded that although other businesses may have contributed to sediment contamination, this possibility did not negate

a conclusion that dumping at the Site into the Boardman River has had and may continue to have an impact on aquatic life: "As in the case of the soil and the groundwater, the full extent of the contamination and its impact are unknown. It is by law [Waterous's] responsibility to investigate and remediate."

In sum, the trial court held that the DEQ had proved by a preponderance of the evidence that it was entitled to declaratory and injunctive relief. The trial court simultaneously entered judgment in favor of the DEQ, declaring Waterous to be liable under MCL 324.20126(1)(b) and MCL 324.20126a(1)(a) "for all future costs of response activity costs lawfully incurred by the State relating to the selection and implementation of response activity at [the Site]." The trial court also entered a permanent, mandatory injunction enjoining Waterous to "perform all response activity necessary to protect the public health, safety, welfare, and the environment and achieve and maintain compliance with part 201 [of] the [NREPA] . . . with respect to all releases of hazardous substances at and emanating from [the Site]." More specifically, the trial court's judgment required Waterous to do the following:

> 1. Within one hundred twenty (120) days after entry of [the] Judgment, . . . submit to the MDEQ for review and approval a work plan for remedial investigation that:
>
> (a) complies with the requirements of [Mich Admin Code] R 299.5528;
>
> (b) is sufficient to fully determine the nature and extent of contamination of hazardous substances at and emanating from the [Site] in all impacted environmental media, including soils, groundwaters, and sediments, and to support the selection of a remedial action for the facility that complies with Part 201 and its rules; and
>
> (c) contains a reasonable schedule for implementation of the work plan and completion of a remedial investigation report.

2. Implement the remedial investigation work plan as approved by the MDEQ in accordance with the approved schedule.

3. If the remedial investigation report identifies more than one (1) feasible remedial option for remedial action at the facility, Waterous shall, within ninety (90) days after completion of the remedial investigation report submit to the MDEQ for review and approval, a feasibility study for the facility that:

(a) complies with Part 201 and its rules, including [Mich Admin Code] R 299.5530; and

(b) is sufficient to support the selection of a remedial action for the facility that complies with Part 201 and its rules.

4. Within ninety (90) days after the completion of the remedial investigation report or the feasibility study, whichever is later, submit to the MDEQ for review and approval, a remedial action plan or remedial action closure report that:

(a) complies with, and contains all elements required under, Part 201 and its rules, including, without limitation, MCL 324.20118, MCL 324.20120a, MCL 324.20120b, and [Mich Admin Code] R 299.5530;

(b) is sufficient to support, to achieve, and to maintain compliance with Part 201 and its rules, and assure protection of the public health, safety, welfare, and the environment, and

(c) contains a reasonable schedule for implementation.

5. Implement the remedial action or closure plan as approved by the MDEQ according to the approved schedule.

6. Maintain long-term compliance with all elements of the approved remedial action or closure plan, including, without limitation, land-use or resource-use restrictions, monitoring, operation and maintenance, permanent markers, and financial assurance.

> 7. Implement any other response activity needed to assure protection of public health, safety, welfare and the environment and to achieve and maintain compliance with Part 201 and its rules.

F. WATEROUS'S POSTTRIAL MOTION

Waterous moved to amend or clarify the judgment and for reconsideration. Waterous pointed out that the judgment required investigation and possible remediation of Boardman River sediments, even though there was undisputed testimony that the sediments did not pose any threat to human health, safety, or welfare. According to Waterous, the only alleged threat from the sediment was to the benthic organisms (aquatic insects) that lived in the sediment, and any claim for harm to such organisms, as natural resources of the state, was dismissed by stipulated order before trial. The DEQ responded, arguing that it agreed to dismiss its claim for natural-resources *damage* only, not its claims for injunctive relief with respect to such natural resources.

Waterous also pointed out that in the judgment's Findings of Facts and Conclusions of Law, the trial court noted that only "concentrations of arsenic, copper, chromium and lead . . . represented a reasonable potential for impact to aquatic life." Yet the judgment did not limit the sediment investigation to those specific contaminants. Therefore, Waterous argued that the judgment should be modified to limit its sediment-investigation responsibilities to those contaminants. Similarly, Waterous pointed out that the DEQ's notice letter noted only certain limited contaminants in the groundwater and the soil as posing an environmental threat. Yet, again, the judgment did not limit the groundwater and soil investigations to those specific contaminants. Therefore, Waterous argued that the judgment should be modified to limit its groundwater-

and soil-investigation responsibilities to those contaminants. The DEQ responded, arguing that the full extent of the contamination at the Site had yet to be determined, which was the point of requiring Waterous to perform a full investigation.

With respect to Waterous's natural-resources argument, the trial court noted that Waterous failed to object to the DEQ's presentation at trial of evidence regarding sediment contamination; indeed, the trial court noted, Waterous countered that evidence with its own, attempting to show a lack of sediment contamination. The trial court stated that all this evidence was relevant to the DEQ's claim for injunctive relief, as opposed to damages. Therefore, the trial court concluded that "[t]he request for injunctive relief is a request that this Court granted, and it's distinct from and not barred by dismissal of the natural resources damage claim." Turning to Waterous's arguments regarding the scope of its investigation responsibilities, the trial court concluded as follows:

> [Waterous's] second claim is that any work [Waterous] is required to do with respect to sediments and groundwater should be limited to those contaminants found to be of concern. The contaminants that were of concern were relevant to showing that this site was a facility and there was a need for injunctive relief. The very point of the [DEQ's] case and the focus of this Court's findings of fact and conclusions of law were that the conditions are not entirely known at this site and the scope is not entirely known. Having shown that, that the site is a facility and there is a need for injunctive relief, there is nothing in Part 201 or rules that are promulgated thereunder that would limit the injunctive relief to only those contaminants that were used by [the DEQ] to show that this was a facility and that there is a need for injunctive relief.
>
> The remainder of this argument, I would consider, as far as it goes to groundwater and the argument made with

> respect to soils, I would consider to be just a rehashing of issues that have been fully and completely litigated and fully and carefully considered by this Court.

Accordingly, the trial court denied Waterous's motion to clarify and for reconsideration. Waterous now appeals.

II. THE TRIAL COURT'S FINDINGS

A. STANDARD OF REVIEW

This Court may only set aside a trial court's findings of fact if those findings are clearly erroneous.[10] This Court reviews de novo a trial court's conclusions of law.[11] And this Court reviews for an abuse of discretion a trial court's ruling on a motion for relief from judgment.[12]

B. REMEDIATION CRITERIA: RESIDENTIAL VERSUS INDUSTRIAL

In its findings and conclusions, the trial court concluded, on the basis of the language of part 201 of the NREPA, that remedial action should be consistent with the current zoning and not the historical use of the property. The trial court then found as follows:

> The zoning of the parcels changed over the years, most recently to accommodate redevelopment. In 1958, some of the parcels were zoned M-1 for restricted industrial use and some were zoned C-3 for commercial use. In 1997, the site was designated as a Planned Unit Development ("PUD"), allowing for mixed residential and commercial use. The zoning of the PUD was ultimately changed to D-1,

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[10] MCR 2.613(C).

[11] *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

[12] *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 340; 425 NW2d 791 (1988).

> Development District. By the time of trial, the redevelopment had resulted in an attractive landscape of condominiums, a boardwalk along the riverbank, and a variety of retail and commercial buildings.

Therefore, the trial court concluded that the "property is now zoned as a Development District and a mixed residential/commercial use is allowed. Thus, the use of the property necessitates any future clean-up be conducted to meet residential zoning requirements."

Part 201 of the NREPA provides for different levels of cleanup criteria depending on the category of land use. Specifically, MCL 324.20120a states, in pertinent part:

> (1) The department may establish cleanup criteria and approve of remedial actions in the categories listed in this subsection. The cleanup category proposed shall be the option of the person proposing the remedial action, subject to department approval, considering the appropriateness of the categorical criteria to the facility. The categories are as follows:
>
> (a) Residential.
>
> (b) Commercial.
>
> * * *
>
> (d) Industrial.
>
> (e) Other land use based categories established by the department.

Waterous argues that the trial court erred in holding Waterous liable for cleanup of the Site to residential, rather than industrial, criteria because caselaw holds that a responsible party only has liability for cleanup that meets the criteria representative of that party's historical use of the site and that cleanup to a higher standard is the responsibility of the party that wishes to

put the land to that different use. Specifically, Waterous relies on *Detroit v Simon*,[13] and *Regional Airport Auth v LFG, LLC*.[14] However, rather than following Waterous's interpretation of these factually distinguishable[15] and nonbinding federal cases,[16] we instead follow the binding authority of the NREPA, which specifically addresses cleanup criteria with respect to zoning of property:

> The department shall not approve of a remedial action plan in categories set forth in subsection (1)(b) to (j), *unless the person proposing the plan documents that the current zoning of the property is consistent with the categorical criteria being proposed*, or that the governing zoning authority intends to change the zoning designation so that the proposed criteria are consistent with the new zoning designation, or the current property use is a legal nonconforming use. The department shall not grant final approval for a remedial action plan that relies on a change in zoning designation until a final determination of that zoning change has been made by the local unit of government. The department may approve of a remedial action that achieves categorical criteria that is based on greater exposure potential than the criteria applicable to current zoning. In addition, *the remedial action plan shall include documentation that the current property use is consistent with the current zoning* or is a legal nonconforming use. Abandoned

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[13] *Simon*, n 4 *supra*.

[14] *Regional Airport Auth v LFG, LLC*, 460 F3d 697 (CA 6, 2006) (following *Simon*).

[15] As the trial court here recognized, the *Simon* court did not indicate on what basis the city of Detroit was requesting clean up beyond the industrial criteria and there was no indication that the property in that case had been rezoned.

[16] *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000) (stating that although a Michigan court may choose to agree with the analysis of a federal court decision, "federal court decisions are not precedentially binding on questions of Michigan law").

> or inactive property shall be considered on the basis of zoning classifications as described above.[17]

As the emphasized language makes clear, the proper cleanup criteria should be consistent with the current zoning and use of the property at the time of remedial action.

Indeed, contrary to Waterous's arguments, *Simon* actually supports a conclusion that the proper cleanup criteria should be consistent with the current use of the property. In *Simon*, the court recognized that "recovery of environmental cleanup costs incurred to achieve a higher level *than the use of the property necessitates* would violate CERCLA's [the Comprehensive Environmental Response Compensation and Liability Act] requirement that recoverable response costs be 'necessary.' "[18] Here, the current residential use of the property necessitates that the residential cleanup criteria be applied.

Accordingly, we conclude that the trial court properly applied the plain language of MCL 324.20120a of the NREPA to hold that any remedial action must be consistent with the Site's current residential use.

C. NATURAL-RESOURCES DAMAGES

The issue here is the extent to which the parties' March 11, 2005, stipulation dismissed the DEQ's natural-resources claims,[19] that is, whether the stipulation dismissed all the DEQ's natural-resources

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[17] MCL 324.20120a(6) (emphasis added).

[18] *Simon, supra* at 630 (citations omitted; emphasis added).

[19] Natural-resources claims are for injuries to the environment. Part 201 of the NREPA defines both "environment" and "natural resources" as "land, surface water, groundwater, subsurface, strata, air, fish, wildlife, or biota within the state." MCL 324.20101(1)(k).

claims, including those for injunctive and declaratory relief, or just those for damages. We conclude, contrary to Waterous's claim that the stipulation was intended to do the former, that the stipulation only operated to dismiss the DEQ's claims for *natural-resources* damages, thereby leaving for trial a determination on the issues concerning injunctive and declaratory relief.

In its March 4, 2005, brief in opposition to Waterous's motion for summary disposition on the limitations-period issues, the DEQ first noted that it would be voluntarily dismissing its "natural resources damage claims, with prejudice." In its brief in opposition to Waterous's motion for summary disposition on the issue of sediment contamination, again noting its intent to dismiss its claim for natural-resources damages, the DEQ explained that it was only seeking "to require Waterous to determine the full extent of the contamination caused by TCIW and then develop and implement an appropriate remedy for such contamination."

On March 11, 2005, the parties stipulated the dismissal of the DEQ's natural-resources claims as follows:

> The parties, by their individual counsel, hereby stipulate, pursuant to MCR 2.504(A)(1)(b), that the portion of [the DEQ]'s Complaint asserting State claims for natural resources damages, natural resources damages assessment costs, and liability for injuries to natural resources, which were or could have been asserted herein be dismissed with prejudice, and without costs.

During the hearing on Waterous's motions for summary disposition held that same day, counsel for Waterous specifically mentioned the stipulation, explaining as follows:

> [W]e have submitted to the Court a stipulation that partially addresses [Waterous]'s statute of limitations motion regarding natural resources damages. The [DEQ] has

> agreed to dismiss their claims for natural resources damages with prejudice and we have submitted a stipulation for the Court's consideration today.

Shortly thereafter, counsel for Waterous stated:

> The relief we are requesting today on these motions is as follows: . . . natural resources damages has been dismissed by stipulation . . . .
>
> * * *
>
> On sediments, we are asking to clarify our motion that states [sic] claim for future injunctive relief to address river sediments in the vicinity [of the] TCIW site be dismissed without prejudice.

These statements clearly indicate that at the time the stipulation was entered, both parties, but especially Waterous, understood that the stipulation was only intended to dismiss the DEQ's claims for *natural-resources* damages. And as the DEQ points out, a review of its requests for relief in its complaint also supports this conclusion.

The DEQ's complaint sought the following relief:

> A. Declare that Traverse City Iron Works' conduct, for which Waterous is responsible through merger, was unlawful and in violation of NREPA Part 31 and Part 201;
>
> B. Grant an injunction requiring Waterous to undertake the appropriate response activities under Part 31 and Part 201 and their administrative rules;
>
> C. Order Waterous to pay [the DEQ]'s response activity costs, including attorney fees, incurred at or in relation to the Facility, plus statutory prejudgment interest;
>
> D. Order Waterous to pay damages for the full value of injury to, destruction of, or loss of natural resources resulting from the release or threat of release, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release or threat of release;

> E. Order Waterous to abate the public nuisance, and;
>
> F. Grant [the DEQ] further relief as the Court finds just and appropriate.

According to the DEQ, the stipulated order was only intended to dismiss the DEQ's claim asserted in paragraph D of its complaint. To support this point, the DEQ notes that each of its first four requests for relief correspond to the relief permitted by MCL 324.20137 of the NREPA. Paragraph A, which requests declaratory relief, corresponds to MCL 324.20137(1)(d), which allows for a cause of action seeking "[a] declaratory judgment on liability for future response costs and damages." Paragraph B, which requests injunctive relief, corresponds to MCL 324.20137(1)(a), which allows for a cause of action seeking "[t]emporary or permanent injunctive relief necessary to protect the public health, safety, or welfare, or the environment from the release or threat of release." Paragraph C, which requests recovery of response-activity costs, corresponds to MCL 324.20137(1)(b), which allows for a cause of action seeking "[r]ecovery of state response activity costs pursuant to section 20126a."[20] And, finally, paragraph D, which requests the payment of damages, corresponds to MCL 324.20137(1)(c), which allows for a cause of action seeking "[d]amages for the full value of injury to, destruction of, or loss of natural resources resulting from the release or threat of release, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release or threat of release."

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[20] As noted previously, the DEQ's claims against Waterous for "all response activity costs, including attorneys' fees and interest, as sought in Paragraph C of the Relief Requested portion of [the DEQ]'s complaint" were resolved before trial by stipulation and order, which required Waterous to pay $1.25 million.

We conclude that, when taken in the context of Waterous's admissions and the statutory framework, the stipulation operated only to dismiss the DEQ's claims for *natural-resources* damages, thereby leaving for trial a determination on the issues regarding injunctive and declaratory relief.

D. EVIDENCE OF PARTICULAR HAZARDOUS SUBSTANCES

Waterous argues that the trial court erred in awarding injunctive relief concerning all possible hazardous substances when only certain substances were alleged to exceed applicable criteria and evidence was only introduced concerning those specific substances. We disagree.

In denying Waterous's motion to clarify or modify the judgment on this issue, the trial court reasoned that the point of the DEQ's bringing this cause of action was that the extent of potential contamination at the Site was not entirely known. Therefore, the trial court explained, requiring Waterous to perform a full investigation served the purpose of determining the full extent of the contamination at the Site. The trial court noted that the fact that certain contaminants had been identified merely served the purpose of showing that the Site was a facility under the NREPA and that there was a need for injunctive relief.

The trial court's conclusions were absolutely correct. The DEQ submitted, and the trial court relied on, evidence regarding the existence of certain proven contaminants simply to establish that response activities were necessary at the Site.[21] Determination of this threshold issue did not limit Waterous's ultimate liabil-

[21] See MCL 324.3109.

ity to fully investigate and remediate the Site in accordance with part 201 of the NREPA.

Under the NREPA, a liable party has the responsibility to perform all necessary response activities, which include investigating and evaluating the full nature and extent of contamination at the subject facility. Specifically, MCL 324.20118(1) authorizes the DEQ to

> take response activity or approve of response activity proposed by a person that is consistent with this part and the rules promulgated under this part relating to the selection and implementation of response activity that the department concludes is necessary and appropriate to protect the public health, safety, or welfare, or the environment.

And MCL 324.20101(1)(ee) defines "response activity" as

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

"Evaluation" is defined as

> those activities including, but not limited to, *investigation*, studies, sampling, analysis, development of feasibility studies, and administrative efforts that are *needed to determine the nature, extent, and impact of a release or threat of release* and necessary response activities.[22]

Here, there has been no remedial investigation to determine the full nature and extent of contamination at the Site, nor has a remedial-action plan been per-

[22] MCL 324.20101(1)(m) (emphasis added).

formed. Thus, Waterous, as the responsible party, was required to perform a full investigation to determine the nature, extent, and impact of the contamination. To hold otherwise would shift the burden of such a determination to the DEQ, thus rendering moot the responsibility placed on the liable party by part 201. Therefore, the trial court properly ordered Waterous to perform the response activities required by part 201 to investigate and remedy contamination in the soils, groundwater, and river sediments of the facility.

E. OTHER PARTIES' LIABILITY

Waterous argues that the trial court impermissibly held it liable for cleanup that was the legal responsibility of other parties, including upstream polluters, and the purchaser/developer who redeveloped the site from industrial use to commercial/residential use. We disagree.

MCL 324.20107a(1) imposes certain "due care" obligations on the current owner of contaminated property:

> A person who owns or operates property that he or she has knowledge is a facility shall do all of the following with respect to hazardous substances at the facility:
>
> (a) Undertake measures as are necessary to prevent exacerbation of the existing contamination.
>
> (b) Exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety.
>
> (c) Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.

As the DEQ explains, the purpose of MCL 324.20107a is to place certain obligations on the current owner of a

facility to prevent unnecessary human exposure to hazardous substances, prevent disruption of limited response activities that have already been performed, and ensure that work being performed at the facility does not result in new releases of contamination.

Under MCL 324.20126a, once a party is found liable under the NREPA, it is jointly and severally liable for all response activities at the facility.[23] By referring to the current owner's obligations under MCL 324.20107a, Waterous is erroneously attempting to obscure its own liability and circumvent the act's intent that the primary responsibility for remediation is on the party liable for the contamination—which is indicated by the language in MCL 324.20102:

> The legislature hereby finds and declares:
>
> * * *
>
> (f) That liability for response activities to address environmental contamination should be imposed upon those persons who are responsible for the environmental contamination.

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[23] MCL 324.20126a states:

> (1) Except as provided in [MCL 324.20126(2)], a person who is liable under [MCL 324.20126] is jointly and severally liable for all of the following:
>
> (a) All costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity under this part.
>
> (b) Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this part.
>
> (c) Damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release.

> (g) That to the extent possible, consistent with requirements under this part and rules promulgated under this part, response activities shall be undertaken by persons liable under this part.

The fact that a current owner *may* be liable for violating its due-care responsibilities by exacerbating or causing the additional release of the existing contamination does not by itself relieve the primarily responsible party of its obligations. If Waterous believes the developer has indeed violated its due-care obligations, its proper remedy is to seek redress under MCL 324.20107a.[24] However, on this point, the DEQ notes that the developer submitted and followed a due-care plan, which was overseen by the DEQ, when it performed its work at the Site, including moving soil to create the new riverbank.

Turning to the issue of other potential contributors to the contamination, the NREPA provides that Waterous, as the prima facie liable party, bore the burden of showing that it was not actually liable for the contamination at issue.[25] As stated, failing that burden renders

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[24] MCL 324.20107a(2) provides:

> Notwithstanding any other provision of this part, a person who violates subsection (1) is liable for response activity costs and natural resource damages attributable to any exacerbation of existing contamination and any fines or penalties imposed under this part resulting from the violation of subsection (1) but is not liable for performance of additional response activities unless the person is otherwise liable under this part for performance of additional response activities. The burden of proof in a dispute as to what constitutes exacerbation shall be borne by the party seeking relief.

[25] MCL 324.20126(6) provides:

> In establishing liability under this section, the department bears the burden of proof. If the department proves a prima facie

a liable party jointly and severally liable.[26] Therefore, by referring to other potential contributors' obligations for the contamination, Waterous is again erroneously attempting to obscure its own liability and circumvent the act's intent that Waterous fulfill its responsibility for remediation of the contamination. If Waterous believes other potential contributors are responsible, its proper remedy is to seek redress under MCL 324.20129.[27]

Accordingly, we conclude that the trial court did not err in finding that Waterous was the liable party under the NREPA and that, therefore, Waterous is obligated to perform the requisite remediation at the Site.

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case against a person, the person shall bear the burden of showing by a preponderance of the evidence that he or she is not liable under this section.

[26] MCL 324.20126a(1).

[27] MCL 324.20129(3) states:

> A person may seek contribution from any other person who is liable under [MCL 324.20126] during or following a civil action brought under this part. This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action by the state under this part. In a contribution action brought under this part, the court shall consider all of the following factors in allocating response activity costs and damages among liable persons:
>
> (a) Each person's relative degree of responsibility in causing the release or threat of release.
>
> (b) The principles of equity pertaining to contribution.
>
> (c) The degree of involvement of and care exercised by the person with regard to the hazardous substance.
>
> (d) The degree of cooperation by the person with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release.
>
> (e) Whether equity requires that the liability of some of the persons should constitute a single share.

F. CORPORATE-SUCCESSOR LIABILITY

Waterous argues that the trial court erred in imposing corporate-successor liability on it when it did not contractually assume environmental liabilities for the Site and when nothing in the NREPA requires it to bear successor liability. We disagree.

According to the DEQ's December 2002 notice letter to Waterous:

> Persons who are liable for the [Site] pursuant to [MCL 324.20126] of the NREPA include persons who arranged for a hazardous substance to be transported to, disposed of, or treated at the [Site]; and persons who selected the [Site] and transported a hazardous substance to the [Site]. Other persons who are liable for the [Site] include owners and operators of the [Site] who were responsible for an activity causing a release or threat of release of a hazardous substance at the [Site] and owners and operators who owned or operated the [Site] on or after June 5, 1995, who did not comply with the requirements of [MCL 324.20126(1)(c)(*i*) and (*ii*)] for performing or disclosing the results of a Baseline Environmental Assessment.

The letter went on to cite the "Plan and Agreement of Merger" (Merger Agreement) entered when TCIW merged with Waterous in February 1978. Specifically, the Merger Agreement states as follows:

> On the Effective Date of the Merger, [TCIW] shall be merged into WATEROUS which shall be the Surviving Corporation and WATEROUS on such date shall merge [TCIW] into itself. The corporate existence of WATEROUS with all its purposes, powers and objects, shall continue unaffected and unimpaired by the merger, and as the Surviving Corporation it shall be governed by the laws of the State of Minnesota and shall succeed to all rights, assets, liabilities and obligations of [TCIW] in accordance with the Michigan Business Corporation Act.

> The separate existence and corporate organization of [TCIW] shall cease upon the Effective Date of the Merger and thereupon [TCIW] and WATEROUS shall be a single corporation, to wit, WATEROUS.

On the basis of the foregoing, the trial court concluded that, even though Waterous never owned the Site while any release of contamination took place, Waterous was indeed liable for the discharge because, as TCIW's successor in interest, Waterous stood in TCIW's shoes for the purposes of liability. The trial court based this decision on the Merger Agreement between TCIW and Waterous and the Michigan Business Corporation Act,[28] which both state that a surviving corporation, here Waterous, assumes all the liabilities of each of the other corporate parties to the merger.

Nevertheless, Waterous argues that it did not agree to assume the environmental liability at issue, pointing to article 4.1(g) of the Plan of Reorganization and Agreement of Merger, which states:

> 4.1 [TCIW] represents and warrants to WATEROUS . . . as follows:
>
> * * *
>
> (g) There are no liabilities of [TCIW] of any kind whatsoever, whether or not accrued and whether or not determined or determinable, in respect of which WATEROUS . . . may

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[28] MCL 450.1724(1)(d) states:

> When a merger takes effect, all of the following apply:
>
> * * *
>
> (d) The surviving corporation has all liabilities of each corporation party to the merger.

> become liable on or after consummation of the merger contemplated by this Agreement other than
>
> (i) liabilities disclosed or provided for in the balance sheets of [TCIW] as of December 31, 1976, and as of November 30, 1977, referred to in Section 4.1(f) above, including the notes to said balance sheets;
>
> (ii) liabilities incurred since December 31, 1976 in the ordinary course of business, all of which are reflected on the books and records of [TCIW] and none of which are materially adverse to the business, assets or results of operations of [TCIW.]

The trial court acknowledged that article 4.1(g) of the Plan of Reorganization and Agreement of Merger indicated that Waterous was not intended to be liable for any obligations not stated in TCIW's balance sheets at the time of merger, but nevertheless concluded Waterous was responsible for the environmental liabilities by operation of law.

We conclude that the trial court correctly determined that, given the merger provision of the Merger Agreement, which specifically incorporated the terms of the Michigan Business Corporation Act, Waterous, as TCIW's successor in interest, stood in TCIW's shoes for the purposes of liability. To the extent this determination contravenes the warranty provision of article 4.1(g) of the Plan of Reorganization and Agreement of Merger, Waterous's proper remedy would be a breach of warranty action against TCIW.

Additionally, the trial court found it significant that Waterous failed to comply with MCL 324.20126(1)(c), which allows certain innocent purchasers to avoid liability. The trial court therefore correctly refused to allow Waterous to create its own innocent-purchaser exception not provided by statute.

In sum, we conclude that the trial court did not err in imposing corporate-successor liability on Waterous.

III. EXPERT TESTIMONY

A. STANDARD OF REVIEW

Waterous argues that the trial court erred by ordering investigation and possible remediation of sediments based on unpromulgated guidelines and by admitting the DEQ's expert's testimony on sediments that was based on nonbinding agency guidelines and not based on reliable principles and methods.

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence.[29] An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.[30]

B. RELIABILITY OF DATA

MRE 702 governs the admission of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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[29] *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

[30] *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The admission of expert testimony requires that (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man.[31] The party presenting the expert bears the burden of persuading the trial court that the expert has the necessary qualifications and specialized knowledge that will aid the fact-finder in understanding the evidence or determining a fact in issue.[32] A witness may be qualified as an expert by knowledge, skill, experience, training, or education.[33]

Waterous does not challenge the expert's testimony on the basis of his qualifications, but instead challenges the data on which he based his opinion. At trial, the DEQ's expert relied on two exhibits—unpromulgated quality-screening guidelines and a draft memorandum—in support of establishing the criteria against which the presence of certain contaminants should be measured to determine whether remediation is necessary. Waterous's counsel objected to the expert's testimony, arguing that his opinions were not based on reliable methods because the screening levels were inherently unreliable. The DEQ's counsel responded as follows:

> The witness's testimony has made clear that those guidelines which are themselves derived from a variety of actual site-specific studies at various locations were collected, were developed using reliable methods, and the witness's testimony . . . relied upon those values as just one

[31] *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990).

[32] *Davis v Link, Inc*, 195 Mich App 70, 74; 489 NW2d 103 (1992).

[33] MRE 702; *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403; 443 NW2d 340 (1989).

> piece of information that he used in evaluating the potential environmental significance of the data at his site.
>
> At the end of the day, the witness's testimony depends upon recognized scientific techniques involving collection of samples from sediments, comparing them to published screening values. Those values themselves are related to and depend upon aquatic toxicity testing that formed the basis of those at various sites.

The trial court then denied Waterous's motion to strike the testimony, stating:

> Well, it seems to me that there is no challenge here to the underlying collection process or methods for obtaining the data that the witness relied on. There is no challenge to those. There is no claim that that is unreliable or was done with an improper methodology. It's, rather, the guidance or the factors that the witness relied upon in part in reaching his conclusion.
>
> It also seems to me that part of the relief that MDEQ is asking for is that there be a remedial investigation done to determine the extent of potential impact or harm on the environment, and in a way [Waterous] is almost requiring MDEQ to prove that aspect when in fact it's part of the relief that they're asking for. So the fact that we only have a guidance or a set of factors that are used as guidance to illustrate potential impact or damage to the environment is not deadly to this witness's ability to form an opinion as to the need for remedial investigation and remedial action.
>
> * * *
>
> I think it's been demonstrated that this witness had reliable scientific opinion testimony to offer the Court that will assist the trier of fact in making an ultimate conclusion in this case, and the motion to strike his testimony is denied.

Given the trial court's explanation, we conclude that the trial court did not abuse its discretion in admitting

the evidence and the witness testimony based thereon. As the trial court stated, the point of this case was to show that remedial action was warranted, not to absolutely prove the extent of contamination.

IV. STATUTE OF LIMITATIONS FOR PUBLIC-NUISANCE CLAIM

A. STANDARD OF REVIEW

Waterous argues that the trial court erred in denying Waterous's motion for partial summary disposition of the DEQ's claim for public nuisance based on the applicable statute of limitations. Absent disputed issues of fact, this Court reviews de novo whether the cause of action is barred by a statute of limitations.[34]

B. CONTINUING TORT

Initially, we note that Waterous has conceded that because the DEQ sought injunctive relief, the period of limitations for its nuisance claim was six years.[35] Nevertheless, Waterous argues that the trial court incorrectly relied on a nonbinding, unpublished case to hold that, because the alleged nuisance was continuing, the DEQ's claim was not barred by the statute of limitations. Moreover, Waterous argues that the unpublished case is distinguishable from the present case because in that case, and the cases relied on therein, the tortious acts were ongoing, as opposed to being merely the harmful effects of completed conduct, as in the present case.

Pursuant to court rule, an unpublished opinion has no precedential value.[36] However, when a party chooses

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[34] *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

[35] MCL 600.5813.

[36] MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994).

to cite an unpublished opinion, this Court may follow that decision if it finds the reasoning persuasive.[37] The case relied on by the trial court, *Bielat v South Macomb Disposal Auth*, *supra*, is persuasive given the similarity between the arguments addressed there and in this case.

In *Bielat*, similar to the parties' argument in this case, the plaintiffs argued that their nuisance claim was not time-barred because they suffered damage as a result of a continuing and repeated tort—"the migration of contaminated water and leachate from the landfills onto plaintiffs' property and into their groundwater."[38] The defendants countered that the doctrine of continuing wrongful acts did not apply because the plaintiffs' claims were not based on recurring wrongful conduct, but rather stemmed from the recurring harmful effects of a completed act.

In addressing the parties' arguments, the *Bielat* panel quoted the following passage from *Blazer Foods, Inc v Restaurant Properties, Inc*:[39]

> "Under the continuing wrong doctrine, 'an alleged timely actionable event will allow consideration of and damages for connected conduct that would be otherwise barred.' Thus, in certain cases, the doctrine recognizes that ' "[w]here a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that the defendant's tortious conduct continues." ' " [Internal citations omitted.][40]

Further citing *Blazer Foods*, the *Bielat* panel stated:

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[37] *Plymouth Stamping v Lipshu*, 168 Mich App 21, 27-32; 424 NW2d 530 (1988), aff'd 436 Mich 1 (1990).

[38] *Bielat*, *supra* at 4.

[39] *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003).

[40] *Bielat*, *supra* at 6.

> To recover under the theory of continuing wrong, the plaintiff must establish that continual tortious acts constitute a continuing wrong. Continual harmful effects from an original completed act do not constitute a continuing wrong. The doctrine is applied in limited circumstances: trespass, civil rights claims and nuisance.[41]

The trial court in *Bielat* attempted to rely on *Jackson Co Hog Producers v Consumers Power Co*,[42] to support its holding that the continuing-wrongful-acts doctrine did not apply on the basis of its conclusion that the plaintiffs were really arguing the continued harmful effects of the alleged tortious acts. However, the *Bielat* panel pointed out that *Jackson Co Hog Producers* was distinguishable because it ultimately involved only negligence claims.

Turning its attention to several cases that specifically addressed the continuing-wrong doctrine in the context of trespass and nuisance claims, the *Bielat* panel found most persuasive this Court's decision in *Traver Lakes Community Maintenance Ass'n v Douglas Co*.[43] In that case, this Court noted that claims for a continuing trespass or nuisance occurring within the limitations period are not barred and stated that damages recoverable under such claims generally depend "upon whether the interference with the plaintiff's property is permanent or temporary."[44] Where a nuisance is temporary, that is, one that is abatable by reasonable curative or remedial action, damage to property affected by the nuisance is recurrent and monetary damages may be recovered from time to time until the nuisance is abated.[45]

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[41] *Id.*, citing *Blazer Foods*, *supra* at 246-247.

[42] *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999).

[43] *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 341; 568 NW2d 847 (1997).

[44] *Id*. at 347.

[45] *Id*. at 347-348.

Part 201 of the NREPA was designed to address temporary nuisances, like the claims herein.[46] Therefore, damage to the Site caused by the nuisance is recurrent and monetary damages may be recovered from time to time until the nuisance is abated. Accordingly, we conclude that the trial court did not err in denying Waterous's motion for partial summary disposition on the ground that the DEQ's claim was not time-barred.

V. FAILURE TO NOTIFY

A. STANDARD OF REVIEW

Waterous argues that the trial court erred in denying Waterous's motion for summary disposition because the DEQ violated its administrative rules when it failed to notify Waterous that it was a liable party until after the public SRP Grant had been spent at the site, cleanup work was completed, and evidence was destroyed and because the DEQ knew that Waterous was a potentially liable party before the SRP Grant was approved and cleanup commenced.

Under MCR 2.116(C)(10), a party may move for summary disposition of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[47] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[48] This Court

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[46] MCL 324.20102.

[47] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[48] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

reviews de novo the trial court's ruling on a motion for summary disposition.[49]

B. DEQ ADMINISTRATIVE RULE 299.5115

DEQ Administrative Rule 299.5115 provides, in pertinent part:

> (1) Except as provided in subrule (3) of this rule, before beginning response activity at a facility with public funds, the department shall provide notice to persons who are liable who have been identified, as described in this rule.
>
> * * *
>
> (3) The requirements of this rule shall not apply when the department has not determined that a person is liable or when the notice process would unreasonably delay the response. [Mich Admin Code, R 299.5115.]

The language of the rule is clear: the DEQ has no obligation to notify a party until the department determines that an identifiable party is liable. Therefore, the plain language of the rule negates Waterous's argument that the DEQ had a duty to notify it as a *potentially* liable party. Moreover, because Waterous settled the claims for past costs before trial, this issue is moot.

Additionally, there is no merit to Waterous's spoliation-of-evidence claim. As the trial court concluded in ruling on Waterous's motion in limine to exclude evidence of the Site's former environmental condition because of the state's spoliation of evidence, there is no evidence that the DEQ engaged in any misconduct here.[50]

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[49] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[50] See *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997).

Accordingly, we conclude that the trial court did not err in denying Waterous's motion for summary disposition on its failure-to-notify claim or its motion regarding the spoliation of evidence.

Affirmed.

RISK v LINCOLN CHARTER TOWNSHIP BOARD OF TRUSTEES

Docket No. 275129. Submitted May 7, 2008, at Grand Rapids. Decided June 26, 2008, at 9:00 a.m.

Kimberly Risk and William Tucker, upon leave granted by the Berrien County Trial Court, filed a quo warranto action against the Lincoln Charter Township Board of Trustees to challenge the dissolution of the township's park commission following a petition and referendum by the electorate. The court, Paul L. Maloney, J., denied relief, ruling that the township's voters were empowered to petition for a dissolution referendum under Const 1963, art 1, § 1, which provides that all political power is inherent in the people and that government is instituted for their equal benefit, security, and protection. The plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 41.426 of the township parks act provides for the establishment of a township park commission upon petition and referendum by a township's electorate. The statute, however, does not provide for the dissolution of a voter-established township park commission. There is no provision in the Michigan Election Law (MCL 168.1 *et seq*.), the township ordinances act (MCL 4.181 *et seq*.), the Charter Township Act (MCL 42.1 *et seq*.), or any other Michigan statute for the dissolution of a voter-established township park commission. Given that the Legislature has in other statutes explicitly provided for both the establishment and dissolution of various municipal commissions, boards, and programs by municipal electors, its failure to provide for the dissolution of a voter-established township park commission must be viewed as intentional. There is simply no statutory mechanism for dissolving a voter-established township park commission. Accordingly, the defendants in this case lacked authority to place before the township's electorate the question of dissolving the township park commission.

2. The improper vote to dissolve the township park commission effectively recalled the individual township park commissioners. However, that effective recall did not conform to statutory provisions governing the recall of public officials, MCL 168.951 *et seq*.

3. On remand, the trial court shall invalidate the purported dissolution of the township park commission and order the reinstatement of the commission and its commissioners as if there had been no dissolution referendum.

Reversed and remanded.

MUNICIPAL CORPORATIONS — TOWNSHIP PARK COMMISSIONS — DISSOLUTION.

The statute that governs the establishment of a township park commission through voter petition and referendum does not provide a procedure for the dissolution of such commission, and no other provision of Michigan law addresses dissolution of a voter-established township park commission (MCL 41.426).

Troff Petzke & Ammeson (by *Charles Ammeson*) for the plaintiffs.

Scholten Fant (by *Rodney L. Schermer* and *James R. Nelson*) and *DeFrancesco & Dienes* (by *Scott A. Dienes*) for the defendants.

Amicus Curiae:

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C. (by *John H. Bauckham*), for the Michigan Townships Association.

Before: JANSEN, P.J., and ZAHRA and GLEICHER, JJ.

JANSEN, P.J. In this quo warranto action,[1] plaintiffs

[1] In actuality, this is both a traditional quo warranto action and an action in the nature of quo warranto brought pursuant to MCL 600.4545. It is a traditional quo warranto action to the extent that it was brought to try title to the offices of Lincoln Charter Township park commissioner and to challenge the individual defendants' intrusion into and usurpation of those offices. MCL 600.4505; *Layle v Adjutant General*, 384 Mich 638, 641; 186 NW2d 559 (1971). It is an action in the nature of quo warranto to the extent that it was brought to challenge the validity of the disputed township election itself. MCL 600.4545(1); *Shoemaker v Southgate*, 24 Mich App 676, 678; 180 NW2d 815 (1970). This distinction, however, does not affect our resolution of the issues because actions in the nature of quo warranto brought to challenge the validity of disputed elections are functionally

appeal by right the circuit court's order validating a local election at which the qualified electors of Lincoln Charter Township voted to dissolve the township park commission. We reverse and remand to the circuit court for entry of an order consistent with this opinion.

I

In 1972, the qualified electors of Lincoln Charter Township established a township park commission in accordance with state law. Although the exact reasons are not clear from the record, the electors of Lincoln Charter Township eventually became disillusioned with the park commission that they had created. In 2006, the electors filed a petition, signed by eight percent of the township's registered voters, seeking to dissolve the park commission and to transfer control of the township's parks to the township board of trustees. Upon receipt of the petition, the township board voted to submit the question whether to dissolve the park commission to the electorate at the November 2006 general election. Specifically, the township board resolved to place the following question on the November 7, 2006, general election ballot:

> Shall the Lincoln Charter Township's elected Parks Commission be dissolved, effective November 15, 2006, to enable the Township Board of Trustees to operate all parks within the Township, pursuant to and in compliance with [the township parks act]?

Believing that the proposed ballot question was invalid, plaintiffs wrote to the Attorney General in September 2006, asking him to intervene and to bring a quo warranto action against defendant township board. However, the Attorney General declined to intervene in this matter.

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equivalent to traditional quo warranto actions and are consequently reviewable in the same manner. See MCL 600.4545(3).

In October 2006, plaintiffs applied for leave to file a quo warranto action in the Berrien County Trial Court. In their application, plaintiffs alleged that defendants were "wrongfully usurping, intruding into and claiming the right to exercise the responsibilities of and the offices of Lincoln Charter Township Park Commissioner." In the proposed complaint attached to their application, plaintiffs asserted that the Lincoln Charter Township Park Commission could not be lawfully dissolved by way of popular election. In support of this proposition, plaintiffs cited OAG 1999-2000, No. 7039 (December 9, 1999), in which the Attorney General opined that a voter-established township park commission could not be dissolved by a township board resolution or by a vote of the township electorate. Plaintiffs also cited OAG 1983-1984, No. 6143 (March 24, 1983), in which the Attorney General explained the limited authority of a local unit of government to submit ballot questions to the electorate. Plaintiffs asserted that the proposed ballot question was nothing more that an improper recall effort, which violated Michigan law.

On November 7, 2006, with 3,444 in favor of dissolution and 2,408 against dissolution, the qualified electors of Lincoln Charter Township voted to dissolve the township park commission.

Defendants answered plaintiffs' application for leave to file a quo warranto action on November 9, 2006. Defendants argued that plaintiffs' application should be denied because plaintiffs had failed to provide adequate proof that the Attorney General had refused to institute quo warranto proceedings.[2] Defendants also argued

[2] A private citizen must generally show that the Attorney General has refused to institute quo warranto proceedings before that citizen may individually pursue a traditional quo warranto action. *Ballenger v Cahalan*, 145 Mich App 811, 818; 378 NW2d 607 (1985). "The attorney

that plaintiffs' application lacked merit. Defendants acknowledged that they had submitted the ballot question to the electors, but argued that they had been required to do so upon receipt of the electors' petition. Defendants also argued that plaintiffs could not bring a quo warranto action against the township board because the park commissioners' offices would cease to exist as of November 15, 2006, and there would accordingly be no dispute after that date between two or more individuals over entitlement to hold a public office. Lastly, defendants argued that MCL 41.426, which allows township electors to vote to establish a township park commission, also allows by implication for the electors to vote to dissolve a township park commission.

The trial court heard arguments concerning plaintiffs' application for leave to file a quo warranto action. Plaintiffs first presented proof that they had timely requested intervention by the Attorney General in this matter. With respect to their application itself, plaintiffs again argued that a township park commission may not be lawfully dissolved by way of a popular election. Plaintiffs asserted that because a township park commission exists only by statute, a park commission can only be lawfully dissolved by legislative action or consent. Defendants responded by arguing that a township

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general shall bring an action for quo warranto when the facts clearly warrant the bringing of that action. If the attorney general receives information from a private party and refuses to act, that private party may bring the action upon leave of court." MCL 600.4501; see also MCR 3.306(B)(3)(b). To bring an action in the nature of quo warranto under MCL 600.4545 on the basis of alleged election error or fraud, a private citizen need not first seek intervention by the Attorney General, *Penn School Dist No 7 v Lewis Cass Intermediate School Dist Bd of Ed*, 14 Mich App 109, 118; 165 NW2d 464 (1968), but must nonetheless obtain "special leave of the court or a judge thereof," MCL 600.4545(2).

electorate may dissolve a park commission by an act of "equal dignity" to the act that originally created the park commission.

The trial court granted plaintiffs' application for leave to file a quo warranto action. Thereafter, the parties filed supplemental briefs and made additional arguments. On November 14, 2006, the trial court ruled from the bench, commenting in pertinent part:

> In *Cain* [*v Brown*, 111 Mich 657; 70 NW 337 (1897)], the state legislature created the Village of Attica through Act 311 of 1885. . . . The Court held that the resolution voted on by the registered voters [of] the Village of Attica to dissolve its incorporation was not effective, because the legislature, a higher authority, create[d] the village and did not delegate any of [its] authority to dissolve the village. Also not explicitly stated, the Michigan Supreme Court in *Cain* functionally concluded that the local resolution was not of equal dignity with the act of the state legislature.
>
> In this case the voters of Lincoln Township in 1972 approved the creation of the Parks Commission. That [question] appeared on the ballot pursuant to statute MCL 41.426. In like manner, in 2006 a [question] was approved by the voters dissolving the Parks Commission, and the [question] was submitted by the Township Board based on their legal position in this case pursuant to the same statute.
>
> Now, the Attorney General's opinions in the Court's judgment do not require a different outcome. . . . All the [Attorney General's] opinions in the Court's judgment are either distinguishable or in the case of . . . Opinion 7[0]39, incorrect. [OAG] 7309 dealt with the dissolution of a township parks commission. In the Court's judgment that opinion misinterprets the *Cain* case. It does—and also does not in the Court's judgment address the equal dignity doctrine. *Cain* is not, therefore, in the Court's judgment . . . on point. *Cain* and all the other [Attorney General's] opinions cited address municipal corporations, and it's clear to this Court that the Parks Commission is not a

municipal corporation. . . . So therefore in the Court's judgment [OAG] 7[0]39 . . . is simply incorrect. [OAG] 6342 dealt with a drainage district[,] which again was a body corporate. [OAG] 7003 also dealt with a body corporate. And likewise the hospital authority is a body—which is the subject matter of [OAG] 6411, is a body corporate pursuant to MCL 331.2. In the Court's judgment based on my review of the case law and the statute, there is similar authority for a Parks Commission to be a body politic.

Now, as I've said before the Township Parks Act, which is MCL 41.421 *et seq*[.], contains a provision for a petition and subsequent ballot question to establish a parks commission. That's at MCL 41.426. As I've indicated before, the act does not contain any specific provision for the dissolution of an established [p]arks commission. However, in the Court's judgment that does not end the inquiry. Article [1], Section 1 of the Michigan Constitution says: "All politic[al] power is inherent in the people. Government is instituted for their equal benefit, security, and protection."

* * *

There is no delegation by either the Michigan Constitution or by a statute to dissolve a parks commission, nor is it prohibited by law in light of the fact that there simply is no provision in Michigan law for dissolution of a parks commission, but neither is it prohibited. Article [7], Section 34 provides that the provisions of the Constitution of Michigan and laws concerning townships shall be liberally construed in their favor, and power granted to counties and townships—in this case townships, obviously—shall be fairly implied and not prohibited by the constitution.

Again, the dissolution of the Parks Commission is not prohibited by law. Neither the constitution [n]or a statute delegates the power to dissolve the Parks Commission. Hence, in the Court's judgment the political power to dissolve the Parks Commission remains in the people of Lincoln Township. And in like manner and . . . supplementary thereto in the Court's judgment the Township's pow-

> ers are to be liberally construed and fairly implied again as not prohibited by the constitution.
>
> Accordingly, this Court rules that given the power residing in the voters of Lincoln Township, exercising their political power under Article [1], Section 1 had the authority to petition their board for a referendum to dissolve the Parks Commission that they had established with equal dignity in . . . 1972. Accordingly, the relief granted—the relief requested by the quo warranto petition in this case is denied, and the Court will deny as moot all other claims for relief under the quo warranto [petition].

II

Whether township electors are empowered to dissolve an established township park commission is a question of law. Questions of law, including questions of statutory interpretation, are reviewed de novo on appeal. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001).

III

Plaintiffs argue that once a township park commission is established in accordance with Michigan law, it may not be dissolved. Plaintiffs argue that the trial court therefore erred by validating the process by which the electors of Lincoln Charter Township voted to dissolve the township park commission. We agree.

Michigan's township parks act, MCL 41.421 *et seq*., governs the establishment of a township park commission. MCL 41.426 provides in relevant part:

> (1) On receipt of a written petition signed by not less than 8% of the registered voters of a township, the township board of that township, at its first meeting after the receipt of the petition, shall submit the question of establishing a township park commission to the registered voters of the township at the next regular election to be

> held in the township. If a majority of the registered voters voting on the question vote in favor of establishing a township park commission, the township board shall appoint the following number of members to a township park commission:
>
> (a) Before the effective date of the amendatory act that added subsection (3), 6 members.
>
> (b) On and after the effective date of the amendatory act that added subsection (3), an odd number of members not fewer than 5 or more than 9 as determined by the township board.
>
> (2) The members appointed pursuant to subsection (1) shall serve until the next township election at which township officers are elected. At the next township election at which township officers are elected . . . , the number of members of the township park commission as determined under subsection (1) shall be elected for terms of 4 years each.

Under the Michigan Election Law, MCL 168.1 *et seq*., township park commissioners are "[e]lective township officers," MCL 168.341, whose names are submitted to the voters on the township's general election ballot, MCL 168.358(1)(g).

The township parks act does not provide for the dissolution of a voter-established township park commission. Nor is any provision for dissolving a township park commission contained within the Michigan Election Law, the township ordinances act, MCL 41.181 *et seq*., the Charter Township Act, MCL 42.1 *et seq*., or any other provision of Michigan law.

Faced with the very question at issue in this appeal, the Attorney General has opined that a voter-established township park commission may not be dissolved:

> Although the township parks act addresses how a township park commission is established, it is silent as to

whether or by what means a township park commission may be dissolved. The charter township act likewise provides no authority for dissolving a township park commission, either by resolution of the charter township board or by vote of the township electors. The absence of any township discretion to terminate township park commissions is further confirmed by provisions in the Michigan election code, MCL 168.1 *et seq*. . . . . Section 341 of the election code provides that elective township officers may include park commission members. Moreover, section 358(1)(g) of the election code provides that there *shall* be elected several specified township officers, including park commission members in those townships having park commissions.

The Legislature has not provided the authorization for, or the means of terminating the existence of a voter-established township park commission. Although not directly on point, the Michigan Supreme Court in *Cain v Brown*, 111 Mich 657, 661; 70 NW 337 (1897), quoted with approval the rule regarding dissolution of municipal corporations: "As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision." This rule, being applicable to other types of public entities, has been applied to consolidated drain districts; to county hospitals; and to local transportation authorities.

It is my opinion, therefore, in answer to your second question, that a voter-established township park commission may not be dissolved by resolution of the charter township board or by vote of the township electors following the township's incorporation as a charter township.

In the event the Legislature deems it appropriate to authorize the dissolution of township park commissions, it may adopt legislation granting such authority and specifying the procedures for its implementation. [OAG 1999-2000, No. 7039, p 80 (December 9, 1999) (emphasis in original).]

"Although Attorney General opinions are not binding on this Court, they can be persuasive authority." *Lyso-*

gorski v Bridgeport Charter Twp, 256 Mich App 297, 301; 662 NW2d 108 (2003); see also *Williams v Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000). For the reasons set forth below, we find the logic of OAG 1999, No. 7039 to be persuasive.

The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). The Legislature is presumed to have intended the meaning it plainly expressed. *Id*. at 232. We cannot read into a statute language that was not placed there by the Legislature. *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003). " 'Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.' " *Grimes v Dep't of Transportation*, 475 Mich 72, 85 n 43; 715 NW2d 275 (2006), quoting *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

We fully acknowledge that provisions of law concerning counties, townships, cities, and villages "shall be liberally construed in their favor." Const 1963, art 7, § 34; *Hess v West Bloomfield Twp*, 439 Mich 550, 560-561; 486 NW2d 628 (1992). However, "the powers granted to townships by the Constitution and by law must include only those fairly implied and not prohibited by the Constitution." *Howell Twp v Rooto Corp*, 258 Mich App 470, 475-476; 670 NW2d 713 (2003). Townships have no inherent powers; rather, they possess only those limited powers conferred on them by the Legislature or the Michigan Constitution. *Hess v Cannon Twp*, 265 Mich App 582, 590; 696 NW2d 742 (2005). Thus, for the dissolution of the Lincoln Charter Township Park Commission to be valid, there must be a

statute or constitutional provision that expressly or impliedly authorizes such an action. See *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168, 187; 351 NW2d 544 (1984).

As noted previously, the township parks act permits the qualified electors of a township to establish a township park commission by popular vote, MCL 41.426, but does not provide a means for dissolving a voter-established township park commission. Nor does any other provision of law allow for the dissolution of a voter-established township park commission.

In contrast, certain other statutes explicitly provide for *both the establishment and dissolution* of various commissions, boards, and programs by the qualified electors of a local unit of government. For example, the community center act, MCL 123.41 *et seq*., states that upon receipt of a petition signed by at least 10 percent of the qualified electors, the legislative body of a township or village[3] "shall submit . . . to the people" the question whether the township or village should establish a community center and a board of directors to oversee it. MCL 123.41; MCL 123.44. The act provides that "if adopted by a majority vote of the qualified voters participating in said election, then this act shall be in full force and effect." MCL 123.41. The act goes on to provide, however, that a township or village that has established a community center and accompanying board of directors may dissolve that community center and board of directors by way of a subsequent popular vote:

> Any . . . village or township having previously adopted the provisions of this act, may at any time thereafter relinquish said authority or power by following the same procedure as provided in this act for adopting the provisions

[3] The community center act applies only to townships and villages with no more than 10,000 inhabitants. MCL 123.41.

> thereof: Provided, That such action may be taken by the legislative body aforesaid only after a petition signed by 10 per centum of the qualified voters residing in such village or township, as the case may be, duly filed with the legislative body thereof at least 90 days prior to the date of re-submission asking that the question of relinquishment of said authority be re-submitted to the vote of the people. [MCL 123.46.]

Similarly, the band act, MCL 123.861 *et seq*., states that upon receipt of a petition signed by at least 10 percent of the qualified electors, the legislative body of a township, village, or city[4] "shall submit . . . to the people" the question whether the township, village, or city should establish a governmentally funded musical band for the benefit of the public. MCL 123.861; MCL 123.862. The act provides that "if adopted or agreed to by a majority vote of the qualified voters participating in said election, then this act shall be in full force and effect." MCL 123.861. The act goes on to provide, however, that a township, village, or city that has established a publicly funded musical band may dissolve that band by way of a subsequent popular vote:

> Any . . . village, township or city, having previously adopted the provisions of this act, may at any time thereafter relinquish said authority or power by following the same procedure as provided in this act for adopting the provisions thereof: Provided, That such action may be taken by the legislative body aforesaid only after a petition signed by 10 per centum of the qualified voters residing in such village, township or city, as the case may be, duly filed with the legislative body thereof at least 60 days prior to the date of re-submission, asking that the question of relinquishment of said authority be re-submitted to the vote of the people. [MCL 123.863.]

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[4] The band act applies to townships and villages, and also applies to cities with no more than 50,000 inhabitants. MCL 123.861.

The firefighters and police officers civil service system act, MCL 38.501 *et seq*., states that upon receipt of a properly signed petition, the governing body of a "city, village, or municipality"[5] shall submit to the qualified electors the question whether that city, village, or municipality should establish a firefighters and police officers civil service commission. MCL 38.517a(2). The act provides that "[i]f the majority of the qualified electors of the city, village, or municipality vote in favor of the adoption of this act, then this act shall be in full force and effect in that city, village, or municipality." MCL 38.517a(4). The act goes on to provide, however, that a city, village, or municipality that has established a firefighters and police officers civil service commission may dissolve that commission by way of a subsequent popular vote:

> This act shall continue in full force and effect in any city, village, or municipality in which it has been properly adopted until rescinded by a majority of the electors voting thereon at an election at which the question of rescission of this act for that city, village, or municipality is properly submitted. [MCL 38.518(1).]

The act specifies that "[i]f the majority of the qualified electors of the city, village, or municipality vote in favor of the rescission of this act, then this act is rescinded in that city, village, or municipality." MCL 38.518(3).

Lastly, the sheriff's department civil service commission act, MCL 51.351 *et seq*., states that upon receipt of a properly signed petition, a county board of commissioners shall submit to the qualified electors the question whether that county[6] should establish a civil ser-

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[5] The firefighters and police officers civil service system act applies only to municipalities that pay some or all members of their fire departments or police departments. MCL 38.501.

[6] The sheriff's department civil service commission act applies only to counties with 400,000 or more inhabitants. MCL 51.351.

vice commission for sheriff's department employees. MCL 51.366. The act provides that "[i]f the majority of the qualified electors vote in favor of the adoption of this act, then the provisions of this act shall be in full force and effect in the county." MCL 51.366(4). The act goes on to provide, however, that a county that has established a civil service commission for sheriff's department employees may dissolve that commission by way of a subsequent popular vote:

> This act shall continue in full force and effect in any county in which it has been properly adopted until rescinded and repealed by a majority of the electors voting thereon at an election at which the question of rescission and repeal of this act for that county is properly submitted. [MCL 51.367.]

The act specifies that "[i]f a majority of the qualified electors vote in favor of the rescission and repeal of this act, then the provisions thereof shall be rescinded and repealed in the county, and not otherwise." MCL 51.367.

The Legislature is presumed to be aware of all existing statutes when enacting new laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). As the abovementioned examples make clear,[7]

[7] As originally enacted, the township parks act required a township board to automatically create a township park commission upon receipt of the necessary petitions. See 1905 PA 157. However, this mechanism for creating a township park commission was altered in 1962. At that time, the Legislature amended the act to require a township board, upon receipt of the necessary petitions, to submit to the qualified electors of the township the question of establishing a township park commission. See 1962 PA 33. Of the abovementioned statutes, three specifically predate this 1962 amendment. For instance, the abovementioned provisions of the community center act were all originally enacted in 1929. See 1929 PA 199. The abovementioned provisions of the band act were all originally enacted in 1923. See 1923 PA 230. The abovementioned section of the firefighters and police officers civil service system act allowing for

the Legislature unquestionably knows how to provide for *both the establishment and dissolution* of various commissions, boards, and programs by the voters of local units of government. In light of these statutes—all of which provide for both establishment and dissolution by popular vote—we must view as intentional the Legislature's failure to provide for the dissolution of township park commissions. *Grimes*, *supra* at 85 n 43; *Farrington*, *supra* at 210. There is simply no statutory mechanism for dissolving a voter-established township park commission, and we may not read into the township parks act a provision that was not included by the Legislature.[8] *AFSCME*, *supra* at 412.

As at least some members of our Supreme Court have observed, the township parks act contains both "the grant and limitation of a township's powers." *Burton Twp v Speck*, 378 Mich 213, 229; 144 NW2d 347 (1966) (ADAMS, J., dissenting). Neither the township board nor the township electorate has been given the express or implied power to dissolve a voter-established township park commission. We therefore conclude that defendants acted beyond their authority when they placed before the township electors the question of dissolving

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voter establishment of a civil service commission was originally enacted in 1935, see 1935 PA 78, and the section providing for voter dissolution of an established civil service commission was enacted in 1951, see 1951 PA 88. Accordingly, it is apparent that when amending the township parks act in 1962, the Legislature knew how to enact laws providing for *both the establishment and dissolution* of various commissions, boards, and programs by the voters of local units of government.

[8] Nor can we conclude that the power to dissolve a township park commission by way of an act of "equal dignity" is fairly implied by the statutory power to establish a township park commission in the first instance. See Const 1963, art 7, § 34. Quite simply, in light of the abovementioned statutes that provide for both the establishment and dissolution of various commissions, boards, and programs, we must conclude that the Legislature has purposefully decided not to enact a mechanism for dissolving voter-established township park commissions.

the Lincoln Charter Township Park Commission. As observed by the Attorney General, it is for the Legislature "to authorize the dissolution of township park commissions"—it is not for the courts.

IV

Nor can we conclude that the improper vote to dissolve the Lincoln Charter Township Park Commission had the effect of recalling the individual township park commissioners. Elected officials may only be removed from office as provided by law. See Const 1963, art 7, § 33. "Recalls of elected officials in Michigan are governed by MCL 168.951 *et seq*." *Dimas v Macomb Co Election Comm*, 248 Mich App 624, 627; 639 NW2d 850 (2001). This includes township officials. MCL 168.372. Among other things, a petition for the recall of a public officer shall "[s]tate clearly each reason for the recall. Each reason for the recall shall be based upon the officer's conduct during his or her current term of office." MCL 168.952(1)(c). Further, "[a] separate petition shall be circulated for each officer sought to be recalled." MCL 168.958a. A copy of the petition seeking to dissolve the Lincoln Charter Township Park Commission is contained in the lower court file. The petition does not mention the recall of any specific park commissioner or state the reasons why any particular park commissioner should be removed. See MCL 168.952(1)(c). Nor were individual petitions circulated for each member of the park commission. See MCL 168.958a. The attempt to dissolve the park commission did not conform to the provisions of Michigan law governing the recall of public officials. Thus, the vote to dissolve the park commission did not have the effect of recalling the individual township park commissioners.

V

We reverse the judgment of the trial court and remand for entry of an order consistent with this opinion. The trial court shall invalidate the purported dissolution of the Lincoln Charter Township Park Commission and shall order reinstatement of the park commission as it would have existed in the absence of the improper vote to dissolve it. The membership of the reinstated park commission shall include all township park commissioners who would have held office, notwithstanding the improper vote to dissolve the commission, as of 12:00 noon on November 20, 2006. See MCL 168.362(1).[9]

In light of our resolution of the issues, we decline to address the remaining arguments raised by the parties on appeal.

Reversed and remanded to the trial court for entry of an order consistent with this opinion. We do not retain jurisdiction. No costs, a public question having been involved.

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[9] The membership of the reinstated park commission shall include all persons who were elected to the office of Lincoln Charter Township park commissioner at the 2006 general election. These persons properly assumed their offices as of 12:00 noon on November 20, 2006, and shall hold office for terms of four years, until their successors are elected at the 2010 general election and qualified. MCL 41.426(2); MCL 168.362(1). The membership of the reinstated park commission shall also include all other park commissioners who would have held office, notwithstanding the improper vote to dissolve the commission, as of 12:00 noon on November 20, 2006. Because the filing deadline for the 2008 primary election has now passed, MCL 168.551, there can be no election of Lincoln Charter Township park commissioners at the 2008 general election. Therefore, all park commissioners—other than those elected at the 2006 general election—shall vacate their offices on January 1, 2009, MCL 168.362(1), and the Lincoln Charter Township board shall fill any resulting vacancies on the township park commission at that time, MCL 41.426(5); MCL 168.370. Any persons appointed to fill such vacancies shall hold office only until the 2010 general election, at which time their successors shall be elected and shall take office upon qualifying. MCL 168.370a.

PEOPLE v PETRI

Docket No. 275019. Submitted May 6, 2008, at Lansing. Decided May 15, 2008. Approved for publication June 26, 2008, at 9:05 a.m. Leave to appeal sought.

Mark R. Petri was convicted by a jury in the Livingston Circuit Court, Stanley J. Latreille, J., of second-degree criminal sexual conduct (CSC), MCL 520c(1)(a), and was sentenced as a second-offense habitual offender to imprisonment for a minimum of 14 years and 10 months and a maximum of 22½ years. The defendant appealed his conviction and sentence.

The Court of Appeals *held*:

1. The defendant was not denied the effective assistance of counsel. First, although defense counsel did not object on the record to the admission of the defendant's two previous convictions of second-degree CSC involving minors, the trial court clearly considered the evidence admissible under MCL 768.27a, and stated that its probative value outweighed the danger of unfair prejudice. Accordingly, it is not reasonably probable that an objection would have made a difference in the outcome. Second, defense counsel was not ineffective for failing to adequately cross-examine a detective regarding an incident involving the defendant's alleged presence at a day-care center. Defense counsel objected to the admission of the evidence and later established that the defendant had an alibi for this incident. Third, stipulating the admission of unredacted copies of the defendant's prior convictions, which included the information that he was on probation and not permitted to have contact with children under 16 years old, was not ineffective assistance. The jury was instructed not to consider the possible penalty for these crimes, and the decision to allow the jury to see the entire judgment of sentence was evidently a strategy to avoid allowing the jury to speculate about the defendant's conviction or the terms of his probation. Finally, defense counsel was not ineffective for failing to object to a detective's testimony that his decision to investigate the defendant stemmed from concerns that he may have been "grooming" the victim for more intense sexual contact in the future. This testimony did not require the detective's qualification as an expert; the

detective would have qualified even if it had, and there is no reasonable probability that this brief testimony affected the outcome of the trial.

2. The trial court did not err by denying the defendant's motion to disqualify the prosecutor on the ground that she was a necessary witness. Granting the defendant's untimely motion would have caused hardship to the prosecution, and the defendant did not establish that the prosecutor was a necessary witness by showing that no other witness could bring forth the information at issue.

3. The defendant has not established a sufficient basis for disturbing the trial court's determination that substantial and compelling reasons existed to depart from the sentencing guidelines recommended minimum sentence range. Although the trial court's reason for departure reflects some of the considerations already taken into account by the guidelines, the trial court determined that the guidelines failed to adequately consider the similar nature of the defendant's pattern of felony crimes.

4. The defendant is not entitled to resentencing under *Blakely v Washington*, 542 US 296 (2004), because that case does not apply to Michigan's indeterminate sentencing scheme.

Affirmed

TRIAL — WITNESSES — ATTORNEY WITNESSES.

A prosecuting attorney who has interviewed a crime victim need not be disqualified on the ground that he or she is a necessary witness at trial if other witnesses can bring forth the information at issue or if granting an untimely motion for disqualification would result in hardship for the prosecution (MRPC 3.7[a]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David L. Morse*, Prosecuting Attorney, and *William J. Vailliencourt, Jr.*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Brandy Y. Robinson*) for the defendant.

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM. Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a person under 13), and was sentenced as a second-offense habitual offender, MCL 769.10, to imprisonment for a minimum of 14 years and 10 months and a maximum of 22½ years. He appeals of right. We affirm.

I

The victim and her parents met defendant on July 5, 2005, during a family outing. Defendant then began arriving at the victim's house for breakfast when her father was leaving for work. Defendant was usually around the victim and her siblings during his visits, on one occasion jumping into bed with the victim and tickling her to wake her up. On more than one occasion he pinched the victim's bottom while they were swimming in a lake.

The incident that led to defendant's conviction occurred on July 14, 2005, while the victim's mother and defendant were helping a friend move to a new residence. The victim and a younger sister rode with defendant in his truck. The victim was seated next to defendant in the front passenger seat, while her sister sat behind them. Defendant stopped at a gas station and bought a bottle of Mountain Dew. After returning to the truck, defendant, while giving the 12-year-old victim a strange smile, used the bottle to open the victim's closed legs and then pushed it up her jean skort (a skirt with shorts stitched underneath) so that the bottle cap touched the clothing covering her genital area. The victim waited a few minutes before removing the bottle. She later told her sister and mother what defendant did with the bottle. The victim's mother reported the incident to the Livingston County Sheriff's

Department, which investigated. During an interview conducted by Detective Scott Domine after his arrest, defendant denied that he was ever left alone with the victim and her sister.

II

Defendant now argues that he was denied the effective assistance of counsel at trial because trial counsel failed to raise several evidentiary objections. Because defendant did not move for a new trial or *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo. *Id*.

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *LeBlanc*, *supra* at 578. To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

(2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first argues that defense counsel was ineffective for failing to challenge the admissibility of evidence of his two prior convictions for second-degree criminal sexual conduct under MRE 404(b), which limits the admission of a defendant's other crimes, wrongs, or acts. We disagree. The admissibility of the evidence did not depend on MRE 404(b), because the prosecutor also relied on MCL 768.27a as authority to admit it. When a defendant is charged with second-degree criminal sexual conduct against a minor, evidence that the defendant committed another crime of second-degree criminal sexual conduct against a minor may be admitted under MCL 768.27a, independent of MRE 404(b), even if there was no conviction for the other crime. See *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). The evidence "may be considered for its bearing on any matter to which it is relevant." MCL 768.27a. A defendant's propensity to commit criminal sexual behavior can be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor. *Pattison, supra* at 619-620.

The trial court's remarks at trial indicate that there were off-the-record discussions with the prosecutor and defense counsel regarding the admissibility of defendant's two prior convictions of second-degree criminal

sexual conduct involving minors. Although defense counsel did not object to the evidence on the record, it is clear from the trial court's remarks that it considered the evidence admissible under MCL 768.27a. The trial court also applied MRE 403, stating that the probative value of such evidence "vastly outweighs" the prejudicial value, calling for its admission. Defendant has failed to show that an on-the-record objection by defense counsel, based on either MRE 404(b) or MCL 768.27a, would have caused the trial court to exclude the evidence.

Further, we agree with the prosecution's argument that the evidence was used by the defense. Defense counsel suggested to the jury in closing argument that the discovery of defendant's status as a convicted sex offender caused the victim's mother to perceive defendant's innocent conduct as a sexual assault. Defense counsel argued that the victim's mother was "in the front lines" of what happened, and concluded his closing argument by suggesting, "It's easy to—to point the finger at him and to agree that what he did was shameful—his past is shameful. . . . It's so dangerous in this case because of his past. That you would overlook something that was otherwise innocent that became something else, but I think that's exactly what happened in this case."

Defendant has failed to overcome the presumption that defense counsel engaged in sound trial strategy by not making an on-the-record objection to evidence that was ultimately used by the defense. Defense counsel stipulated the admission of a certified copy of the convictions during the victim's mother's testimony regarding information that she acquired from defendant about him being a registered sex offender. A failed strategy does not constitute deficient performance.

People v Kevorkian, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). In any event, defendant's claim of ineffective assistance of counsel on this ground cannot succeed because there is no reasonable probability that an objection would have made a difference in the outcome.

Defendant also argues that defense counsel was ineffective by not adequately cross-examining Detective Domine to dispel any suspicion that defendant was involved in "scoping out" a day-care center. Because defendant has not supported his argument with citations to the record, as required by MCR 7.212(C)(7), we need not consider this argument. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). But even if we were to overlook this deficiency, appellate relief on this ground would not be warranted.

The questioning of witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, defense counsel made an initial hearsay objection to the victim's mother giving testimony regarding what a friend told her about an incident at a day-care center in Pinckney. The trial court overruled the objection, because the prosecutor was not offering the evidence for a substantive purpose (to prove the truth of the matter asserted), but rather to show how the information affected the victim's mother. The prosecutor was cautioned not to suggest that defendant committed the act, and the prosecutor responded by using leading questions to question the victim's mother. The victim's mother testified that information about the day-care incident caused her to contact defendant's probation agent, who told her to contact Detective Domine, which in turn led her to

report the incident involving the victim to Detective Domine. Defense counsel later elicited testimony from Detective Domine that he received information from the Pinckney Police Department that defendant had an alibi for the day-care-center incident.

Defendant's argument is cursory. And we are not persuaded that defense counsel's failure to further cross-examine Detective Domine on the fact that defendant was not linked to the day-care incident, or to emphasize the matter more strongly to the jury, constituted deficient performance or caused the requisite prejudice. This is especially true given that defense counsel established that defendant had an alibi for the incident.

Defendant next argues that defense counsel was ineffective for stipulating the admission of a certified copy of his prior convictions. Defendant argues that a simple verbal stipulation would have been sufficient to inform the jury about the prior convictions. Alternatively, defendant argues that defense counsel should have requested that the documents be redacted to exclude information that he was sentenced to probation and was not allowed to have unsupervised contact with children under 16 years of age. Limiting our review to the record, defendant has not met his burden of showing either deficient performance or prejudice.

Although we agree that penalty is not an appropriate consideration for the jury, the jury was instructed that "[p]ossible penalty should not influence your decision." Jurors are presumed to follow instructions, and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Further, there is no evidence that the jury was informed of the possible penalty; it was only informed of the sentences that defendant received for prior crimes.

Considering that the victim's mother testified that she spoke with defendant's probation agent, the jury could have reasonably inferred that defendant was on probation, regardless of the content of the exhibit. Defense counsel evidently made a strategic decision to have the jury see the entire judgment of sentence, rather than risk the jury speculating about the applicable conviction for the probationary sentence or the terms of probation. The information that defendant was not permitted to have unsupervised contact with children was consistent with defense counsel's closing argument that it did not make sense that defendant would take the children into his truck and assault one of them.

And while the prosecutor used this information in her closing argument to suggest that defendant lied to Detective Domine, because of concern that his probation would be revoked if he told the truth, we are not persuaded that the argument was improper. That our rules of evidence preclude the use of evidence for one purpose does not render the evidence inadmissible for other purposes. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Therefore, we reject defendant's claim that defense counsel was ineffective by not objecting to the prosecutor's argument. Counsel need not make a futile objection. *Rodgers, supra* at 715.

Finally, defendant argues that defense counsel was ineffective for failing to object to Detective Domine's testimony about "grooming." We disagree. Detective Domine did not testify that defendant engaged in "grooming"; only that he was concerned that there might have been grooming going on, based on what he was told by the victim's mother, and that this was a factor in his decision to go forward with an investigation and prosecution. Although Detective Domine also

provided a definition of "grooming," we reject defendant's position that the definition required expert testimony.

In *People v Ackerman*, 257 Mich App 434, 443-445; 669 NW2d 818 (2003), this Court upheld the admissibility of a psychotherapist's expert testimony about patterns of behavior exhibited by child sex abusers. Unlike in *Ackerman*, Detective Domine was attempting to explain his decision to move forward with an investigation. Detective Domine did not testify regarding typical patterns of behavior, but only described a process in his definition of "grooming" where "you start with small things with children and they progress to greater things. Touching can progress to more intense sexual contact later on."

Because there is no indication that Detective Domine was offering a technical or scientific analysis of the behavior of child sex abusers, it was not necessary that the prosecutor qualify Detective Domine as an expert. Cf., e.g., *People v McLaughlin*, 258 Mich App 635, 657-658; 672 NW2d 860 (2003) (lay opinion admissible under MRE 701 where it was largely based on common sense and did not involve highly specialized knowledge).

Even assuming that it was necessary that Detective Domine be qualified as an expert witness to give his brief testimony regarding "grooming," any error was harmless, because Detective Domaine would have qualified. Detective Domine testified that he had 15 years of experience with the Livingston County Sheriff's Department, and received training in the forensic interviewing of children. A police witness can be qualified as an expert on the basis of experience or training in child sexual abuse cases. MRE 702; *People v Dobek*, 274 Mich App 58, 76-79; 732 NW2d 546 (2007). In any event, we conclude that expert testimony was not necessary to

assist the jury in evaluating the evidence of the events leading up to the July 14, 2005, incident underlying the charge. Finally, because no reasonable probability exists that Detective Domine's brief testimony regarding "grooming" affected the outcome of the trial, defendant's claim of ineffective assistance of counsel fails.

III

Defendant next argues that the trial court erred by denying his motion to disqualify the prosecutor from trying the case on the ground that she had interviewed the victim and was therefore a necessary witness. We review the trial court's findings of fact for clear error and its application of the law to the facts de novo. *People v Tesen*, 276 Mich App 134, 141; 739 NW2d 689 (2007). A defendant seeking to disqualify a prosecutor as a necessary witness bears the burden of proof. *Id*. at 144. A prosecutor is not a necessary witness if the substance of the testimony can be elicited from other witnesses, and the party seeking disqualification did not previously state an intent to call the prosecutor as a witness. *Id*.

Michigan lawyers are governed by the Michigan Rules of Professional Conduct (MRPC), under which a lawyer generally cannot simultaneously be a witness and an advocate at trial. MRPC 3.7(a) provides:

> *A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness* except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client. [Emphasis added.]

In *Tesen*, a prosecutor, in investigating a complaint that the defendant sexually abused his son, took a lead role by conducting a forensic interview of the son[2] while other team members observed all or part of the interview. *Tesen, supra* at 135-136. The next day, the prosecutor authorized a warrant charging the defendant with first-degree criminal sexual conduct and other charges. *Id.* at 136. The defendant moved to disqualify the prosecutor before the preliminary examination, asserting that he reasonably intended to call him as a witness. *Id.* The district court denied the motion, but the circuit court later granted a defense motion to disqualify the prosecutor. *Id.* at 139. This Court affirmed the disqualification order, finding no clear error in the circuit court's determination that the prosecutor was likely to be a necessary witness at trial. *Id.* at 135.

We find *Tesen* distinguishable, because here defendant did not make a timely demand to disqualify the prosecutor, nor did he demonstrate that the prosecutor would be a necessary witness at trial. The issue was first raised at defendant's preliminary examination. Defense counsel acknowledged that the prosecutor was a highly qualified, trained forensic interviewer, and that another trained forensic interviewer also observed the interview. The district court did not disqualify the prosecutor, but indicated that its decision could change, and that defense counsel would have a right to cross-examine the prosecutor if there was information that only she possessed. Any notes of the interview of the victim were to be given to defense counsel.

Ultimately, only the victim and her mother testified at the preliminary examination. After defendant was

[2] The goal of the forensic interview was to obtain a statement from the child "in a developmentally sensitive, unbiased, and truth-seeking manner" to support accurate and fair decision-making. *Tesen*, *supra* at 136.

bound over for trial in the circuit court, defendant's counsel withdrew. Much later, substitute counsel filed a motion to disqualify the prosecutor. The prosecutor filed a response that, among other things, challenged defense counsel's claim that no hardship would result if she were disqualified. The trial court denied the motion, ruling that the prosecutor was not a necessary witness because other witnesses could bring forth the information at issue, and ruling that, because the motion was on the eve of trial, granting the motion would be prejudicial to the prosecution.

We affirm the trial court's reasoning. The trial court appropriately questioned the timeliness of the motion. "[T]he timeliness of the motion may be considered in determining the likelihood that the defendant's motion is made in good faith and not just for the purpose of gaining a tactical advantage." *People v Paperno*, 54 NY2d 294, 303; 429 NE2d 797; 445 NYS2d 119 (1981). It can cause a hardship by disqualifying the prosecutor most familiar with the case and requiring duplicative work by a substitute prosecutor. *United States v Johnston*, 690 F2d 638, 645 (CA 7, 1982).

Further, we agree with the trial court's determination that defense counsel failed to establish that the prosecutor was a necessary witness. Although given an opportunity to identify a particular issue on which the prosecutor would be a necessary witness, the gist of defense counsel's argument was that any prosecutor should be automatically disqualified if he or she becomes part of an interview team or conducts a forensic interview. Because defense counsel failed to offer any particularized basis for concluding that the prosecutor's testimony would be material to the defense, we uphold the trial court's denial of the motion to disqualify.

The trial court's decision did not deprive defendant of a substantial defense. Defense counsel presented evidence at trial regarding the prosecutor's interview through his cross-examination of Detective Domine. Defendant has not identified any issue that actually arose at trial, or was raised by defense counsel on the basis of the trial evidence, that demonstrates a need for the prosecutor's testimony to support the defense. The right to present a defense may be limited by rules of procedure and evidence designed to ensure fairness and reliability. *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000). Because we find no error in the trial court's ruling not to disqualify the prosecutor, and defendant has not demonstrated that he was deprived of his right to present a substantial defense at trial, reversal is denied.

IV

Next, defendant seeks to set aside his minimum sentence of 14 years and 10 months.[3] Defendant argues that the trial court erred by imposing a minimum sentence of 178 months, a 71-month (about a six-year) departure from the sentencing guidelines recommended range of 43 to 107 months for the minimum sentence. As explained in *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007):

> In reviewing a trial court's grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court's factual finding that a particular factor in support of departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). However, whether

[3] Although it appears that the trial court intended to impose the statutory maximum sentence of 15 years, the trial court was dissuaded from doing so by the prosecutor's erroneous calculation that two-thirds of the $22\frac{1}{2}$ year maximum was 14 years and 10 months.

> the factor is objective and verifiable is a question of law that this Court reviews de novo. *Id*. Finally, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Id.* at 264-265. A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *Id.* at 269.

The guidelines range was based on a score of 60 total prior record variable (PRV) points and 45 total offense variable (OV) points. A score of 50 points for PRV 1 reflected that defendant had two prior high-severity felony convictions, MCL 777.51(1)(b), and a score of 10 points for PRV 6 reflected that defendant was on probation, MCL 777.56(1)(c). A score of 10 points each for OV 4 and OV 10 reflected that the victim suffered serious psychological injury requiring professional treatment, MCL 777.34(1)(a), and that defendant exploited the victim's youth, MCL 777.40(1)(b). Finally, the score of 25 points for OV 13 reflected that the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b).

We agree with defendant that the trial court's reason for departure reflects some of the characteristics already considered in OV 13 and PRV 1. But this is not necessarily fatal to the minimum sentence imposed. A trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range *unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight*." MCL 769.34(3)(b) (emphasis added). Here, the trial court's determination that the guidelines failed to adequately consider the similar nature of defendant's pattern of

felony crimes, and the aggravating circumstances, satisfied the exceptions permitted by statute.

The requirement that the trial court base its decision on objective and verifiable facts—i.e., actions and occurrences external to the minds of those involved in the decision and capable of being confirmed, *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003)—did not preclude the court from drawing inferences about defendant's behavior from objective evidence. For instance, in *People v Claypool*, 470 Mich 715, 718; 684 NW2d 278 (2004), our Supreme Court determined that if it could be objectively and verifiably shown that police conduct or some other precipitating cause altered a defendant's intent, the altered intent could be considered by a sentencing judge as a basis for a downward departure. Here, while the trial court described defendant's conduct as "grooming" and "stalking," it reached these conclusions on the basis of objective evidence that defendant arrived at the victim's home after her father left the home, that defendant crawled into her bed, and that defendant pinched the victim when they were swimming. The trial court drew reasonable conclusions about defendant's actual behavior to depart from the guidelines, and we find no error in its consideration of these aggravating circumstances as a basis for exceeding the guidelines range.

We are also satisfied that the trial court's observations regarding the reversal of convictions of first-degree criminal sexual conduct in another case did not affect its decision to depart from the guidelines range, nor did it affect the extent of the departure. We find no support for defendant's suggestion that the trial court improperly assumed that he committed the prior offenses. Examined in context, the trial court's remarks indicate only that it was summarizing defendant's criminal history. Therefore, resentencing on this ground is not warranted. *Babcock, supra* at 271-272.

In sum, defendant has not established sufficient basis for disturbing the trial court's determination that substantial and compelling reasons existed to depart from the guidelines recommended range for the minimum sentence. Further, the degree of departure was not an abuse of discretion. To be sure, this case presented a difficult sentencing decision. But we conclude that a minimum sentence of 178 months is within the range of reasonable and principled outcomes. *Babcock*, *supra* at 268-269; *Young*, *supra* at 448. The sentence is proportionate to the seriousness of defendant's crimes, past and present. *Babcock*, *supra* at 262.

V

Finally, defendant argues that he is entitled to resentencing, because the trial court enhanced the sentence on the basis of facts neither admitted by defendant nor proven to a jury beyond a reasonable doubt. Defendant relies on the Due Process Clause, as well as the Fourth and Sixth amendments of the United States Constitution. We disagree.

Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), contending that the trial court erred by relying on facts not found by the jury when scoring the sentencing guidelines. But defendant concedes that he did not preserve his argument. In any event, defendant's argument lacks merit, because *Blakely* does not apply to Michigan's indeterminate sentencing regime. See *People v McCuller*, 479 Mich 672, 694-695; 739 NW2d 563 (2007).

VI

The trial court did not infringe defendant's constitutional right to the effective assistance of counsel. The

trial court did not abuse its discretion in denying defendant's eleventh-hour motion to disqualify the prosecutor. The trial court did not abuse its discretion in imposing a minimum sentence in excess of the range recommended by the statutory sentencing guidelines, and did not impose a disproportionate sentence. Finally, the trial court's sentence did not violate defendant's federal Sixth Amendment rights.

Affirmed.

SISK-RATHBURN v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 275121. Submitted April 9, 2008, at Detroit. Decided April 29, 2008. Approved for publication June 26, 2008, at 9:10 a.m.

Christina Sisk-Rathburn, who did not have a no-fault automobile insurance policy of her own, brought an action in the Wayne Circuit Court against Farm Bureau General Insurance Company of Michigan, seeking a resumption of no-fault personal protection insurance (PIP) benefits for injuries she sustained while driving a rented car. The defendant, which had issued a "business auto" policy to the plaintiff's husband, ceased paying PIP benefits to the plaintiff after determining that its policy provided only liability coverage with respect to a temporary substitute for a covered automobile that is out of service. The court, William J. Giovan, J., granted summary disposition for the defendant, ruling in part that there existed no genuine issue of fact and the defendant was entitled to judgment as a matter of law.

The Court of Appeals *held*:

1. The trial court correctly concluded that the defendant's policy does not provide PIP coverage for a vehicle not listed as owned by the plaintiff's husband's business. That policy provided that only liability coverage is extended to an automobile being used "as a temporary substitute for a covered 'auto' that you own that is out of service."

2. The plaintiff, as the spouse of an employee, is entitled to whatever PIP benefits her husband would be entitled to under the policy, MCL 500.3114(3). The defendant owed no PIP benefits to the plaintiff because the policy provides to her husband only liability coverage for rented automobiles.

3. Equitable estopped does not apply to obligate the defendant to continue paying PIP benefits to the plaintiff. The plaintiff had the same access as the defendant to the insurance contract, which expressly limited PIP benefits to enumerated vehicles and extended only liability coverage for substitute vehicles.

4. The "innocent third party" rule, which prohibits an insurer from rescinding an insurance policy because of a material misrep-

resentation made in an application for no-fault insurance where there is a claim involving an innocent third party, does not apply to this case because the defendant did not rescind the policy, but merely stopped paying benefits after concluding that the claim was not covered by the policy.

Affirmed.

Craig S. Romanzi & Associates, P.C. (by *Craig S. Romanzi*), for the plaintiff.

G.W. Caravas & Associates, P.C. (by *Gary W. Caravas*), for the defendant.

Before: JANSEN, P.J., and DONOFRIO and DAVIS, JJ.

PER CURIAM. Plaintiff appeals as of right an order dismissing her complaint against defendant in this no-fault insurance action. We affirm.

The plaintiff was injured in a car accident while driving a rental vehicle. She did not have her own automobile insurance policy at the time, but her husband, with whom she resided, had a no-fault policy with defendant at the time. The policy listed plaintiff as a driver, and it covered four vehicles; the rental vehicle was temporarily substituting for one of those vehicles because that vehicle "was in the shop." Defendant paid personal protection insurance (PIP) benefits for a time, but terminated those benefits and contends that the rental car was not actually covered under the policy. Plaintiff commenced this action, asserting that defendant may not terminate those benefits. The trial court concluded that the insurance policy had been a *business* policy and that plaintiff was not in one of the business's vehicles; therefore, plaintiff was not entitled to benefits, and the benefits already paid were a "windfall."

A grant or denial of summary disposition is reviewed 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). Although defendant brought its motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), the trial court examined evidence outside the pleadings, so we treat the grant of summary disposition as having been pursuant only to MCR 2.116(C)(10). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden, supra* at 120.

We agree with the trial court's determination that the policy at issue here was a business policy. The policy explicitly states that the policy type is "business auto," and it is replete with further supporting indicators that it was issued to a business. The schedule of coverages refers to "business auto coverages" only. The schedule of covered vehicles lists four vehicles, two of which are described as being for "commercial" use and two of which are described as being for "service" use. Under the schedule for non-ownership liability, the premium is calculated on the basis of the "insured's business" being "other than a social serv. agcy," and the number of employees being between zero and 25. The policy identifies the "form of business" as being "individual," and lists the "named insured and mailing address" as plaintiff's husband at his personal residence. However, a business can consist of a single self-employed individual or sole proprietor. The trial court correctly concluded that the policy had been issued to a business.

We also agree with the trial court's determination that plaintiff is not covered for PIP benefits under the

policy unless in one of the business's vehicles, which she was not. The policy contains a schedule of covered benefits and covered vehicles. PIP is limited to the enumerated vehicles, and only liability coverage extends to any other vehicles. PIP and liability coverages are distinct. *Husted v Auto-Owners Ins Co*, 459 Mich 500, 513; 591 NW2d 642 (1999). The policy provides that *only liability coverage* is extended to an automobile being used "as a temporary substitute for a covered 'auto' that you own that is out of service." In contrast, although PIP coverage apparently *could* be purchased for vehicles not specifically listed, such coverage was not purchased in *this* policy. The trial court correctly concluded the policy does not provide PIP coverage for a vehicle not listed as owned by the business.

Although plaintiff is named as a designated driver in the policy, this does not make her a named insured. *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 253; 535 NW2d 207 (1995). The only named insured on the policy is plaintiff's husband, and because the policy is unambiguously a business policy issued to an individual business, plaintiff's husband is an employee under MCL 500.3114(3). *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996). Plaintiff would therefore be entitled to whatever PIP benefits her husband would be entitled to under the policy. As discussed, the trial court correctly found that defendant owed no PIP benefits because the policy does not provide PIP coverage for the rental vehicle.

Plaintiff also argues that defendant is required to continue making PIP benefit payments pursuant to the doctrine of equitable estoppel. "The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract." *Morales v Auto-Owners Ins Co*, 458

Mich 288, 295; 582 NW2d 776 (1998). "Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006) (internal quotation and citation omitted). Plaintiff contends that she refrained from filing a claim with another insurance provider because of her reliance on defendant's PIP benefit payments, and the "one-year-back" rule, MCL 500.3145(2), now precludes her from doing so. We disagree.

At oral argument, counsel for defendant conceded that defendant terminated payments for a few specific services less than a year after the accident because defendant did not believe those services were necessary, but defendant did not terminate PIP benefit coverage altogether for contractual reasons until *more* than a year after the accident. However, a party who is actually "cognizant of all the material facts can claim nothing by estoppel," even if that cognizance is by virtue of an agent. *Cudahy Bros Co v West Michigan Dock & Market Corp*, 285 Mich 18, 26-27; 280 NW 93 (1938). Critically here, the prejudiced party had the same *access to* the true facts as the party to be estopped; in other words, where plaintiff had a feasible means to discover the truth, she cannot contend that she was influenced by the defendant. *Sheffield Car Co v Constantine Hydraulic Co*, 171 Mich 423, 450-451; 137 NW 305 (1912). Here, plaintiff was aware of the insurance contract, which expressly limited PIP benefits to enumerated vehicles and extended only liability coverage for temporarily substitute vehicles; moreover, she retained counsel only a few months after the accident. Thus, she had

equal access to the pertinent information and the means to independently assess defendant's actions. Therefore, the doctrine of equitable estoppel does not apply here.

Plaintiff finally contends that she is entitled to continue receiving PIP benefits as an innocent third party to the transaction between her husband and defendant where her husband procured the no-fault policy as the named insured. We disagree.[1] The "innocent third party" rule prohibits an insurer from rescinding an insurance policy because of a material misrepresentation made in an application for no-fault insurance where there is a claim involving an innocent third party. *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993). Defendant has not rescinded the insurance policy in this case. Rather, defendant stopped paying plaintiff benefits because the policy did not cover her claim. Thus, the "innocent third party" rule is inapplicable. Furthermore, a third-party beneficiary may only enforce rights actually found in the contract. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 738; 605 NW2d 18 (1999). The contract here does not provide for PIP coverage for vehicles other than those enumerated, so plaintiff could not require PIP benefit payments under the contract even if she were an innocent third party.

Affirmed.

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[1] We note in part that this assertion is directly contrary to plaintiff's claim that *she and* her husband decided to place all of their household vehicles on the business insurance policy "to qualify for a multi-car discount just like most married couples would do to save money on insurance premiums."

VANERIAN v CHARLES L PUGH CO, INC

Docket No. 276568. Submitted June 12, 2008, at Lansing. Decided July 1, 2008, at 9:00 a.m. Leave to appeal sought.

Marie Vanerian brought an action in the Wayne Circuit Court against Charles L. Pugh Co., Inc. (Pugh), and G & G Floor Company (G & G Floor), seeking monetary damages for flood damage to the floor of her home's basement and related structures, for accumulation of mold, and for other incidental and consequential damage. After a previous flood in her basement, the plaintiff's homeowner's insurer had hired Pugh to repair the plumbing, sewer or drainage system, and the wood floor in the basement. Pugh had then contracted with G & G Floor for the replacement of the basement floor. Another flood occurred and prompted the plaintiff's action. The court, Isidore B. Torres, J., granted summary disposition for G & G Floor, ruling that the plaintiff was not an intended third-party beneficiary of the contact between Pugh and G & G Floor. The plaintiff appealed.

The Court of Appeals *held*:

1. MCL 600.1405 provides that any person for whose benefit a promise is made by way of contract has the same right to enforce the promise as if the promise had been made directly to the person, and that a promise shall be construed as having been made for the benefit of a person whenever the promisor has undertaken to give or to do or refrain from doing something directly to or for the person. Not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise. Only intended third-party beneficiaries may sue for breach of a contractual promise in their favor.

2. A court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of MCL 600.1405.

3. Here, the plaintiff was an intended beneficiary of the contract between Pugh and G & G Floor. The whole and singular purpose of the contract was to secure repairs to the flooring in the plaintiff's basement. G & G Floor undertook a promise directly benefitting the plaintiff, and the plaintiff is expressly referred to in the contract.

4. Under MCL 600.1405, there is not a different or separate standard determining the third-party beneficiary status of property owners in construction cases involving contracts between contractors and subcontractors.

5. This case must be remanded for a grant of summary disposition in favor of the plaintiff on G & G Floor's motion for summary disposition and for further proceedings.

Reversed and remanded.

CONTRACTS — THIRD-PARTY BENEFICIARIES.

A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person; an objective standard is used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status (MCL 600.1405).

Giarmarco, Mullins & Horton, P.C. (by *David A. Binkley* and *Trisha M. Werder*), for Marie Vanerian.

Sondee, Racine & Doren, PLC (by *Maurice A. Borden*), for G & G Floor Company.

Before: DONOFRIO, P.J., and SAWYER and MURPHY, JJ.

MURPHY, J. Plaintiff appeals as of right the trial court's order granting summary disposition, under MCR 2.116(C)(10), in favor of defendant G & G Floor Company (defendant). The trial court ruled that plaintiff was not an intended third-party beneficiary of the contract between defendant and defendant Charles L. Pugh Company, Inc. (Pugh). We reverse and remand.

The underlying facts in this case are not in dispute. Plaintiff's basement flooded, causing damage to her home. Plaintiff's homeowner's insurance company hired Pugh to repair the plumbing, sewer or drainage system, and the wood floor in plaintiff's basement. Plaintiff discussed the floor repairs with a Pugh repre-

sentative, who suggested to plaintiff that if she already had a flooring contractor, she should contact that person again to make the repairs.

Defendant had previously performed work for plaintiff in her kitchen and dining room, so plaintiff contacted defendant to discuss the repairs needed for her basement floor. Subsequently, defendant and Pugh entered into a contract under which defendant agreed to replace plaintiff's floor. Under the contract, the name of the job was entitled "Marie Vanerian Residence." Specifically, the contract required defendant to "[t]ear out water damaged flooring and subfloor and haul away debris from the family room and the bar room[,] [s]upply and install a plywood subfloor in the same above rooms[, and] [s]upply, install, sand, stain, seal, and finish maple flooring in the same above rooms." The contract also contained a detailed list of instructions and requirements relative to the job, including, for example, the need for others to remove all furniture, wall hangings, and window treatments. The work to be performed under the contract related entirely to repairs and improvements in plaintiff's house. At some later date, plaintiff's basement flooded again, and the floor installed by defendant buckled and became unusable. Plaintiff proceeded to file suit against Pugh and defendant. She sought to recover for the damage to the floor and related structures, for accumulation of mold, and for other incidental and consequential damage. Plaintiff asserted that she was an intended third-party beneficiary of the contract between Pugh and defendant. The trial court disagreed and summarily dismissed the case against defendant without oral argument.[1]

[1] Plaintiff stipulated the dismissal of Pugh.

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).

MCL 600.1405 provides in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

It cannot reasonably be disputed that the promises made by defendant in the contract to tear out the old damaged floor and to supply and install a new floor were for plaintiff's benefit. All the work under the contract expressly related to repairs in plaintiff's basement. Indeed, plaintiff and defendant discussed the project with each other at the time the contract was formed at the behest of Pugh, and plaintiff and defendant agreed that defendant would replace her maple floors with oak floors. Defendant undertook to do something directly for plaintiff. The caselaw does not contradict our conclusion that plaintiff was an intended third-party beneficiary under the statute.

In *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427-428; 670 NW2d 651 (2003), the Michigan Supreme Court set forth the principles governing the proper analysis under MCL 600.1405:

> "[T]he plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise . . . ." Thus, only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor.

> A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person. By using the modifier directly, the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. An objective standard is to be used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status.
>
> . . . [A] court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of § 1405. [Citations omitted.]

In *Schmalfeldt*, the plaintiff was injured in a bar fight and directly sued the bar's insurer to secure payment for dental bills on the basis that he was a third-party beneficiary of the insurance contract between the bar and the insurer. Our Supreme Court held that the plaintiff was not a third-party beneficiary under the insurance policy. *Schmalfeldt, supra* at 423. The Court concluded:

> The focus of the inquiry . . . should be whether [the insurer], by its agreement to cover medical expenses for bodily injuries caused by accidents, had undertaken to give or to do or refrain from doing something directly to or for [the plaintiff] pursuant to the third-party beneficiary statute, MCL 600.1405(1). Thus, . . . we must turn to the contract itself to see whether it granted [the plaintiff] third-party beneficiary status.
>
> We affirm the decision of the Court of Appeals because the contract contains no promise to directly benefit [the plaintiff] within the meaning of § 1405. Nothing in the insurance policy specifically designates [the plaintiff], or the class of business patrons of the insured of which he was one, as an intended third-party beneficiary of the medical

> benefits provision. At best, the policy recognizes the possibility of some incidental benefit to members of the public at large, but such a class is too broad to qualify for third-party status under the statute. [*Schmalfeldt*, *supra* at 429 (citations omitted).]

Here, plaintiff was not an incidental beneficiary; the whole and singular purpose of the contract was to secure repairs to the flooring in plaintiff's basement. The focus of the contract is on restoring plaintiff's property; defendant promised to do the work directly for plaintiff. This is not a case involving "the possibility of some incidental benefit to members of the public at large." *Id.* Viewing the contract objectively, defendant undertook a promise directly benefitting plaintiff, and plaintiff is expressly referred to in the contract. Any argument that defendant was not clearly aware that the scope of its contractual undertakings encompassed plaintiff is absurd, given the nature of the contract; it was the "Marie Vanerian Residence" job. This case is easily distinguishable from *Schmalfeldt*.

Our case is also distinguishable from *Brunsell v City of Zeeland*, 467 Mich 293; 651 NW2d 388 (2002), in which the plaintiff tripped and fell on a sidewalk defect, and the sidewalk was part of an area leased to the defendant city by a bank. The city-bank lease required the city to repair the sidewalk, and the plaintiff sued the city, claiming that she was a third-party beneficiary of the lease and that the city breached its contractual undertaking to repair the sidewalk. *Id.* at 294-295. The Supreme Court held that the plaintiff was not a third-party beneficiary of the city-bank lease agreement. *Id.* at 299. The Court reasoned:

> In the present case, plaintiff can only plausibly claim third-party beneficiary status under the lease agreement as a member of the public because her claim is premised on contractual language referring to the city repairing im-

> provements "as may be necessary for the public safety." There is nothing in the lease agreement that specifically designates plaintiff (or any reasonably identified class) as an intended beneficiary of the promise. Accordingly, . . . plaintiff cannot be considered an intended third-party beneficiary under MCL 600.1405 because the public as a whole is too expansive a group to be considered "directly" benefitted by a contractual promise.
>
> Moreover, an objective analysis of the contract at issue indicates that the contractual provision at issue was intended to delineate the obligations of the city and the bank with regard to the premises, not to directly benefit third parties. The allocation to the city of responsibility to "repair the improvements which it constructs on the premises as may be necessary for the public safety" is in the same paragraph of the lease agreement as the allocation to the bank of the duties to "remove snow, pick-up litter, and perform such other sanitary maintenance as may be required." This reflects that the parties were defining their obligations to each other with regard to maintenance concerns, not acting for the purpose of directly benefiting third parties. With regard to its promise, the city was assuring the bank that the bank would not be responsible for repairing the improvements on the premises to protect public safety. There is no reason to conclude that the bank, obviously a business and not a charitable institution, was acting to protect parties other than itself in receiving this promise. Accordingly, plaintiff was not an intended third-party beneficiary of the lease agreement because an objective analysis reflects that the city's promise to the bank that the city would be responsible for repairs was not intended to directly benefit third parties. [*Id.* at 298-299.][2]

Here, the Pugh-defendant contract specifically designates plaintiff as an intended beneficiary of the promise, i.e., the promise is to remove and replace flooring in

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[2] In its opinion, the Court stated that a third-party beneficiary can be a member of a class; however, the class must be sufficiently described. *Brunsell*, *supra* at 297, quoting the lead opinion in *Koenig v South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999).

the basement of plaintiff's home. There is no expansive group or unidentified party that is benefited by defendant's promises. The obligations delineated in the contract concerned repair of the floor in plaintiff's basement. Pugh was necessarily contracting with defendant for the purpose of directly benefiting plaintiff because Pugh had an obligation to see to it that the basement floor was repaired.

The trial court and defendant relied on *Kisiel v Holz*, 272 Mich App 168, 171-172; 725 NW2d 67 (2006), in which this Court stated:

> In general, although work performed by a subcontractor on a given parcel of property ultimately benefits the property owner, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor. 9 Corbin, Contracts (interim ed), § 779D, p 41; see also 2 Restatement Contracts, 2d, § 302, comment e, illustration 19, p 444 (property owner is only an incidental beneficiary of construction subcontract between general contractor and subcontractor). Absent clear contractual language to the contrary, a property owner does not attain intended third-party-beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner. See, e.g., *155 Harbor Drive Condo Ass'n v Harbor Point Inc*, 209 Ill App 3d 631, 646-647; 568 NE2d 365 (1991); see also *Gentile v Ristas*, 160 Ohio App 3d 765, 791-792; 828 NE2d 1021 (2005); *Thomson v Espey Huston & Assoc, Inc*, 899 SW2d 415, 419-420 (Tex App, 1995); *Vogel Bros Bldg Co v Scarborough Constructors, Inc*, 513 So 2d 260, 261-262 (Fla App, 1987).
>
> In the present case, on the basis of an objective review of the contract, we conclude that plaintiff [homeowner] was not an intended third-party beneficiary of the oral subcontract between GFA [subcontractor] and Holz [contractor]. Before the start of construction, Holz orally subcontracted with GFA for excavation and concrete work. Plaintiff does

> not dispute the scope of this oral subcontract. There is nothing in the scope of the oral contract to suggest that GFA expressly promised to provide plaintiff with concrete walls. Because the oral contract did not contain an express promise to create the basement walls for plaintiff's benefit, and because the contract was primarily executed for the benefit of the contracting parties, plaintiff was only an incidental beneficiary. Accordingly, plaintiff is unable to maintain an action against GFA for breach of the subcontract.

The problem with *Kisiel*, as we view it, is that there is no discussion regarding the nature of the oral contract and the particular communications between the contractor and the subcontractor, other than an indication that the subcontract was for excavation work and the pouring of concrete. There is no language suggesting that the plaintiff homeowner was mentioned or referenced by name during verbal communications between the contractor and subcontractor when the oral contract was formed. There is no indication that the plaintiff was "directly referred to in the contract." *Schmalfeldt*, *supra* at 428. As recited above, the *Kisiel* panel concluded that "[t]here is nothing in the scope of the oral contract to suggest that GFA expressly promised to provide plaintiff with concrete walls." *Kisiel*, *supra* at 172. Here, the contract expressly and directly references plaintiff by name, and defendant promised to tear out the old damaged floor and to supply and install a new floor in the basement of plaintiff's home. In fact, plaintiff and defendant discussed the project with each other at the time the contract was formed on Pugh's suggestion, and plaintiff and defendant agreed that defendant would replace her maple floors with oak floors. Defendant undertook to do something directly for plaintiff. MCL 600.1405(1); *Schmalfeldt*, *supra* at 428.

While we find *Kisiel* distinguishable, we also note our concern that *Kisiel* suggests that there is a different or separate standard for determining third-party-beneficiary status in construction cases involving contracts between contractors and subcontractors. As evident from the plain language of MCL 600.1405, there are no situational distinctions created by the statute in analyzing whether a party is a third-party beneficiary. Most telling in the *Kisiel* opinion is the panel's reliance, not on Michigan authority, but on out-of-state authority and general treatises, although the out-of-state cases ultimately, for the most part, support our resolution of this appeal. First, there is no reference to any relevant statutory provision on the issue of third-party beneficiaries in any of the out-of-state cases, which all rejected a finding that third-party beneficiary status was conferred relative to contractor-subcontractor agreements under the facts presented, and here we are confined to the language in MCL 600.1405; common-law principles were at work in these other jurisdictions. *155 Harbor Drive*, *supra* at 645-648; *Gentile*, *supra* at 791-793; *Thomson*, *supra* at 419-420; *Vogel Bros*, *supra* at 261-262. Furthermore, in *155 Harbor Drive*, *supra* at 647, the Illinois appellate court concluded:

> We find that the trial court properly dismissed plaintiff's third-party beneficiary claims. Plaintiff has the burden of proving that defendants intended to confer a direct benefit upon the Association. Plaintiff has failed to meet this burden. The Association has failed to identify any language in the subcontract which constitutes a virtual express declaration to overcome the presumption that the parties contracted only for themselves.[3] The subcontracts make no reference to the Association or its members, and do not express an intent to directly benefit either the Association

[3] We note that MCL 600.1405 creates no presumptions under Michigan law.

> or its members. The provisions in the construction contracts regarding guarantees to be provided by the contractor and the subcontractors do not mention the unit owners. There is no question that the parties were aware that the building was being built for subsequent purchasers. However, "[i]t is not enough that the parties know, expect or even intend that" such people may benefit or that they are referred to in the contract.

Here, the subcontract expressly references plaintiff by name, and the subcontract is directly for her benefit.

In *Vogel Bros*, *supra* at 261, the contractor and the subcontractor included an arbitration provision in their contract in case of disagreements regarding the amount to be paid, and there was no mention of any third party. The city of Tarpon Springs, owner of the construction project at issue, had filed a motion to abate court litigation that had arisen, attempting to invoke the arbitration provision as a third-party beneficiary. The Florida appellate court reversed the trial court ruling that granted the motion, and the appellate court reasoned that there was nothing in the plain language of the contract suggesting that the contractor and the subcontractor had intended for the city to primarily and directly benefit from the arbitration provision. *Id.* at 261-262. Again, in the case at bar, there is contractual language indicating that the flooring work was to be performed directly for plaintiff.

In *Gentile*, *supra* at 792, the Ohio appellate court rejected the plaintiff's third-party beneficiary claim, holding that "the evidence does not create a reasonable inference that [the contractor and the subcontractor] entered into the roof-replacement contract in contemplation of the [plaintiff] purchasing the home. It is undisputed that when [the contractor] contracted with [the subcontractor] to have the new roof installed, neither [the contractor] nor [the subcontractor] had

ever met the [plaintiff].” The appellate court refused to infer intent to create a third-party beneficiary solely on the basis of broad, conclusory assertions that the contractor understood that the roof was being replaced for the benefit of someone who would eventually purchase the home. *Id.* at 792-793. The flooring work here was not for some unknown person or persons who would eventually benefit from the work; rather, plaintiff was an expressly identified third party under the contract.

In *Thomson*, *supra* at 419-420, the Texas appellate court first stated that “absent clear evidence to the contrary, a property owner is not a third-party beneficiary of a contract between the general contractor and a subcontractor.”[4] The plaintiffs in *Thomson* claimed third-party beneficiary status on the basis of two contracts. The first contract involved engineering services that had been subcontracted relative to the construction of an apartment complex, and the contractor-subcontractor agreement did mention in its title that the project was located on the plaintiffs’ property. *Id.* at 417-418. The Texas court, however, concluded that the plaintiffs were merely incidental beneficiaries because the plaintiffs indirectly benefited from the contract as real-estate development almost always benefits the property owner. *Id.* at 420. While this case might run contrary to our conclusion here, the ruling would be inconsistent with MCL 600.1405 and the Supreme Court precedent cited above, where our statute simply requires the existence of a promise to do something directly for a third party, i.e., a third party referenced in the contract. The second contract relied on by the plaintiffs in *Thomson* was rejected by the court as a basis for a third-party beneficiary claim because that

[4] As indicated above, we emphasize that MCL 600.1405 does not create special rules for cases involving contractors and subcontractors.

contract contained no mention of the plaintiffs or the property. *Thomson*, *supra* at 420. Such is not the case here.

We hold that plaintiff is a third-party beneficiary of the Pugh-defendant contract under MCL 600.1405 as a matter of law, and the trial court on remand is to enter an order granting summary disposition in favor of plaintiff on this issue. MCR 2.116(I)(2). Of course, plaintiff must now proceed to litigate whether defendant breached the contract, whether plaintiff incurred damages, and whether the breach caused the alleged damage.

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

HEERINGA v PETROELJE

Docket No. 274852. Submitted June 10, 2008, at Lansing. Decided July 1, 2008, at 9:05 a.m. Leave to appeal sought.

Jodi P. Heeringa, trustee of the Jodi P. Heeringa Trust, dated May 7, 1985, brought an action in the Ottawa Circuit Court against Glenn E. and Marilyn C. Petroelje, trustees of the Marilyn C. Petroelje living trust, dated November 2, 1999, seeking an order requiring the defendants to remove an extension of the defendants' dock that they had placed pursuant to a permit issued by the Department of Environmental Quality (DEQ) in Pine Creek Bay, a part of Lake Macatawa. The parties own adjacent riparian lots on the shore of Pine Creek Bay. The DEQ had issued the permit, following a contested-case hearing involving the parties, after it determined that the dock extension would not interfere with the plaintiff's riparian rights. The court, Edward R. Post, J., following a bench trial dominated by the testimony of the parties' respective surveyors, held that the boundary line between the parties' riparian bottomlands lies where the plaintiff's surveyor contended, necessitating the removal of the dock extension. The court also held that the defendants had acquired title to the land underlying their original dock and its adjacent structures by adverse possession. The defendants appealed, and the plaintiff cross-appealed.

The Court of Appeals *held*:

1. The trial court erred in failing to give the DEQ determination its proper preclusive effect. The DEQ's determination was legally correct.

2. The DEQ properly stated that it did not have the authority to determine any sort of property lines, and the DEQ did not determine any property lines. However, the DEQ did determine which of the parties' respective riparian surveys best depicted the correct thread line (the middle or center) in the bay. That factual determination constitutes an adjudication of a critical fact that has a preclusive effect on the trial court.

3. The defendants' surveyor employed the correct method. This method uses the General Land Office survey as the underlying basis for determining the thread, but other evidence may be considered to ultimately determine the shoreline.

4. The trial court erred in holding that the plaintiff's surveyor's riparian property lines were correct.

Reversed and remanded.

WATER AND WATERCOURSES — BOUNDARIES — RIPARIAN BOUNDARY LINES.

The general method for determining riparian boundary lines involving irregularly shaped bodies of water is to first draw a "thread" line through the geographic middle of the body of water, then determine whether the riparian landowners' surface property lines intersect with the water, and then draw lines from the thread at as close to right angles as possible as measured at the thread line to the landward terminus points; the thread line must be determined on the basis of the shape of the original shoreline; the United States government survey at the time the government parted with title to the property is used as the underlying basis for determining the shoreline, but other evidence may be used to determine the actual shape of the original shoreline; the general rule for drawing riparian boundaries from the thread requires right angles to be drawn therefrom, but the general rule should be flexed where necessary to equitably apportion useful riparian rights to riparian landowners.

Varnum, Riddering, Schmidt & Howlett LLP (by *Eric J. Guerin*) for the plaintiff.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Michael J. Hodge* and *Scott R. Eldridge*), for the defendants.

Before: DAVIS, P.J., and MURRAY and BECKERING, JJ.

DAVIS, P.J. The parties[1] are neighbors owning adjacent riparian lots on the shore of Pine Creek Bay, which is part of Lake Macatawa. The dispute in this case concerns defendants' extension of their dock. The original dock extended perpendicularly from defendants' shoreline, and the extension deflects slightly away from plaintiff's property, but because of the irregular shape

[1] For ease of reference, we will sometimes refer to plaintiff as "the Heeringas" and defendants as "the Petroeljes" in this opinion.

of the bay and the concavity of the parties' shoreline area, plaintiff contends that the extension intrudes upon its riparian bottomlands. The trial court, after a two-day bench trial dominated by testimony from the parties' respective surveyors, held that the boundary line between the parties' riparian bottomlands lies where plaintiff's surveyor contended it lay, necessitating removal of the dock extension, but that defendants had acquired title to the land underlying their original dock and its adjacent structures by adverse possession. Both parties appeal, and we reverse and remand.

The important background facts are undisputed. The Petroeljes own a large parcel of property, but it tapers to only 20 feet of shoreline. The Heeringas own another parcel of property immediately to the south with 200 feet of shoreline. Both parties have docks that extend perpendicularly from their shorelines—the Petroeljes' dock from the middle of theirs, the Heeringas' dock from slightly to the north of the middle. The Petroeljes had been putting seasonal docks into the bay since before the Heeringas purchased their property in 1981, and had installed a 62-foot permanent dock by at least 1985. The water level in Lake Macatawa has gone down over the years, rendering it difficult or impossible to dock boats at either party's dock.

In 2000, the Petroeljes sought a permit from the Department of Environmental Quality (the DEQ) to extend their dock. This ultimately resulted in both parties retaining surveyors to determine their riparian boundary lines, followed by a contested-case hearing before the DEQ. The DEQ emphasized that it lacked jurisdiction to legally determine property boundary lines, but it determined that the dock extension would not interfere with the Heeringas' riparian rights. The Petroeljes received their permit in July 2004, and had

completed the extension by the following November. The Heeringas commenced the instant action seeking to have the extension removed.[2] The Petroeljes moved for summary disposition, arguing that the DEQ's determination constituted collateral estoppel of the riparian-survey issue; the trial court disagreed, and most of the trial consisted of testimony by the surveyors.

The surveyors agreed on most issues, consistent with the caselaw we discuss later in this opinion. Briefly, the proper method for determining riparian boundary lines involving irregularly shaped bodies of water is: first, to draw a "thread" line through the geographic middle (as opposed to the deepest point) of the body of water; second, to determine where the riparian landowners' surface property lines[3] intersect with the water; and third, to draw lines from the thread at as close to right angles as possible *as measured at the thread line* to the "landward terminus points." The thread line must be determined on the basis of the shape of the "original" shoreline, referring to the date the United States government parted with title to the property.

The surveyors' major point of disagreement was that the Heeringas' surveyor contended that the thread line must be drawn strictly on the basis of the General Land Office (GLO) survey with no other considerations permitted, whereas the Petroeljes' surveyor contended that the GLO survey was the underlying basis for drawing the thread line, but that other evidence could be con-

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[2] The Heeringas emphasized that, although they believed they could argue that the original dock itself was almost entirely on the Heeringas' bottomlands and that the Petroeljes might be precluded from any access to the water at all, the only relief the Heeringas wanted was removal of the dock extension.

[3] The location of the parties' shared surface boundary line, including where that boundary line intersects with the water of the lake, is not and was not at issue in this matter.

sidered to determine the actual shape of the original shoreline. The surveyors agreed that, whatever the basis for determining the original shoreline shape, how to draw the thread line entailed some subjectivity and "art." The surveyors agreed that the underlying goal was to "equitably apportion" riparian bottomlands according to relative shoreline lengths. The Heeringas' surveyor opined that the Petroeljes' surveyor violated the legal requirements for determining the thread line, whereas the Petroeljes' surveyor opined that the Heeringas' surveyor was improperly elevating methodology over the underlying purpose. The surveyors' thread lines were very similar, with the exception that the Petroeljes' surveyor's line "deflected," or changed direction, more than the Heeringas' surveyor's line. The trial court ultimately concluded that the Heeringas' surveyor had employed the more correct method.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A grant or denial of summary disposition is reviewed 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 deciding a motion under MCR 2.116(C)(7), alleging that the claim is barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Maiden*, *supra* at 119.

We conclude that the trial court erred in failing to give the DEQ determination its proper preclusive effect, and we further conclude that the DEQ's determination was legally correct in any event.

Preclusion doctrines, among them the doctrine of collateral estoppel, are intended to preclude parties who "have previously had a full and fair opportunity to adjudicate their claims" in either a court or an agency setting from attempting to have those matters adjudicated again. *Nummer v Dep't of Treasury*, 448 Mich 534, 541-542; 533 NW2d 250 (1995). The parties only seriously dispute whether the DEQ actually determined an essential fact. *Id*. at 542. The DEQ explained that it only had the jurisdiction to determine whether the dock would invade "riparian rights" as defined in MCL 324.30101,[4] "as opposed to drawing property lines per se." The DEQ did, however, state that the Heeringas' proposed riparian boundary lines would "make no sense and def[y] logic" and "may not even be physically possible" given the layout of the other docks throughout Pine Creek Bay and the "relative riparian interests in the sense of the physical configuration of the area . . . ." The DEQ further found that "the extension will not adversely affect the riparian uses of the [plaintiff]," noting also that plaintiff's interest was "immediately adjacent to the project," so the fact that plaintiff's interest was unaffected meant no other interests in the area were. It finally determined that "the sealed survey provided by [the Petroeljes] is sufficient to find the project is sited entirely on bottomland within [their] riparian interest" and "[b]ecause [the Heeringas'] proposal would adversely affect riparian rights, it cannot be permitted."

The DEQ did not actually adjudicate the location of the parties' common riparian boundary line, but it *did* make factual findings regarding the location of the

[4] The subsection has been redesignated—albeit with no substantive change—several times. Currently, "riparian rights" are defined in subsection 30101(*o*). The DEQ did not specify a subsection.

thread line on the basis of the relative propriety of the proposed surveys. Additionally, the DEQ found that defendants' dock would not interfere with plaintiff's "riparian rights," as defined in MCL 324.30101. However, the Legislature has not defined what those "riparian rights" actually are.

The earliest Michigan caselaw considered it well established that "as to the right of riparian proprietors; and unless a contrary intent of the parties clearly appears from the deeds under which they hold, such proprietors hold to the thread of the stream." *Norris v Hill*, 1 Mich 202, 207 (1849). The "thread," as was agreed to by both surveyors in the instant matter, referred to the middle or center of Pine Creek Bay. *Id*. at 203, 207. The area over which a riparian owner has these rights is determined by drawing a right angle to the central thread because

> [a]ny other rule would subject riparian owners to have their entire access to the stream and all their docking privileges cut off, whenever the local curve of the shore would be such that a line drawn at right angles with their neighbor's shore line would cross in front of them—a result which would be inevitable where the shore is not altogether straight and parallel with the middle of the stream, and which would also cause great confusion with every subdivision of ownership. [*Bay City Gas-Light Co v Industrial Works*, 28 Mich 182, 183 (1873).]

Although the body of water in *Norris* was a stream, the same rule applies to lakes. *Rice v Ruddiman*, 10 Mich 125, 139-143 (1862).

The *nature* of the riparian ownership from the shore to the thread is, at its simplest, an entitlement to "every beneficial use of the [underwater] property in question which can be exercised with a due regard to the common easement." *Lorman v Benson*, 8 Mich 18, 32

(1860). "Any erection which can lawfully be made in the water within those lines belongs to the riparian estate. And the complete control of the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large to the navigation, and such other use, if any, as appertains to the public over the water." *Ryan v Brown*, 18 Mich 196, 207 (1869). "And this right to the covered lands in front has always been held to exclude any adjacent claimant from intercepting in any way the full extent indicated by the width at the shore, without reference to whether the tract approaches the shore at right angles or diagonally." *Clark v Campau*, 19 Mich 325, 328 (1869). Although "the private right must yield to the public right," otherwise that private right extends even to considering it a trespass for another party to construct something on that bottomland. *Ryan*, *supra* at 209. Therefore, a riparian landowner's riparian rights to water-covered bottomlands are, other than the public's right of reasonable access to the water itself, indistinguishable from ordinary fee ownership of dry land.

Nevertheless, the DEQ repeatedly emphasized that it did not determine any sort of property lines, and indeed it lacked the authority to do so. The DEQ did, however, determine which of the parties' respective riparian surveys best depicted the correct thread line in Pine Creek Bay. That factual determination—the DEQ's rejection of the Heeringas' survey—constitutes an adjudication of a critical fact that has a preclusive effect on the trial court. We further observe that the DEQ reached the correct result.

The Heeringas in their briefs in the trial court and on appeal rely on *Cutliff v Densmore*, 354 Mich 586; 93 NW2d 307 (1958), for the proposition that " '[t]he

proper shoreline used in fixing the boundaries of a riparian owner's subaqueos lands is determined by determining the shoreline at the time the United States government patented the lake and surrounding land to the State of Michigan.' " (Plaintiff's brief on appeal, p 19.) But no such—or even similar—language appears in that case, nor can we find it in any Michigan decision. Furthermore, *Cutliff* only dealt with *surface* property boundaries where riparian shorelines change through accretion. *Cutliff* relied on *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930). *Hilt* held that water boundaries are inherently dynamic, so meander lines are—both legally and factually—merely general approximations of the shoreline; it is the water itself that is the real boundary. *Id*. at 204-227; see also *Glass v Goeckel*, 473 Mich 667, 693 n 23; 703 NW2d 58 (2005). In *Pittsburgh & Lake Angeline Iron Co v Lake Superior Iron Co*, 118 Mich 109, 123; 76 NW 395 (1898), which was ultimately decided on the basis of a contract, it was explained that "[n]o fixed rule ever has been or ever can be laid down for the division of the territory covered by these inland lakes, with their irregular shores. Each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible." The trial court's decision was largely premised on a rule used in establishing riparian boundaries that was allegedly stated in *Cutliff*; however, *Cutliff* did not state that rule.

Although the meander lines were presumed correct in the absence of evidence to the contrary, the actual location of the water itself is the true boundary, even in a GLO plat. *Poch v Urlaub*, 357 Mich 261, 277-281; 98 NW2d 509 (1959). As the Petroeljes' surveyor therefore correctly explained, the GLO survey was the "underlying basis" for determining the thread, but ultimately, the thread depended on the shoreline as determined by all available evidence, not on the GLO survey meander

lines alone. He also correctly explained that the "rule" was intended to accomplish equity, not to mandate the elevation of procedure over purpose. Indeed, the "object to be kept in view in cases of this kind is to secure to each proprietor access to navigable water, and an equal share of the dockage line at navigable water, in proportion to his share on the original shore line," and if that goal could not be accomplished by drawing right angles to the thread, some other method may be required. *Blodgett & Davis Lumber Co v Peters*, 87 Mich 498, 506; 49 NW 917 (1891).

In summary, no party has cited any case, nor can we find one, establishing a rule specifying how the thread must be established and what evidence—if any—may or must be resorted to in order to find it, other than the simple requirement that it must be the middle of the body of water based on the original shoreline. The general rule for drawing riparian boundaries from the thread requires right angles to be drawn therefrom, but the general rule should be flexed where necessary to accommodate the underlying purpose, which is to equitably apportion *useful* riparian rights to riparian landowners. The trial court erroneously decided this matter largely on the basis of a nonexistent rule of law. Application of the correct legal rules to the surveyors' testimony shows that the Petroeljes' surveyor employed the correct method, whereas the Heeringas' surveyor elevated a mechanistic application of a nonexistent rule over the underlying goals to be served.

The trial court erred in holding the Heeringas' surveyor's riparian property lines to be correct, because of the preclusive effect of the DEQ's determination, and the Petroeljes' surveyor used the more correct method in any event. We therefore need not address any of the other issues raised on appeal.

Reversed and remanded for any further proceedings that may be necessary. We do not retain jurisdiction.

SINICROPI v MAZUREK
POWERS v MAZUREK

Docket Nos. 281726 and 281770. Submitted May 7, 2008, at Lansing. Decided July 1, 2008, at 9:10 a.m. Leave to appeal denied, 482 Mich ___.

Martin A. Powers brought an action in the Jackson Circuit Court against Holly V. Mazurek, seeking custody of a child born to Mazurek. Gregory G. Sinicropi brought an action in the same court against Mazurek, seeking to establish that he is the biological father of Mazurek's child. After the child's birth, Powers and Mazurek had executed an acknowledgment of parentage that recognized Powers as the father. However, a DNA test later revealed that Sinicropi was the child's biological father. The court, John G. McBain, J., consolidated the actions, gave temporary custody of the child to Powers, entered an order of filiation recognizing Sinicropi as the father, awarded sole physical custody to Powers, awarded Powers and Mazurek joint legal custody, awarded Mazurek parenting time, and ordered Mazurek and Sinicropi to pay child support. At no time did the court revoke Powers's acknowledgment of parentage. On appeal by Mazurek and cross-appeals by Sinicropi and Powers, the Court of Appeals, MURPHY, P.J., and METER and DAVIS, JJ., held in part that the trial court had erred by ruling that the child had two legally recognized fathers because the order of filiation in favor of Sinicropi could not enter until after the acknowledgement of Powers's parentage has been revoked. The Court of Appeals also remanded the case, directing the trial court to address the issue of revocation of the acknowledgment of parentage solely under MCL 722.1011(3), which requires that Mazurek prove by clear and convincing evidence that revocation is proper considering the equities of the case. 273 Mich App 149 (2006). On remand, the trial court denied Mazurek's request to revoke Powers's acknowledgment of parentage. Mazurek and Sinicropi appealed.

The Court of Appeals *held*:

The trial court did not err in balancing the equities against a revocation of the acknowledgment of parentage.

1. Testimony that several minors had consumed alcohol while visiting Powers does not constitute evidence that Powers was

unsuited or unfit to be a parent of the child, given that it related to an isolated incident of poor judgment by Powers.

2. The trial court did not err by concluding that Mazurek and Sinicropi had failed to present clear and convincing evidence that would support revocation of the acknowledgment of parentage. The trial court had acquired considerable knowledge of the dynamics of the child's custodial environment and did not rely exclusively on the testimony of a court-appointed psychologist who interviewed and evaluated the parties and the child. The trial court also afforded Mazurek a virtually limitless opportunity to present evidence regarding any issue relevant to the equities of revocation.

3. The "law of the case" doctrine applies to preclude reconsideration of Mazurek and Sinicropi's claim that the trial court's decision conflicts with *Van v Zahorik*, 460 Mich 320 (1999), after the Court of Appeals decided in the prior appeal that *Van* does apply to this case.

4. The "law of the case" doctrine applies to preclude reconsideration of Mazurek and Sinicropi's claim that the trial court erred by refusing to enter an order of filiation under MCL 722.717(1) after a decision by the Court of Appeals in the prior appeal that an order of filiation cannot be entered under the Paternity Act, MCL 722.711 *et seq*., if, under the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., a proper acknowledgment of parentage was previously executed and has not been revoked.

5. The "law of the case" doctrine applies to preclude reconsideration of Mazurek and Sinicropi's constitutional claims, which were addressed by the Court of Appeals in the prior appeal.

6. There is no merit to Mazurek and Sinicropi's claim that their rights to due process had been violated, given the absence of standards or guidelines defining "the equities" a trial court should apply when considering the potential revocation of an acknowledgement of parentage. Trial courts are accustomed to fashioning equitable resolutions and the trial court in this case drew on virtually all the traditional equitable principles applicable to family-law cases: the best interest of the child, the fitness of the competing parents, and the past relationships of the parties.

7. Sinicropi's relationship to the child is biological, rather than parental, and otherwise wholly undeveloped. Under *Michael G v Gerald D*, 491 US 110 (1989), which rejected the notion that biological parenthood standing alone, or even in conjunction with some additional relationship, suffices to establish a constitution-

ally protected liberty interest, Sinicropi has no protected rights in the substance or procedures conducted pursuant to MCL 722.1011(3).

Affirmed.

PARENT AND CHILD — ACKNOWLEDGMENT OF PARENTHOOD — REVOCATION.

The statute that governs claims for the revocation of an acknowledgment of parentage requires a court presented with such a claim to consider the equities of the case; in doing so, it is proper for the court to draw on equitable principles applicable in family-law cases: the best interest of the child, the fitness of the competing parents, and the past relationships of the parties (MCL 722.1011[3]).

Melisa G. Leckie for Gregory G. Sinicropi.

Anne Argiroff for Holly V. Mazurek.

Elizabeth Warner for Martin A. Powers.

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

GLEICHER, P.J. In *Sinicropi v Mazurek*, 273 Mich App 149; 729 NW2d 256 (2006), we instructed the trial court to determine on remand whether clear and convincing evidence supported the revocation of an acknowledgment of parentage, considering the "equities of the case." *Id*. at 185. After conducting an evidentiary hearing, the trial court refused to revoke the acknowledgment of parentage signed by Holly Mazurek shortly after the birth of her son, Noah Powers. Mazurek and Gregory Sinicropi, Noah's biological father, now appeal as of right. We affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

This Court's prior opinion succinctly states the pertinent facts as follows:

This case concerns a child [Noah] who was born out of wedlock in 1999 to Mazurek while she was in a relationship with Powers, but Sinicropi is the biological father of the child as established by DNA (deoxyribonucleic acid) testing. Mazurek had dated Powers, then briefly dated Sinicropi, before subsequently resuming her relationship with Powers, during which time the child was born. Powers, along with Mazurek, executed an acknowledgment of parentage on the child's birth. None of the parties was aware that Sinicropi was the biological father until 2004, when the DNA testing was conducted following Mazurek's suspicion that Sinicropi might be the father given the child's developing physical characteristics and appearance. Meanwhile, Powers raised the child as his own with Mazurek.

Powers and Mazurek again split up in 2001, and Powers filed a custody action against Mazurek when the relationship ended. They immediately stipulated the entry of a consent order giving them joint legal and physical custody. In 2004, Powers sought sole custody after Mazurek moved out of Jackson, Michigan, where Powers, Mazurek, and the child had resided since the child's birth, to live with her new fiancé in Shepherd, Michigan. An ex parte order was entered granting Powers sole custody pending an evidentiary hearing. The trial court refused to dismiss Powers's custody action and to revoke the acknowledgment of parentage as requested by Mazurek on multiple occasions, not because of a failure to show that Sinicropi was the biological father, but because it would be inequitable and because res judicata and collateral estoppel arising out of the consent order of joint custody would not allow it.

The trial court eventually converted the ex parte custody order into a temporary order, scheduling a full evidentiary hearing on issues of custody and parenting time. Thereafter, Sinicropi filed a paternity action under the Paternity Act. Subsequently, the trial court, after consolidating the paternity and custody cases, entered an order of filiation that recognized Sinicropi as the child's father, yet the acknowledgment of parentage was not revoked. At this stage in the proceedings, the young boy was five years old. The trial court had rejected Powers's argument that Sini-

> cropi lacked standing to file a paternity action, and it similarly rejected renewed efforts to have Powers's custody action dismissed for lack of standing and to have the acknowledgement [sic] of parentage revoked. The trial court effectively ruled that the child had two legal fathers under the Acknowledgment of Parentage Act and the Paternity Act.
>
> Following a best-interests evidentiary hearing on custody, the trial court awarded sole physical custody of the child to Powers, awarded Powers and Mazurek joint legal custody, and awarded Mazurek parenting time. The trial court reserved ruling on parenting time for Sinicropi and on the issue of child support. In response to postjudgment motions filed by Mazurek and Sinicropi, the trial court concluded that it should have conducted a best-interests analysis with respect to Sinicropi and custody, but the court otherwise rejected Mazurek's and Sinicropi's attack on the judgment. The trial court reviewed the child custody factors and in a separate opinion decided that it would not be in the child's best interests to award shared custody to Sinicropi. Subsequently, Mazurek and Sinicropi were both ordered to pay child support. [*Sinicropi*, *supra* at 153-155.]

In the prior decision in this case, this Court held that the trial court erred by ruling that Noah had two legally recognized fathers because an order of filiation in favor of Sinicropi could not enter until the acknowledgment of Powers's parentage had been revoked. *Id*. at 152. This Court remanded the case to the trial court

> for further reflection on the issue of revocation of the acknowledgment of parentage. The trial court is directed to address revocation solely under MCL 722.1011(3), which requires, in part, that Mazurek prove by clear and convincing evidence that revocation of the acknowledgment of parentage is proper considering the equities of the case. Should the trial court again rule to reject revocation, the court shall pronounce Powers as the child's legal father, vacate the order of filiation and any orders based thereon, including the child support orders relative to Sinicropi, and

> let stand the custody determination as between Powers and Mazurek because we find no errors warranting reversal with respect to that determination. Should the trial court decide to revoke the acknowledgment of parentage on remand, the court shall pronounce Sinicropi the child's legal father consistent with the order of filiation, vacate any orders based on Powers's status as the father, including the order granting him joint legal and sole physical custody, and enter any appropriate orders, upon hearing if necessary, in regard to custody and support as those matters relate to Sinicropi and Mazurek. [*Id*. at 185-186.]

The trial court commenced the evidentiary hearing on September 20, 2007, and continued it on October 3, 2007. In support of Mazurek's motion to revoke the acknowledgment of paternity, she presented evidence that two of Powers's former students consumed alcohol at his home on at least one occasion, and that Noah had established a good relationship with Sinicropi's parents.[1] Mazurek conceded, however, that Noah and Powers have "a significant and long-enduring bond," and that the removal of Powers from the child's life would not benefit Noah.

Sinicropi testified that he spent time with Noah on four occasions before the trial court entered a no-contact order. According to Sinicropi, Noah "knew" that Sinicropi was his father. In Sinicropi's view, Noah's best interests demanded the maintenance of a relationship with his biological father "[b]ecause he knows about me, because he's 8, and because it's the right thing."

Powers presented the testimony of Dr. Janice Lazar, a psychologist who served as a court-appointed expert pursuant to the parties' stipulation. Dr. Lazar inter-

[1] Mazurek admitted that she permitted Noah to develop a relationship with Sinicropi's parents and his other family members despite the existence of an October 2005 court order prohibiting contact between Sinicropi and the child.

viewed and evaluated Mazurek, Sinicropi, Powers, and Noah. She concluded that Noah had a strong bond with both Mazurek and Powers, and opined that the termination of Noah's relationship with Powers "would be quite harmful to that child." Dr. Lazar explained:

> Noah has been raised believing that Martin is his father in every sense of the word. To remove Martin from his life would be the same as removing any child's parent that they are strongly bonded and attached to. That would be extremely harmful to any child.

According to Dr. Lazar, Noah referred to Sinicropi as a "helper dad," and was unsure of Sinicropi's actual status. Dr. Lazar opined that the removal of Sinicropi from Noah's life would not harm Noah.

In its bench opinion, the trial court observed that if it granted Mazurek's motion, "Noah would lose the only father he's ever known, and I don't think that that represents the proper balancing of the equities in the case." Relying primarily on Dr. Lazar's testimony, the court denied Mazurek's request to revoke the acknowledgment of parentage, finding that Noah would endure harm from either the termination of his relationship with Powers or the introduction of another father. Mazurek and Sinicropi now appeal that decision.

II. ISSUES PRESENTED AND ANALYSIS

Mazurek and Sinicropi raise identical issues on appeal. Initially, they contend that the trial court clearly erred when it balanced the equities against revocation of the acknowledgment of parentage. According to both briefs on appeal, "the equities show that Noah has an ongoing relationship with Mr. Sinicropi, his biological father and his extended family. In contrast, Mr. Powers has demonstrated particularly poor judgment (at best)

which has a direct impact on his ability to act as a responsible parent to Noah."

When reviewing a dispositional ruling in an equitable matter, "an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

This Court previously stated that the sole issue to be determined on remand was whether, under MCL 722.1011(3), clear and convincing evidence of "the equities of the case" supported revocation of Mazurek's acknowledgment of Powers's parentage. The record reveals that throughout the eight years of his life, Noah knew no father besides Powers. Indeed, the trial court awarded Powers sole physical custody of Noah in September 2005, finding that Powers had "shown an enormous [parenting] capacity for a single man" and consistently "put Noah first." In contrast, Noah had only a short-lived, peripheral relationship with Sinicropi, despite some possible awareness that Sinicropi was his biological father.[2]

Dr. Lazar observed that Noah presented as a happy and "extremely enthusiastic" child, and that he expressed an inability to think of "anything that he would

[2] In her written report admitted as an exhibit during the evidentiary hearing, Dr. Lazar stated, "Noah does not appear to have knowledge of the issue of paternity in this case. Furthermore, I do not believe he understands or has knowledge of the biological issue involved."

change in his life at this time." The evidence demonstrated that Noah enjoyed a strong and positive bond with both Powers and Mazurek, performed well in school, and, in the words of Dr. Lazar, seemed "an extremely engaging, happy and contented child who enjoys a strong relationship with all of the adults in his life, particularly his mother, Holly Mazurak [sic], and the man he is bonded to as his father, Martin Powers."

Mazurek and Sinicropi argue that the trial court erred by failing to place stronger emphasis on the testimony that several minors consumed alcohol while visiting Powers. Because this appears to have been an isolated event that may have reflected poor judgment in limited circumstances, it does not, in our view, constitute evidence that Powers is either unsuited or unfit to parent Noah. Mazurek and Sinicropi additionally contend that the trial court relied exclusively on the testimony of Dr. Lazar, and thereby "abdicated" its role as the finder of fact. This argument ignores the trial court's considerable knowledge regarding the dynamics of Noah's custodial environment, acquired during the proceedings that occurred in 2005 and intensified in 2006. At the conclusion of the October 2007 hearing, the trial court expressed its heartfelt sympathy and respect for Sinicropi, and specifically referenced its previous findings under the "best interest" factors.

Furthermore, the trial court afforded Mazurek and Sinicropi a virtually limitless opportunity to present evidence regarding any issue relevant to the equities of revocation. Mazurek and Sinicropi took full advantage of that opportunity by offering evidence that included the observations of a private detective who investigated Powers, and testimony from Sinicropi's mother describing Noah's relationship with his biological grandparents and other members of the Sinicropi family. We find

no clear error in the trial court's conclusion that Mazurek and Sinicropi had failed to present clear and convincing evidence supporting revocation of the acknowledgment of parentage.

Mazurek and Sinicropi also argue that the trial court's decision conflicts with *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999), because it "essentially makes Mr. Powers an 'equitable father.' " As this Court previously explained, however, *Van* "is not implicated here because, in contrast to the factual circumstances in *Van*, Powers executed an acknowledgment of parentage," and at that point "is . . . deemed the natural and legal father" of Noah, and not an equitable parent. *Sinicropi*, *supra* at 162. Further, this Court's determination that *Van* does govern here constitutes the law of the case. Under the "law of the case" doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981).

Mazurek and Sinicropi next assert that the trial court erred by refusing to enter an order of filiation under MCL 722.717(1). However, this Court considered and decided that issue in *Sinicropi*, holding that "an order of filiation cannot be entered under the Paternity Act, MCL 722.711 *et seq*., if, under the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., a proper acknowledgment of parentage was previously executed and has not been revoked." *Sinicropi*, *supra* at 152. Again, the "law of the case" doctrine prohibits reconsideration of this issue because there has been no intervening change in the law.

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. . . . However, the doctrine does not preclude reconsideration of a question if there has been an intervening change of law. [*Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).]

Finally, Mazurek and Sinicropi argue that the trial court should have taken into account the "Constitutional considerations in this case [that] go directly to the issue of [the] equities." Initially, we observe that in *Sinicropi*, we addressed essentially the same constitutional issues as those now raised on appeal. *Id.* at 168-171. Because the "law of the case" doctrine governs the outcome of these constitutional questions, as well, we decline to revisit that constitutional analysis here. See also MCR 7.215(J)(1).

During oral argument, appellants' counsel contended that the absence of standards or guidelines defining "the equities" a trial court should apply when considering the potential revocation of an acknowledgment of parentage violated Mazurek's and Sinicropi's due-process rights. We reject this argument for several reasons. First, although neither caselaw nor the statute defines "the equities" as that term appears in MCL 722.1011(3), the equitable functions of a court are well-established in our jurisprudence. For example, MCL 600.601 "contains a broad grant of all equity powers traditionally exercised in chancery to the circuit courts." *Lester v Oakland Co Sheriff*, 84 Mich App 689, 695; 270 NW2d 493 (1978). Trial courts are accustomed to fashioning equitable resolutions because "[i]t is the historic function of equity to give such relief as justice and good conscience require." *Levant v Kowal*, 350

Mich 232, 241; 86 NW2d 336 (1957). Here, the trial court drew on virtually all the traditional equitable principles applicable in family-law cases: the best interest of the child, the fitness of the competing parents, and the past relationships of the parties. Additionally, the trial court entertained testimony from Sinicropi concerning Noah's interest in and awareness of his genetic heritage, and expert opinion regarding the existing emotional bonds and family dynamics. In our view, highly charged and intimate circumstances such as these require the flexibility and practicality of a traditional equitable approach. Equity aims to "do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject-matter, to make performance of the orders perfectly safe to those who have to obey it, and to prevent further litigation." *Ladas v Psiharis*, 241 Mich 101, 106; 216 NW 458 (1927). Had the Legislature intended to impose a rigid template on this decision-making process, it would have done so. *Sparks v Sparks*, 440 Mich 141, 158-159; 485 NW2d 893 (1992).

Lastly, we observe that this case is not equivalent to a proceeding for the termination of parental rights, in which the state must establish by at least clear and convincing evidence constitutionally sufficient grounds for termination before it may sever parental rights. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The due-process principles discussed in *Santosky* derive from the liberty interests inherent in a parent's already established custodial relationship with a child. The United States Supreme Court has specifically rejected the notion that biological parenthood standing alone, or even in conjunction with some additional relationship, suffices to establish a liberty interest. *Michael H v Gerald D*, 491 US 110, 123; 109 S Ct 2333; 105 L Ed 2d 91 (1989). Because Sinicro-

pi's relationship to Noah is biological, rather than parental, and otherwise wholly undeveloped, he has no constitutionally protected rights in the substance or procedures of the hearing conducted pursuant to MCL 722.1011(3).

Affirmed.

ROBERT A HANSEN FAMILY TRUST v FGH INDUSTRIES, LLC

Docket Nos. 276372 and 276452. Submitted May 13, 2008, at Detroit. Decided July 1, 2008, at 9:15 a.m.

The Robert A. Hansen Family Trust brought an action in the Oakland Circuit Court against FGH Industries, LLC (FGHI), FGH Capital, LLC (FGH Capital), and Daniel Fuhrman and William Gruits, the owners and managers of FGH Capital. The plaintiff alleged, in part, breach of an operating agreement between the plaintiff and FGH Capital that created FGHI, breach of fiduciary duties, and misuse of FGHI's assets. The original operating agreement, executed in September 2003, contained a Michigan choice-of-law provision and an Arizona forum-selection clause. An amended operating agreement was drafted in December 2003, which included Delaware choice-of-law and forum-selection clauses; however, that agreement was not executed by the plaintiff. The complaint alleged that, consistent with the December agreement, Delaware law controlled the dispute. However, a copy of the agreement was not attached. The defendants answered the complaint, but did not assert any affirmative defense relating to the forum-selection clause. The defendants then filed amended answers, asserting affirmative defenses relating to the application of Delaware law, lack of subject-matter and personal jurisdiction, and improper venue. The defendants moved for summary disposition and sought sanctions, contending that the action was filed in an improper forum, solely to serve improper motives. The plaintiff then filed an amended complaint, attaching the September 2003 agreement and omitting any reference to Delaware law as governing the dispute. The defendants renewed their motion for summary disposition and again sought sanctions. The plaintiff asserted that the defendants waived their claim of improper venue by failing to contest the court's personal jurisdiction over them in their first responsive pleading. The plaintiff also argued that the forum-selection clause in the September 2003 agreement was unenforceable under MCL 600.745(3) and that the action was properly filed in Michigan and, therefore, sanctions were not appropriate. The court, Mark A. Goldsmith, J., eventually determined that the forum-selection clause in whichever operating agreement was deemed operative was enforceable under MCL

600.745(3) and that the plaintiff's claims against all the defendants are subject to that clause. The court granted summary disposition in favor of the defendants on all of the plaintiff's claims, but denied the request for sanctions, ruling that the plaintiff had a belief that it had an arguable case for filing its action in Michigan under MCL 600.745(3). The plaintiff appealed from the order granting summary disposition in favor of the defendants, and the defendants appealed from the denial of their request for sanctions. The appeals were consolidated.

The Court of Appeals *held*:

The trial court properly granted the motion for summary disposition on the basis of the forum-selection clause and properly denied sanctions.

1. The defendants were not required to assert the affirmative defense of lack of personal jurisdiction in order to seek dismissal on the basis of the parties' choice of a forum other than Michigan. Although Michigan courts have personal jurisdiction over each of the defendants, the parties' contractual agreement to forgo Michigan as a forum for adjudication leaves Michigan courts incapable of granting relief on claims based on the contract, unless one of the exceptions stated in MCL 600.745(3) applies. Dismissal was properly based on the forum-selection clause regardless of the trial court's purported grant of summary disposition under MCR 2.116(C)(1).

2. The parties' dispute regarding which of the two operating agreements is operative did not preclude the trial court from dismissing the complaint when it determined that the forum-selection clause in either agreement is enforceable under MCL 600.745(3).

3. The trial court did not err in determining that the exceptions set forth in MCL 600.745(3) do not apply to prevent dismissal of the complaint pursuant to the forum-selection clause of either agreement.

4. The trial court did not clearly err in holding that the plaintiff's filing of the complaint in Michigan was not patently frivolous or for an improper purpose and, therefore, did not clearly err in denying the request for sanctions.

Affirmed.

CONTRACTS — FORUM-SELECTION CLAUSES.

The enforcement of contractual forum-selection clauses is premised on the parties' freedom to contract; Michigan honors the parties' contractual choice of forum, in the absence of certain factors, by

> requiring Michigan courts to dismiss, or stay, actions in which it is demonstrated that the parties have agreed that a forum other than Michigan shall be the exclusive forum for resolution of their dispute; a valid forum-selection clause does not divest the Michigan courts of personal jurisdiction over the parties (MCL 600.745[3]).

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson* and *James E. DeLine*), for the plaintiff.

Morgan Associates, PLC (by *Kenneth B. Morgan, K. Dino Kostopoulos*, and *Ian M. Redmond*), and *Powell, Murphy & Adolf, PLLC* (by *Steven C. Powell*), for the defendants.

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

BANDSTRA, P.J. In Docket No. 276372, plaintiff Robert A. Hansen Family Trust appeals the trial court's order dismissing its complaint against defendants FGH Industries, LLC (FGHI), FGH Capital, LLC, Daniel Fuhrman, and William Gruits. In Docket No. 276452, defendants appeal the trial court's denial of their request for sanctions. The appeals were consolidated. We conclude that the trial court properly enforced the parties' forum-selection agreement under MCL 600.745(3) and properly denied sanctions. We affirm.

FACTS AND PROCEEDINGS BELOW

This action arises from a dispute over an investment plaintiff made in a business venture with defendant FGH Capital[1] pursuant to an operating agreement that created FGHI. This operating agreement, executed by plaintiff and FGH Capital in September 2003, con-

[1] Gruits and Fuhrman are owners and managers of FGH Capital.

tained a Michigan choice-of-law provision[2] and an Arizona forum-selection clause (the September agreement).[3] In December 2003, an amended operating agreement was drafted by counsel for plaintiff and defendants but, ultimately, it was not executed by plaintiff (the December agreement). The December agreement included Delaware choice-of-law and forum-selection provisions.[4]

Plaintiff filed this action in March 2006, in the Oakland Circuit Court, alleging, among other claims, that defendants breached the operating agreement,

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[2] Section 10.3 of the September agreement provides that "[t]his Operating Agreement shall be governed by and construed in accordance with the laws of the State of Michigan."

[3] Section 10.4 of the September agreement specifies that

> [t]he parties agree and stipulate that any and all claims, demands, disagreements, controversies or disputes arising out of or relating to (the operating agreement) (collectively "Claims") shall be adjudicated exclusively in the Pima County, Arizona, Superior Court, which courts [sic] shall have the sole and exclusive jurisdiction and venue for adjudication of all Claims. The parties hereby agree upon, consent and stipulate to the jurisdiction and venue of the aforementioned courts for the adjudication of all Claims, to the exclusion of all other courts, forums and venues whatsoever.

[4] Section 10.3 of the December agreement provides that "[t]his Operating Agreement shall be governed by and construed in accordance with the laws of the State of Delaware." Section 10.4 of the December agreement provides that

> [t]he parties agree and stipulate that any and all claims, demands, disagreements, controversies or disputes arising out of or relating to this Operating Agreement (collectively "Claims") shall be adjudicated exclusively in the federal or state courts sitting in the State of Delaware, which courts shall have the sole and exclusive jurisdiction and venue for the adjudication of all Claims. The parties hereby agree upon, consent and stipulate to the jurisdiction and venue of the aforementioned courts for the adjudication of all Claims, to the exclusion of all other courts, forums and venues whatsoever.

breached their fiduciary duties to plaintiff, misused FGHI's assets for the personal pecuniary benefit of Gruits and Fuhrman, and engaged in related-party transactions to plaintiff's detriment. Plaintiff indicated in its complaint that the operating agreement provided that it "shall be governed by and construed in accordance with" Delaware law, consistent with the December agreement. However, plaintiff did not attach a copy of the agreement to the complaint, instead representing that a copy of it was in defendants' possession. Defendants answered the complaint; they did not assert any affirmative defense relating to the forum-selection clause contained in the agreement. The parties engaged in discovery over the next few months.

On August 8, 2006, defendants filed amended answers to plaintiff's complaint, asserting affirmative defenses relating to the application of Delaware law, a lack of subject-matter and personal jurisdiction, and improper venue. Thereafter, defendants moved for summary disposition, under MCR 2.116(C)(1) (lack of personal jurisdiction), (4) (lack of subject-matter jurisdiction), and (8) (failure to state a claim), contending that Delaware courts were the sole and exclusive forum for the resolution of disputes arising from or relating to the operating agreement. Defendants also sought sanctions on the basis that plaintiff filed this action in Michigan, knowing that it was an inappropriate forum, solely to serve improper motives. Additionally, defendants moved to strike plaintiff's complaint because plaintiff did not attach to it the operating agreement on which its claims were based. They explained that while plaintiff's complaint clearly referenced the December agreement, plaintiff was then indicating that the September agreement was the operative agreement, creating "tremendous confusion." Ultimately, defendants' motion to strike was withdrawn, and, on September 22, 2006,

plaintiff filed an amended complaint, attaching the September 2003 agreement and omitting any reference to Delaware law as governing this dispute.

Defendants renewed their motion for summary disposition, again asserting that the December 2003 agreement was the operative agreement between the parties, but arguing further that, in either case, the court of a state other than Michigan—either Arizona or Delaware—was selected by the parties as the exclusive forum for the adjudication of all claims or disputes arising out of or relating to the operating agreement, thus requiring that the trial court dismiss plaintiff's complaint. Defendants again sought sanctions. Plaintiff opposed defendants' motion, asserting that defendants waived their claim that Michigan was an improper forum for this action by failing to contest the court's personal jurisdiction over them in their first responsive pleading. Plaintiff also argued that the September operating agreement constituted the agreement between the parties and that the forum-selection clause set forth therein was unenforceable under MCL 600.745(3). Plaintiff contested defendants' request for sanctions on the basis that this action was properly filed in Michigan.

The trial court determined as an initial matter that, because an analysis of the enforceability of a forum-selection clause is "more akin" to a determination whether the court lacks personal jurisdiction, it would decide defendants' motion under MCR 2.116(C)(1).[5] The trial court then acknowledged that there was a "threshold question" of fact regarding "which of the two ostensible agreements is operative," preventing it from deciding as a matter of law which forum-selection

[5] The trial court did not address plaintiff's argument that defendants waived the defense of lack of personal jurisdiction by failing to assert it in their first responsive pleading.

clause applies to this dispute. The trial court concluded, however, that because neither agreement permitted a Michigan forum, the question of which agreement is operative is not material to the issue whether the parties had an enforceable agreement to adjudicate their disputes exclusively in a forum other than Michigan so as to require dismissal of plaintiff's action. The trial court determined, relying in large part on this Court's decision in *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341; 725 NW2d 684 (2006), that the forum-selection clause in whichever operating agreement was deemed operative was enforceable under MCL 600.745(3) and, further, that plaintiff's claims against all the defendants are subject to that clause. The court reasoned that the forum-selection clause applies to all claims arising from the operating agreement, and not just to the claims concerning the parties to that agreement, finding the decision in *Elf Atochem North America, Inc v Jaffari*, 727 A2d 286 (Del, 1999), to be persuasive. The trial court thus granted defendants summary disposition on all of plaintiff's claims, on the basis that "they are not properly brought in Michigan." However, finding that the record before it suggested that plaintiff "believed that it had an arguable case for jurisdiction of its claims in Michigan," the trial court denied defendants' request for sanctions.

ANALYSIS

Plaintiff argues on appeal, in Docket No. 276372, that the trial court erred by granting defendants' motion for summary disposition. 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). Whether a forum-selection clause is enforceable under

MCL 600.745 presents a question of statutory interpretation, which we also review de novo. *Turcheck*, *supra* at 345.

MCL 600.745(3) provides:

> If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:
>
> (a) The court is required by statute to entertain the action.
>
> (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
>
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.
>
> (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (e) It would for some other reason be unfair or unreasonable to enforce the agreement.

Plaintiff first asserts that defendants waived their right to invoke the forum-selection clause to preclude Michigan courts from adjudicating this dispute by failing to assert the defense of lack of personal jurisdiction in their first motion or responsive pleading. We disagree.

In *Turcheck*, *supra* at 344, this Court, in determining the appropriate standard of review for a trial court's dismissal of an action based on a forum-selection clause, explained that,

> [w]hile *not identical*, dismissal based on a forum-selection clause is *similar to* a grant of summary disposition for lack of personal jurisdiction. Although a valid forum-selection clause *does not divest the Michigan courts of personal*

> *jurisdiction over the parties*, it evinces the parties' intent to forgo personal jurisdiction in Michigan and consent to *exclusive* jurisdiction in another forum. [Emphasis in original and added.]

The Michigan Legislature has elected to honor the parties' contractual choice of forum, in the absence of certain factors, by requiring Michigan courts to dismiss, or stay, actions in which it is demonstrated that the parties have agreed that a forum other than Michigan shall be the exclusive forum for resolution of their disputes. MCL 600.745(3). Here, as in *Turcheck*, *supra* at 345:

> We begin with Michigan's fundamental rules of contract interpretation, set forth by our Supreme Court in *Quality Products & Concepts* [*Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003)]:
>
> "In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy." [*Id.* at 375 (internal citations omitted).]
>
> It is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions.

Enforcement of contractual forum-selection clauses is premised on the parties' freedom to contract; it does not divest Michigan courts of personal jurisdiction over the parties. *Turcheck*, *supra* at 344, 350. Indeed, as plaintiff points out, plainly, Michigan courts have personal jurisdiction over each of the defendants. However, the parties' contractual agreement to forgo Michigan as a forum for adjudication leaves Michigan courts incapable of granting relief on claims based on the contract.

Regardless of the trial court's purported grant of summary disposition under MCR 2.116(C)(1), dismissal based on a valid forum-selection clause, as mandated by MCL 600.745(3), while similar, is not a dismissal based on a lack of personal jurisdiction.[6] *Id.* Consequently, defendants were not required to assert the affirmative defense of lack of personal jurisdiction in order to seek dismissal of plaintiff's complaint on the basis of the parties' choice of forum. Therefore, any failure to assert that defense in their first responsive motion or pleading did not waive their right to seek dismissal of plaintiff's complaint under MCL 600.745(3).[7]

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[6] Dismissal of this action on the basis of the existence of a valid forum-selection clause falls under MCR 2.116(C)(8), because pursuant to MCL 600.745(3), plaintiff's complaint fails to state a claim upon which the courts of this state are permitted to grant relief. However, as explained in *Detroit News, Inc v Policemen & Firemen Retirement Sys of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002), " '[i]f summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart.' " (Citation omitted.) That is the case here.

[7] Even were we to agree with plaintiff that dismissal based on a forum-selection clause was not just similar, but rather must be treated as identical, to dismissal for lack of personal jurisdiction under MCR 2.116(C)(1), we would conclude that defendants' inclusion of lack of personal jurisdiction as an affirmative defense in their amended answers to plaintiff's complaint and in their answers to plaintiff's amended complaint preserved defendants' right to seek dismissal of plaintiffs' complaint on the basis of the forum-selection clause. MCR 2.116(D)(1) requires that the defense of lack of personal jurisdiction "be raised in a party's first motion under [MCR 2.116] or in the party's responsive pleading, whichever is filed first, or [it is] waived." However, MCR 2.111(F)(3) provides that "[a]ffirmative defenses must be stated in a party's responsive pleading, *either as originally filed or as amended in accordance with MCR 2.118.*" (Emphasis added.) And, under MCR 2.118(A)(4), "[u]nless otherwise indicated, *an amended pleading supersedes the former pleading*." (Emphasis added.) It is well settled that this includes a party's amendment of its affirmative defenses. See *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241

Plaintiff next argues that the trial court's failure to determine which of the two operating agreements was controlling prevented it from properly assessing plaintiff's assertion that the forum-selection clause was unenforceable under MCL 600.745(3). We disagree. Regardless of which of the two agreements is determined to be the operative agreement between the parties, neither provides for a Michigan forum for resolution of the instant matter. And, either agreement presents the same issues under MCL 600.745(3). Therefore, the parties' dispute over which of the two agreements is operative did not preclude the trial court from dismissing plaintiff's complaint upon determining that the forum-selection clause in either agreement is enforceable under MCL 600.745(3).[8]

(2000) (upholding the trial court's grant of leave to amend to add previously unasserted affirmative defenses). As this Court explained in *Grzesick v Cepela*, 237 Mich App 554, 562; 603 NW2d 809 (1999), "[i]t necessarily and logically follows that just as an amended complaint supersedes the original complaint, a party's most recent amended answer supersedes any previously filed responsive pleadings." Thus, defendants' inclusion of lack of personal jurisdiction as an affirmative defense in their amended answers to plaintiff's complaint, and in their answers to plaintiff's amended complaint, comports with the plain language of MCR 2.111(F)(3). Hence, even if they were required to plead the affirmative defense of lack of personal jurisdiction to preserve their right to seek dismissal of this action on the basis of the forum-selection clause in the operative agreement, we would conclude that defendants did not waive that right here. See, e.g., *Boladian v Clinton*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2005 (Docket No. 261746) (the defendant did not waive the affirmative defense of laches by failing to plead it in his first responsive pleading, where he asserted that defense in his answer to the plaintiff's amended complaint).

[8] Further, as the trial court properly noted, if defendants' motion were treated as a motion under MCR 2.116(C)(1), as plaintiff suggests, all factual disputes for purposes of deciding the motion are to be resolved in plaintiff's favor, *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). Similarly, if treated, as we conclude to be more appropriate, as a motion under MCR 2.116(C)(8), all factual allegations in plaintiff's complaint are to be accepted as true, together with any

Plaintiff argues further that the trial court erred by concluding that the exceptions set forth in MCL 600.745(3) do not apply to prevent dismissal of the complaint pursuant to the forum-selection clause in either agreement. We disagree.[9]

As this Court explained in *Turcheck*, *supra* at 348:

> . . . Michigan courts generally enforce contractual forum-selection clauses. The exceptions to this rule are stated in MCL 600.745(3)(a)-(e), and unless one of the statutory exceptions applies, Michigan courts will enforce a forum-selection clause as written. . . . A party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced.

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reasonable inferences or conclusions that can be drawn from those facts. *Mich Dep't of Transportation v North Central Coop LLC*, 277 Mich App 633, 636; 750 NW2d 234 (2008). In either case, the court would consider the September agreement as the operative one.

[9] We evaluate the enforceability of the forum-selection clause at issue here under Michigan law, and specifically under MCL 600.745(3), because plaintiff's amended complaint is premised on the September agreement, which calls for Michigan law to govern disputes thereunder, because the action was filed in Michigan, and because the parties do not contest the applicability of Michigan law to this determination. However, we note that were we faced with the question of which state's law to apply to determine the enforceability of the forum-selection clause in either agreement, see *Turcheck*, *supra* at 346-347, we would conclude that the forum-selection clauses at issue are equally enforceable under Michigan law, Delaware law, or Arizona law. See *Turcheck*, *supra*; *Outokumpu Engineering Enterprises, Inc v Kvaerner Enviropower, Inc*, 685 A2d 724, 733 n 5 (Del Super, 1996) (forum-selection clauses are "presumptively valid" and should be enforced absent a showing that the trial will be so inconvenient as to deprive a party, for all practical purposes, of its day in court; absent such a showing, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to its bargain); *Societe Jean Nicolas et Fils v Mousseux*, 123 Ariz 59, 61; 597 P2d 541 (1979) ("a forum selection clause that is fairly bargained for and not the result of fraud will be enforced so long as to do so is reasonable at the time of litigation and does not deprive a litigant of his day in court"). Therefore, we need not address the issue of which state's law would govern the clause's applicability. *Turcheck*, *supra*.

> Accordingly, the party seeking to avoid the forum-selection clause bears the burden of proving that one of the statutory exceptions of MCL 600.745(3) applies. [Citations omitted.]

The statutory exceptions at issue in this case provide that a forum-selection clause should be enforced unless "[t]he plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action[,]" "[t]he other state would be a substantially less convenient place for the trial of the action than this state[,]" or "[i]t would for some other reason be unfair or unreasonable to enforce the agreement." MCL 600.745(3)(b), (c), and (e).

Plaintiff contends that it cannot secure complete relief against defendants in either Arizona or Delaware, because defendants' assets are located here, and thus, if plaintiff is successful in an action against defendants in either of those forums, additional proceedings will be necessary in Michigan to enforce the judgment. However, as properly explained by the trial court, securing effective relief in a foreign jurisdiction and enforcing a foreign judgment in Michigan are separate and distinct considerations.

Plaintiff also argues that there may be a question whether Arizona or Delaware courts have jurisdiction over all the defendants, particularly Gruits and Fuhrman, and that any question regarding personal jurisdiction in Arizona or Delaware may impede enforcement in Michigan of any judgment obtained in either of those jurisdictions. However, as a party to the operating agreement, FGH Capital has consented to personal jurisdiction in either Arizona or Delaware, and FGHI is unequivocally bound by the terms of its operating agreement as well. Gruits and Fuhrman are the real parties in interest in FGH Capital, the majority owner of FGHI. Defendants concede that the forum-selection

clause in the operating agreement applies to plaintiff's claims against Gruits and Fuhrman under *Elf Atochem*, *supra*. Indeed, they unequivocally admit that, as managers of FGHI, they are subject to the personal jurisdiction of the Delaware courts.[10] See *Elf Atochem*, *supra*; *Palmer v Moffat*, 2001 WL 1221749 (Del Super, 2001); *Albert v Alex Brown Mgt Services, Inc*, 2005 Del Ch LEXIS 133 (Del Ch, 2005); *Assist Stock Mgt LLC v Rosheim*, 753 A2d 974 (Del Ch, 2000); *RJ Assoc, Inc v Health Payors' Org Ltd Partnership, HPA, Inc*, 1999 WL 550350 (Del Ch, 1999). Further, defendants' actions as managers of FGH Capital admittedly were intentionally directed at plaintiff in Arizona in that defendants actively sought plaintiff's investment in FGHI through conduct directed toward plaintiff in Arizona. In fact, defendants concede that Gruits and Fuhrman had sufficient contact with plaintiff in Arizona—that is, that they purposely availed themselves of the privilege of conducting activities within Arizona—so as to permit plaintiff to establish that the Arizona courts have personal jurisdiction over them, at least for purposes of claims arising from or relating to the operating agreement and plaintiff's investments in FGHI.[11] See, e.g., *Meyers v Hamilton Corp*, 143 Ariz 249; 693 P2d 904 (1984); *Rollin v William V Frankel & Co, Inc*, 196 Ariz 350; 996 P2d 1254 (Ariz App, 2000). Plaintiff offers no authority compelling a conclusion otherwise. Therefore, the trial court correctly concluded that plaintiff did not

[10] In their brief, defendants represent to this Court that "[i]n *Elf Atochem*, the Delaware Supreme Court clearly held that an operating agreement selecting a forum for all claims arising out of an operating agreement, covers all claims against the LLC itself, the managers, and the members."

[11] Defendants acknowledge, in their brief to this Court, that "Fuhrman and Gruits made trips to Arizona and otherwise communicated with [plaintiff] in Arizona. Thus, [plaintiff] could establish jurisdiction over all [defendants] in [that] forum . . . ."

meet its burden of establishing that the exception to enforceability of the forum-selection clause set forth in MCL 600.745(3)(b) applies here.

Plaintiff next asserts that, because defendants, defendants' records, and defendants' witnesses are located in Michigan, because defendants have no ties to either Arizona or Delaware, because FGH Capital is a Michigan limited-liability company located exclusively in Michigan, because FGHI, although a Delaware company, conducts no business and maintains no office, books, or records in Arizona or Delaware, and because the September agreement is governed by Michigan law, the trial court erred in failing to determine that the Arizona and Delaware forums are substantially less convenient forums for trial than Michigan. We disagree.

In *Turcheck*, *supra* at 350, this Court noted that

> inconvenience, insofar as it is within the contemplation of the parties at the time of contracting, should not render a forum-selection clause unenforceable. Where the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties. Allowing a party who is disadvantaged by a contractual choice of forum to escape the unfavorable forum-selection provision on the basis of concerns that were within the parties' original contemplations would unduly interfere with the parties' freedom to contract and should generally be avoided. [Citations omitted.]

By virtue of the forum-selection clause set forth in each operating agreement, plaintiff has acknowledged that there is a sufficient nexus with the chosen forum to consider it appropriate for resolution of disputes arising under or relating to the agreement. The factors that plaintiff now asserts render Arizona or Delaware "substantially less convenient" than Michigan are the same factors that plaintiff deemed acceptable in agreeing to

the forum-selection clause as part of its bargain with defendants under each operative agreement. Plaintiff does not suggest that anything has changed since its agreement to the forum-selection clauses, rendering the forums chosen significantly less convenient now than they were then. Absent additional considerations not within those reasonably contemplated by the parties at the time of their agreement, we do not conclude that the chosen forums are "substantially less convenient" than Michigan for adjudication of plaintiff's claims.[12]

Moreover, plaintiff is located in Arizona, conducts its affairs primarily in Arizona, and maintains its records in Arizona. It has not provided any information to establish that it would incur greater expense or inconvenience litigating this matter in its home state of Arizona than it would litigating in Michigan. Nor has plaintiff offered any basis for concluding that it would be less costly or more convenient to undertake proceedings in Michigan than in Delaware. In either case, plaintiff will incur the expense and inconvenience of conducting litigation thousands of miles from its home in Arizona. Plaintiff repeatedly asserts that defendants did not establish that litigating the action in Arizona or Delaware would be more convenient for them, and that they cannot articulate any reason that litigating in

[12] Plaintiff asserts that the trial court should have applied the analysis set forth in *Lease Acceptance Corp v Adams*, 272 Mich App 209, 225-229; 724 NW2d 724 (2006), to determine whether Arizona and Delaware are "substantially less convenient" than Michigan. However, *Lease Acceptance* addresses the application of MCL 600.745(2), under which the parties' choice of Michigan as the exclusive forum for resolving disputes will be enforced, as long as Michigan is a "reasonably convenient" place for trial. *Lease Acceptance* did not address the applicability of MCL 600.745(3), nor did it purport to construe the "substantially less convenient" language set forth therein. Therefore, the trial court correctly declined to consider *Lease Acceptance* when determining the enforceability of the forum-selection clauses under MCL 600.745(3).

Michigan would be less convenient, given that defendants are located in Michigan. However, defendants are not required to establish that the chosen forum is more convenient; rather, it is plaintiff that bears a "heavy burden" of showing that the chosen forum is "substantially less convenient" than Michigan.[13] The trial court correctly concluded that plaintiff failed to meet this burden.[14]

Additionally, plaintiff reiterates its assertion that there may be a question whether Arizona or Delaware courts have jurisdiction over Gruits and Fuhrman, this time asserting that it would be "far more convenient" to litigate all its claims against all the defendants in the same forum—Michigan—rather than to do so piecemeal in multiple forums. However, as noted above, defendants have conceded that, as managers of FGHI, Gruits and Fuhrman are subject to the personal jurisdiction of the Delaware courts, and that they actively sought plaintiff's investment in FGHI through conduct directed toward plaintiff in Arizona and had sufficient contact with plaintiff in Arizona so as to permit plaintiff to establish that the Arizona courts have personal jurisdiction over them. Therefore, plaintiff has not established that it cannot litigate its claims against all parties in the contractually selected forum. Plaintiff's claims against Gruits and Fuhrman are intertwined

[13] Contrary to plaintiff's framing of this issue, the statute neither requires nor permits a determination regarding which forum is the "most convenient" place for trial of this action. Rather, plainly, MCL 600.745(3)(c) mandates that Michigan courts enforce valid contractual agreements to commence certain actions exclusively in a chosen forum, unless that chosen forum is "substantially less convenient" than Michigan.

[14] Likewise, plaintiff has failed to establish that either Arizona or Delaware is so inconvenient to plaintiff as to essentially deprive it of its day in court if proceedings were to be undertaken in either of those forums. See n 9 of this opinion.

with its claims against FGHI and FGH Capital, to the extent that we agree with plaintiff that it would be "far more convenient" to litigate against all defendants in a single action—in the forum that the parties selected for resolution of all claims arising out of and relating to the operating agreement.

Finally, plaintiff argues that it would be unfair and unreasonable to enforce the forum-selection clause because defendants did not promptly invoke it and because defendants are actively litigating other disputes in this state. For the reasons discussed above, defendants complied with all court rules and statutory requirements in asserting that the forum-selection clause necessitated dismissal of plaintiff's complaint. Further, defendants' involvement in litigating other actions in Michigan simply has no bearing on the enforceability of the forum-selection clause in the parties' contract in this case. Defendants are entitled to the benefit of the bargain struck by the parties, irrespective of defendants' conduct in other legal actions not involving plaintiff that may be pending in the courts of this state.[15]

Defendants argue, in Docket No. 276452, that the trial court abused its discretion in denying their motion for sanctions under MCR 2.114, on the basis that plaintiff's filing of its complaint in Michigan was not well grounded in fact or law. We disagree.

This Court reviews a trial court's decision to deny sanctions for clear error. *Kitchen v Kitchen*, 465 Mich

[15] We note with approval the trial court's conclusion that it is neither unfair nor unreasonable to hold plaintiff to its contractually agreed upon choice of forum for resolution of "any and all claims, demands, disagreements, controversies or disputes arising out of or relating to" the operating agreement, regardless of whether some of the claims, demands, disagreements, controversies, or disputes also concern defendants other than FGH Capital who were not signatories to that agreement.

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. Sanctions are warranted under MCR 2.114 where a plaintiff asserts claims without any reasonable basis in law or fact for those claims, or where the claims are asserted for an improper purpose. MCR 2.114(D), *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 407; 700 NW2d 432 (2005). "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). And, " '[n]ot every error in legal analysis constitutes a frivolous position.' " *Id.*, quoting *Kitchen*, *supra* at 663.

The trial court found, on the basis of the record before it, that plaintiff's decision to file its complaint in Michigan was not "patently frivolous," but rather was premised on plaintiff's belief that it had an arguable case for filing its claims in Michigan under MCL 600.745(3). The court also determined that defendants presented no evidence in support of their assertion that plaintiff filed its complaint in Michigan to serve improper purposes.

We find no clear error in the trial court's conclusion that plaintiff's filing of its complaint in Michigan was not patently frivolous. There is no evidence in the record before us to establish that plaintiff filed its complaint in Michigan for improper purposes. Rather, the record reflects that plaintiff filed its complaint in Michigan believing that Michigan courts offered the most convenient forum for, and the most efficient path to, resolution of its claims against defendants. The filing of plaintiff's complaint in Michigan was premised

on a colorable assertion under MCL 600.745(3) that the forum-selection clause in the operating agreement did not prevent Michigan courts from adjudicating plaintiff's claims. As noted earlier, the mere fact that plaintiff did not ultimately prevail on its legal position does not render its filing of the complaint in Michigan frivolous. *Jerico*, *supra*; *Kitchen*, *supra* at 662-663.

We affirm.

LEWIS v BRIDGMAN PUBLIC SCHOOLS (ON REMAND)

Docket No. 261349. Submitted March 26, 2008, at Lansing. Decided July 1, 2008, at 9:20 a.m. Leave to appeal sought.

James Lewis, a high school teacher in the Bridgman Public Schools, gave a student an air gun at school despite a school district policy calling for the expulsion of any student who possesses a "dangerous weapon," which the policy defined to include air guns. The school district initiated a proceeding for Lewis's discharge. After a hearing, a hearing referee at the State Tenure Commission issued a preliminary decision and order for Lewis's discharge. Both parties filed exceptions to the hearing referee's decision. Although the commission agreed with the referee's findings, it decided that the proper penalty was an unpaid suspension, given the lack of improper motive by Lewis and given his significant contributions to the school district as a teacher. The Court of Appeals, SERVITTO, P.J., and TALBOT, J. (FITZGERALD, J., dissenting), reversed and remanded, holding that the commission erred by reviewing the hearing referee's decision de novo when it should have limited its review to whether the hearing referee's decision was supported by competent, material, and substantial evidence. 275 Mich App 435 (2007). The Supreme Court, in lieu of granting leave to appeal, reversed and remanded, directing the Court of Appeals to consider whether the commission's decision was arbitrary, capricious, or an abuse of discretion; or unsupported by competent, material, and substantial evidence on the whole record. 480 Mich 1000 (2007).

On remand, the Court of Appeals *held*:

The commission's decision was not arbitrary, capricious, or an abuse of discretion; nor was it unsupported by competent, material, and substantial evidence on the whole record.

Affirmed.

FITZGERALD, J., stated that tenured teachers may be discharged or demoted only for reasonable and just cause. MCL 38.101. The school district or controlling board of education bears the burden of establishing reasonable and just cause, which can be shown only by significant evidence proving that the teacher is unfit to teach. The commission has authority to adopt, modify, or reverse the preliminary decision and order of a hearing officer. MCL

38.104(5)(m). The commission has the authority to reduce the level of discipline from discharge to suspension where it determines that the charged misconduct, while proven, was not reasonable and just cause for discharge. In this case, the commission acted within its authority in concluding that Lewis's misconduct did not constitute reasonable and just cause for discharge, and in reducing the penalty to a suspension.

TALBOT, J., stated that he was constrained by the Supreme Court's order to concur in the affirmance of the commission's decision. He wrote to take issue with the standard of review laid out by the Supreme Court, noting that the changes made by 1993 PA 60 to the procedure for appealing from a controlling board of education's decision necessitates a re-examination of the proper scope of the commission's authority to modify a controlling board's decision regarding the penalty imposed for misconduct by a tenured teacher.

SERVITTO, P.J., likewise stated that she was constrained by the Supreme Court's order to concur in the affirmance of the commission's decision. She stated that statutory changes have substantially altered the standard of review and that meaningful review is precluded with the continued use of the old standard of review.

Kalniz, Iorio & Feldstein Co., L.P.A. (by *Fillipe S. Iorio*), for James Lewis.

Thrun Law Firm, P.C. (by *Roy H. Henley*), for the Bridgman Public Schools.

Amicus Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Joshua S. Smith*, Assistant Attorney General, for the State Tenure Commission.

ON REMAND

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

FITZGERALD, J. This teacher-tenure case returns to this Court on remand from our Supreme Court. Respondent Bridgman Public Schools (the school district)

appeals by leave granted from the State Tenure Commission's February 18, 2005, decision and order that reduced petitioner James Lewis's discipline from discharge, as recommended by the hearing officer, to a suspension without pay or benefits through the end of the 2005-2006 school year. On May 8, 2007, a majority of this panel reversed, concluding that the tenure commission had applied an incorrect standard of review.[1] *Lewis v Bridgman Pub Schools*, 275 Mich App 435; 737 NW2d 824 (2007), rev'd 480 Mich 1000 (2007).

Lewis sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court reversed this Court's decision[2] and remanded "for consideration of whether the commission's decision was arbitrary, capricious, or an abuse of discretion; or unsupported by competent, material, and substantial evidence on the whole record." *Lewis v Bridgman Public Schools*, 480 Mich 1000 (2007).

The background facts were set forth in this Court's previous opinion:

> This case arose when Lewis, a high school teacher with 12 years of teaching experience, presented his 18-year-old male teaching assistant, a student at the high school, with an air gun as a Christmas gift. Presentation of the gift was made while on school property. The air gun, described as an accurate replica of a Ruger semi-automatic handgun, along with ammunition, was presented to the teaching assistant in the presence of other students. The air gun discharges plastic pellets and has a muzzle velocity of over 250 feet per

[1] I dissented and stated that the tenure commission's application of a de novo standard of review was proper.

[2] The Supreme Court reversed this Court's judgment "because the teacher tenure act, MCL 38.101 *et seq.*, does not require the State Tenure Commission to apply a 'clear error,' rather than a 'de novo' standard of review to its consideration of the preliminary decisions of administrative law judges."

second, which is comparable to other types of pellet guns and BB rifles. Although the box containing the air gun indicated specific warnings, particularly regarding the need for eye protection, Lewis did not provide such protective gear as part of the student's gift. Lewis did not instruct the student on safe use of the air gun or any dangers regarding its use. In addition, Lewis failed to solicit or secure the advice or permission of school administrators or the student's parents before the selection and presentation of the gift.

The student was uncomfortable with accepting this gift and feared expulsion for having the air gun on school property. This concern was legitimate, as possession of the gun was violative of School District Policy No. 5610.01, which states in relevant part:

"In compliance with State and Federal law, the Board shall expel any student who possesses a dangerous weapon in a weapon-free school zone. . . .

* * *

"For purposes of this Policy, a dangerous weapon is defined as, 'a firearm, dagger, dirk, stiletto, knife with a blade over three (3) inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles' or other devices designed to or likely to inflict bodily harm, including, but not limited to, air guns and explosive devices."

The air gun remained in an unlocked storage room in Lewis's classroom for several weeks before the student took the air gun home. When the student informed his parents of the gift, they complained to the school, which resulted in the school district's decision to proceed with charges for Lewis's discharge. [*Lewis*, *supra*, 275 Mich App at 437-438.]

Lewis was charged with abrogating his responsibility to perform his duties in a professional manner and to act as an appropriate example and role model for students. He was also charged with insubordination for

violating the school district's policy on staff conduct and ethics, which prohibits staff members from possessing or storing weapons on school property. The policy defines "weapon" to include "air and gas-powered guns."

At the tenure hearing, the school district supported its request for Lewis's discharge with evidence of several prior incidents exemplifying Lewis's poor judgment. These incidents included (1) a 1993 remark to a student high jumper that he should arch his back as if "there is a vagina in the sky," which resulted in a letter of reprimand, (2) a 1993 incident involving sleeping in the school building, (3) arriving at work more than one hour late on one occasion, (4) making a sexual comment to a female student, (5) bringing his dog onto school property, resulting in the dog biting a student, (6) allowing his dogs to run loose in the school building during Christmas break, (7) a comment to a female student that she did not know who her father was, which generated a letter of concern, (8) telling his class that he had been to a condom shop "but they didn't have [his] size," which resulted in a two-day suspension without pay in 2002, and (9) inappropriate physical contact with a female student after he approached the student from behind, wrapped his arms around her mid-section, and lifted her off the floor, which generated a letter of concern. In March 2003, Lewis was placed in an individualized development plan that lasted for two months, which he successfully completed.

Evidence of Lewis's many positive contributions to the school was also presented at the hearing. He served as class advisor on two occasions, started an environmental-science stewardship program and a recycling program, served on the school's curriculum committees, served as science-club advisor, coached the

Science Olympiad team, led students on community-service events, and organized science-related field trips. Lewis has coached various middle-school sports teams, developed the cross-county program for middle school, supervised the intramural sports program, volunteered with the high school sports program, and participated in summer sports programs. His fellow teachers and coaches described him as positive, upbeat, good with students, an effective and outstanding teacher, and a passionate and effective coach. Two of Lewis's former students testified that he was an effective teacher.

The hearing officer issued a 28-page preliminary decision and order, finding that the school district had proven reasonable and just cause to terminate Lewis's employment. The hearing officer found that Lewis "showed a serious lack of professional judgment" in giving the air gun to the student, and that the air gun was "not a mere toy." The hearing officer found that Lewis had ample opportunity to reflect on his choice of gift, that he disregarded warnings on the gun box, that he did not provide the student with any protective eye gear, that he did not seek permission from the student's parents before giving such a gift, that he knew nothing of the student's family, including whether there were young children living in the family's home, and that the gift placed the student at risk of expulsion. The hearing officer further found that the realistic appearance of the air gun had the potential to lead to "an extremely dangerous law enforcement response." After applying the discipline factors in *Szopo v Richmond Comm Schools Bd of Ed* , State Tenure Commission Decision (Docket No. 93-60, decided November 29, 1994), the hearing officer determined that discharge was appropriate on the basis of the following: (1) Lewis's behavior was planned and intentional, (2) the incident involved a realistic replica of a semi-automatic weapon, (3) the

incident placed the school community and the student at risk, (4) the incident caused considerable anxiety to the student and his family, and (5) Lewis's prior lapses of judgment. The hearing officer explained his reasons for recommending Lewis's discharge:

> There was undisputed testimony of [Lewis's] significant contributions to the Bridgman school community, and I cannot conclude from the evidence that his motive in this instance was improper. Nevertheless, given [Lewis's] history of significant lapses in judgment, the egregious violation of professional decorum in his choice of [the student's] gift, and the school district's legitimate concern to maintain a safe environment free of weapons, including replica weapons, I am persuaded that discharge is the appropriate remedy in this case. I find that this is the sole remedy which both reflects the seriousness of appellant's conduct and serves as a clear message that such conduct will not be tolerated.

Both parties filed exceptions to the hearing officer's preliminary decision and order.

The tenure commission issued a 32-page decision and order, rejecting all but one of the parties' exceptions. The tenure commission disagreed with the hearing officer's recommendation of discharge, and instead imposed a suspension without pay until the end of the 2005-2006 school year. The tenure commission affirmed the hearing officer's conclusions in all other respects, stating that the hearing officer's findings "clearly support his determination that [Lewis] demonstrated a serious lack of professional judgment" given his failure to consider "possible ramifications" of giving the gift to the student while on school property, particularly given the "close resemblance" of the air gun "to an actual semi-automatic pistol." The tenure commission applied the *Szopo* factors, and was "left with the definite conclusion that [Lewis's] misconduct was both egre-

gious and a clear violation of the conduct expected of a teaching professional." The tenure commission was also "troubled" by Lewis' lack of appreciation for the seriousness of his misconduct and by his history of "less serious lapses of judgment," which went uncorrected despite interventions by the school district.

However, in support of its decision to reduce the penalty from discharge to suspension, the tenure commission cited a lack of evidence of an "improper motive" by Lewis, and "undisputed evidence" of Lewis's "significant contributions to the District" as a teacher. The tenure commission reasoned:

> [W]e cannot ignore the lengthy and positive contribution to teaching [Lewis] has made. While it is clear that a serious penalty recognizing the gravity of [his] misconduct and acting to deter future improper behavior is in order, we find discharge is too severe for this particular teacher based on these circumstances. Further, a reduction in the level of discipline more fairly reflects the principle of progressive discipline as [Lewis's] only previous formal discipline was a two-day unpaid suspension.
>
> Thus, after considering all of the facts underlying [Lewis's] misconduct, previous Commission cases where recommended discharges were reduced to lengthy penalties, and [Lewis's] significant contributions as a teacher, we believe an unpaid suspension until the end of the 2005/2006 school year is appropriate. The substantial length of this penalty recognizes the seriousness of [Lewis's] misconduct and provides a strong message to appellant to exercise good judgment in his future teaching career.

The school district argues that the tenure commission's reduction in discipline was unsupported by competent, material, and substantial evidence on the whole record. A final decision of the tenure commission must be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is sup-

ported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; MCL 24.306(1)(d); *Beebee v Haslett Pub Schools (After Remand)*, 406 Mich 224, 231; 278 NW2d 37 (1979). "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a scintilla but may be substantially less than a preponderance." *Parker v Bryon Center Pub Schools Bd of Ed*, 229 Mich App 565, 578; 582 NW2d 859 (1998). This Court gives due deference to the expertise of an administrative agency, and will not "invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Widdoes v Detroit Pub Schools*, 218 Mich App 282, 286; 553 NW2d 688 (1996) (citation and quotation marks omitted). Review involves a degree of qualitative and quantitative evaluation of all the evidence that the tenure commission considered, rather than just those portions of the record supporting the tenure commission's decision. *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 366-367; 395 NW2d 195 (1986).

Tenured teachers may be discharged or demoted only for reasonable and just cause. MCL 38.101; *Satterfield v Grand Rapids Pub Schools Bd of Ed*, 219 Mich App 435, 437; 556 NW2d 888 (1996). The school district bears the burden of establishing reasonable and just cause, which can be shown only by significant evidence proving that the teacher is unfit to teach. *Parker*, *supra* at 574; *Benton Harbor Area Schools Bd of Ed v Wolff*, 139 Mich App 148, 154; 361 NW2d 750 (1984). The tenure commission has authority to "adopt, modify, or reverse the preliminary decision and order" of the hearing officer. MCL 38.104(5)(m).

The Legislature has vested the tenure commission with decision-making authority regarding an appropri-

ate penalty for teacher misconduct. In *Lakeshore Bd of Ed v Grindstaff (After Second Remand)*, 436 Mich 339; 461 NW2d 651 (1990), our Supreme Court held that the tenure commission has the authority under MCL 38.101 to reduce the level of discipline for a tenured teacher from discharge imposed by a school board to suspension where it determines that the charged misconduct, while proven, was not reasonable and just cause for discharge.

The tenure commission's finding of reasonable and just cause to reduce Lewis's discipline from discharge to a lengthy suspension without pay was not arbitrary or capricious, or an abuse of discretion, and it was supported by competent, material, and substantial evidence on the whole record. The tenure commission differed with the hearing officer's conclusions only with regard to the appropriate level of discipline, and it gave several reasons for its decision to modify the hearing officer's recommendation and impose a less severe penalty.

Lewis's involvement in the community and his teaching record militated against termination. Teachers and former students praised Lewis's teaching ability, and described him as an exceptional teacher and coach. The tenure commission observed that Lewis's record "show[ed] numerous examples of a teacher who went well above and beyond what was required." Although the hearing officer found that several of the factors articulated in *Szopo*, *supra*, supported discharge, other factors weighed in Lewis's favor. Lewis's motive in giving the air gun to the student was not malicious, no actual harm resulted, and Lewis had no previous violations of the school's weapons policy. Lewis took responsibility for his actions and stated that he would not repeat the misconduct in the future. *Id*.

Additionally, the tenure commission's application of progressive discipline principles favored a more lenient penalty than discharge. Although Lewis's record showed that he had exercised poor judgment on numerous occasions, he received only reprimands for all but one of the previous incidents. The only formal discipline imposed was a two-day suspension. This is Lewis's second offense, for which the tenure commission suspended him for more than one year. This escalation from the first-offense, two-day suspension was reasonable.

The tenure commission acted within its authority in concluding that Lewis's misconduct did not constitute reasonable and just cause for discharge, and reducing the penalty to a lengthy suspension. *Lakeshore*, *supra*. The evidence militating against discharge was undisputed, and it was competent and substantial. All of the tenure commission's reasons for imposing a punishment short of termination are adequately grounded in the record.

Affirmed.

TALBOT, J. (*concurring*). This matter is on remand by order of the Michigan Supreme Court based on that court's determination that "the teacher tenure act, MCL 38.101 *et seq.*, does not require the State Tenure Commission to apply a 'clear error,' rather than a 'de novo,' standard of review to its consideration of the preliminary decisions of administrative law judges." *Lewis v Bridgman Pub Schools*, 480 Mich 1000 (2007). The Court remanded the case "for consideration of whether the commission's decision was arbitrary, capricious, or an abuse of discretion; or unsupported by competent, material, and substantial evidence on the whole record." *Id.*

Because I am constrained by the language of the Supreme Court's remand order, I am forced to concur

with this Court's revised ruling. However, I must take issue with the abbreviated review engaged in by our Supreme Court, which focused solely on the standard of review and failed to address the substantive issue pertaining to the effect of statutory changes on the role and authority of the tenure commission. As a result, I am compelled to write separately on this important and dispositive issue. Specifically, I am concerned about the failure to review or consider the effect of the amendment of the teacher tenure act by 1993 PA 60, which initiated the use of a hearing officer, and the presumed propriety of the continued application of a de novo standard of review.

In order to understand my concerns, which were outlined in the original opinion in this case, which is[1] now on remand, I believe it is necessary to provide a short historical perspective of how the authority of the tenure commission has evolved and the Court's role in that development. Disputes regarding the authority of the State Tenure Commission to alter disciplinary decisions by school boards are longstanding and have arisen repeatedly in caselaw. See *Rehberg v Melvindale, Ecorse Twp School Dist No 11 Bd of Ed*, 345 Mich 731; 77 NW2d 131 (1956) (*Rehberg II*); *Rehberg v Melvindale, Bd of Ed*, 330 Mich 541; 48 NW2d 142 (1951) (*Rehberg I*). This line of caselaw recognized that

> [t]he tenure act places an additional safeguard upon the arbitrary or unreasonable dismissal of teachers and is designed for their protection. It does not, however, otherwise diminish or interfere with the administrative power of the local controlling board, nor require it to indulge in idle ceremonies. [*Rehberg I* at 548.]

However, these cases did not resolve the primary issue that is currently before this Court regarding the au-

[1] *Lewis v Bridgman Pub Schools*, 275 Mich App 435; 737 NW2d 824 (2007), rev'd 480 Mich 1000 (2007).

thority of the tenure commission to overrule a controlling board and substitute its judgment regarding the punishment to be imposed for teacher misconduct. That determination arose later in *Long v Bd of Ed*, *Dist No 1*, *Fractional Royal Oak Twp and City of Royal Oak*, 350 Mich 324; 86 NW2d 275 (1957), when our Supreme Court ruled that the teacher tenure act, "[d]iscloses clear legislative intent that the commission—following appeal by a teacher under said article 6—be vested with duty and authority to determine, anew and as original questions, all issues of fact and law theretofore decided by the controlling board." *Id.* at 327. It should be noted, however, that the Court made this ruling regarding "the commission's administrative function" based "particularly from language appearing in section 1 of said article 6, by which the commission is directed to conduct its hearing on the appeal 'the same as provided in article 4, section 4 of this act.' " *Id.*

At the time of this 1957 ruling, MCL 38.121, comprising article 6, § 1, provided:

> A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission. The state tenure commission shall provide for a hearing to be held within 60 days from the date of appeal. Notice and conduct of such hearing shall be the same as provided in article 4, section 4 of this act, and in such other rules and regulations as the tenure commission may adopt.

MCL 38.104, constituting article 4, § 4, detailed the procedure to be followed by the controlling board and the tenure commission in the conduct of hearings, including, in relevant part:

> a. The hearing shall be public or private at the option of the teacher affected.

> b. No action shall be taken resulting in the demotion or dismissal of a teacher except by a majority vote of the members of the controlling board.
>
> c. Both the teacher and the person filing charges may be represented by counsel.
>
> d. Testimony at hearings shall be on oath or affirmation.
>
> e. The controlling board shall employ a stenographer who shall make a full record of the proceedings of such hearing and who shall, within 10 days after the conclusion thereof, furnish the controlling board and the teacher affected thereby with a copy of the transcript of such record, which shall be certified to be complete and correct.
>
> f. Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within 5 days after the decision is rendered.
>
> g. The controlling board shall have the power to subpoena witnesses and documentary evidence, and shall do so on its own motion or at the request of the teacher against whom charges have been made [1937 (Ex Sess) PA 4, art IV, § 4.]

Under the statutory language, existing at that time, it was clearly appropriate to require the use of a de novo standard of review, given the authority of the tenure commission to not only review the record developed by the controlling board on appeal, but to also generate additional evidence and testimony as part of its review process.

However, 1993 PA 60 substantively changed the procedure to be used in the appeal of a decision by a controlling board and, in my opinion, necessitates a renewed look at the effect of the statutory changes on the process of reviewing controlling-board rulings in light of the current restrictions placed on the authority

of the tenure commission. Even before amendment of the act, our Supreme Court acknowledged that many of its rulings pertaining to the authority of the tenure commission came, not from the language of the statute itself, but rather were the result of judicial construction. Specifically, the Court noted:

> [T]he act has been construed, as a matter of practice, to safeguard a tenured teacher against suspension except for reasonable and just cause and to provide for review of a suspension by the Tenure Commission. The act thus has been construed, although it does not literally provide therefor, to mean, in effect, that the commission shall determine whether there was reasonable and just cause for the imposition of the "discipline" imposed by the school board, whether the discipline imposed was suspension or discharge. [*Lakeshore Bd of Ed v Grindstaff (After Second Remand)*, 436 Mich 339, 356; 461 NW2d 651 (1990).]

What is currently problematic is the fact that the scope and authority of review by the tenure commission has been substantively circumscribed through amendment of the act but the courts continue to adhere to the judicially created prior review standard without any consideration of these changes.[2] While I admit, as noted by the Supreme Court in its order of remand, that the act "does not require the State Tenure Commission to apply a " 'clear error' " standard of review, I would

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[2] This calls to mind an essay by United States Supreme Court Justice Antonin Scalia, in which he postulates:

> What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consist of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges! [Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997).]

contend that the statutory language also does not specifically mandate the use of a de novo standard of review. The Court has previously determined the appropriate standard of review by judicial construction. It would seem that amendment of the statute provides the perfect opportunity, as well as the necessity, to revisit our interpretation of this language and how it affects procedure.

As a starting point in this analysis, I must take issue with our Supreme Court's purported reliance on MCL 38.101 in its ruling in *Lakeshore*, which suggested that this statute provided the tenure commission with the authority to determine what constitutes an appropriate penalty for teacher misconduct and permitted it to reduce or alter a school board's determination regarding the appropriate level of discipline to be imposed for teacher misconduct. In reality, the relevant portion of MCL 38.101 states only that "[d]ischarge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause and only as provided in this act." Further, the suggestion that this purported authority derives from MCL 38.101 is directly contrary to the specific acknowledgement by our Supreme Court that the exercise of the decision-making function pertaining to penalties imposed for teacher misconduct actually originated through judicial construction. See *Lakeshore*, *supra* at 356.

The primary provision of the act addressing the role of the tenure commission has been amended to circumscribe its authority. MCL 38.104 now provides, in relevant part:

> (5) The hearing and tenure commission review shall be conducted in accordance with the following:
>
> * * *

> (m) *If* exceptions are filed, the tenure commission, after review of the record and the exceptions, may adopt, modify, or reverse the preliminary decision and order. The tenure commission *shall not hear* any additional evidence and *its review shall be limited* to consideration of the issues raised in the exceptions based solely on the evidence contained in the record from the hearing. [Emphasis added.]

Such language does not automatically, nor inevitably, lead to an interpretation requiring the use of a de novo standard of review or the vesting of authority by the Legislature in the tenure commission to substitute its judgment for the controlling board regarding the discipline to be imposed for teacher misconduct. Rather, I would contend that the language equally lends itself to a reading and understanding that the tenure commission may review the record and is restricted solely to a determination whether the controlling board's actions are substantiated by reasonable and just cause in accordance with the legislative intention underlying the act.

The amendment of the statutory language renders the reasoning provided by Chief Justice RILEY in the dissent to *Lakeshore* all the more compelling and applicable to the circumstances of this case. Chief Justice RILEY opined that "the function of the commission in reviewing the discharge or discipline of a teacher is limited to determining whether the local board's action was for 'reasonable and just cause.' " *Lakeshore*, *supra* at 358 (RILEY, C.J., dissenting). Reviewing the history of decision-making by the tenure commission, Chief Justice RILEY noted:

> There is, obviously, no express authority granted to the commission in the statute itself to reduce or otherwise modify a penalty imposed by a local board. The statute gives the local board the right to discharge or demote a teacher for "reasonable and just cause." The teacher has the right to appeal the board's action to the commission,

> which conducts its own hearing on the matter, in the same manner as the local board. On appeal, the commission acts as a "board of review" and is vested with "such powers as are necessary to carry out and enforce the provisions" of the act.
>
> The plaintiff and the commission contend that this statutory scheme impliedly vests the commission with the authority to modify the decisions of a local board regarding the severity of the penalty imposed on a teacher. They rely on various decisions of this Court to establish that authority. In my view, such reliance is misplaced. [*Id.* at 359-360 (citations omitted).]

Relying on the language of the statute indicating that the tenure commission functions as a "review board," Chief Justice RILEY opined, "[T]he mere fact that the commission has the authority to *review* the penalty imposed, to determine whether it is for reasonable and just cause, does not necessarily mean that it has the right to *alter* that penalty if it concludes otherwise." *Id.* at 365-366 (emphasis in original).

While acknowledging the authority of the tenure commission "to make an independent determination regarding whether the penalty imposed meets the reasonable and just cause standard," Chief Justice RILEY opined that such authority was not bestowed by the Legislature with the intention to create a "super-school board." *Id.* at 366, 368. In conclusion, Chief Justice RILEY took issue with the commission's authority to modify or substitute its judgment for that of the school board with regard to "how to best discipline the teacher," determining that "[t]here is no provision in the Act which expressly or impliedly grants this power to the [commission]." *Id.* at 369. As suggested within Chief Justice RILEY's dissent, the resultant effect of such judicial construction, without commensurate statutory justification, has served to elevate the commission's status from a

"review board" to a policy-making body usurping the authority of local school boards.

As a result, given the substantive changes in the controlling statutory language, I believe it is improper to presume and continue the applicability of prior caselaw interpreting the authority and scope of the tenure commission's review. While I am constrained by the wording of our Supreme Court's order remanding this matter, I am compelled to voice my concerns regarding the restrictions imposed on our review and the resultant elevation of form over substance, precluding our ability to engage in a more thorough and considered analysis of the underlying issue.

SERVITTO, P.J. (*concurring*). I, like Judge TALBOT, concur because I am constrained to do so by the Supreme Court's order on remand. I believe that statutory changes have substantially altered the standard of review governing this matter, and that the employment of what I would consider to be the formerly applicable standard of review severely limits our meaningful review of the issues presented on appeal.

ADAIR v STATE OF MICHIGAN (ON SECOND REMAND)

Docket No. 230858. Submitted March 22, 2006, at Lansing. Decided July 3, 2008, at 9:00 a.m.

Daniel Adair and others, including school districts, intermediate school districts, and taxpayers, brought an original action in the Court of Appeals against the state of Michigan and others, seeking a declaration that the state had failed to honor its funding obligations under the second sentence of Const 1963, art 9, § 29, the Headlee Amendment, with regard to certain activities and services that state law or regulation obligated the plaintiff school districts to provide. The Court of Appeals, HOLBROOK, JR., P.J., and TALBOT, J. (SAAD, J., dissenting), granted summary disposition for the defendants and dismissed the case. 250 Mich App 691 (2002). The plaintiffs appealed to the Supreme Court, which affirmed in part, reversed in part, and remanded, holding that the only claim on which relief might be granted to plaintiffs was a record-keeping requirement set forth in MCL 388.1752 and Executive Order No. 2000-9. 470 Mich 105 (2004). On remand, the Court of Appeals, SAAD, P.J., and TALBOT and FORT HOOD, JJ., granted summary disposition in favor of the defendants and dismissed the plaintiffs' remaining claims, holding that the plaintiffs failed to present documentary support from which it can be inferred that either MCL 388.1752 or Executive Order No. 2000-9 mandates the school districts to actively participate in the maintenance of data that the state requires for its own purposes. 267 Mich App 583 (2005). The Supreme Court, in lieu of granting leave to appeal, vacated the judgment on remand of the Court of Appeals and remanded the matter to the Court of Appeals for a reevaluation of the plaintiffs' claims under both the "new activity or service" and the "increase in the [level] of any activity or service" prongs of the prohibition of unfunded mandates in Const 1963, art 9, § 29, in accordance with the Supreme Court's conclusion in *Adair*, 470 Mich at 130, that the plaintiffs have alleged that the state is not merely requiring different data from the school districts, but also requiring the districts to actively participate in maintaining data that the state requires for its own purposes. 474 Mich 1073 (2006). On second remand, the Court of Appeals employed the referral procedure prescribed by MCL 600.308a(5), and appointed former Wayne

Circuit Judge Pamela R. Harwood to serve as a special master to hear the remaining claims in this case. The special master issued an opinion in which she concluded that the state violated the prohibition on unfunded mandates (POUM) clause of Const 1963, art 9, § 29 because the record-keeping obligations imposed by the state on the school districts require the districts to actively participate in collecting, maintaining, and reporting data that the state requires for its own purposes only.

On second remand, the Court of Appeals *held*:

1. To demonstrate the existence of an offloading of state funding responsibilities and to demonstrate actual or imminent injury, the school districts must only establish an increase in the level of activity or services mandated by the state and a complete failure on the part of the state to provide any funding to offset the necessary costs to be incurred by the districts in the provision of the increased level of services or activities.

2. The evidence supports the special master's finding that, through the implementation of the databases, the state is requiring the districts to actively participate in collecting, maintaining, and reporting data that the state requires for its own purposes only. The evidence supports the special master's finding that the data-collection and reporting requirements effectuated through the Center for Educational Performance and Information resulted in an increase in the level of activity beyond that required before the conclusion of *Durant v Michigan*, 456 Mich 175 (1997), and beyond the level required as of December 23, 1978.

3. The record establishes that the data-collection and reporting implemented through the Center for Educational Performance and Information resulted in the state's offloading some of its responsibilities onto the districts and imposing on the districts obligations to undertake several new activities and to engage in an increased level of activities within the meaning of the POUM clause.

4. Federal mandates enforced by the state do constitute state requirements implicating the Headlee Amendment.

5. The special master erroneously concluded that the state had offloaded error-checking functions onto the districts. The state's motion for summary disposition with regard to this claim must be granted.

6. The state has failed to fund the necessary costs associated with the data-collection and reporting mandates associated with the Center for Educational Performance and Information.

7. The presence of the term "appropriation" in the POUM clause reflects the intent of the voters that the Legislature actually determine the necessary costs associated with the implementation of new legislative mandates and then appropriate that amount for the express purpose of funding the new mandate. The POUM clause does not reflect any intent to allow the Legislature to appropriate a certain level of "discretionary" funds to the districts and then remove some of the "discretion" afforded the districts by mandating how some of those funds should be used.

8. With the exception of the costs associated with implementing the Single Record Student Database, the state has not funded the necessary costs associated with the data-collection and reporting mandates associated with the Center for Educational Performance and Information, as required by the POUM clause.

9. The plaintiffs' suit cannot be characterized as having been "sustained" within the meaning of Const 1963, art 9, § 32, because the plaintiffs' other claims have been rejected by the Court of Appeals. The plaintiffs' request for attorney fees must be denied.

Declaratory judgment in favor of the plaintiffs granted; summary disposition in favor of the state denied, except with respect to the claim that the special master erroneously concluded that the state had offloaded error-checking functions onto the school districts.

1. CONSTITUTIONAL LAW — PROHIBITION OF UNFUNDED MANDATES.

A unit of local government, in order to demonstrate the existence of offloading of state funding responsibilities to the unit and actual or imminent injury, need only establish an increase in the level of activity or services mandated by the state and a complete failure on the part of the state to provide any funding to offset the necessary costs to be incurred by the unit in the provision of the increased level of services or activities (Const 1963, art 9, § 29).

2. CONSTITUTIONAL LAW — PROHIBITION OF UNFUNDED MANDATES.

Federal mandates enforced by the state do constitute state requirements for purposes of the constitutional provisions regarding state financing of activities or services required of local units of government (Const 1963, art 9, § 29).

3. CONSTITUTIONAL LAW — PROHIBITION OF UNFUNDED MANDATES.

The constitutional prohibition of unfunded mandates placed on a unit of local government by the state does not permit the Legislature to appropriate to school districts a certain level of discretion-

ary funds and then remove some of the discretion afforded the districts by mandating how some of those funds should be spent (Const 1963, art 9, § 29).

Thrun Law Firm, P.C. (by *Dennis R. Pollard* and *Richard E. Kroopnick*), for the plaintiffs.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Jane O. Wilensky* and *D.J. Pascoe*, Assistant Attorneys General, for the defendants.

ON SECOND REMAND

Before: SAAD, C.J., and TALBOT and FORT HOOD, JJ.

TALBOT, J. By prior order, we appointed a special master to hear the remaining claims in this school-financing case brought under § 29 of the Headlee Amendment, Const 1963, art 9, §§ 25-34. We charged the special master with the task of determining whether the record-keeping obligations imposed on plaintiff school districts as a result of MCL 388.1752 and Executive Order No. 2000-9 constituted either a new activity or service or an increase in the level of state-mandated activity or service within the meaning of the Headlee Amendment's prohibition of unfunded mandates. The special master has concluded that the state violated the second sentence of § 29, more commonly referred to as the "prohibition on unfunded mandates" or POUM clause, because the record-keeping obligations imposed by the state on the school districts require the districts to actively participate in collecting, maintaining, and reporting data that the state requires for its own purposes only. We have reviewed the extensive evidentiary record created by the special master and the parties, the briefs, and the report of the special master. We adopt the conclusions of

law and factual findings of the special master, with the modifications detailed below. Accordingly, we enter a declaratory judgment in favor of plaintiffs. We deny the state's motion for summary disposition in all but one regard.

BURDEN OF PROOF

To establish a violation of the POUM clause, a plaintiff "must show that the state-mandated local activity was originated without sufficient state funding after the Headlee Amendment was adopted or, if properly funded initially, that the mandated local role was increased by the state without state funding for the necessary increased costs." *Adair v Michigan*, 470 Mich 105, 111; 680 NW2d 386 (2004). The state argues that plaintiff school districts must prove, as an essential element of their claim under the POUM clause, that the implementation of the mandates required the districts to actually incur specific costs, i.e., out-of-pocket expenses in a quantified amount. We reject the state's position, as did the special master, albeit for reasons other than those advanced by the special master.

This Court has twice ruled, at different stages of the same action, that the plaintiff school districts in a Headlee challenge establish "a prima facie case by showing the actual costs to all the school districts for each of the mandated services." *Durant v Dep't of Ed (After Remand, On Third Remand)*, 213 Mich App 500, 503; 541 NW2d 278 (1995), aff'd in part *sub nom Durant v Michigan*, 456 Mich 175 (1997), reconsideration den and lv den 456 Mich 924 (1998); *Durant v Dep't of Ed (On Third Remand)*, 203 Mich App 507, 514; 513 NW2d 195 (1994). Likewise, our Supreme Court has recognized the need to determine with specificity the amount of necessary costs incurred for a mandated

activity, including whether such costs fall within the de minimis exclusion of MCL 21.232(4). *Oakland Co v Michigan*, 456 Mich 144, 165; 566 NW2d 616 (1997) (Opinion by KELLY, J.) (cost of county foster-care services).

Unlike the present action, both the *Durant* and *Oakland Co* actions presented challenges brought pursuant to the first sentence of § 29 of the Headlee Amendment, which is also referred to as the "maintenance of support" or MOS clause. *Adair*, 470 Mich at 111; *Oakland Co*, 456 Mich at 149 (Opinion by KELLY, J.); *Durant v State Bd of Ed*, 424 Mich 364, 378-379; 381 NW2d 662 (1985). The MOS clause provides: "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law." Const 1963, art 9, § 29. "[T]o establish a Headlee violation under the MOS clause, the plaintiff must show '(1) that there is a continuing state mandate, (2) that the state actually funded the mandated activity at a certain proportion of necessary costs in the base year of 1978-1979, and (3) that the state funding of necessary costs has dipped below that portion in a succeeding year.' " *Adair*, 470 Mich at 111.

Claims brought under the MOS clause involve determinations of specific "statewide-to-local district funding ratio[s] . . . ." *Schmidt v Dep't of Ed*, 441 Mich 236, 249-250; 490 NW2d 584 (1992); *Durant*, 213 Mich App at 505. Such ratios are determined in the following manner:

> This approach requires an initial calculation of the proportion of statewide funding for a particular mandated activity to the total necessary costs of providing that activity. The necessary costs to each local unit in the funding year at issue are then calculated. Next, the proportion of state financed funding for the activity or service

> in the base year is compared to the proportion of funding provided to the district in the year at issue. The state is obligated to afford each unit providing the activity or service the same portion of funding that the state provided on a statewide basis in the year that the Headlee Amendment was ratified. [*Schmidt*, 441 Mich at 250.]

Thus, by its very nature, the determination of ratios involves the quantifying of the necessary costs incurred by the school districts in specific dollar amounts.

Claims brought under the POUM clause, as is the case here, by contrast, do not involve determinations of statewide to local district funding ratios, but instead address future services or activities and seek funding for the future implementation of newly mandated services or activities. *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 266; 583 NW2d 512 (1998). The remedy required in such actions is not an award of damages, but instead "comprises a resolution of the parties' prospective rights and obligations by declaratory judgment." *Id*. at 266. Because awards of money damages are not generally at issue, *id*. at 267, and because this Court lacks authority to order the Legislature to appropriate funds, *Musselman v Governor (On Rehearing)*, 450 Mich 574, 577 (BRICKLEY, C.J.), 582 (BOYLE, J.); 545 NW2d 346 (1996); *Musselman v Governor*, 448 Mich 503, 524; 533 NW2d 237 (1995), the goal of a declaratory judgment issued in a POUM Headlee action is only to provide sufficient notice so that "the state will be aware of the financial adjustment necessary to allow for future compliance." *Oakland Co*, 456 Mich at 166 (Opinion by KELLY, J.). Such notice may be provided without requiring the school districts to demonstrate out-of-pocket expenses in a specifically quantified amount. Indeed, as the evidence adduced before the special master clearly demonstrated, our Legislature possesses the ability to respond to its obligations

under the Headlee Amendment without first requiring the school districts to demonstrate actual costs to be incurred, as reflected by its 2002 appropriation of $2 per pupil ($3.4 million) in categorical funding to offset some of the costs incurred by the districts in implementing the reporting requirements regarding the Single Record Student Database (SRSD), one of the databases maintained by the Center for Educational Performance and Information (CEPI).[1]

Furthermore, the plaintiff in a declaratory-judgment action bears "the burden of establishing the existence of an actual controversy, as well as the burden of showing that . . . it has actually been injured or that the threat of imminent injury exists." 22A Am Jur 2d, Declaratory Judgments, § 239, p 788. To demonstrate that the school districts have actually been injured or are confronted with an imminent injury, plaintiffs need only show that the "mandated local role was increased by the state without state funding for the necessary increased costs." *Adair*, 470 Mich at 111. In the case at bar, plaintiffs have alleged

> "that the state is not merely requiring different data from the school districts, but also requiring the districts to actively participate in maintaining data that the state requires for its own purposes. An off-loading of state funding responsibilities onto local units of government without the provision of funds presents a colorable claim under Headlee." [*Adair v Michigan*, 474 Mich 1073 (2006).]

To demonstrate the existence of such an off-loading of state funding responsibilities and to demonstrate actual or imminent injury, we conclude that the school dis-

[1] Transcript from July 10, 2007, at 194-201; Transcript from July 11, 2008, at 606-607; Transcript from July 17, 2007, at 984, 1069; Transcript from July 18, 2007, at 1185-1186; Transcript from July 25, 2007, at 1753; Transcript July 24, 2007, at 1700.

tricts need only establish (1) an increase in the level of activity or services mandated by the state and (2) a complete failure on the part of the state to provide any funding to offset the necessary costs to be incurred by the districts in the provision of the increased level of services or activities.

NEW OR INCREASED ACTIVITIES OR SERVICES

Notwithstanding the state's assertion to the contrary, there is evidentiary support for the special master's findings that, "[t]hrough the implementation of the databases, the state is requiring the districts to actively participate in collecting, maintaining and reporting data that the state requires for (only) its own purposes," and that the data-collection and reporting requirements effectuated through the CEPI resulted in "an increase in the level of activity beyond that required prior to the conclusion of Durant I and . . . to existing law as of December 23, 1978."

The evidence adduced before the special master establishes that the state is requiring districts to actively participate in collecting, maintaining, and reporting data the state requires for its own purposes. The federal government requires the states to report data on a dis-aggregated student-by-student, teacher-by-teacher, or building-by-building basis to receive federal funds under the No Child Left Behind Act, PL 107-110. 115 Stat 1425.[2] With future federal requirements in mind, the state employs the CEPI and its databases as a warehouse and holds within that warehouse such quantities of discrete information that the state is in a

[2] Transcript from July 24, 2007, at 1575-1578; Transcript from July 25, 2007, at 1808-1810; Transcript from July 31, 2007, at 1952-1953, 1984, 2023; Stipulation in lieu of testimony of defendants' witnesses, Exhibit 3(D) at 9; Exhibit 5(D) at 37-40; Exhibit 12(D) at 16-17, 29.

position to "more flexibly answer" the ever-changing questions posed by the federal government, "without going back to the districts time and time again and re-asking for them to aggregate the data differently, group it differently, that is really the impetus of why the thought came up for creating more discrete data sets."[3] One of the consequences of this approach to data gathering has been, for example, that the school districts are being required to collect and report to the Financial Information Database (FID) detailed financial information that is of no use to the districts and that they might not otherwise record but for the FID reporting requirements.[4] If the state were not requiring the school districts to report such data to the CEPI, the state would have to send personnel to each district to gather the data.[5]

Furthermore, although the CEPI was intended, in part, to allow the school districts to use the data as an analytical tool to answer questions about student and teacher performance and to generate reports targeted to improving student achievement, the districts have been unable to access the databases in any meaningful manner.[6] Although the school districts can obtain a limited number of reports from the CEPI on the basis of data they supply, the CEPI lacks the requisite staff to provide any custom data reports that might be requested by a school administrator for use by a district.[7]

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[3] Transcript from July 31, 2007, at 1985; see also Transcript from July 31, 2007, at 2001, 2027, 2057; Stipulation in lieu of testimony of defendants' witnesses, Exhibit 11(D) at 93, 123.

[4] Transcript from July 10, 2007, at 316; Transcript from July 11, 2007, at 570-571; Transcript from July 17, 2007, at 932-933, 987-988; Transcript from July 18, 2007, at 1150; Transcript from July 31, 2007, at 1940.

[5] Transcript from July 24, 2007, at 1693-1694.

[6] Transcript from July 18, 2007, at 1267-1272; Transcript from July 25, 2007, at 1833-1834, 1850-1853.

[7] Transcript from July 24, 2007, at 1524-1525; Transcript from July 25, 2007, at 1766, 1799-1800, 1854-1856.

The record also establishes that the data collection and reporting implemented through the CEPI resulted in the state's offloading some of its responsibilities onto the districts and, therefore, imposing upon the districts obligations to undertake several new activities and to engage in an increased level of activities within the meaning of the POUM clause. The state made a conscious decision to offload onto the districts the new activity of designing and updating the software necessary to perform some of the data-collection, storage, and reporting obligations in an attempt to avoid a Headlee funding obligation and as an acknowledgment of the CEPI's lack of funding necessary to develop the software itself.[8] Additionally, the data-collection and reporting obligations resulted in the districts' reporting to the state new types of data and significantly greater amounts of data, at a more discrete level. This information is no longer reported to the state in aggregate form, but instead is reported on a student-by-student, employee-by-employee, and building-by-building basis.[9] The burdens associated with these requirements were particularly acute at the time each database was brought online and the districts had to gather and format the data and report that data to each new database for the first time. These burdens are also

[8] Transcript from July 25, 2007, at 1729-1731, 1755, 1778, 1780-1781.

[9] Transcript from July 10, 2007, at 158-159, 169-170, 179, 224-225, 227-231, 244, 246-249, 272, 284-285; Transcript from July 11, 2007, at 385-386, 417-418, 421, 620, 650, 656; Transcript from July 12, 2007, at 795-796, 806, 817-818, 893-894; Transcript from July 17, 2007, at 939, 950, 955-956, 961-962, 1029-1032, 1035; Transcript from July 18, 2007, at 1111, 1148-1149, 1158-1159, 1215-1217, 1225-1227, 1250-1254, 1257; Transcript from July 19, 2007, at 1412; Transcript from July 24, 2007, at 1597; Transcript from July 25, 2007, at 1752; Transcript from July 31, 2007, at 1940; Stipulation in lieu of testimony of plaintiffs' witnesses, Exhibit 9(P) at 18; Exhibit 14(P) at 13-14; Exhibit 17(P) at 20; Exhibit 18(P) at 41.

especially acute during the periods when the districts prepare and submit new reports. With the exception of the FID, for which there is evidence that maintenance of the data required to be reported remains labor intensive throughout the year, maintenance of the data for the SRSD, the Registry of Educational Personnel (REP), and the School Infrastructure Database (SID) requires minimal levels of staff time.[10]

The state correctly observes, by way of a defense, that any increase in the data-reporting burden imposed upon the districts is not the consequence of any obligation imposed by Executive Order No. 2000-9, which only created the CEPI, or by MCL 388.1752 (now MCL 388.1694a), which confers authority on the CEPI to act, but rather is the consequence of other state and federal laws, such as Michigan's School Safety Initiative and the federal government's No Child Left Behind Act.[11] The fact that the increases in state-mandated activities required of the school districts is the product of other state statutes is no defense for the state. Headlee prohibits the imposition of unfunded mandates no

[10] Transcript from July 10, 2007, at 170-171, 197, 349-350, 360; Transcript from July 11, 2007, at 529, 542-543, 549-552, 624-625, 628-631; Transcript from July 12, 2007, at 689-690, 720, 778, 797-800, 804, 806-809, 832, 850, 864-865, 870-872, 889, 903-904, 907, 1066-1067; Transcript from July 17, 2007, at 978, 980, 983, 1035-1037; Transcript from July 18, 2007, at 1166, 1230-1232, 1240-1241, 1247; Stipulation in lieu of testimony of plaintiffs' witnesses, Exhibit 4(D) at 20-21; Exhibit 4(D) at 20-21; Exhibit 6(D) at 29; Exhibit 7(P) at 15-16, 41-42; Exhibit 7(D) at 43-44; Exhibit 11(P) at 12, 34; Exhibit 12(P) at 22-23; Exhibit 14(P) at 39-40; Exhibit 15(P) at 18; Exhibit 18(D) at 46; Exhibit 19(P) at 11, 14, 30, 33.

[11] Transcript from July 10, 2007, at 153, 157, 244; Transcript from July 11, 2007, at 441, 673; Transcript from July 19, 2007, at 1356, 1359-1360; Transcript from July 24, 2007, at 1589-1590, 1648, 1652, 1659-1661; Transcript from July 25, 2007, at 1752-1753, 1754-1756, 1788, 1807-1809, 1845-1847, 1849; Transcript from July 31, 2007, at 1985, 2001, 2003, 2027, 2056-2057.

matter what particular state statute imposes such mandates. Furthermore, the state's contention that federal mandates do not constitute "state requirements" implicating Headlee contradicts the pronouncement of our Supreme Court that there is no exception in § 29 for federal mandates enforced by the state. *Durant*, 456 Mich at 190-196.

Nevertheless, all is not lost for the state. The state's position that the special master erroneously concluded that the state had offloaded error-checking functions onto the districts has support in the record. The evidence demonstrates that most of the error-checking functions are performed by computers employing error-checking software provided by the CEPI. Moreover, the evidence demonstrates that the districts have always had a concomitant duty to ensure the accuracy of data reported to the state, even before the CEPI came into existence, and, hence, played a role in ensuring the accuracy of data reported.

FUNDING OF THE MANDATE

We agree with the special master that the state has failed to fund the necessary costs associated with the data-collection and reporting mandates associated with the CEPI. Again, we reach our conclusion for reasons other than those relied upon by the special master.

With the ratification of Proposal A, Const 1963, art 9, § 11, and the passage of its enacting legislation, the method of financing Michigan's public schools changed radically, moving from a funding system primarily financed by the levying of a local millage on real property to a system financed by an increase in the state sales tax and various use taxes. *Durant v Michigan (On Remand)*, 238 Mich App 185, 195-197; 605 NW2d 66 (1999). This change in the funding system shifted the

responsibility for generating school funding from the local school districts to the state. As the evidence adduced before the special master demonstrated, 75 percent of the funding received by local school districts for the 2007 fiscal year came from the state. The remaining 25 percent came from local revenues, including revenue generated by a levy of 18 mils on local non-homestead property.[12] By contrast, in the 1989-1990 school year, locally generated revenues funded 63 percent of the costs of school operations, with state-generated revenues funding the remaining 37 percent of those costs.[13]

The state supplies a significant portion of its funding to school districts from per-pupil funds commonly referred to as the "foundation allowance." *Id.* at 197. According to one witness, "the total revenue that a district is going to get for the lion's share of its activities is based on the number of kids that you have in the system times this foundation number."[14] The foundation allowance is composed of unrestricted funds that school districts may use for any school-related operational purpose authorized by law, e.g., to pay salaries, to provide transportation, to pay utilities, and to purchase textbooks and supplies. *Id.* at 197-198.

The state fulfills the constitutional obligations imposed by both Proposal A and Headlee by employing a "tripartite funding scheme," which has been referred to as the " 'three bucket' or the 'three pot' approach." *Durant v Michigan*, 251 Mich App 297, 299; 650 NW2d 380 (2002) (*Durant III*). The Legislature divides the foundation allowance amongst two of the three buckets. It allocates to the first bucket a per-pupil amount

[12] Transcript from July 25, 2007, at 1744-1745, 1759.

[13] Transcript from July 25, 2007, at 1743-1745.

[14] Transcript from July 18, 2007, at 1176.

sufficient to satisfy the base level of per-pupil funding guaranteed by Proposal A, which consists of the level of per-pupil funding provided in 1994-1995 (just over $4,000[15]). *Id*. at 299-302, 308. The Legislature then pours into the second bucket that portion of the foundation allowance that consists of the difference between the base level of per-pupil funding allocated to the first bucket and the total per-pupil foundation allowance provided by the state. The Legislature conditions a school district's receipt of the unrestricted funds in this second bucket, in part, on a district's supplying "data and other information required by state and federal law to the [CEPI] and the department [of education] in the form and manner specified by the center or the department . . . ." MCL 388.1622b(3)(c). Only state-provided funds fill this second bucket. The Legislature allocates to the third bucket those funds necessary to satisfy its Headlee obligation under the MOS clause, as determined by the *Durant* cases. *Durant III*, 251 Mich App at 300.

The state asserts that it has satisfied its obligation under Headlee to reimburse the districts for any increase in the necessary costs associated with the reporting requirements because the state has supplied the school districts with $3.5 billion in discretionary funds, contingent upon the districts' agreeing to comply with the CEPI's reporting requirements, from which the districts are expected to defray any costs associated with their reporting requirements. The special master rejected the state's position. She concluded, instead, that the state had off-loaded onto the districts the funding responsibilities associated with the data-collection, storage, and reporting obligations. Although

[15] Transcript from July 18, 2007, at 1178-1180; Transcript from July 25, 2007, at 1735, 1740.

acknowledging that the districts must pay for any CEPI-related costs and expenses from their general operating budget that is funded by unrestricted funds from the state, the special master opined that the fact that the state provides a percentage of school district funding does not mean that the state can impose additional mandates upon the districts without appropriating the necessary funds needed to perform those mandates. We agree.

In *Durant III*, this Court ruled that the Legislature may allocate that portion of the foundation allowance over and above the base level required by Proposal A to the "Headlee allocation bucket" and use those additional funds to satisfy the state's Headlee obligation under the MOS clause without violating the constitution. *Id.* at 308. The *Durant III* panel also ruled that that portion of the foundation allowance over and above the base level could be allocated to the "discretionary use bucket." *Id.* at 308-309. The panel did not address whether the Legislature could require the school districts to dip into the "discretionary use budget" to satisfy the state's Headlee obligation. To answer this question, the language of the POUM clause must be examined.

The POUM clause provides:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. [Const 1963, art 9, § 29.]

When construing the language of the Headlee Amendment, the courts apply the rule of " 'common understanding,' " *Durant III*, 251 Mich App at 306, the parameters of which are as follows:

> " 'A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding and ratified the instrument in the belief that that was the sense designed to be conveyed." ' " [*Durant*, 456 Mich at 192, quoting 1 Cooley, Constitutional Limitations (8th ed), p 143.]

The language of the POUM clause is clear and uncomplicated. It prohibits the Legislature from increasing the level of an activity or service beyond that required by existing law "unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs." According each term and phrase employed in the POUM clause its plain meaning, the language employed in the POUM clause reflects the voters' intent that the clause serve as a directive to the Legislature to appropriate and disburse the funds required to cover the necessary costs associated with implementing a new legislative mandate. At the heart of this directive lies the command to appropriate and disburse the funds to carry out new legislative mandates. The term "appropriation" commonly means a legislative body's act of prescribing a particular, special, or distinct use for particular money authorized to be paid from a public treasury. *Webster's New Twentieth Century Dictionary* (Unabridged 2d ed), p 91; *Random House Webster's College Dictionary* (2d ed, 1997), p 66; Black's Law Dictionary (5th ed), p 93. The presence of the term "appropriation" in the POUM clause reflects the intent of the voters that the Legislature actually determine the necessary costs associated

with the implementation of new legislative mandates and then appropriate that amount for the express purpose of funding the new mandate. The language of the POUM clause does not reflect any intent to allow the Legislature to appropriate a certain level of "discretionary" funds to the districts and then remove some of the "discretion" afforded the districts by mandating how some of those funds must be used. Indeed, "[s]uch a result is inconsistent with the historic ability of school districts to use funds as they see fit; a system of local control and local accountability is in keeping with the clear desire of the voters in passing the Headlee Amendment." *Durant*, 424 Mich at 386-387.

Our review of the evidentiary record reveals that the Legislature provided a one-time appropriation in the amount of $2 per pupil in 2002 ($3.4 million) to be disbursed to the districts to offset some of the initial costs incurred by the districts in implementing the reporting requirements of the SRSD. The evidence also established that the Legislature appropriated no other categorical funding for any of the costs associated with the districts' implementation of the reporting requirements of the REP, SID, or FID or their ongoing duty to comply with the reporting requirements for all four databases. Rather, the evidence established that the school districts are expected to shift funds from the discretionary funds bucket to cover any of the costs associated with their data-collection and reporting obligations. Indeed, none of the parties disputes, and the evidence unquestionably established, that each school district shifted its existing resources funded by the discretionary monies appropriated by the Legislature to comply with the data-collection and reporting requirements.[16] On this factual predicate, with the exception of

[16] See, e.g., Transcript from July 18, 2007 at 1276.

the costs associated with implementing the SRSD, the state has not funded the necessary costs associated with the data-collection and reporting mandates associated with the CEPI, as required by the POUM clause.

ATTORNEY FEES

Finally, plaintiffs request that this Court award plaintiffs their costs incurred in prosecuting this Headlee action, including an award of a reasonable attorney fee. Const 1963, art 9, § 32, governs the awarding of costs and provides:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

Although plaintiffs have sustained their claim with regard to the data-collection and reporting requirements, it must be noted that this claim is but one of many plaintiffs initially raised in this action. Plaintiffs' other claims were rejected by this Court. *Adair*, 250 Mich App 691. This Court's decision with regard to those claims was sustained by our Supreme Court. *Adair*, 470 Mich 105. Under these circumstances, plaintiffs' suit cannot be characterized has having been "sustained" within the meaning of § 32. Accordingly, we decline plaintiffs' request for attorney fees.

A declaratory judgment is granted in favor of plaintiffs consistent with this opinion. Summary disposition in favor of the state is denied except with regard to its claim that the special master erroneously concluded that the state had offloaded error-checking functions onto the school districts. No costs are awarded.

WRIGHT v RINALDO

Docket No. 275518. Submitted January 9, 2008, at Detroit. Decided July 10, 2008, at 9:00 a.m.

Rickie J. Wright brought a legal-malpractice action in the Oakland Circuit Court against Amy Rinaldo and her former law firm, Kohn & Associates, P.L.L.C., related to Rinaldo's prosecution of an application to amend and reissue his patent. While Rinaldo was representing Wright, he was consulting other attorneys on various matters that included his patent application, and he ultimately revoked the power of attorney that allowed Rinaldo to represent him before the United States Patent and Trademark Office. The court, Colleen A. O'Brien, J., granted the defendants summary disposition, concluding that the attorney-client relationship had ended on December 18, 2003, which was more than two years before Wright filed his complaint, and that the statute of limitations for malpractice therefore barred his action. Wright appealed.

The Court of Appeals *held*:

1. Pursuant to MCL 600.5805(6) and MCL 600.5838, a plaintiff must filed a legal-malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later. Generally, an attorney's representation of a client continues until the client or the court relieves the attorney of that obligation. Retention of an alternate attorney effectively terminates the attorney-client relationship.

2. The evidence showed that Wright terminated the attorney-client relationship on December 18, 2003, by (1) hiring other attorneys to handle his patent application, (2) revoking Rinaldo's power of attorney, and (3) on the same day, granting one of his new attorneys a power of attorney to represent him in the patent matter. Rinaldo performed no work on the patent prosecution—the matter for which Wright had retained her—after Wright revoked her power of attorney.

3. Wright needed Rinaldo's testimony in a related lawsuit concerning the patent, and he also wished to postpone the accrual date of his malpractice claim against her so that the malpractice action would not be time-barred. Because of this, Wright concealed

from Rinaldo (1) his dissatisfaction with her performance, (2) his intent to sue her, and (3) the fact that had had replaced her with other attorneys. Nonetheless, Wright's actions show that the attorney-client relationship ended as of December 18, 2003, even though he strategically concealed this information from Rinaldo and never explicitly terminated her services or formally relieved her of her duties.

4. While Rinaldo advised Wright in October 2005 that he needed to file a maintenance fee for his patent, the ministerial task of sending a reminder letter did not extend the date that Wright's claim accrued. An attorney has an ethical duty to serve the client zealously, and follow-up activities attendant to otherwise completed matters of representation do not extend the time of an attorney's service to the client. The trial court did not err by granting the defendants summary disposition because Wright filed his complaint in February 2006, more than two years after he ended his attorney-client relationship with Rinaldo.

Affirmed.

GLEICHER, J., dissenting, disagreed that the statute of limitations barred Wright's action. Under MCL 600.5838(1), Wright's claim accrued when Rinaldo stopped serving him in a professional capacity concerning the patent matter, regardless of whether Wright knew of the existence of a claim against her earlier. Rinaldo stopped her professional service in October 2005 when she first learned that Wright had revoked her power of attorney, not when Wright revoked it. An attorney remains responsible for representing a dissatisfied client until (1) the court relieves the attorney of that obligation, (2) the client fires the attorney, or (3) the attorney gives the client reasonable notice that he or she has terminated the representation. Rinaldo never communicated to Wright an intent to withdraw as his patent counsel, Wright never told Rinaldo that he had fired her, and the director of the patent office never approved Rinaldo's withdrawal, which the rule governing patent matters requires. Although Wright retained an additional attorney, Rinaldo continued to serve as his patent counsel.

1. LIMITATION OF ACTIONS — MALPRACTICE — LEGAL-MALPRACTICE ACTIONS — ATTORNEY AND CLIENT.

A plaintiff must file a legal-malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later; retention of an alternate attorney effectively terminates the attorney-client relationship (MCL 600.5805[6], 600.5838).

2. ATTORNEY AND CLIENT — REPRESENTATION OF CLIENT — TERMINATION OF LEGAL SERVICES — ACCRUAL OF CLAIMS.

An attorney's follow-up activities attendant to otherwise completed matters of representation, such as the ministerial task of sending a reminder of a deadline, do not extend the time of the attorney's service to the client for purposes of determining when a legal-malpractice claim accrues (MCL 600.5805[6], 600.5838).

Lawrence J. Acker, P.C. (by *Lawrence J. Acker*), for the plaintiff.

Maddin, Hauser, Wartell, Roth & Heller, P.C. (by *Steven M. Wolock* and *Harvey R. Heller*), for the defendants.

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

SAAD, C.J. In Mr. Rickie Wright's legal-malpractice action against his lawyer, Ms. Amy Rinaldo, the trial court granted summary disposition to Rinaldo and her law firm[1] because Wright failed to file his complaint within the applicable two-year period of limitations. For the reasons set forth in this opinion, we affirm the trial court's holding that plaintiff's malpractice claim is time-barred.

I. NATURE OF THE CASE

Under Michigan's statutory law, a client's claim against his or her attorney for professional malpractice accrues on the date that his attorney "discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice

[1] Rinaldo worked for Kohn & Associates, P.L.L.C., at the time this claim arose, and Wright sued both Rinaldo and the law firm for Rinaldo's alleged malpractice. However, for ease of reference, and because Rinaldo's conduct is at issue, we refer to Rinaldo alone for the remainder of this opinion.

arose . . . .” MCL 600.5838(1). The client’s action for malpractice is time-barred unless it is brought within two years from the date the claim accrued or arose (i.e., the date that services were discontinued), or within six months of the date that “the plaintiff discovers or should have discovered the existence of the claim,” whichever date occurs later. MCL 600.5805(6); MCL 600.5838(2); *Kloian v Schwartz,* 272 Mich App 232, 237; 725 NW2d 671 (2006). Here, the client, Wright, unquestionably knew of his lawyer’s alleged malpractice before Rinaldo ceased representing him; therefore, the timeliness of Wright’s filing of his complaint depends on the date that his attorney discontinued services. Rinaldo says this accrual date is December 18, 2003, when Wright in essence ended the relationship, albeit without formally informing Rinaldo. Rinaldo maintains, and we agree, that Wright effectively terminated the attorney-client relationship on December 18, 2003, when he (1) hired other attorneys to handle his patent application, (2) executed documents revoking her power of attorney, and (3) granted one of his new lawyers power of attorney to represent him in the patent-application process. The evidence also shows that Wright concealed from Rinaldo (1) his dissatisfaction with her performance, (2) his intent to sue her for malpractice, and (3) the fact that he had replaced her with other lawyers, because he needed her testimony in a related lawsuit and also because he wished to postpone the accrual date of his malpractice claim so that his cause of action would not be time-barred.

Accordingly, by virtue of Wright’s actions, the attorney-client relationship ended on December 18, 2003, notwithstanding Wright’s “strategic concealment” of his conduct from Rinaldo. Wright’s malpractice suit was therefore untimely because he delayed

filing it until February 16, 2006, more than two years after the accrual date of December 18, 2003.

II. FACTS AND PROCEDURAL HISTORY

Beginning in August 2000, Rinaldo represented Wright to prosecute his patent application and amendments for an absorbent "surface protection system mat" and, as counsel, filed various documents with the United States Patent and Trademark Office. During the summer and fall of 2003, Wright became dissatisfied with Rinaldo's work. At the time, Wright was also represented by attorney Michael Nedelman in a bankruptcy matter. Wright also intended to have Nedelman pursue litigation to enforce Wright's patent rights against his former business partner, Wade Waterman, and other companies that were marketing a surface-protection mat that was similar to Wright's invention.

By October 2003, Wright and Nedelman began to consult with another patent attorney, Arnold Weintraub, about the enforceability of Wright's patent, and Wright ultimately directed Weintraub to undertake all the legal work for the patent. To this end, *on December 18, 2003*, Wright met with Nedelman and Weintraub and signed a document issued by the patent office that *revoked Rinaldo's power of attorney*. At the same time, Wright executed a power of attorney for Weintraub and instructed the patent office that all future correspondence should go to Weintraub. The power of attorney authorized Weintraub to prosecute the patent and "to transact all business in the United States Patent and Trademark Office connected therewith." On the same day, Wright also signed an affidavit that Nedelman notarized. It appears that the affidavit was drafted in an effort to remove Waterman's name from Wright's floor-mat patent. In this affidavit, Wright blamed the

error in designating Waterman as a co-inventor on Rinaldo, whom he identified as his "*previous counsel*." Wright also asserted in the affidavit that he had "retained new patent counsel."

The record reflects that, after the revocation, Wright and his attorneys were reluctant to communicate with Rinaldo because they believed that Rinaldo's favorable testimony was critical to Wright's lawsuit against Waterman. Indeed, after Wright obtained the favorable testimony he sought from Rinaldo, Wright ceased all communication with her.

On February 23, 2004, Weintraub filed a "preliminary amendment" with the patent office to add new claims to the description of Wright's floor-mat invention. Weintraub signed the documents and also sent to the patent office the December 18, 2003, documents that granted him power of attorney and revoked Rinaldo's power of attorney. The record reflects that, though no one corresponded with Rinaldo after she signed the affidavit, Wright remained concerned about Rinaldo's continuing role in providing favorable testimony in the litigation against Waterman. However, around the same time, Wright and Nedelman began to consult with attorneys about filing a malpractice action against Rinaldo. Wright also advised Weintraub that Nedelman should participate in the attorney consultations because he needed Rinaldo's testimony before they filed the malpractice action. Wright also expressed concern that the period of limitations for his claim against Rinaldo might expire.

In October 2005, Rinaldo sent Wright a letter to advise him that the maintenance fee for his patent was due on March 10, 2006. Rinaldo testified that, although she did not represent Wright as his attorney at that time, she had calendared his maintenance-fee dates

and, when the date was flagged, she alerted Wright so that she would not be blamed if he allowed the patent to lapse. Rinaldo's letter further stated that, if Wright wanted her or her firm to pay the fee, he would need to pay a retainer fee in advance.[2] Wright ultimately had Weintraub pay the maintenance fee for the patent.

Later, in October 2005, Rinaldo sent another letter to Wright, indicating that she had received correspondence from the patent office that it had disallowed some claims she filed in May 2003. Rinaldo also stated that she had received notice from the patent office that her power of attorney had been revoked, and she asked for information about where to send the file. Wright was upset to learn that Weintraub had submitted the revocation of Rinaldo's power of attorney to the patent office. He wrote to Weintraub and complained that Nedelman and Weintraub had always taken the position that Rinaldo needed to remain the attorney of record with the patent office if they wanted to timely file a legal-malpractice action against her.

Thereafter, Weintraub informed Wright that had he replied to correspondence from the patent office that had been erroneously sent to Rinaldo. Weintraub wrote the following in his response to the patent office:

> Kohn & Associates, Farmington Hills, Michigan prosecuted the above United States Patent 6,446,275 and on May 12, 2003 filed this reissue application. *On December 18, 2003, Applicant (Mr. Rickie Wright) revoked the Power of Attorney to Kohn & Associates and appointed the under-*

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[2] After he received the letter, Wright wrote to Nedelman and Weintraub and stated:

> What response (if any) should I make to Amy regarding the letter she sent to me.
>
> She will get suspicious if I do not respond.

signed (Mr. Arnold S. Weintraub) as his attorney to prosecute all business associated with this matter.

Wright filed this legal malpractice action against Rinaldo on February 16, 2006. Specifically, Wright alleged that Rinaldo had (1) failed to promptly remove Waterman from the patent application, (2) improperly drafted documents submitted to the patent office, and (3) failed to recognize and take steps to correct the patent because it did not adequately protect Wright's invention. The trial court granted Rinaldo's motion for summary disposition, held that Wright and Rinaldo's attorney-client relationship ended on December 18, 2003, and, therefore, ruled that Wright's February 2006 complaint was barred under the two-year statute of limitations.

III. ANALYSIS[3]

The primary purposes behind statutes of limitations can be summarized as (1) encouraging the plaintiffs to diligently pursue claims and (2) protecting the defendants from having to defend against stale and fraudulent claims. *Lemmerman v Fealk,* 449 Mich 56, 65; 534 NW2d 695 (1995). In *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982), our Supreme Court enu-

[3] Pursuant to MCR 2.116(C)(7), the trial court granted summary disposition to defendants because Wright's claim was barred by the statute of limitations. As this Court explained in *Citizens Ins Co v Scholz*, 268 Mich App 659, 662; 709 NW2d 164 (2005):

> This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is properly granted under MCR 2.116(C)(7) when an action is time-barred. *Id.* at 118 n 3. *Young v Sellers,* 254 Mich App 447, 449; 657 NW2d 555 (2002). " '[A]bsent disputed questions of fact, whether a cause of action is barred by a statute of limitations is a question of law that this Court also reviews de novo.' " *Id.* at 450 (citation omitted).

merated several policy considerations underlying statutory limitations periods, including security against stale demands when circumstances would be unfavorable to a just outcome, the avoidance of inconvenience resulting from delay in asserting legal rights, and penalization of plaintiffs who have not been industrious in pursuing their claims.

Pursuant to MCL 600.5805(6) and MCL 600.5838(2), a plaintiff must file a legal-malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later.[4] The parties agree that Wright's knowledge of Rinaldo's alleged malpractice clearly preceded the last day of service and that the operative date is the date of Rinaldo's last service as Wright's attorney. The parties disagree about when that occurred.[5] "Generally, when an attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court." *Mitchell v Dougherty,* 249 Mich App 668, 683; 644 NW2d 391 (2002).[6] Retention of an alternate attorney effectively

[4] *Kloian*, *supra* at 237.

[5] We agree with Rinaldo that the trial court simply made a clerical error when, at the end of its opinion and order, it stated that "clearly Rinaldo's representation of [Wright] ended when he *filed* a revocation of the power of attorney on December 18, 2003, more than two years before the date the instant Complaint was filed." (Emphasis added.) As is clear from the rest of the trial court's opinion, the court believed that the attorney-client relationship ended when Wright executed the documents that revoked Rinaldo's power of attorney and granted it to Weintraub, not when Weintraub filed the documents with the patent office.

[6] We note that Wright has changed his position with regard to the accrual date. In the trial court, Wright argued that the revocation of Rinaldo's power of attorney was not effective until the patent office officially accepted it in October 2005. Now he argues that the revocation did not occur until Weintraub mailed the revocation to the patent office

terminates the attorney-client relationship. *Kloian, supra* at 237. The dispositive question is when did Wright effectively terminate Rinaldo's representation of him in this patent application.

Rinaldo testified that, at a meeting on November 7, 2003, it was made clear to her by Wright, and Nedelman and Weintraub, that she no longer represented Wright as his patent counsel. Also, significantly, Wright signed the revocation of Rinaldo's power of attorney on December 18, 2003, and, on the same day, he signed another document granting power of attorney to Weintraub. As Weintraub later represented to the patent office, Wright's revocation and Weintraub's appointment both occurred when Wright signed the papers on December 18, 2003. Indeed, from Weintraub's assertions to the patent office, it is clear that he believed that he was acting as Wright's sole patent counsel as of December 18, 2003. On the same date, Wright also signed a notarized affidavit in which he referred to Rinaldo as his former attorney and stated that he had retained new counsel.

Though Wright claims that he intended Weintraub and Rinaldo to act as "co-counsel," his own actions belie this assertion. Wright would have had no reason to revoke Rinaldo's power of attorney if he had intended her to continue representing him along with Weintraub. Rather, Wright substituted Weintraub as his attorney by authorizing Weintraub "to transact all business in the United States Patent and Trademark Office connected" with his floor-mat patent. While Wright claims that mere "consultation" with another attorney does not end an attorney-client relationship, the evidence we

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on February 23, 2004. However, the evidence shows that Wright replaced Rinaldo with other counsel, Weintraub, well before the patent office was informed of the change.

have outlined shows that he not only consulted with Weintraub, but appointed him as his new counsel. And, though Rinaldo drafted language to correct the patent or expand its protection in November and December 2003, Wright later had Weintraub file his own changes with the patent office.

Rinaldo presented further evidence that, as early as October 28, 2003, Wright directed Weintraub to correct Rinaldo's alleged mistakes and that, by November 2003, Nedelman had determined that Rinaldo was "doing nothing of value" while he and Weintraub were reworking Wright's patent claims. In the November 24, 2003, e-mail from Wright to Nedelman, Wright asserted that he would no longer communicate with Rinaldo, and he directed that Weintraub "take charge" of the patent prosecution. Indeed, from the time Wright signed the documents on December 18, 2003, he had Rinaldo perform no work on the patent prosecution—the very matter for which he had retained her.

Though Wright maintains that he never explicitly informed Rinaldo of her termination as his counsel or formally relieved her of her duties, his actions show that the attorney-client relationship was, in fact and law, terminated as of December 18, 2003.[7]

In response to the substantial evidence that Wright discharged Rinaldo as his attorney by December 18, 2003, Wright takes the position that the rules in the Manual of Patent Examining Procedure (MPEP) determine when a claim accrues because the rules define when an attorney may withdraw from representing a client in the patent office. According to Wright, the rules state that a withdrawal or revocation does not

[7] *Mitchell, supra* at 684 ("[N]o formal discharge by the client is required, and the termination of an attorney-client relationship can be implied by the actions or inactions of the client.").

occur until the patent office approves it. Wright cites no authority to support his claim that MPEP rules take precedence over Michigan law in determining the state-law matter of whether a malpractice action is timely. Wright merely maintains that, because the underlying case involved a patent issue, the patent office's rules should govern. However, as the trial court pointed out, the rules Wright cites only state that the *withdrawal* of patent counsel is effective upon approval by the patent office. The rules do not state that the *revocation* of a power of attorney is only effective when it is approved. Further, as Rinaldo's evidence established, Wright did not merely revoke her power of attorney, he granted the power of attorney to new counsel, Weintraub, and specifically directed him to take over the patent prosecution. Again, a formal discharge is not required to end an attorney-client relationship, particularly when, as here, a client has retained new counsel. *Mitchell, supra* at 682-684.

In an effort to prove an accrual date after December 18, 2003, Wright also presented evidence that, in October 2005, Rinaldo wrote to Wright to advise him that he must file a maintenance fee for his patent. Wright claims that this shows that Rinaldo saw her professional relationship with Wright as ongoing. In response, Rinaldo testified that she had calendared Wright's maintenance-fee schedule when he was a client and that she received notification in October 2005 that the fee was due. She further testified that, although she did not consider herself to be Wright's attorney, she sent the reminder letter so that she would not be blamed if the patent lapsed. Regardless of her reasoning, Rinaldo's ministerial task of sending a reminder letter to Wright did not extend the accrual date. Rather, Rinaldo's notification falls within the category of matters out-

lined in *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538-539; 599 NW2d 493 (1999):

> A lawyer has an ethical duty to serve the client zealously. See, e.g., *Grievance Administrator v Fried,* 456 Mich 234, 242; 570 NW2d 262 (1997); *American Employers' Ins Co v Medical Protective Co,* 165 Mich App 657, 660; 419 NW2d 447 (1988). Some of a lawyer's duties to a client survive the termination of the attorney-client relationship, most notably the general obligations to keep client confidences and to refrain from using information obtained in the course of representation against the former client's interests. See MRPC 1.6 and 1.9 and comments. Sound public policy would likewise encourage a conscientious lawyer to stand ever prepared to advise a former client of changes in the law bearing on the matter of representation, to make a former client's file available if the former client had need of it, and, indeed, to investigate and attempt to remedy any mistake in the earlier representation that came to the lawyer's attention. *To hold that such follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention.* We conclude that the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship. [Emphasis added.]

Rinaldo specifically stated in her letter that, if Wright wanted her to follow up with the patent maintenance, he would have to remit a retainer fee. Further, Wright had vowed not to speak to Rinaldo and, indeed, he did not speak to her after he signed the revocation on December 18, 2003. As Rinaldo observes, Wright did not even know how to respond to her maintenance-fee letter, but feared that if he did not respond, she would "get suspicious." This conduct is inconsistent with an ongoing professional relationship between Wright and Rinaldo, particularly given that Wright had obtained

different patent counsel, did not permit Rinaldo to work on any further patent matters, and had no communication with her for almost two years.

In sum, Wright's conduct clearly demonstrated that he ended the attorney-client relationship with Rinaldo no later than December 18, 2003, although he did so in a somewhat unorthodox fashion. And, because Wright failed to file his legal-malpractice complaint until February 16, 2006, the trial court correctly ruled that his malpractice claim was barred by the two-year statute of limitations.

Affirmed.

BORRELLO, J., concurred.

GLEICHER, J. (*dissenting*). I respectfully dissent. Under the text of MCL 600.5838(1), plaintiff's legal-malpractice claim accrued when defendant Amy Rinaldo discontinued serving him in a professional capacity "as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." Rinaldo discontinued serving plaintiff in October 2005, when Rinaldo first learned that plaintiff had revoked her power of attorney to act as his patent counsel. Contrary to the majority's analysis, plaintiff's earlier knowledge of the existence of a claim is neither controlling nor relevant, according to the unambiguous language of the accrual statute. Therefore, plaintiff timely filed this lawsuit on February 16, 2006.

The majority concludes that the cause of action accrued on December 18, 2003, because plaintiff signed documents on that date revoking Rinaldo's power of attorney and referring to her as his "former" counsel. According to the majority, when plaintiff signed these

documents, he "in essence ended the relationship, albeit without formally informing Rinaldo." *Ante* at 529. The majority acknowledges that plaintiff "strategic[ally] conceal[ed]" his intent to discharge Rinaldo and that Rinaldo had no knowledge of plaintiff's intent to discharge her until October 2005. *Ante* at 529.

The "matter[] out of which the claim for malpractice arose" was a defective patent application. The factual record, in conjunction with the rules governing patent-law practice, establishes that Rinaldo bore the responsibility to represent plaintiff until his new counsel successfully filed a revocation of her power of attorney and Rinaldo learned of that filing. In MCL 600.5838(1), the Legislature described a purely objective standard for accrual that triggers the running of the two-year period of limitations by a discernible event: the discontinuation of services. An attorney does not discontinue serving a client merely by making a subjective mental decision to quit. In my view, communication with the client is an essential element of an attorney's decision to discontinue representation. Further, I believe that an unhappy client may elect to continue an attorney's representation despite dissatisfaction with the attorney's performance or an expressed intent to discharge the attorney in the future. If the client elects to maintain the attorney-client relationship, the attorney remains responsible for the dissatisfied client's representation until he or she (1) is relieved of that obligation by the court, (2) is officially fired by the client, or (3) gives the client reasonable notice that representation has been terminated. See MRPC 1.16.

I. THE FACTUAL RECORD

In September 1999, plaintiff, Rickie Wright, and his business partner, Wade Waterman, filed an initial

patent application for a "Surface Protection System Mat." Plaintiff had drafted the patent application without the assistance of counsel. In June 2000, the United States Patent and Trademark Office (USPTO) rejected the patent application for several reasons, including plaintiff's failure "to define the invention" in the requisite manner and the application's recitation of the claims "in narrative form . . . replete with indefinite and functional or operational language." Plaintiff then retained Rinaldo, a registered patent specialist,[1] to file an amendment of the defective 1999 patent application. Rinaldo commenced her efforts on plaintiff's behalf by filing with the USPTO a power of attorney signed by plaintiff.

The rules of practice before the USPTO are similar to the Michigan Court Rules in several important respects. Under the Michigan Court Rules, an attorney "may appear by an act indicating that the attorney represents a party in the action." MCR 2.117(B)(1). "Act" includes filing "a written appearance . . . ." MCR 2.117(B)(2)(a). The rules governing practice in the USPTO provide that "[a]n applicant for patent may file and prosecute his or her own case, or he or she may give a power of attorney so as to be represented by one or more patent practitioners or joint inventors." 37 CFR 1.31. The power of attorney in a patent case serves exactly the same function as an appearance:

> When a patent practitioner acting in a representative capacity appears in person or signs a paper in practice before the United States Patent and Trademark Office in a patent case, his or her personal appearance or signature

[1] Rinaldo testified at her deposition that a registered patent attorney "can prosecute applications before the United States Patent and Trademark Office," which encompasses filing applications, preparing amendments, discussing applications with examiners, and "if need be, do[ing] interference proceedings, appeals before the Board . . . ."

> shall constitute a representation to the United States Patent and Trademark Office that under the provisions of this subchapter and the law, he or she is authorized to represent the particular party on whose behalf he or she acts. [37 CFR 1.34.]

On August 29, 2000, Rinaldo filed with the USPTO an amendment of plaintiff's patent. While the amended patent application was pending in the USPTO, a business owned by plaintiff and Waterman (Golden Eagle) marketed and sold the surface-protection mat. In September 2002, the USPTO approved plaintiff's amended patent.

After the USPTO approved the amended patent, plaintiff discovered that a company called St. Clair Plastics "was out there making and selling my invention without my permission . . . ." Plaintiff brought this concern to the attention of both Rinaldo and Golden Eagle's business litigation firm, Maroko & Landau, P.C. Around the same time, plaintiff's relationship with Waterman deteriorated, and Golden Eagle sought bankruptcy protection.

On May 12, 2003, at plaintiff's request, Rinaldo filed a "reissue application" to "correct inventorship" by removing Waterman's name from the patent as a coinventor. This act continued Rinaldo's representation of plaintiff regarding the defective patent. At that point, correction of the patent to remove Waterman's name constituted the matter about which Rinaldo represented plaintiff as his patent counsel.

On July 9, 2003, plaintiff sent Rinaldo an e-mail stating:

> Michael Nedelman is a new lawyer being added to assist Maroko and Landau in my defense of the patent and any offensive action I may need to take. Michael is well known and respected in the courts. Michael is taking a lead role in

> the bankruptcy court regarding the termination of my patent license to Golden Eagle as well as other matters. . . .
>
> Would you please give him a brief call or send him an e-mail regarding the patent[?]

According to her billing records, Rinaldo met with plaintiff on July 28, 2003, regarding "litigation," reviewed documents drafted by an attorney concerning "related litigation," and forwarded "comments regarding the same to attorney."

On September 5, 2003, Nedelman wrote to Rinaldo and requested more information about the patent. His letter read: "I need some guidance from you in connection with the anticipated institution of suit against potential infringers upon the patent held by Rickie Wright. Since I have no patent experience, I read the patent as approved by the Patent Office." (Emphasis in original.) Rinaldo e-mailed plaintiff on September 17, 2003, and advised that "we should add a few new claims . . . ." The e-mail continued: "[P]lease let me know how you wish to proceed. I will be out of the office until Monday, but I can begin working on the new claims first thing Monday morning."

Plaintiff, Nedelman, and Rinaldo met on September 23, 2003. On October 14, 2003, Nedelman spoke with another patent attorney, Arnold Weintraub, regarding correction of the inventorship issue. Three days later, Nedelman wrote to Rinaldo to express concern about the progress of the efforts to remove Waterman's name from the patent. Nedelman also criticized "the efficacy" of Rinaldo's attempts to remove Waterman "as an inventor" and expressed concern about the patent itself:

> You have recently admitted that the claims you prepared failed to adequately describe and do not encompass the actual product designed by Rickie Wright, and as being

> manufactured and sold. The failure to advance the correct claims, coupled with your earlier misrepresentations to Rickie Wright that the product was protected, has caused Mr. Wright to suffer significant damages including, but not limited to, lost profits/royalties, the legal fees and expenses paid to your firm, and the costs anticipated to be incurred in rectifying your errors and omissions.
>
> The situation must be rectified, and your errors and omissions corrected to the fullest extent possible. Mr. Wright must be compensated for the damages he has suffered and, if your errors and omissions cannot be corrected, for the damages he will continue to suffer. Please immediately advise me of the course of action you intend to take.

When she received this letter, Rinaldo could have communicated to plaintiff and Nedelman her intent to withdraw as plaintiff's counsel in the patent matter. Alternatively, plaintiff could have fired Rinaldo and instructed Weintraub to file a power of attorney with the USPTO. Instead, Rinaldo responded to Nedelman on October 29, 2003, asserting that "the removal of Wade Waterman as an inventor is being handled properly and in accordance with USPTO practices." Rinaldo concluded:

> Finally, and most importantly, please be aware that the written opinions you expressed in your letter of October 17, 2003, could be grossly prejudicial to Mr. Wright's position. *In the future, Mr. Wright's interests are best served by telephoning our office to seek clarification of any issues that may be confusing to either you or Mr. Wright.* [Emphasis supplied.]

Rinaldo wrote the following to plaintiff on the same day:

> I have responded to Mr. Nedelman's letter of October 17, 2003. Please be aware that the written opinions expressed by Mr. Nedelman in his letter could be grossly

> prejudicial to your position. *In the future, your interests are best served by telephoning our office to seek clarification of any issues that may be confusing to either you or Mr. Nedelman.* [Emphasis supplied.]

Rinaldo met with Nedelman, plaintiff, and Weintraub on November 7, 2003, and prepared the following "Memorandum of Understanding" summarizing their discussion:

> At a meeting held Friday, November 7, 2003, it was agreed among all parties present that Nedelman and/or Weintraub will draft, file, serve and prosecute to finality a civil action lawsuit on behalf of Rickie Wright against Wade Waterman.
>
> It was further agreed among all parties present that Rinaldo will draft and file an amendment consistent with the claims presented at the meeting by Weintraub.

Later that month, plaintiff e-mailed Rinaldo to "check in and make sure you, Michael, and Arne [Weintraub] are working toward a correction of the problems we discussed regarding the patent and it's [sic] claims." The e-mail concluded, "Please let me know if you have any questions or if I can help in any way." On November 26, 2003, Rinaldo replied: "The week after we met I sent the correction to Arnie [Weintraub]. I am waiting for him to tell me to file the amendment." On December 3, 2003, Rinaldo e-mailed the proposed amendment to Weintraub, along with a USPTO form entitled "Reissue Application Declaration By The Inventor," which listed Rinaldo and her law firm as plaintiff's counsel after the language "As a named inventor, I hereby appoint the following attorney(s) and/or agents to prosecute this . . . ."

On December 18, 2003, plaintiff signed a document revoking Rinaldo's USPTO power of attorney and executed the affidavit discussed by the majority, which

referred to Rinaldo as his "previous counsel." Despite signing these documents, plaintiff deliberately refrained from instructing Weintraub to file the documents or discharging Rinaldo as his patent counsel. On January 9, 2004, Rinaldo signed an affidavit averring that Waterman had "made no contribution to the invention of the surface protection mat" and had been "inadvertently and erroneously identified as a co-inventor" in the patent application. On January 21, 2004, plaintiff sued Waterman in federal court, seeking a declaration that Waterman had no legally cognizable interest in the surface-protection-mat patent.

In February 2004, Weintraub mailed to the USPTO the preliminary patent amendment prepared by Rinaldo, as well as the signed revocation of her power of attorney. The parties agree that, for unknown reasons, the USPTO never acknowledged receiving these documents and did not act on them. According to Weintraub, a patent examiner eventually told him that the February 2004 filings had "fallen into a black hole . . . ." Weintraub resubmitted the materials in September 2005, and the USPTO finally processed them on October 20, 2005.

Meanwhile, however, the amendment submitted by Rinaldo in May 2003 remained pending in the USPTO. On October 17, 2005, the USPTO announced its decision regarding the patent amendment by sending Rinaldo, the attorney of record, an "Office communication concerning this application or proceeding," which informed Rinaldo that the USPTO had rejected "Claim(s) 1-8" of the May 12, 2003, patent reissue application. A clerk at Rinaldo's office wrote on the USPTO transmission document: "Response 11-17-05."

Rinaldo admitted at her deposition that she had never sent plaintiff a communication reflecting her

intent to withdraw as his patent counsel. She additionally conceded that plaintiff had never advised her that he had "fired" her; she merely assumed that he had done so because of the "tone" of their November 7, 2003, meeting with Nedelman and Weintraub. Nor did Rinaldo make any effort to withdraw as plaintiff's patent counsel, pursuant to the clear provision of the patent rules providing: "A registered patent attorney or patent agent who has been given a power of attorney pursuant to [37 CFR 1.32(b)] may withdraw as attorney or agent of record *upon application to and approval by the Director*." 37 CFR §1.36(b) (emphasis supplied). This rule bears a substantial similarity to MCR 2.117(C)(2), which provides that "[a]n attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court."

II. APPLICATION OF THE LAW

The majority's decision to affirm the trial court's grant of summary disposition is premised on its determination that "the attorney-client relationship was, in fact and law, terminated as of December 18, 2003," the date that plaintiff signed the revocation of the power of attorney. *Ante* at 536. According to the majority, plaintiff "ended the attorney-client relationship with Rinaldo no later than December 18, 2003, although he did so in a somewhat unorthodox fashion." *Ante* at 539.

But the determination of when a legal-malpractice action accrues for purposes of the statute of limitations does not depend on a subjective interpretation of when plaintiff "ended" or "terminated" the attorney-client relationship. Rather, MCL 600.5838(1) requires that an analysis of accrual focus on the date that the defendant attorney discontinued serving the plaintiff in a professional capacity, "regardless of the time the plaintiff"

had knowledge of the claim. In *Gebhardt v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994), our Supreme Court examined the application of MCL 600.5838 in a legal-malpractice case. The Supreme Court observed that the "statute is unambiguous" and held that a "client has up to two years from the time his attorney stops representing him regarding the matter in question to bring a malpractice suit." *Id*. at 541, 544. Rinaldo did not and could not stop representing plaintiff until (1) he fired her, (2) the USPTO received and accepted plaintiff's request to revoke Rinaldo's power of attorney, or (3) she communicated to plaintiff that she had terminated their relationship. None of these events occurred until October 2005.

Citing *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006), the majority holds that plaintiff's "retention of an alternate attorney effectively terminate[d] the attorney-client relationship." *Ante* at 534-535. In my view, this is a patently incorrect conclusion because the alternate attorney plaintiff retained, Weintraub, worked *with* Rinaldo and not in her stead. Rinaldo, Weintraub, and plaintiff met together on November 7, 2003, and Rinaldo subsequently prepared a "Memorandum of Understanding" regarding that meeting that reflected *her* intent and designated assignment within plaintiff's legal team to "draft and file an amendment consistent with the claims presented at the meeting by Weintraub." Despite plaintiff's retention of Weintraub, Rinaldo clearly continued to serve as plaintiff's official patent counsel.

Furthermore, the statement from *Kloian* on which the majority relies in my view qualifies as dictum, unnecessary to that decision and simply incorrect under the plain language of MCL 600.5838. In *Kloian*, the defendant attorneys informed the plaintiff in writing

that the trial court had dismissed the plaintiff's case. In the same writing, the defendant attorneys additionally informed the plaintiff that they would not prosecute an appeal on the plaintiff's behalf. *Id*. at 236. This Court held that

> in the absence of an attorney's dismissal by the court or the client, and in the event that an attorney sends notice of withdrawal as his or her final act of professional service, a legal malpractice claim with respect to a particular matter that has been finally dismissed by order of the trial court accrues at the time affirmative notification of withdrawal is sent. [*Id.* at 238.]

Unlike the defendant attorneys in *Kloian*, Rinaldo did not send plaintiff a "notice of withdrawal" as his patent counsel. The October 2005 transmission to Rinaldo of plaintiff's revocation of her power of attorney constituted the only "affirmative notification" that Rinaldo no longer represented plaintiff before the USPTO. In my view, *Kloian* supports a conclusion that plaintiff's legal-malpractice claim did not accrue until October 2005, when Rinaldo received the affirmative notification that plaintiff had terminated their attorney-client relationship.

Elsewhere in *Kloian*, this Court observed that "an attorney's representation of a client generally continues until the attorney is relieved of that obligation by the client or the court." *Id*. at 237. This Court followed that sentence with a statement that now serves as the linchpin of the majority opinion: " 'Retention of an alternate attorney effectively terminates the attorney-client relationship.' " *Id*., quoting *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002). The *Kloian* opinion identified *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994), as the original source of the language "retention of an alternate attorney."

In *Maddox*, however, this Court noted that the retention of alternate counsel did *not* terminate the attorney-client relationship or alter the date on which the plaintiff's legal-malpractice claim accrued:

> Although plaintiffs already had consulted alternative counsel in Florida in August 1988, we do not believe that this necessarily terminated the attorney-client relationship between the instant parties because defendant earlier had directed plaintiffs to consult with Florida counsel in order to protect fully plaintiffs' interests under Florida law. In other words, plaintiffs' Florida counsel was not consulted in place of, but in addition to, defendant. [*Id*. at 451.]

In my view, the relationship between Weintraub, Rinaldo, and plaintiff was directly analogous to that of the lawyers and parties involved in *Maddox*. Weintraub and plaintiff deliberately continued Rinaldo as plaintiff's official patent counsel and relied on her efforts in this role to correct the patent. They planned to delay her discharge until Weintraub officially substituted as plaintiff's counsel.

The majority clearly believes that plaintiff, Nedelman, and Weintraub conducted themselves in an offensive manner. That may be an accurate perception. Regardless of the negative and derogatory behind-the-scenes discussions between plaintiff, Nedelman, and Weintraub regarding Rinaldo, plaintiff intended that she remain his official patent counsel until Weintraub officially superseded her. Further, the character of a client's conduct is not an element of the definition of accrual under MCL 600.5838.

In my view, the majority has essentially rewritten the text of that statute in order to punish plaintiff for his duplicity regarding Rinaldo. From a pure policy perspective, it may be appropriate to penalize clients who behave as plaintiff did and to prohibit "strategic con-

cealment" of an intent to discharge counsel. But the statute simply cannot be read to provide that a legal-malpractice claim accrues when a client decides to fire his or her lawyer or discusses with alternate counsel a plan to replace the current lawyer. Rather, the statute clearly and unambiguously provides that a malpractice claim accrues "at the time [the defendant] discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose, *regardless of the time the plaintiff discovers or otherwise has knowledge of the claim*." MCL 600.5838(1) (emphasis supplied). According to the USPTO, Rinaldo continued to represent plaintiff and remained his official patent counsel until October 20, 2005. In the absence of any communications to the contrary, Rinaldo remained responsible for the prosecution of the May 2003 patent reissue application, at least until she learned in October 2005 that plaintiff had revoked her power to act as his patent counsel.

Because plaintiff filed this lawsuit in February 2006, I conclude that it was timely filed and would reverse the trial court's grant of summary disposition.

DAWE v DR REUVAN BAR-LEVAV & ASSOCIATES, PC

Docket No. 269147. Submitted September 11, 2007, at Detroit. Decided July 10, 2008, at 9:05 a.m. Leave to appeal sought.

Elizabeth Dawe brought a medical-malpractice action in the Oakland Circuit Court against Dr. Reuvan Bar-Levav & Associates, P.C., Dr. Reuvan Bar-Levav's estate, and Dr. Leora Bar-Levav, after she was shot by a psychiatric patient during a group-therapy session. Dawe also alleged a claim of statutory failure to warn under MCL 330.1946 on the ground that the defendants knew or had reason to know that the shooter, Joseph Brooks, who had made threatening statements to the defendants, presented a danger to the other members of the group. The defendants moved for summary disposition, arguing that Dawe had failed to establish that Brooks had communicated a threat of violence against Dawe specifically. The court, Charles W. Simon, Jr., denied this motion, as well as defendants' later motion for a partial directed verdict, and a jury returned a verdict in Dawe's favor. The court denied the defendants' motion for judgment notwithstanding the verdict. The defendants appealed.

The Court of Appeals *held*:

1. MCL 330.1946, which sets forth the duties of mental-health professionals to warn third persons of danger from their patients, abrogated all common-law duties to warn or protect third persons from dangerous patients. A plain reading of the statute indicates that the statute was intended to modify and preempt the common-law duty to warn or protect that arises out of the special relationship between mental-health professionals and their patients. The statute also abrogates the common-law duty to treat other patients within the applicable professional standard of care to the extent that it includes the duty to provide a safe clinical environment for patients. The repeated use of the word "section" in subsection 5 of MCL 330.1946, which specifies that MCL 330.1946 does not affect duties that mental-health professionals may have under other sections of law, indicates that the Legislature intended to preserve statutory duties, not common-law duties.

2. The phrase "third person," as used in MCL 330.1946, refers to all other persons who are neither the dangerous patient nor the mental-health professional, including the professional's other patients.

3. Because Dawe failed to present evidence from which a reasonable jury could conclude that Brooks communicated a threat of physical violence specifically against her to the defendants, she failed to establish a claim as a matter of law, and the trial court erred by failing to grant the defendants a directed verdict.

Reversed, judgment vacated, and case remanded for further proceedings.

SMOLENSKI, P.J., dissenting, would hold that MCL 330.1946(1) applies only to patients who are "recipients" as defined by MCL 330.1100c(12), and, therefore, modified common-law duties only with respect to mental-health professionals who are treating recipients. Accordingly, because Brooks was not a recipient, the defendants had no statutory duty to warn or protect the plaintiff, and the trial court should have granted the defendant's motion for a directed verdict on that theory of liability. However, this error was harmless because the plaintiff's claim that the defendants breached their common-law duty to provide a safe clinical environment remained viable.

1. MENTAL HEALTH — PRACTITIONERS — THREATS BY PATIENTS — DUTY TO WARN THIRD PARTIES.

The statutory provision that sets forth the duties of mental-health professionals to warn third persons of danger from their patients abrogated all common-law duties to warn or protect third persons, including the duty to provide other patients with a safe clinical environment (MCL 330.1946).

2. STATUTES — WORDS AND PHRASES — MENTAL HEALTH — PRACTITIONERS — DUTY TO WARN THIRD PARTIES.

The phrase "third person," in the statutory provision that sets forth the duties of mental-health professionals to warn of or protect third persons from danger from their patients, refers to all other persons who are neither the dangerous patient nor the mental-health professional, including the professional's other patients (MCL 330.1946).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Haas & Goldstein, P.C.* (by *Justin Haas*), for the plaintiff.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank* and *Regina T. Delmastro*), for the defendants.

Before: SMOLENSKI, P.J., WHITBECK, C.J., and KELLY, J.

WHITBECK, C.J. In this medical malpractice action, defendants Dr. Reuvan Bar-Levav & Associates, the estate of Dr. Reuvan Bar-Levav (Dr. Bar-Levav), and Dr. Leora Bar-Levav appeal as of right the jury verdict in favor of Elizabeth Dawe on various grounds. On cross-appeal, Dawe appeals the trial court's calculation of prejudgment interest on the jury's award. We reverse, vacate the judgment, and remand.

I. BASIC FACTS

This medical malpractice action arises out of a shooting incident at defendants' psychiatric office where Dawe received treatment. On June 11, 1999, Joseph Brooks, who was a former patient of Dr. Bar-Levav,[1] came to the office, drew a handgun, and shot and killed Dr. Bar-Levav. Brooks then proceeded to the back of the office and fired into Dawe's group therapy room. Brooks killed one patient and wounded others, including Dawe. After firing dozens of rounds into the room, Brooks committed suicide.

Dawe sued defendants, alleging that Brooks made threatening statements to defendants in which he indicated that he "fantasized about murdering" and that he demonstrated his ability to carry out threats by coming to defendants' office with a handgun. Dawe further alleged that a "manuscript" that Brooks delivered to defendants in June 1999 "could be reasonably construed as a threat of violence against other members who participated in his group therapy sessions, including [Dawe]." Accordingly, Dawe alleged that defendants were liable under two theories: statutory liability for failure to warn under MCL 330.1946, and common-law medical malpractice. With respect to her common-law

[1] Defendants discharged Brooks from their care on March 19, 1999.

medical malpractice claim, Dawe alleged that defendants breached their applicable standard of care, which included "informing the police, warning patients or others, and taking reasonable precautions for the protection of patients when a doctor or health care provider has information which could reasonably be construed as a threat of violence against a patient or others," when defendants failed to warn Dawe and the police of Brooks's "threats" or take reasonable steps to protect Dawe. Dawe also filed an affidavit of Meritorious Claim in support of her complaint.[2]

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that there was no evidence that Brooks expressed a threat to defendants about Dawe specifically and, therefore, defendants owed no duty to warn or protect Dawe under MCL 330.1946. Defendants also noted that Dawe was not alleging malpractice with regard to her individual care; rather, her only allegation was a failure to fulfill the duty to warn, which was derived solely from the statute.

In response, Dawe argued that it was significant that she was defendants' patient rather than merely a "third person" to whom the statute applied. Dawe argued that her special physician-patient relationship with defendants also required them to treat her within the applicable standard of care stated in her complaint. In other words, Dawe argued that defendants owed both statutory and common-law duties. Dawe further argued that she had presented a genuine issue of material fact that defendants violated that standard of care. In support of her motion, Dawe submitted the affidavit of Dr. Mark Fettman, Dawe's psychiatric expert, who attested that a psychiatrist has a duty to take reasonable precautions for the protection of patients. According to Dr. Fettman,

[2] See MCL 600.2912d.

included within this duty is the requirement that the psychiatrist assess a patient to determine if the patient is a suitable candidate for group therapy before placing the patient in a group. Dr. Fettman averred that once a patient has been placed in group therapy, the psychiatrist has a further duty to continually assess the patient to ensure that the patient remains suitable for group therapy. Dr. Fettman attested that defendants violated the applicable standard of care by placing Brooks in a group session with Dawe and other patients.

The trial court ruled that summary disposition was not appropriate because Dawe had stated a prima facie case and there were genuine issues of material fact regarding whether defendants violated MCL 330.1946 or the applicable standard of care. Accordingly, the trial court denied defendants' motion.

At trial, Dawe argued that defendants breached their duty to warn and that defendants breached their duty to provide Dawe with a safe clinical environment for her treatment. Specifically, Dawe contended that defendants breached the standard of care by placing Brooks in Dawe's group therapy sessions when they knew or should have known that Brooks was a danger to the other group members.

After the close of Dawe's proofs, defendants moved for a partial directed verdict on Dawe's claim of failure to warn under MCL 330.1946, arguing that Dawe failed to establish that Brooks communicated to defendants a threat of violence specifically against Dawe. Defendants also argued that Dawe failed to present expert testimony concerning the standard of care applicable under the statute; that is, defendants noted that Dr. Fettman's testimony applied solely to defendants' alleged duties when placing Dawe in group therapy, not to defendants' duty to warn. In response, Dawe again argued that it

was significant that she was defendants' patient, apparently on the basis that MCL 330.1946 did not even apply in cases where the victim was a patient.[3] Nevertheless, the trial court denied the motion on the ground that Dawe had stated a prima facie case sufficient to survive a directed verdict.

After the six-day trial in September 2005, the jury returned a verdict in favor of Dawe. Defendants moved for a judgment notwithstanding the verdict (JNOV) and for a new trial, raising several of the same issues now raised on appeal; however, the trial court denied the motions. Defendants now appeal.

II. PREEMPTION OF A PSYCHIATRIST'S COMMON-LAW DUTY TO PROTECT

Defendants argue that the only duty that a psychiatrist has to protect others from a patient is the duty imposed by MCL 330.1946, and that the Legislature abrogated all other common-law duties to protect third persons when it enacted MCL 330.1946. We agree.

A. THE STATUTE

MCL 330.1946(1) provides:

> If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient[4] has the apparent intent and ability to carry

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[3] Dawe's counsel specifically stated: "[T]his statute that [defendants are] referring to is talking—it's in establishing a duty by someone that isn't normally a patient. That doesn't exist here because Elizabeth Dawe was [a patient]. . . . This other statute is talking about if Elizabeth Dawe wasn't a patient[.]"

[4] 1995 PA 290 amended MCL 330.1946 to change the third use of the word "patient" in subsection 1 to "recipient." All other references to "patient" in the statute were left unaltered. The term "recipient" is defined to mean

> out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in [MCL 330.1946(2)]. Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person.

MCL 330.1946(2) provides:

> A mental health professional has discharged the duty created under subsection (1) if the mental health professional, subsequent to the threat, does 1 or more of the following in a timely manner:
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> (a) Hospitalizes the patient or initiates proceedings to hospitalize the patient under [MCL 330.1400 *et seq*.] or [MCL 330.1498a *et seq*.].
>
> (b) Makes a reasonable attempt to communicate the threat to the third person and communicates the threat to the local police department or county sheriff for the area where the third person resides or for the area where the patient resides, or to the state police.
>
> (c) If the mental health professional has reason to believe that the third person who is threatened is a minor or is incompetent by other than age, takes the steps set forth in subdivision (b) and communicates the threat to the department of social services in the county where the minor resides and to the third person's custodial parent, noncustodial parent, or legal guardian, whoever is appropriate in the best interests of the third person.

In other words, a mental-health professional does not have a duty to take the actions described under MCL

"an individual who receives mental health services from the department, a community mental health services program, or a facility or from a provider that is under contract with the department or a community mental health services program." MCL 330.1100c(12). Although not all patients of mental-health professionals will qualify as recipients, see *Saur v Probes*, 190 Mich App 636, 641; 476 NW2d 496 (1991) (construing former MCL 330.1700, which defined "recipient" in a substantially similar way to present MCL 330.1100c[12]), for this issue, it is not necessary to examine how the use of the term "recipient" might affect the duty imposed by this statute.

330.1946(2) unless four criteria are met: (1) a mental-health professional is presently treating a patient, (2) that patient communicates a threat of physical violence to the mental-health professional, (3) that threat of physical violence is directed against a readily identifiable third person, and (4) the patient has the apparent intent and ability to carry out the threat in the foreseeable future.

B. PRINCIPLES OF COMMON-LAW PREEMPTION

"The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed."[5] "Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent."[6] But "legislative amendment of the common law is not lightly presumed."[7] When the Legislature exercises its authority to modify the common law, "it should speak in no uncertain terms."[8]

C. PRINCIPLES OF STATUTORY INTERPRETATION

When interpreting a statute,

> [t]his Court's primary task . . . is to discern and give effect to the intent of the Legislature. "The words of a statute provide 'the most reliable evidence of [the Legislature's] intent . . . .' " In discerning legislative intent, a court must "give effect to every word, phrase, and clause in a statute . . . . The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " "The statutory lan-

[5] *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006), citing Const 1963, art 3, § 7.

[6] *Id*.

[7] *Id*.

[8] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

> guage must be read and understood in its grammatical context, unless it is clear that something different was intended." "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written."[9]

The Legislature is presumed to have intended the meaning it plainly expressed.[10]

D. RELEVANT CASELAW INTERPRETING MCL 330.1946

To establish a prima facie case of negligence, the plaintiff must prove as a matter of law that the defendant owed a duty to the plaintiff to avoid negligent conduct.[11] Generally, under the common law, "there is no duty that obligates one person to aid or protect another."[12] However, under the common law, "[w]here there is a duty to protect an individual from a harm by a third person, that duty to exercise reasonable care arises from a 'special relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury."[13]

In *Davis v Lhim*,[14] the Court adopted the reasoning of *Tarasoff v Regents of Univ of California*[15] and held that

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[9] *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004) (internal citations omitted).

[10] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

[11] *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190,195; 583 NW2d 719 (1998).

[12] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988).

[13] *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997).

[14] *Davis v Lhim*, 124 Mich App 291, 301; 335 NW2d 481 (1983), rev'd on other grounds sub nom *Canon v Thumudo*, 430 Mich 326 (1988).

[15] *Tarasoff v Regents of Univ of California*, 17 Cal 3d 425; 131 Cal Rptr 14; 551 P2d 334 (1976).

the special relationship between a psychiatrist and his or her patient gives rise to "a duty of reasonable care to a person who is foreseeably endangered by [the psychiatrist's] patient." The Michigan Supreme Court later reversed *Lhim* on the ground that the psychiatrist in *Lhim* was protected by governmental immunity, and, in light of that holding, the Court found it unnecessary to address "whether a duty to warn should be imposed upon mental-health professionals to protect third persons from dangers posed by patients."[16]

Shortly thereafter, the Michigan Legislature enacted MCL 330.1946, thereby codifying the duty of mental-health professionals to warn third parties of danger from their patients.[17] As recognized by this Court, the legislative history of the statute indicates that the Legislature enacted the statute to "limit the liability of mental health practitioners."[18]

Since its enactment, only two published cases have interpreted the statute. However, the issue now before this Court—whether a common-law duty to warn or protect has survived the statute's limitation on a psychiatrist's liability to protect others—has not been resolved.

In 1996, this Court released its first opinion addressing the statute. In *Jenks v Brown*, the plaintiff's ex-wife told her psychiatrist that she intended to kidnap her, and the plaintiff's, son.[19] The plaintiff then sued the psychiatrist, alleging that he breached MCL 330.1946 by failing to warn the plaintiff of his ex-wife's threat. This Court affirmed the trial court's grant of summary

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[16] *Canon*, *supra* at 355.

[17] See 1989 PA 123.

[18] *Jenks v Brown*, 219 Mich App 415, 418; 557 NW2d 114 (1996), citing House Legislative Analysis, HB 4237, July 11, 1989.

[19] *Id*. at 417.

disposition in the psychiatrist's favor, holding that the psychiatrist had no duty to the plaintiff because the threat was directed at the child, not the plaintiff. This Court explained:

> In prior years, the common-law duty to warn had been extended in some cases to unnamed third parties and even to property. In response to these developments, the duty to warn statute limited a mental health practitioner's duty to that as provided in the statute. Furthermore, in order for any duty to arise, a patient must communicate "a threat of physical violence against a reasonably identifiable third person." It is apparent from the language of the statute and its legislative history that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made.[20]

The plaintiff also sought to amend his complaint to add a common-law theory of negligence.[21] This Court ruled any such amendment futile on the ground that there was no special relationship between the plaintiff and the psychiatrist that would give rise to a duty to protect the plaintiff.[22] In so ruling, this Court acknowledged but declined to address the issue "whether a claim brought against a mental-health practitioner under a common-law theory of failure to warn is superseded by MCL 330.1946[.]"[23]

Two years later, this Court again published an opinion interpreting the statute. In *Swan v Wedgwood Christian Youth and Family Services, Inc*, a teenage boy (LaPalm) killed his mother's boyfriend after being released from the defendant's residential facility where LaPalm had received psychiatric treatment.[24] The

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[20] *Id*. at 418-419 (citations omitted).

[21] *Id*. at 420.

[22] *Id*. at 421.

[23] *Id*. at 421 n 1.

[24] *Swan*, *supra* at 191-193.

plaintiff, as personal representative of the decedent's estate, sued the defendant, alleging that it negligently treated LaPalm, thereby proximately causing the decedent's death.[25] Relying on *Jenks*, this Court affirmed the trial court's grant of summary disposition in the defendant's favor on the ground that MCL 330.1946 served "as a bar to the plaintiff's suit because, pursuant to the statute, it owed no duty to the decedent."[26] More specifically, this Court explained that the defendant owed no duty to warn or protect the decedent under the terms of the statute because LaPalm never communicated a threat against the decedent.[27] This Court stated, "Under the statute, the *only* duty owed is a duty to warn in those situations where a patient communicates a threat and the object of the threat is reasonably identifiable."[28]

The *Swan* Court also rejected the plaintiff's argument that the statute did not apply because his claim against the defendant alleged negligence rather than a failure to warn. This Court explained:

> Plaintiff notes correctly that the type of claims it asserts are often brought together with a failure to warn claim, but they are separate questions. However, plaintiff's argument fails because to the extent that he alleges a breach of duties on the part of defendant, those duties were owed to LaPalm and not to the decedent, as the circuit court correctly noted. Moreover, plaintiff's argument ignores the last sentence of MCL 330.1946(1) . . . , which provides, "Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection *or to protect the third person*." (Emphasis added.) We believe that this language is unam-

[25] *Id*. at 193-194.

[26] *Id*. at 197-199.

[27] *Id*. at 198-199.

[28] *Id*. at 198 (emphasis added).

> biguous and clearly limits the duty a mental health professional owes to third persons to the duty to warn identifiable third persons "as provided in this section . . . ." Plaintiff cannot claim the benefit of any alleged breach of duty to LaPalm, and the statute plainly provides that defendant did not owe a duty to the decedent.[29]

This Court also acknowledged but rejected the plaintiff's position to the extent that it could be interpreted as arguing that defendant owed a common-law, rather than a statutory, duty to the decedent.[30] More specifically, this Court concluded that even under the common law the defendant had no duty to warn or protect the decedent because no foreseeable danger to decedent, or any other third person, was made known during LaPalm's treatment.[31] In so ruling, this Court again declined to "decide whether a common-law duty survived the enactment of the statute[.]"[32]

Thus, this case presents this Court with an opportunity to resolve a recurring issue of contention regarding a plaintiff's ability to sue a psychiatrist (or other mental-health professional) outside the limitation imposed by the statute.

E. THE PSYCHIATRIST'S COMMON-LAW DUTY TO PROTECT "*THIRD PERSONS*" FROM PATIENTS

We conclude that a plain reading of MCL 330.1946 indicates that the statute was intended to modify the common-law duty to warn or protect third persons from a patient that arises out of the special relationship between a psychiatrist and that patient. The second sentence of subsection 1 clearly states that a mental-

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[29] *Id*. at 199 (citations omitted).

[30] *Id*. at 199-200.

[31] *Id*. at 200-201.

[32] *Id*. at 200.

health professional has no duty to "warn" or "protect" a "third person," *except as provided under MCL 330.1946*. Thus, the Legislature has clearly stated its intent to preempt a mental-health professional's common-law duty to warn or protect third persons. Indeed, Dawe concedes this interpretation. However, because Dawe alleges ambiguity in the phrase "third person," this conclusion does not end our inquiry.

F. THE PSYCHIATRIST'S COMMON-LAW DUTY TO PROTECT *PATIENTS* FROM OTHER PATIENTS

Dawe argues that MCL 330.1946 addresses only the duty that arises from the relationship between a psychiatrist and a dangerous patient while specifically preserving other duties and, therefore, does not abrogate or modify the common-law duty to treat other patients within the applicable professional standard of care, which includes a duty to provide a safe clinical environment for patients. We disagree.

As mentioned, Dawe concedes that "MCL 330.1946 explicitly governs the issue of" a mental-health professional's duty when a patient communicates a threat of violence against a reasonably identifiable third person, and therefore concedes that it is clear that the Legislature intended to modify a mental-health professional's common-law duty to warn or protect those *third persons*. But she contends that it is not at all clear that the Legislature intended to modify or abrogate every common-law duty that a mental-health professional may have to protect the mental-health professional's *other patients*.

In support of her position, Dawe finds it significant that under subsection 5, the Legislature expressly stated, "This section [MCL 330.1946] does not affect a duty a mental health professional may have under any

other section of law." Dawe interprets this to mean that the Legislature clearly contemplated that some duties would remain despite the language of MCL 330.1946(1), which purports to eliminate all duties to "warn" or "protect" "third persons." In other words, Dawe would have us conclude that MCL 330.1946(1) only addresses a mental-health professional's duty to warn or protect *third persons* from a patient arising from the mental-health professional's relationship *with that patient* who may pose a danger to the *third person*, but that the statute does not modify any common-law duties that the mental-health professional may have to protect *another patient* based on the mental-health professional's relationship with *that patient* (e.g., a psychiatrist's duty to render professional care).

Thus, the issue essentially boils down to whether the term "third person" in MCL 330.1946(1) includes the psychiatrist's other patients.

The second sentence of MCL 330.1946(1) expressly states: "Except as provided in this section, a mental-health professional does not have a duty to warn a third person of a threat as described in this subsection or *to protect the third person*." (Emphasis added.) The phrase "third person" is defined as "the grammatical person used in an utterance in referring to *anyone* or anything other than the speaker or the one or ones being addressed."[33] Reading the phrase in context and employing a common usage of the phrase "third persons" lead to the inevitable conclusion that the phrase encompasses all other persons who are neither the dangerous patient nor the mental-health professional. Accordingly we can only conclude that the Legislature intended the term "third persons" to include those third persons who

[33] *Random House Webster's College Dictionary* (2000) (emphasis added).

might also happen to be the psychiatrist's patient. Therefore, we conclude that the statute applies both to "third persons" who are members of the public at large and to "third persons" who are also the psychiatrist's patients. To read "third persons" as not including other patients employs a strained reading of the language and contravenes the dictate that we may not speculate regarding the intent of the Legislature beyond the language expressed in the statute.[34]

Thus, we believe that the statute was specifically intended to expressly limit a mental-health practitioner's duty to that "*as provided in this section*," thereby limiting a mental-health practitioner's *only* duty to protect to *only* those readily identifiable persons against whom a threat of physical violence is made.[35] In other words, we believe that it is clear that the Legislature intended to modify or abrogate any other conceivable duty that a mental-health professional may have to protect others, which would include a duty to take reasonable steps to ensure that the patient is treated in a safe clinical environment. The duty a mental-health professional owes to protect third persons does not vary depending on the cause of action, nor on the identity or category of the "third person."

Further, we disagree that subsection 5 of the statute, in which the Legislature stated, "This section does not affect a duty a mental health professional may have under any other section of law," supports a conclusion that the Legislature contemplated that some common-

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[34] *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007).

[35] See *Swan*, *supra* at 198 ("Under the statute, the *only* duty owed is a duty to warn in those situations where a patient communicates a threat and the object of the threat is reasonably identifiable."); *Jenks*, *supra* at 419 ("It is apparent from the language of the statute and its legislative history that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made.").

law duties would remain despite the language of MCL 330.1946(1). To the contrary, reading the plain language of the statute indicates that the Legislature merely contemplated that a psychiatrist's other *statutory* duties remain viable—for example, the duty to report suspected abuse under the Child Protection Law.[36] More specifically, subsection 5 begins with the words "[t]his *section*," clearly referring to the statute, MCL 330.1946, as "[t]his section." Subsection 5 then concludes with the words "under *any other section* of law[.]" The Legislature's decision to use the word "section" again here clearly indicates that it was again referring to statutory law, rather than common law.

G. CONCLUSION

In sum, we conclude that no common-law duty to protect survived the Legislature's enactment of MCL 330.1946. We conclude that MCL 330.1946 preempts the field on the issue of a mental-health professional's duty to warn or protect others, including the psychiatrist's other patients. We therefore conclude that Dawe's claim that defendants breached their duty to provide Dawe with a safe clinical environment for her treatment is without merit. Consequently, we conclude that the trial court erred when it refused to grant defendants' requests for relief premised on the theory that they had no common-law duty to protect Dawe beyond that imposed by MCL 330.1946.

H. UNFAIR RESULT

We acknowledge that the evidence presented at trial was compelling proof that defendants knew or should have known that Brooks posed a danger to the other

[36] MCL 722.623.

patients in his therapy group and, therefore, should not have been placed in group therapy. Therefore, it is an unfair result to shield defendants from liability in this case. Common sense and the general tenets of the common-law duty to protect arising out a special relationship would seem to justify holding defendants accountable here. However, we are bound to interpret plain statutory language as written. The plain language of the statute dictates the result we reach today, and any arguments that the statute is unwise or results in bad policy must be addressed to the Legislature.[37]

III. STATUTORY DUTY TO WARN OR PROTECT UNDER MCL 330.1946

Applying the language of the statute, defendants argue that Dawe failed to present evidence that Brooks communicated to defendants a threat of physical violence against Dawe. Therefore, defendants argue that the trial court erred when it declined to grant defendants' motions for summary disposition,[38] directed verdict, and JNOV on Dawe's claim under MCL 330.1946.

In interpreting MCL 330.1946, this Court has clarified that "[i]t is apparent from the language of the statute and its legislative history that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made."[39] Accordingly, communication of a threat of physical

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[37] See *Oakland Co Bd of Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 613; 575 NW2d 751 (1998); *Richter v Turlow*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 1999 (Docket No. 210922), p 2.

[38] Because defendants do not substantively address their motion for summary disposition, we limit our analysis to whether the trial court should have granted defendants' motion for a directed verdict.

[39] *Swan*, *supra* at 198, citing *Jenks*, *supra* at 419.

violence directed against the victim is essential to liability under the statute.[40]

Applying the statutory criteria to this case, we conclude that Dawe failed to present evidence from which a reasonable jury could conclude that Brooks communicated a threat of physical violence against Dawe to defendants. The only relevant testimony was that of James Stanislaw, a certified social worker employed by defendants, who served as the therapist for the group that included Brooks and Dawe. And although Stanislaw's testimony, even taken in the light most favorable to Dawe,[41] established that Brooks probably indicated that he wanted to hurt *someone* at the practice, his testimony did not establish that Brooks made a threat of physical violence *against Dawe*, either individually or as a member of the therapy group. Therefore, we conclude that Dawe failed to present evidence from which a reasonable jury could conclude that Brooks communicated to defendants a threat of physical violence against Dawe, as a readily identifiable third person. Thus, Dawe failed to establish a claim as a matter of law under MCL 330.1946. Consequently, the trial court should have granted defendants' motion for directed verdict on this claim.

Given the resolution of this issue, we decline to address defendants' argument that the statutory claim should have been dismissed because Dawe failed to present expert testimony concerning the standard of care applicable under MCL 330.1946. Further, we find it unnecessary to address whether the trial court erred in failing to grant defendants' motion for JNOV.

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[40] See *Lagow ex rel Welch v Segue, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2001 (Docket No. 219624).

[41] See *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005).

IV. CONCLUSION

The trial court erred by failing to grant defendants a directed verdict. Therefore, we vacate the lower court judgment against defendants, reverse the trial court's denial of defendants' motion for a directed verdict, and remand for entry of an order dismissing Dawe's claims against defendants. Given our disposition, we decline to address the parties' remaining arguments regarding errors related to the trial and judgment.

Reversed, judgment vacated, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

KELLY, J., concurred.

SMOLENSKI, P.J. (*dissenting*). Because I do not agree that MCL 330.1946 preempts plaintiff Elizabeth Dawe's common-law medical malpractice claim and conclude that there were no errors warranting a new trial, I cannot agree with the majority's decision to vacate the judgment against defendants. Therefore, I must respectfully dissent.

I. PREEMPTION OF PLAINTIFF'S MEDICAL MALPRACTICE CLAIM

On appeal, defendants argue that MCL 330.1946 preempts plaintiff's malpractice claim. Specifically, defendants contend that the only duty that defendants owed to plaintiff with respect to Brooks's conduct was the duty imposed by MCL 330.1946. I cannot agree.

Plaintiff originally sued defendants under two theories: statutory liability for failure to warn under MCL 330.1946 and common-law medical malpractice based on a failure to warn. However, as the case proceeded, plaintiff's medical malpractice claim evolved. At trial,

plaintiff continued to argue that defendants breached their duty to warn under MCL 330.1946. But, rather than argue that defendants also had a duty to warn under the common law, plaintiff argued that defendants breached their common-law duty to treat plaintiff within the applicable standard of care. Specifically, plaintiff contended that defendants breached the standard of care by placing Brooks in plaintiff's group therapy sessions when they knew or should have known that Brooks was a danger to the other group members. Hence, by the time of trial, plaintiff's common-law claim was no longer premised exclusively on defendants' failure to warn or protect Dawe from the danger posed by Brooks. Instead, plaintiff's claim was premised on defendants' decision to negligently expose her to a dangerous patient in a group therapy setting. Because this claim implicates both defendants' common-law duty to protect third parties from patients and defendants' duty to properly treat plaintiff, I will examine whether and to what extent MCL 330.1946(1) affected each theory of liability.

A. STANDARDS OF REVIEW

"The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006), citing Const 1963, art 3, § 7. Whether a statute abrogates or modifies the common law is matter of legislative intent. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). When the Legislature exercises its authority to modify the common law, "it should speak in no uncertain terms." *Id.* Further, legislative amendment of the common law is not lightly presumed. *Wold*, *supra* at 233. Finally, statutory interpretation is an

issue of law that is reviewed de novo. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004).

B. ANALYSIS

The common law imposes on all persons a general obligation to refrain from engaging in negligent conduct—to act reasonably in light of the apparent risk to others. See *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). It does not, however, normally obligate one person to protect another from third parties. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988).[1] But a duty to protect another from harm caused by a third person may arise from "a 'special relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury." *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). One such special relationship is the one between a psychiatrist and a patient, which gives rise to "a duty of reasonable care to a person who is foreseeably endangered by [the psychiatrist's] patient." *Davis v Lhim*, 124 Mich App 291, 301; 335 NW2d 481 (1983), rev'd on other grounds sub nom *Canon v Thumudo*, 430 Mich 326 (1988). Hence, under the common law, "when a psychiatrist determines or, pursuant to the standard of care of his profession, should determine that his patient poses a serious danger of violence to a readily identifiable person, the psychiatrist has a duty to use reasonable care to protect that individual against danger." *Lhim*, *supra* at 305.

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[1] The distinction is one of nonfeasance, or failing to intervene, versus misfeasance, which is actively setting events in motion that lead to the harm. *Williams*, *supra* at 498.

With the enactment of MCL 330.1946(1), our Legislature modified this common-law duty to protect third parties:

> If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in [MCL 330.1946(2)]. Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person.

With this statute, the Legislature accomplished two things: it established a statutory duty for mental-health professionals to warn or protect others on the basis of the mental-health professional's relationship with certain patients, and it abrogated any common-law duty to warn or protect third parties from these patients except as provided under the statute.

The first sentence of MCL 330.1946(1) establishes a statutory duty for mental-health professionals to warn or protect third parties. Under this provision, a mental-health professional has a duty to take the steps listed under MCL 330.1946(2) if (1) the mental-health professional is treating a patient, (2) the patient communicates to the mental-health professional (3) a threat of physical violence (4) against a reasonably identifiable third person, and (5) the "recipient" has the apparent intent and ability to carry out the threat in the foreseeable future. Further, the second sentence clearly provides that, except as provided by the first sentence, a mental-health professional does not have a duty "to warn a third person of a threat as described in this subsection or protect the third person." MCL 330.1946(1). Hence, the second sentence abrogates a

mental-health professional's common-law duty to warn or protect third persons from dangerous patients. But, by referring to the threats described under the first sentence and noting that the mental-health professional does not have a duty to warn of those threats or otherwise protect "*the* third person" threatened "as described," the Legislature limited application of MCL 330.1946(1) to those instances involving patients who meet the criteria described under the first sentence.

In 1995, the Legislature amended MCL 330.1946 to change the third use of the word "patient" in sentence one to "recipient." See 1995 PA 290. All other references to "patient" in the statute were left unaltered. The term "recipient" is defined to mean "an individual who receives mental health services from the department, a community mental health services program, or a facility or from a provider that is under contract with the department or a community mental health services program." MCL 330.1100c(12). Not all patients of mental-health professionals will qualify as recipients, see *Saur v Probes*, 190 Mich App 636, 641; 476 NW2d 496 (1991) (construing former MCL 330.1700, which defined "recipient" in a substantially similar way to present MCL 330.1100c[12]). Hence, the duty imposed under the first sentence of MCL 330.1946(1) applies only to mental-health professionals who are treating patients who are also "recipients" within the meaning of MCL 330.1100c(12). Accordingly, the second sentence necessarily only modified the common-law duties applicable to mental-health professionals who are treating recipients.

In the present case, there is no evidence that Brooks was a recipient within the meaning of MCL 330.1100c(12) during the period defendants treated him. Because Brooks was not a recipient, MCL

330.1946(1) did not modify defendants' common-law duty to protect third parties from Brooks. Consequently, MCL 330.1946(1) did not abrogate or modify plaintiff's common-law claim.

Even if MCL 330.1946(1) could be said to apply to all patients, even those patients who do not qualify as recipients, by its own terms, MCL 330.1946(1) only modifies a mental-health professional's common-law duty to warn or protect third parties from the acts of others. It does not apply to a mental-health professional's duty to refrain from harming a third party through his or her own negligent acts—even where the ultimate harm is perpetrated by the mental-health professional's patient. See *Williams*, *supra* at 498 (noting that courts have made a distinction between "misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm"). As already noted, all persons have a common-law duty to refrain from actively endangering others by their conduct. *Moning*, *supra* at 437. This includes actions that foreseeably lead to the infliction of harm by others against a third party. See *Davis v Thornton*, 384 Mich 138; 180 NW2d 11 (1970) (holding that the defendant may be liable for the harms inflicted by a group of minors who stole defendant's car after he left the car unlocked with the keys inside); *Ross v Glaser*, 220 Mich App 183; 559 NW2d 331 (1996) (holding that a father may be civilly liable for a murder committed by his son, who had a history of mental illness, where the father provided a loaded gun to his son while the son was in an agitated state); *Pamela L v Farmer*, 112 Cal App 3d 206, 209-211; 169 Cal Rptr 282 (1980) (stating that a wife, who knew that her husband had a history of molesting children, could be liable for placing minors in danger by encouraging them to use her home and swimming pool while she was at work and

her husband was home alone); *Bryson v Banner Health Sys*, 89 P3d 800, 804-805 (Alas, 2004) (recognizing that a treatment provider may be liable for placing a known rapist into a therapy group with a woman and then encouraging them to interact outside group therapy). Under the majority's interpretation of MCL 330.1946(1), except to the extent provided by MCL 330.1946(1), a mental-health professional would have no common-law duty to refrain from negligently placing another in danger of harm at the hands of that mental-health professional's patients. Thus, a psychiatrist would have no duty to refrain from leaving his keys in his unlocked car for a patient to steal, see *Thornton*, *supra*, to refrain from giving a loaded weapon to an agitated patient, see *Ross*, *supra*, to refrain from encouraging minors to associate with a pedophile patient, see *Pamela L*, *supra*, or from placing a known rapist-patient into group therapy with a woman and then encouraging her to associate with the rapist-patient outside group sessions, *Bryson*, *supra*. I cannot give MCL 330.1946(1) such a broad interpretation. Rather, I conclude that MCL 330.1946(1) does not abrogate a mental-health professional's duty to refrain from *actively* placing a third party in danger of harm at the hands of the mental-health professional's patients.

C. CONCLUSION

Because MCL 330.1946 does not apply to patients such as Brooks, who are not also recipients, and does not affect a mental-health professional's common-law duty to refrain from actively placing another in danger of harm at the hands of a patient, plaintiff's claim that defendants breached their duty to properly provide plaintiff with a safe clinical environment for her treatment remained viable. Consequently, I conclude that

the trial court did not err when it refused to grant defendants' requests for relief premised on the theory that they had no common-law duty to protect plaintiff beyond that imposed by MCL 330.1946. Because my resolution of this issue is not dispositive of the appeal, I will address the remaining issues raised by the parties.

II. DIRECTED VERDICT OF THE STATUTORY DUTY TO WARN

Defendants argue that the trial court erred when it declined to grant defendants' motions for a directed verdict and judgment notwithstanding the verdict (JNOV) of plaintiff's claim under MCL 330.1946. This Court reviews de novo a trial court's decisions regarding a party's motions for directed verdict and JNOV. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005).

As already noted, I believe that MCL 330.1946 only applies to patients who are also recipients. Because Brooks was not a recipient, defendants had no duty to warn or protect plaintiff under MCL 330.1946. For that reason, I agree that the trial court should have granted defendants' motion for a directed verdict on that theory of liability. However, because this error was harmless, I conclude that it does not warrant a new trial.

Plaintiff originally sued under two separate theories of liability: statutory liability for failure to warn under MCL 330.1946 and common-law medical malpractice for failure to warn. However, at trial, plaintiff argued that defendants were liable because they breached the professional standard of care by failing to provide a safe clinical environment for plaintiff's treatment. To this end, most of the testimony and evidence presented at trial dealt with the behavior and symptoms exhibited by Brooks and how defendants responded to those behaviors and symptoms. Indeed, plaintiff's counsel spent the majority of his closing argument discussing the evi-

dence that Brooks had a serious mental disorder and, as a result, should never have been assigned to group therapy.

In addition, although plaintiff presented MCL 330.1946 as a separate theory supporting liability, the trial court did not instruct the jury that a breach of the duty imposed by MCL 330.1946 could alone support a verdict against defendants. Instead, the trial court instructed the jury that, "[i]f you find that any of the Defendants violated this statute before or at the time of the occurrence, such violation is evidence of negligence which you should consider, together with all of the evidence, in deciding whether the Defendant was negligent." Further, the trial court instructed the jury that "professional negligence or malpractice" means "the failure to do something which a psychiatrist of ordinary learning, judgment or skill in this community or a similar one would do, or the doing of something which is—a psychiatrist of ordinary learning, judgment or skill would not do under the same or similar circumstances you find to exist in this case." Hence, the only theory of liability before the jury was medical malpractice. Nevertheless, because the duty imposed by MCL 330.1946 did not apply to the facts of this case, the trial court erred when it instructed the jury that it could consider a breach of this statute to be evidence that defendants were negligent.

On appeal, defendants argue that, if this Court concludes that the jury should not have been instructed on MCL 330.1946, this Court must grant defendants a new trial because "it cannot be known whether the jury awarded damages based on the unsupported statutory claim . . . ." I do not agree. The trial court did not instruct the jury on separate theories of liability. Hence, defendants' reliance on authorities discussing the erro-

neous submission of a claim on a general verdict form is inapposite. See *Tobin v Providence Hosp*, 244 Mich App 626; 624 NW2d 548 (2001), and *Berwald v Kasal*, 102 Mich App 269; 301 NW2d 499 (1980). Instead, the relevant inquiry is whether the trial court's erroneous instruction caused defendants such unfair prejudice that it would be "inconsistent with substantial justice" to refuse to grant defendants a new trial. *Ward v Consolidated R Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005); MCR 2.613(A). Because the overwhelming evidence supported plaintiff's medical malpractice claim and there was little evidence involving plaintiff's claim under MCL 330.1946, I cannot conclude that this instruction caused defendants unfair prejudice.

In his video trial deposition, Dr. Mark Fettman, who is plaintiff's psychiatric expert, testified that a psychiatrist has a duty to take reasonable precautions for the protection of patients. Included within this duty is the requirement that the psychiatrist assess a patient to determine if the patient is a suitable candidate for group therapy before placing him or her into a group. Once a patient has been placed in group therapy, the psychiatrist has a further duty to continually assess the patient to ensure that the patient remains suitable for group therapy. Consistent with this testimony, plaintiff's proofs largely consisted of evidence concerning what defendants knew or should have known about Brooks's mental health and how defendants used that information.

Testimony and records submitted to the jury established that Brooks was institutionalized after he attempted suicide in 1992. Dr. Joseph Gluski testified that Brooks was referred to his practice after Brooks left the group home. Gluski stated that he treated Brooks from April 1994 to October 1995. Gluski testified that Brooks

was on antipsychotic medications when he arrived at the practice and that he determined that Brooks should remain on antipsychotic medications during treatment. Gluski acknowledged that he wrote in Brooks's chart that Brooks had mentally slipped back into 1992, which was the year he tried to commit suicide, around the time that he ceased taking his medications. Gluski also testified that Brooks appeared to misunderstand how he was being treated in group therapy and thought that the others were conspiring against him. Gluski stated that Brooks abruptly stopped treatment in October 1995.

Gluski also described two incidents with Brooks returning to his office after treatment was over. Gluski testified that in the summer of 1996, Brooks called and asked to have a meeting with Gluski and Anika Kirby, the therapist who led Brooks's group therapy sessions. At the meeting, Brooks asked questions about Kirby's ethnic background, which was Finnish. Brooks had even brought a map of Finland with him.

Gluski further testified about an incident that occurred in the summer of 1997 or 1998.[2] Gluski testified that Brooks barged into his office before normal office hours and began searching the office for Kirby. Gluski stated that Brooks seemed agitated and thought he might get physical. Gluski testified that Brooks seemed furious and made comments about his treatment in group therapy. Gluski left the office and walked to a nearby restaurant, but Brooks followed him and did not leave until Gluski called the police. Gluski acknowledged that the police report indicated that Gluski told the officer that Brooks had said, "You better run." The report also indicated that Brooks told him, "I want to get your partner."

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[2] Gluski stated that he recalled that it occurred in 1997, but the associated police report was dated July 1, 1998.

Gluski testified that, after Brooks began treating with defendants, Reuvan called about Brooks. Gluski said he told Reuvan about the incidents with Brooks and warned him that Brooks was dangerous. Gluski said he also told Reuvan that, if Reuvan decided to treat Brooks, Brooks should be in individual treatment for one full year and needed to be on medication. Gluski stated that he was so concerned about the situation that he called Reuvan the next day to reiterate that Reuvan should be careful.

In addition to Gluski's testimony, plaintiff presented evidence that, on October 19, 1998, Brooks came to defendants' office and told Joseph Froslie, who was a therapist at the practice, that he had obtained a gun and driven to New Hampshire with an intent to kill his ex-girlfriend's mother and then commit suicide. In response to this revelation, Froslie asked Brooks to bring the gun into the office, which Brooks did. After Brooks brought the gun to the office, Froslie contacted Dr. Leora Bar-Levav (Leora), who was Reuvan's daughter and also a psychiatrist at Reuvan's practice. Leora performed a general mental-status examination of Brooks. Although Leora prescribed a two-week supply of medication after this incident and claimed to have performed further assessments of Brooks, the jury heard evidence that these subsequent assessments were not documented and that no one at defendants' practice recalled ever having a specific discussion about Brooks. Hence, the jury could have concluded that no other steps were taken to ensure that Brooks was not a danger to himself or others. Notwithstanding these prior incidents, in December 1998, Reuvan decided to place Brooks in group therapy. Testimony established that Reuvan made the decision after consulting with the other staff members.

Froslie testified that Brooks exhibited some narcissistic behavior and also had disturbances in social functioning. James Stanislaw, another group therapist at the practice, testified that Brooks had some symptoms that were consistent with paranoid schizophrenia, including confused thinking and suspiciousness, and that he was not always appropriate or responsive in group therapy. Froslie also indicated that Brooks sometimes did not appear to understand the group therapy process. Brooks was finally discharged from the practice in March 1999 after Reuvan prescribed medication to Brooks, which Brooks refused to take.

This evidence is compelling proof that defendants knew or should have known that Brooks posed a danger to the other patients in his therapy group and, therefore, should not have been placed in the group. In contrast, the evidence tending to support plaintiff's claim under MCL 330.1946 was limited. Hence, it is not likely that the jury relied on a purported violation of MCL 330.1946 to conclude that defendants breached the standard of care. Furthermore, the testimony concerning threats was relevant to the underlying medical malpractice claim, even though the evidence was inadequate to establish the existence of a duty imposed under MCL 330.1946, because the threatening behavior is additional evidence from which a jury could conclude that defendants failed to continually assess whether Brooks should be in group therapy. Yet, by instructing the jury that it could only consider threats under MCL 330.1946 as evidence of negligence, the jury may have concluded that it could not consider the fact that Brooks expressed threatening feelings unless those threats constituted a violation of MCL 330.1946. Hence, the instruction may have benefited defendants' case. For this reason, I would conclude that the erroneous in-

struction did not prejudice defendants and that a new trial is not warranted on that basis. *Ward*, *supra* at 84.

III. COMMON-LAW DUTY AND PROXIMATE CAUSE

Defendants also argue that Brooks's criminal conduct was not foreseeable. Because Brooks's conduct could not be foreseen, defendants had no duty to protect plaintiff and any failures on their part were not the proximate cause of plaintiff's injuries. For these reasons, defendants further argue, as a matter of law, they cannot be held liable for plaintiff's injuries. Again, I would disagree.

A. STANDARD OF REVIEW

Whether defendants owed a duty to plaintiff is a question of law, which this Court reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

B. DEFENDANTS' PROFESSIONAL DUTY TO PLAINTIFF

It is well established that a "negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). " 'Duty' comprehends whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct; it does not include—where there is *an* obligation—the nature of the obligation: the general standard of care and the specific standard of care." *Moning*, *supra* at 437. Courts will traditionally examine various competing policy factors in determining whether a duty should be imposed. These include: " ' "the relationship of the par-

ties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." ' " *In re Certified Question from the Fourteenth District Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007), quoting *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004), quoting *Murdock*, *supra* at 53. For purposes of duty, a risk is foreseeable if a reasonable person could anticipate that a particular event would occur and that the event posed a risk of injury or harm to a person or property. *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975).

In cases involving a traditional relationship between a medical professional and a patient, the law imposes a duty on the medical professional to treat the patient within the standard of care generally applicable to medical professionals. See *Dyer*, *supra* at 49-50. It is undisputed that defendants had an established psychiatrist-patient relationship with plaintiff. Given this relationship, defendants generally owed a duty to treat plaintiff within the standard of care applicable to medical professionals. *Id*. Hence, defendants were required to " 'exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science.' " *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 424; 684 NW2d 864 (2004), quoting *Adkins v Annapolis Hosp*, 116 Mich App 558; 323 NW2d 482 (1982); see also MCL 600.2912a (codifying the standard of care).

At some point in the course of plaintiff's treatment, defendants made the decision to treat plaintiff with group therapy and specifically to include Brooks in plaintiff's group. The decision to pursue a particular course of treatment involves considerations of professional medical judgment that implicate defendants'

duty to provide proper medical care to plaintiff. See *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46-47; 594 NW2d 455 (1999). In the group therapy setting, it is foreseeable that a patient who is not mentally healthy enough to participate in group therapy may be or become a danger to the other members of the group. Because plaintiff was among the class of persons who could foreseeably be harmed by defendants' decision to place Brooks in group therapy, as a matter of law, defendants owed plaintiff a duty to act within the applicable standard of care. See *Moning*, *supra* at 439 (noting that a duty will not be imposed unless "it is foreseeable that the actor's conduct may create a risk of harm to the victim"). Thus, a mental-health professional's duty to treat a patient within the applicable standard of care includes a duty to take reasonable steps to ensure the safety of its patients during treatment. This includes a duty to take reasonable steps to ensure that the patients placed in group therapy do not pose a danger to the other members of the group. Although it is for the court to decide questions of duty,[3] "the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including . . . whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable." *Id.* at 438.

[3] Under some circumstances, whether a defendant owes a duty to the plaintiff will turn on factual findings. In those cases, the jury must make the necessary factual findings. See *MacDonald v PKT, Inc*, 464 Mich 322, 339; 628 NW2d 33 (2001) (noting that the plaintiff presented sufficient factual evidence from which a jury could conclude that plaintiff was a member of the class of persons to which the landlord owed a duty, but concluding that defendant satisfied its duty by having the police present); *Bonin v Gralewicz*, 378 Mich 521, 527-528; 146 NW2d 647 (1966) (noting that whether the defendant had knowledge that there was a foreseeable risk of harm to others was a question of fact for the jury).

Accordingly, it was for the jury to decide whether defendants' decision to place Brooks in group therapy with plaintiff fell below the general standard of care applicable to medical professionals and whether that decision was the cause of plaintiff's injuries.

C. FORESEEABILITY AS AN ELEMENT OF PROXIMATE CAUSE

In order to prevail in an ordinary negligence action, the plaintiff must also prove that the defendant's breach of duty proximately caused the plaintiff's injuries. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Likewise, in a medical malpractice action, the plaintiff must prove that the defendant's breach of the applicable standard of care proximately caused the plaintiff's injuries. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Unless reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, proximate cause is a question for the jury. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). Proximate cause entails proof of two separate elements: (1) cause in fact and (2) legal or proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. [*Id.* at 163 (citations omitted).]

In the present case, the "cause in fact" element is not in dispute. Rather, defendants argue that plaintiff failed to prove proximate cause as a matter of law. Specifically,

defendants contend that criminal acts are not foreseeable and that Brooks's criminal acts in particular were too remote in time from defendants' alleged breach to constitute a proximate cause of plaintiff's injuries.

In order for negligence to be the legal or proximate cause of an injury, " 'the injury must be the natural and probable consequence of a negligent act or omission, which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as a result of his negligent act.' " *Paparelli v Gen Motors Corp*, 23 Mich App 575, 577; 179 NW2d 263 (1970), quoting *Nielsen v Henry H Stevens, Inc*, 368 Mich 216, 218; 118 NW2d 397 (1962). There may be more than one proximate cause of an injury. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401-402; 571 NW2d 530 (1997). "When a number of factors contribute to produce an injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury." *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988).

With regard to proximate cause, defendants argue that criminal acts are not foreseeable as a matter of law. However, courts in Michigan have long recognized that criminal acts by third parties can be foreseeable. See *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 415; 189 NW2d 286 (1971) (stating that, whether the defendant employer knew or should have known of its employee's dangerous propensities and, therefore, should be held liable for the employee's criminal assault, was a question for the jury); *Samson*, *supra* at 407-408, 409 (stating that whether the criminal acts of a patient-visitor to the landlord's premises were foreseeable was properly a jury question); *Thornton*, *supra* at 149 (stating that reasonable people might conclude that the

defendant's act of leaving his keys in an unlocked car, which was later stolen and involved in an accident, was "not too remote a cause of the plaintiff's injuries and that the joyrider's intervention did not sever that causal connection"); *Ross*, *supra*. Further, although the length of time between the shooting and Brooks's departure from defendants' care is relevant to whether defendants' placement of Brooks in plaintiff's group constituted a proximate cause of plaintiff's injuries, it is not dispositive. See *Michigan Sugar Co v Employers Mut Liability Ins Co of Wisconsin*, 107 Mich App 9, 15; 308 NW2d 684 (1981) ("Lapse of time does not foreclose the cause of an injury from being its proximate cause."). Plaintiff presented evidence that defendants knew or should have known that Brooks would form improper emotional attachments to persons in his group therapy and that he might seek out those persons long after the termination of his participation in the group. Given this evidence, a reasonable jury could conclude that defendants' breach of the standard of care foreseeably included the possibility that Brooks would return long after the conclusion of his participation in group therapy and harm persons with whom he formed these attachments. Therefore, the lapse of time alone was insufficient to render Brooks's actions unforeseeable as a matter of law. *Id*. Because a reasonable jury could conclude that defendants proximately caused plaintiff's injury by placing Brooks in the therapy group or by failing to take reasonable precautions to protect plaintiff from Brooks, the trial court did not err in refusing to grant defendants' motion for JNOV on this basis. *Nichols*, *supra* at 532.

IV. IMPROPER TESTIMONY CONCERNING DEFENDANTS' DUTY TO BROOKS

Defendants next argue that the trial court improperly permitted plaintiff to present evidence that defen-

dants breached their duty to treat Brooks within the applicable standard of care. I find no merit to this argument.

Plaintiff did not present evidence or argue that defendants failed to properly treat Brooks. Plaintiff presented evidence that Brooks had symptoms and exhibited behavior that indicated that Brooks was not suitable for group therapy. Plaintiff further presented evidence that Brooks was placed in group therapy without first requiring him to go through a lengthy period of individual treatment and taking proper medication. Although this evidence permits an inference that defendants failed to properly treat Brooks, the evidence was relevant to plaintiff's theory of the case. MRE 401; MRE 402. Therefore, there was no error.

V. GREAT WEIGHT OF THE EVIDENCE

Defendants next argue that the verdict against Dr. Leora Bar-Levav was against the great weight of the evidence. Again, I disagree.

This Court reviews a trial court's denial of a motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). In deciding whether to grant a motion for a new trial, the trial court's function is to "determine whether the overwhelming weight of the evidence favors the losing party." *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). In reviewing the trial court's decision, this Court will give substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Id.*

At trial, Fettman testified that the applicable standard of care required defendants to take steps to ensure that

the clinical environment was safe for plaintiff's treatment. Fettman stated that this required defendants to assess Brooks's suitability for group therapy before placing him in a therapy group and to continually assess him thereafter to determine whether he remained suitable for group therapy. Fettman testified that defendants breached the standard of care by placing Brooks in a therapy group when there were clear signs that he was not suitable for group therapy and by failing to continually assess and communicate about Brooks's continued suitability for group therapy.

Although Fettman indicated that he understood the evidence to show that Reuvan had the final decision regarding the placement of Brooks in group therapy, there was testimony that this decision was made after receiving input from all the staff members. The jury also heard evidence that Leora performed the assessment of Brooks after he disclosed that he had traveled to New Hampshire to kill his ex-girlfriend's mother. There was also evidence that suggested that Leora failed to make any subsequent assessments. Finally, evidence indicated that Leora participated in several of Brooks's group therapy sessions and yet failed to make any of the continuing assessments that Fettman testified would be required with a patient like Brooks.

From this evidence, a reasonable jury could conclude that Leora did participate to some extent in the decision to place Brooks in group therapy. A reasonable jury could also conclude that Leora breached the standard of care by failing to perform additional assessments of Brooks after the gun incident and by failing to continually reevaluate whether Brooks should be in group therapy. Finally, a reasonable jury could conclude that these breaches of the standard of care proximately caused plaintiff's injuries.

Given this evidence, I cannot conclude that the trial court abused its discretion by declining to grant defendants' motion for a new trial on the basis that the verdict against Leora was not against the great weight of the evidence.

VI. TESTIMONY CONCERNING BROOKS'S MANUSCRIPT

Defendants next argue that the trial court improperly permitted plaintiff's counsel to make remarks and present testimony concerning papers sent by Brooks to Reuvan. Defendants further contend that those remarks and testimony were prejudicial and warrant a new trial. I disagree. Even if the trial court properly determined that these papers should be excluded from evidence, the few references made to them at trial did not prejudice defendants. Therefore, a new trial is not warranted on this basis.

Before trial, defendants moved in limine to preclude plaintiff from eliciting testimony about or referring to a document that the parties referred to as the "manuscript." The manuscript contained Brooks's ramblings about Reuvan's therapy techniques and Brooks's belief that his therapists "used" him to benefit the other members of the therapy group. In the manuscript, Brooks wrote about his desire to seek revenge, but did not directly threaten any one person or group. Brooks mailed the manuscript to Reuvan one day before the shooting. In their motion, defendants argued that evidence and arguments concerning the manuscript should be precluded because the manuscript was not relevant. Specifically, defendants noted that the manuscript arrived after Brooks's placement in group therapy and contained no threat within the meaning of MCL 330.1946. Defendants also contended that there was no evidence that Reuvan read it. For these reasons,

defendants argued, it could not be used to support any of plaintiff's claims and should not be referred to or admitted into evidence. The trial court denied defendants' motion in limine.

At trial, defendants again moved to have the manuscript excluded. The trial court agreed that the manuscript was not relevant and also concluded that it was more inflammatory than probative. Therefore, the trial court excluded the manuscript. In addition, the trial court precluded plaintiff's counsel from asking any questions about the manuscript.

Although the trial court excluded the manuscript, plaintiff's counsel had already commented on the manuscript during his opening statement. Specifically, plaintiff's counsel stated that Brooks sent

> a manuscript, priority mail, addressed to Dr. Bar-Levav. It was received the next day. Maria Attard will tell you she handed the package to Dr. Bar-Levav. She's unsure if she opened it or he opened it, but she is certain of one thing, nobody reads his mail but him.
>
> At a later point in the day, Dr. Bar-Levav gave the manuscript back to Maria and said he's [sic] read it over the weekend. The defendants will tell you that Dr. Bar-Levav didn't have any idea what was inside the package. However, before the shooting took place, Mr. Baker will tell you that he recalls hearing that a manuscript had been received and he was advised that it was a confused document based on something Brooks had read in Dr. Bar-Levav's book.
>
> This is not something he was advised of in a formal meeting, Mr. Baker will tell you, but there was a buzz around the office, people were talking about the manuscript. What was in this manuscript, all the experts agree, is a very troubled, very confused writing that demonstrated a psychotic episode. The manuscript talks about revenge. The manuscript talks about Brooks feeling that he was being used in therapy.

Plaintiff's counsel also stated that defendants "failed to warn [plaintiff] that Brooks had made threats against her group after receiving the manuscript . . . ."[4]

After the trial court's ruling to preclude testimony concerning the manuscript, there were two brief references to the manuscript. First, a witness who testified by deposition referred to the timing of the arrival of the package. Second, plaintiff's counsel referred to the fact that the manuscript had not been submitted to the jury. He stated:

> But you may have a question in your mind, where['s] the manuscript, and you have heard reference throughout the trial, but it hasn't come into evidence.
>
> Those are the decisions, as the Judge instructed you at the beginning, he's going to tell you at the end, were made outside of your presence, and that's without respect to whether or not an attorney or myself wanted to actually present this certain evidence. For legal reasons, sometimes it doesn't come into evidence. You can't hold that against us. And at the time when we thought it was coming in, we told you you were going to see it, but that changed. But as the Judge will tell you, if he makes certain decisions on things, its not to be held against the attorneys.

On appeal, defendants argue that these references to the manuscript prejudiced defendants and warrant a new trial. However, defendants did not object to plaintiff's opening or closing remarks. Further, when redacting the deposition testimony of the witness at issue, defendants' counsel specifically asked to have certain references to the manuscript removed, which the trial court granted. But defendants' counsel did not object to

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[4] Plaintiff's counsel also noted that if the jury found that there was "no duty to warn about the manuscript," but nevertheless concluded that defendants had a "duty to keep the clinic safe, then you must enter a decision of negligence."

or request a redaction of the deposition testimony cited on appeal. Hence, these claims of error are unpreserved.

An error in the admission or exclusion of evidence "will not warrant appellate relief 'unless refusal to take this action appears . . . inconsistent with substantial justice,' or affects 'a substantial right of the [opposing] party.' " *Craig*, *supra* at 76, quoting MCR 2.613(A) and MRE 103(a). Unpreserved claims that an attorney committed misconduct are analyzed to determine whether the conduct " 'may have caused the result or played too large a part and may have denied a party a fair trial.' " *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501; 668 NW2d 402 (2003), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982).

The brief mention of the manuscript that was not redacted from the deposition testimony could not have affected the jury's verdict. Therefore, even if it were plain error to permit its submission to the jury, it would not warrant any relief. MCR 2.613(A). Likewise, taken as a whole, plaintiff's attorney's remarks were minimally prejudicial and could not have had a controlling influence on the verdict. *Wiley*, *supra* at 505. Furthermore, the trial court instructed the jury that the attorneys' comments were not evidence. This instruction cured any minimal prejudice that these comments may have had. *Tobin*, *supra* at 641. There was no error warranting the requested relief.

VII. THE APPLICABLE DAMAGES CAP

Finally, defendants argue that the trial court erred when it applied the damages cap imposed by MCL 600.1483 that was in effect on the date that the trial court entered the judgment against defendants rather than the cap in effect on the date plaintiff filed her suit. I disagree.

The amount of the cap applicable to an award of noneconomic damages is a matter of statutory interpretation that this Court reviews de novo. See *Shinholster*, *supra* at 548.

MCL 600.1483(1) limits the total amount of noneconomic damages that may be recovered by all plaintiffs as a result of negligence arising out of an action alleging medical malpractice. The cap was initially set at $280,000 for injuries, such as those at issue in this case, that do not meet the exceptions stated under MCL 600.1483(1)(a) to (c). However, under MCL 600.1483(4), the state treasurer is required to adjust this amount annually to reflect changes in the consumer price index. Although the statute provides for the annual adjustment of the cap, it does not address how this adjustment affects suits that are pending but have not yet been reduced to judgment.

In examining the applicability of the damages cap to wrongful death actions arising from medical malpractice, our Supreme Court noted that "[o]nly after the court or jury has, in its discretion, awarded damages as it considers fair and equitable does the court, pursuant to [MCL 600.6304(5)], apply the noneconomic damages cap of [MCL 600.1483]." *Jenkins v Patel*, 471 Mich 158, 172; 684 NW2d 346 (2004), citing MCL 600.6098(1) and MCL 600.6304(5). The Court further noted that the damages cap does not impinge on the jury's right to determine the amount of damages, but rather only limits the legal consequences of the jury's finding by limiting the amount of the judgment on the verdict. *Id.* at 173. Hence, our Supreme Court recognized that the cap only applies to a judgment rendered after a verdict. Because the cap applies to judgments, it follows that the amount of the cap is the amount in effect on the date the judgment is entered. See *Wessels v Garden Way, Inc*,

263 Mich App 642, 652-654; 689 NW2d 526 (2004) (holding that the cap applicable to product liability actions is determined by the date of the judgment).

The trial court did not err in applying the 2005 cap.

VIII. CALCULATION OF PREJUDGMENT INTEREST

On cross-appeal, plaintiff argues that the trial court did not properly calculate plaintiff's prejudgment interest. I agree.

This Court reviews de novo questions of statutory interpretation such as the proper application of MCL 600.6013 and MCL 600.1483. *Shinholster*, *supra* at 548.

When rendering its verdict, the jury had to make specific findings of fact regarding the amount of past economic damages, past noneconomic damages, future economic damages, and future noneconomic damages for plaintiff. MCL 600.6305(1). Future damages are defined to be "damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made . . . ." MCL 600.6301(a). Noneconomic damages are defined as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss." MCL 600.1483(3). In the present case, the jury found that plaintiff suffered a total of $600,000 in past medical expenses[5] and $400,000 in past noneconomic damages. The jury also found that plaintiff would suffer $1,040,000 in future noneconomic damages. The verdict form did not provide for future economic damages.

Once the jury awarded damages, plaintiff was entitled to interest on her money judgment. MCL 600.6013(1). Although MCL 600.6013(8) provides that

[5] This amount was reduced by the trial court to $44,338.28, which was the amount of medical expenses for which plaintiff presented evidence at trial.

interest "is calculated on the entire amount of the money judgment, including attorney fees and other costs" from the filing of the complaint, MCL 600.6013(1) specifically excludes interest "on future damages from the date of filing the complaint to the date of entry of the judgment." Hence, under a plain reading of MCL 600.6013, plaintiff would normally be entitled to interest on the full amount of her past noneconomic damages. However, in a medical malpractice action, the trial court is required to reduce an award of damages to "the amount of the appropriate limitation set forth in [MCL 600.1483]." MCL 600.6304(5). Under MCL 600.1483(1), the total noneconomic damages recoverable by plaintiff could not exceed $371,800. Because the jury found that plaintiff suffered more than $1.4 million in total noneconomic damages, the trial court had to reduce the total award for noneconomic damages to $371,800. By its plain terms, MCL 600.1483(1) applies to "the total amount of damages for noneconomic loss recoverable by all plaintiffs . . . ." However, the Legislature failed to address how MCL 600.1483(1) should be applied to separate awards of past and future noneconomic damages. This legislative silence poses no problem in cases where the jury finds either past or future noneconomic damages but not both, or where the combined total of past and future noneconomic damages does not exceed the applicable cap.[6] However, where the jury finds both past and future noneconomic damages whose combined total

[6] In cases where the jury finds only past noneconomic damages, the plaintiff would clearly be entitled to prejudgment interest on the full amount. MCL 600.6013(1). Likewise, in cases where the jury finds only future noneconomic damages, the plaintiff would clearly not be entitled to any prejudgment interest on that amount. *Id.* Finally, where a jury finds both past and future noneconomic damages, but the combined total does not exceed the cap provided by MCL 600.1483, the trial court would

exceeds the cap provided by MCL 600.1483, it becomes essential to a proper determination of prejudgment interest under MCL 600.6013(1) to first determine how the cap applies to the individual awards of past and future noneconomic damages.

Because MCL 600.1483 and MCL 600.6013 both relate to the trial court's entry of a judgment after a jury renders a verdict, they must be read together as though constituting one law. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Nevertheless, it is clear that the statutes serve distinct purposes. The Legislature enacted MCL 600.1483 to control increases in health care costs by limiting the liability of medical care providers. *Zdrojewski v Murphy*, 254 Mich App 50, 80; 657 NW2d 721 (2002). This purpose is accomplished by *limiting* the amount of compensation that a plaintiff may obtain for noneconomic damages. In contrast, MCL 600.6013 serves two purposes: (1) to compensate the prevailing party for the loss of the use of funds awarded as a money judgment and for the costs of bringing a court action and (2) to provide an incentive for prompt settlement. *Old Orchard by the Bay Assoc v Hamilton Mut Ins Co*, 434 Mich 244, 252-253; 454 NW2d 73 (1990), overruled on other grounds by *Holloway Constr Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608, 615-616 (1996). With regard to the latter purpose, our Supreme Court explained that the "award of statutory prejudgment interest . . . serves a distinct deterrent function by both encouraging settlement at an earlier time and discouraging a defendant from delaying litigation solely to make payment at a later time." *Old Orchard*, *supra* at

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not reduce either the past or future economic damages and the plaintiff would be entitled to prejudgment interest on the full amount of the past noneconomic damages.

253. These purposes are accomplished under MCL 600.6013 by *increasing* the costs that a defendant will have to pay if the plaintiff prevails. Although these statutes appear to conflict, they can be construed together in a way that substantially preserves the purpose of each.

It must be noted that MCL 600.1483 does not limit all forms of compensation that a defendant may be required to pay after a verdict in favor of the plaintiff. The statute does not limit economic damages and does not purport to limit interest, attorney fees, or other costs. In contrast, MCL 600.6013 clearly requires compensation in the form of interest on the entire amount of the money judgment, which excludes future damages, but includes attorney fees and other costs. See MCL 600.6013(8). Thus, MCL 600.6013 has broader application than MCL 600.1483. Further, application of the cap provided by MCL 600.1483 directly and substantially affects the compensatory and deterrent effects of MCL 600.6013, while application of MCL 600.6013, which is based on the total damages, attorney fees, and costs, only indirectly affects the purpose of MCL 600.1483. Therefore, absent any guidance from the statutory language, I conclude that MCL 600.1483 should be construed in a way that minimizes its overall effect on a plaintiff's ability to receive the compensation required by MCL 600.6013. See *Denham v Bedford*, 407 Mich 517, 528-529; 287 NW2d 168 (1980) (examining a prior version of MCL 600.6013 and noting that the prejudgment interest statute is remedial and entitled to liberal interpretation).

In the present case, the trial court determined that plaintiff would not be entitled to prejudgment interest on the full amount of the capped noneconomic damages award. Instead, the trial court determined that plaintiff

would be entitled to interest on that portion of the capped damages equal to the ratio of past noneconomic damages to future noneconomic damages found by the jury. Applying this formula to the $371,800 noneconomic damages cap, the trial court concluded that $140,949.38 of the capped amount represented past noneconomic damages and $230,850.62 represented future noneconomic damages.

Although this solution appears equitable on its face, it is clear from its application that it significantly undermines the remedial purposes of MCL 600.6013. Future damages include damages for harm that a plaintiff will suffer during his or her remaining life. See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 469; 633 NW2d 418 (2001); MCL 600.6305(2). Further, future damages are reduced to a present cash value and payable with the judgment. MCL 600.6306(1). Hence, a plaintiff will invariably receive timely compensation for his or her future losses. In contrast, past damages reflect losses that the plaintiff has already incurred and for which he or she has not yet received any compensation. Yet, under the trial court's method, plaintiff would receive less compensation for the injuries she has already suffered solely on the basis that she would at some point in the future suffer further losses. Indeed, on this basis, the trial court more than halved the amount of interest to which plaintiff was entitled under MCL 600.6013(1) for her past damages. This method of applying MCL 600.1483 defeats the purpose of MCL 600.6013 without substantially furthering the purposes of the damages cap.

This problem can be avoided only by construing MCL 600.1483 in such a way as to minimize its effect on the application of MCL 600.6013. Hence, I construe MCL 600.1483(1) to reduce future noneconomic damages

before past noneconomic damages. Where the jury finds that the plaintiff has past noneconomic damages in excess of the applicable cap, as is the case here, the plaintiff will be entitled to prejudgment interest on the full amount of the applicable cap under MCL 600.6013(1). However, where the past noneconomic damages do not rise to the level of the applicable cap, the plaintiff will only be entitled to interest on the actual amount of the past noneconomic damages found by the jury. In this way, the plaintiff will be fully compensated for the losses already suffered.

For these reasons, I would conclude that the trial court erred when it concluded that plaintiff was only entitled to interest on a portion of the past noneconomic damages found by the jury. Therefore, I would vacate the award of interest and remand this case to the trial court for recalculation of the interest award consistent with my opinion.

IX. CONCLUSION

For the reasons stated, I would conclude that there were no errors warranting a new trial. However, I would conclude that the trial court erred when it determined that plaintiff was not entitled to prejudgment interest on the full amount of the capped noneconomic damages. Therefore, I would vacate the award of prejudgment interest and remand for recalculation of the interest consistent with this opinion. In all other respects, I would affirm.

CITY OF HUNTINGTON WOODS v CITY OF DETROIT

Docket No. 276021. Submitted July 10, 2008, at Detroit. Decided July 15, 2008, at 9:00 a.m. Leave to appeal sought.

The city of Huntington Woods and others brought an action in the Oakland Circuit Court against the city of Detroit, seeking declaratory and injunctive relief with regard to the defendant's attempts to sell the Rackham Golf Course, a public golf course owned by the defendant and situated in Huntington Woods. The land on which the golf course now sits was deeded to Horace and Mary Rackham by the Baker Land Company (the Baker deed). The conveyance was in fee simple and provided that "[i]t is part of the consideration hereof that the land transferred by this deed shall be used only as a public park or golf course or for other similar purpose." After the Rackhams constructed a golf course and a clubhouse, they deeded the property to the defendant (the Rackham deed). That deed included several conditions and a reversionary clause. It required the premises to be perpetually maintained "exclusively as a public golf course for the use of the public" and reserved to the Rackhams the "right to restrict or limit the use of the premises" "in such manner as to them shall seem proper in order to carry out and fulfill the purpose for which said course was built and improvements made." It further provided that "if any of the foregoing conditions shall be broken then the estate hereby granted shall be forfeited and the said premises shall revert to [the Rackhams and their heirs] who shall thereupon have the right to re-enter and re-possess the same." The court, Rae Lee Chabot, J., granted summary disposition in favor of the plaintiffs. The court held that the Rackham deed contains a clear restriction that the property is to be used as a public golf course or it reverts to the Rackham heirs. It further held that the defendant may transfer its interest in the property once it has acquired all the necessary waivers so as to eliminate any possibility of reverter. The court also held that the Baker deed prohibits the use of the property for any purpose other than those specifically set forth therein. The court concluded that the absence of a reverter clause in the Baker deed does not change the clear intention stated therein that the property be used only as a public park or golf course. The

defendant appealed, and the plaintiffs cross-appealed from the order granting summary disposition in favor of the plaintiffs.

The Court of Appeals *held*:

1. The primary issue asserted by the plaintiffs regarding the right or authority of the defendant to sell the property, and pursuant to what terms, was not hypothetical. The trial court was not precluded from ruling whether the sale was authorized and under what conditions merely because a sale had not yet been effectuated. The issue was ripe for determination.

2. The plaintiffs demonstrated a concrete and particularized harm that was imminent and different from that of the general public. The plaintiffs have standing to bring this action.

3. The Rackham deed conveyed a fee simple subject to a condition subsequent, not an easement, to the defendant.

4. The defendant is precluded from conveying the subject property while the reversionary rights of the Rackham heirs remain intact. The possibility of reverter may not be assigned before breach of a condition subsequent. The agreement delineated in the Rackham deed requiring maintenance of the property as a public golf course for use by the public qualified as one invoking a public-welfare purpose and is exempt under MCL 554.381 from being an unlawful restraint on alienation.

5. The defendant may sell the property after securing waivers from those retaining reversionary rights to the property. However, the defendant may only sell the property to another public entity and not a private entity, despite the retention of any conditions or assurances that the golf course would remain a golf course open to the public. The trial court failed to recognize that the property could only be sold to a public entity.

6. The trial court properly determined that the language in the Baker deed restricting use of the property to a public park or golf course or for other similar purpose, despite the absence of a reversionary clause or other conditional language, comprises a restrictive covenant that runs with the land and precludes the Rackhams, the defendant, and future owners from using the land for any purpose other than as a public golf course.

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

1. DECLARATORY JUDGMENTS — ACTUAL CONTROVERSIES.

The existence of an actual controversy is a condition precedent to invocation of declaratory relief; this requirement prevents a court from deciding hypothetical issues; the purpose of declaratory relief

is to provide litigants with court access in order to preliminarily determine their rights; an actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct before actual injuries or losses have occurred.

2. PUBLIC LANDS — PARKS — APPROPRIATION FOR OTHER USES — ACTIONS — STANDING.

Owners of property abutting a public park or having an unobstructed view thereof may sustain injury different from that of the general public where the park is appropriated to other uses and such owners have a special right to a cause of action to insist that it not be appropriated to other uses.

3. DEEDS — FEE SIMPLE DETERMINABLE — FEE SIMPLE SUBJECT TO A CONDITION SUBSEQUENT.

A fee simple determinable is a fee subject to special limitation that expires automatically on the happening or nonhappening of a specified event; a fee simple subject to a condition subsequent is subject to a power by the grantor to terminate the estate on the happening of a specified event, such as a breach of a condition; a fee simple determinable is a limited grant while a fee simple subject to a condition subsequent is an absolute grant to which a condition is applied.

Shifman & Carlson, P.C. (by *John A. Carlson* and *Burton R. Shifman*), for the plaintiffs.

John E. Johnson, Jr., Corporation Counsel, and *Jeffrey S. Jones*, Senior Assistant Corporation Counsel, for the defendant.

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

TALBOT, J. Defendant, city of Detroit, appeals as of right the order granting plaintiffs', city of Huntington Woods, Bonnie Sheehy Nielsen, Kellie Treppa, and John Steinberg, motion for summary disposition and request for a declaratory judgment pertaining to the sale of the Rackham Golf Course.[1] Plaintiffs cross-appeal certain

[1] In addition, the trial court denied the motion of Premium Golf, LLC, which is not a party to this appeal, to intervene in the action.

parts of the trial court's order. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL HISTORY AND BACKGROUND

This lawsuit involves a dispute concerning the authority of defendant to sell or convey its interest in the Rackham Golf Course, which comprises approximately 121 acres and is situated in plaintiff city of Huntington Woods. Originally, this parcel was part of a recorded plat identified as the "Bronx Subdivision." In 1922, on petition by the Baker Land Company, a portion of the land platted within the Bronx Subdivision property, which now comprises the Rackham Golf Course, was removed from the plat by vacation of that part of the plat by order of the Oakland Circuit Court. Approximately six months after entry of the order removing this portion of the property from the subdivision plat, the owner, the Baker Land Company, deeded the property to Horace Rackham and his wife, Mary Rackham (hereinafter referred to as the Baker deed). The remaining portion of the Bronx Subdivision was developed as residential property. At the time of this conveyance, it appears there were no particular improvements or development with regard to the property. There is no dispute that this conveyance was in fee simple and contained the following relevant provision: "It is part of the consideration hereof that the land transferred by this deed shall be used only as a public park or golf course or for other similar purpose." The Rackhams constructed an 18-hole golf course, with a clubhouse, on the property.

In 1924, the Rackhams deeded the improved property, containing the golf course and the clubhouse, to defendant (hereinafter referred to as the Rackham deed). The Rackham deed included several conditions,

along with a reversionary clause. Specifically, the Rackham deed provided, in relevant part:

> Provided always, however, that these presents are upon the several express conditions and limitations following, to-wit: FIRST: That the said premises shall be perpetually maintained by the said party of the second part exclusively as a public golf course for the use of the public under reasonable rules, regulations and charges to be established by second party. SECOND: That the course and the turf thereon shall be maintained at a standard condition at least equal to its condition at the time of the acceptance of this grant. THIRD: That beverages containing any alcoholic content whatever shall not be brought upon, kept, used or sold on said premises by any party hereto or by any person or persons, firm or corporation. FOURTH: First parties hereby reserve the right to restrict or limit the use of the premises hereby conveyed in such manner as to them shall seem proper in order to carry out and fulfill the purpose for which said course was built and improvements made. FIFTH: That if any of the foregoing conditions shall be broken then the estate hereby granted shall be forfeited and the said premises shall revert to the parties of the first part and their heirs and assigns who shall thereupon have the right to re-enter and re-possess the same.

The parties acknowledge that since this conveyance, in 1924, defendant has continuously operated and maintained the property as a public golf course.

II. PROPERTY BIDS

In 2006, the Detroit Planning and Development Department received an unsolicited inquiry from Premium Golf, LLC, seeking to acquire defendant's interest in the Rackham Golf Course. Defendant communicated this offer to the Detroit City Council, indicating:

> We are in receipt of a request from Premium Golf LLC, a Michigan Limited Liability Company, to purchase the . . . property for the amount of $5,000,000. Premium Golf LLC

> has offered to purchase the property and continue to use it as a golf course. Given the City's financial condition and in an effort to meet our land sales projections we are recommending this sale.

Concerned that maximum value be obtained by defendant for the property, an additional term of the proposed agreement indicated that defendant would receive substantial remuneration beyond the referenced sale price if Premium Golf, LLC, were successful in removing the use conditions and was able to develop the property for residential construction.[2] In response to questions raised by the city council, defendant's planning and development department indicated:

> The City received an unsolicited offer from Premium Golf, LLC to purchase Rackham Golf Course with the deed restriction in tact [sic] with the immediate plan to continue to operate it as a golf course. Premium Golf is in negotiations with the Rackham heirs to buy out the deed restriction.

While the offer from Premium Golf, LLC, was under consideration, plaintiff city of Huntington Woods also submitted an unsolicited bid to purchase the property from defendant for the sum of $5,500,000 contingent on the approval of a bond issue by voters.

After this lawsuit was initiated, defendant's planning and development department authorized the issuance of a request for proposals (hereinafter referred to as the RFP), which basically sought bids for the acquisition of the golf-course property. The RFP provided, in pertinent part:

> The intent of this Request for Proposal is to retain an experienced and qualified Developer who has the potential

[2] Defendant was to receive $10,000 for each single-family detached lot; $8,000 for each cluster-style home; and $5,000 for each multiple-family dwelling unit, defined as including eight or more units in each building.

> and financial capacity to purchase the Rackham Golf Course for the existing use or demonstrate the ability to obtain re-zoning for other uses. . . .
>
> * * *
>
> The City of Detroit has established a minimum bid price of $6,250,000 for sale of the Rackham Golf Course . . . . In the event that the respondent is able to remove the deed restriction, the City of Detroit will require a minimum of $5,000,000 in additional compensation.
>
> * * *
>
> There is an existing deed restriction that the property be maintained as a public golf course.

Shortly thereafter, plaintiff city of Huntington Woods, responding to defendant's RFP, authorized the submission of an offer to purchase the property, with appurtenances, for $6.25 million.

III. LOWER-COURT PROCEEDINGS

Plaintiffs filed their initial complaint on June 20, 2006, seeking a declaratory judgment. Shortly thereafter, plaintiffs filed an amended complaint for a declaratory judgment and an injunction. Plaintiffs alleged that defendant held the golf course in public trust subject to restrictions regarding its use. Plaintiffs argued that defendant's attempt to sell the property to a private entity was contrary to the deed restrictions and, therefore, precluded. Plaintiffs city of Huntington Woods, Nielsen, and Treppa further argued that as subsequent owners of property in the Bronx Subdivision, they have contractual rights "which initially accrued to the Baker Land Company to enforce the restrictions in the [Baker] deed to the Rackhams." Plaintiff Treppa contended that as an owner of property abutting the golf

course, she enjoyed "special rights in the maintenance of the Rackham Golf Course and the status quo may not be changed without their concurrence." Plaintiffs further alleged a right to enforce the Baker deed and Rackham deed restrictions as third-party beneficiaries.[3] Plaintiffs sought a determination from the trial court that: (A) restrictions on use of the property contained in the Baker and Rackham deeds "remain valid and enforceable and preclude the sale and/or development . . . of that property for residential housing"; (B) a determination that defendant cannot sell the property to a private entity because it is a "public golf course"; (C) the property at issue cannot be sold or developed for any purpose other than that specified in the Rackham deed "without the concurrence of property owners abutting and having an unobstructed view thereof" and the property owners of the Bronx subdivision; and (D) the court enjoin the sale of the property. Defendant filed an answer and asserted as relevant affirmatives defenses:

> 1. Plaintiff [sic] has failed to state a claim upon which relief can be granted.
>
> 2. There is no justiciable case or controversy before the Court.
>
> 3. Plaintiffs lack standing to sue.
>
> * * *
>
> 4. Plaintiffs have failed to join indispensable parties [the Rackham heirs].

Plaintiffs filed a motion for summary disposition, pursuant to MCR 2.116(C)(9) and (10), asserting that defendant had no interest it could sell in the golf course because it served only as a trustee that maintains the

[3] Plaintiff Steinberg owns a home in the Huntington Woods subdivision that does not abut the golf course.

property in trust for use only by the public as a public golf course. Plaintiffs asserted that the language of the Rackham deed was restrictive, because it required defendant to maintain the property " 'as a public golf course for the use of the public.' " Consequently, plaintiffs asserted that defendant has only an easement interest and not title to the property and that any attempt to sell it to a private entity would be a breach of the Rackham deed restrictions. Plaintiffs also asserted that they were proper parties to bring the action because their properties abutted the golf course and had unobstructed views or they could demonstrate their reliance on maintenance of the property as a golf course in purchasing or improving their residences. Plaintiffs contended that the language of the Baker deed comprised a restriction on the use of the land. Because plaintiffs are property owners in the chain of title from the original grantor of the Baker deed, they asserted that they are entitled to enforce those restrictions.

Defendant responded, asserting the lack of a justiciable controversy. Defendant observed that the city council had rejected a resolution approving the purchase of the golf course by Premium Golf, LLC. Acknowledging that other offers or bids were pending and being reviewed by the city council, defendant asserted that plaintiffs' claims for declaratory relief were merely hypothetical and that no appreciable harm could be demonstrated to have resulted from defendant's contemplation of offers to purchase the property. Defendant argued that it had operated and maintained the property for 80 years as a golf course and that there has been no breach of duty or provision pertaining to the conveyance as delineated in the Rackham deed. As a result, defendant sought the grant of summary disposition in its favor, pursuant to MCR 2.116(I)(2), asserting that the claims of plaintiffs presented no issue "ripe for

judicial review" and, therefore, dismissal was required for lack of jurisdiction. In addition, defendant argued that there was no prohibition against conveying the property subject to the conditions delineated in the Rackham deed. While defendant asserted that the Rackham heirs could release their reversionary rights, defendant additionally contended that such an event was merely hypothetical and, therefore, review by the trial court was precluded. Defendant argued that the provisions in the Baker deed did not comprise a restrictive covenant, which runs with the land, but were merely a statement of purpose that is not enforceable by the grantor.

Following a hearing, the trial court granted plaintiffs' motion for summary disposition, pursuant to MCR 2.116(C)(10), ruling, in relevant part:

> The deed from the Rackhams to the city of Detroit contains a clear and undeniable restriction that the property is to be used as a public golf course, or the property may revert to the Rackham heirs. This does not, however, prohibit the city of Detroit from ever selling the property. . . .
>
> Insofar as Defendant indicates it may transfer the property subject to the deed restrictions, it is partially correct. Defendant may transfer its interest in the property once it has acquired all the necessary waivers so as to eliminate any possibility of reverter. . . .
>
> As to Plaintiff's [sic] contention that the deed from the Baker Land Company to the Rackhams prohibits the use of the property for any purpose other than those specifically set forth therein, this is also granted. . . .
>
> It cannot be ignored that the property was originally platted for development and prior to the transfer to the Rackhams the plat was vacated by an action in this Court. The facts and record indicate the intention of Baker Land Company was that the property be used only as a public

> park or golf course. The absence of a reverter clause does not change the very clear intention as set forth in the deed.

The trial court denied plaintiffs' request for summary disposition pursuant to MCR 2.116(C)(9), indicating the "fail[ure] to address in the supporting brief how the pleadings are defective or insufficient . . . ." On the basis of its determination of the propriety of summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(10), the trial court denied defendant's request for summary disposition pursuant to MCR 2.116(I)(2). An order memorializing the trial court's ruling was entered on October 25, 2006.

IV. ISSUES

On appeal, defendant challenges the trial court's ruling, asserting that plaintiffs' claim is not justiciable because a sale of the property is not imminent. Defendant further contends that plaintiffs lack standing because they have failed to demonstrate any individualized or particularized harm different from that of the general public. Defendant contends that the trial court erred in its determination that defendant cannot convey the property, even subject to the deed restrictions, without first obtaining waivers from the Rackham heirs of their reversionary interest. Finally, defendant argues that the trial court's ruling that the Baker deed contained a restrictive covenant running with the land and enforceable by the grantor was erroneous. Instead, defendant asserts that the Baker deed merely includes a statement of purpose because the deed lacks a reverter clause and was between private parties and, thus, cannot be construed as a dedication to public use.

On cross-appeal, plaintiffs argue that the trial court's ruling, while favorable, did not go far enough. Plaintiffs contend that the trial court erred in its determination

that defendant had a right to convey the property because defendant is merely a trustee with an easement interest. In addition, plaintiffs argue that defendant must obtain not only the approval of the Rackham heirs but also the consent of the abutting property owners in order to convey the property and that such a conveyance can only be to another public entity so as not to violate the Rackham deed restrictions.

V. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(10). *Bragan v Symanzik,* 263 Mich App 324, 327-328; 687 NW2d 881 (2004). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. "In reviewing a motion for summary disposition brought under MCR 2.116 (C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins,* 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact and "the moving party is entitled to judgment as a matter of law." *MacDonald v PKT, Inc,* 464 Mich 322, 332; 628 NW2d 33 (2001). In addition, whether a party has standing is a question of law, which we review de novo. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608, 612; 684 NW2d 800 (2004). Questions pertaining to justiciability and ripeness comprise constitutional issues, which are also reviewed de novo. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006).

VI. CONSTITUTIONAL ISSUES

> "In seeking to make certain that the judiciary does not usurp the power of coordinate branches of government, and exercises only 'judicial power,' both this Court and the federal courts have developed justiciability doctrines to ensure that cases before the courts are appropriate for judicial action." *Id.* at 370.

Although the term "judicial power" is not defined in our constitution,

> " '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." [*Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 293; 737 NW2d 447 (2007), quoting *Nat'l Wildlife, supra* at 614-615.]

Our Supreme Court has further "distill[ed] this litany of considerations arising from the proper exercise of the 'judicial power,' and . . . determined that 'the most critical element' is 'its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute.' " *Michigan Citizens for Water Conservation, supra* at 293, quoting *Nat'l Wildlife, supra* at 615.

The doctrine of ripeness is designed to prevent "the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon ' "contingent future events that may not

occur as anticipated, or indeed may not occur at all." ' " *Michigan Chiropractic Council, supra* at 371 n 14 (citations omitted). Hence, when considering the issue of ripeness, the timing of the action is the primary focus of concern. Defendant contends that plaintiffs' complaint was not ripe for consideration by the trial court because defendant had neither sold its interest in the golf course nor violated any restrictions contained in the Rackham deed regarding use of the property as a public golf course.

"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." *Detroit v Michigan,* 262 Mich App 542, 550; 686 NW2d 514 (2004) (internal quotation marks and citation omitted). However, it is the purpose and intent behind the grant of declaratory relief to provide litigants with court access in order to "preliminarily determine their rights." *Id.* at 551; MCR 2.605(A)(1). An actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct. In such situations, courts are " 'not precluded from reaching issues before actual injuries or losses have occurred.' " *Detroit*, *supra* at 551 (citation omitted).

Defendant is correct in its assertion that, when this litigation was initiated, there had been no violation of the restrictive covenants contained in the Rackham deed and the property had not been sold. However, even though a sale had not been effectuated, it was obvious that defendant was not only seriously considering sale of the property but had begun, through the issuance of a formal RFP, to solicit bids. Hence, the primary issue asserted by plaintiffs regarding the right or authority of defendant to sell the property, and pursuant

to what terms, comprised an issue that was not hypothetical. "[D]eclaratory relief is designed to resolve questions like the one at issue before the parties change their positions or expend money futilely." *Id.* at 551. As a result, plaintiffs' request for declaratory relief properly seeks a determination regarding defendant's authority to sell the property. The trial court was not precluded from ruling whether the sale was authorized and under what conditions merely because a sale had not yet been effectuated.

Defendant further asserts that plaintiffs lacked standing to pursue this matter because they could not demonstrate a sufficient injury, separate and distinct from that of the general public.

> Standing ensures that a genuine case or controversy is before the court. It requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large. To successfully allege standing, a plaintiff must prove three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [*Michigan Citizens for Water Conservation, supra* at 294-295, quoting *Nat'l Wildlife, supra* at 628-629 (additional citations and internal quotation marks omitted).]

Contrary to defendant's assertion, the aforementioned plaintiffs have demonstrated a "concrete and particularized" harm that was "imminent." As we have noted, defendant was actively pursuing a sale of the golf course. Plaintiffs, as owners of property abutting the

golf course or having an unobstructed view of the golf course, could assert an injury different from that of the general public, which was merely concerned with access to the property. Instead, plaintiffs' interests extended to the enjoyment and beneficial use of their own property, which is distinct from the potential for harm to the general public. As our Supreme Court recognized in *Baldwin Manor, Inc v Birmingham,* 341 Mich 423, 435; 67 NW2d 812 (1954): " 'If the facts warranted the conclusion . . . that the gift . . . has been subverted to a use foreign to that of a public park, there is no doubt that complainant as an abutting property owner might seek the aid of a court of equity.' " (Citation omitted.) In addition, the Court quoted with approval 64 CJS, Municipal Corporations, § 1823, pp 310-311,[4] regarding the rights of property owners in such situations:

> "[S]uch right of action where he does sustain a special injury; and ordinarily the owners of property abutting on a park or square have such a special right to insist that it shall not be appropriated to other uses.
>
> "The owner of a lot in the immediate vicinity of a park, although not abutting thereon, but who is an adjacent proprietor in that he has an unobstructed view from his property, may sustain such an injury by reason of its diversion to other uses as to give him a right of action to enjoin the diversion and abandonment by the city of the grounds as a public park." [*Baldwin Manor, supra* at 436.]

Defendant contends that *Baldwin* is inapplicable and factually distinguishable because there has been no diversion of use of the property as a golf course. However, we note that in the RFP soliciting bids, defendant has clearly indicated that "[t]he intent of this Request for Proposal is to retain an experienced and

[4] We note that the cited provision is now contained in 64 CJS, Municipal Corporations, § 1561, p 719.

qualified Developer who has the potential and financial capacity to purchase the Rackham Golf Course for the existing use *or demonstrate the ability to obtain rezoning for other uses*." (Emphasis added.) Consequently, defendant's own solicitation of bids under these conditions precludes its assertion that the alleged harm is based solely on conjecture or is hypothetical in nature. In addition, the harm is "clearly traceable" to defendant's proposed action to sell the property and encourage its alternative development for residential purposes in order to secure additional remuneration. Finally, a decision favorable to plaintiffs would clearly redress the injury, thereby satisfying the technical requirements for establishing standing for these parties.

VII. FEE SIMPLE vs. EASEMENT

Defendant asserts that the trial court erred in determining that defendant was precluded from transferring its interest in the Rackham Golf Course without first obtaining waivers from individuals with reversionary interests. Defendant contends that as long as it conveys the property subject to the deed restrictions there is no breach or abandonment sufficient to give rise to the reverter clause. In response and on cross-appeal, plaintiffs assert that defendant's interest in the property is merely an easement, which cannot be conveyed to a private entity such as Premium Golf, LLC. Rather, plaintiffs contend that the language of the deed requires the golf course be maintained by a public entity and that the trial court did not go far enough and should have required defendant to obtain the waivers or permission of abutting land owners for any conveyance.

Initially, we must determine and define the precise nature of the property interest conveyed to defendant by the Rackham deed.

> An inquiry into the scope of the interest conferred by a deed such as that at issue here necessarily focuses on the deed's plain language, and is guided by the following principles:
>
> (1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable.
>
> These four principles stand for a relatively simple proposition: our objective in interpreting a deed is to give effect to the parties' intent as manifested in the language of the instrument. [*Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005) (citations and internal quotation marks omitted).]

Our starting point in this analysis is the language of the Rackham deed, which provides that it does "grant, bargain, sell, remise, release, alien and confirm" to defendant "[f]orever, [a]ll that certain piece or parcel of land situate and being in the Township of Royal Oak, County of Oakland" as described by metes and bounds. The deed provides for specific "express conditions and limitations" regarding use of the property by defendant with rights of reversion "if any of the foregoing conditions shall be broken then the estate hereby granted shall be forfeited and the said premises shall revert to the parties of the first part and their heirs and assigns who shall thereupon have the right to re-enter and re-possess the same."

As with any instrument, a deed must be read as a whole in order to ascertain the grantor's intent. *Carmody-Lahti, supra* at 370. "[A] deed *granting* a right-of-way typically conveys an easement, whereas a deed granting *land itself* is more appropriately characterized as conveying a fee or some other estate[.]" *Id*. at 371 (emphasis in original). Notably the terms "easement" and "right-of-way" are not contained in the Rackham deed. Rather, the deed indicated that the conveyance was for a "certain piece or parcel of land . . . ." Therefore, on the basis of the plain and unambiguous language of the Rackham deed, we reject plaintiffs' assertion and find that a fee simple in the land was conveyed to defendant, rather than an easement. However, our inquiry does not stop with this determination and we must now ascertain what type of fee was conveyed.

The Rackham deed clearly and unambiguously delineates "express conditions and limitations" pertaining to use of the land conveyed to defendant. In addition, following a listing of those conditions, the deed affirmatively provides that the property "shall revert" upon the breach of "any of the foregoing conditions . . . ." A distinction exists between a fee subject to a condition subsequent and a fee simple determinable. Specifically,

> [a] "fee simple determinable" is a limited grant, while a "fee simple subject to a condition subsequent" is an absolute grant to which a condition is appended. A "fee simple determinable" is a fee subject to special limitation. It expires automatically on the happening or nonhappening of a specified event, while a fee simple subject to a condition subsequent is subject to a power in the grantor to terminate the estate on the happening of a specified event, such as a breach of a condition. [28 Am Jur 2d, Estates, § 164, p 191.]

The intent of the Rackhams to create a condition subsequent is clearly and definitively demonstrated by the language contained in the deed. *Clark v Grand Rapids,* 334 Mich 646, 655; 55 NW2d 137 (1952). Although "conditions subsequent are not favored in law," in this instance the presence of a reverter clause specifically requiring forfeiture upon breach of any of the delineated conditions requires us to find that the interest conveyed by the Rackham deed is a fee simple subject to a condition subsequent. *Id.* at 654; *Quinn v Pere Marquette R Co,* 256 Mich 143, 152; 239 NW 376 (1931).

Guided by our determination regarding the interest conveyed by the Rackham deed, we are then able to address defendant's assertion that the trial court erred in requiring it to obtain waivers from those individuals retaining reversionary rights in the property before any conveyance. Defendant contends that it may convey the property to any entity as long as the restrictive conditions pertaining to maintenance of the property as a public golf course are preserved. Although recognizing that an abutting property owner "who proves special injury caused by an actual diversion of the use may obtain an injunction against the diversion or misuse," defendant asserts that abutting property owners cannot force or require that it "obtain a relinquishment of the use restriction . . . in order to sell [the] land."

Defendant is partially correct in its assertion. The trial court's imposition of a requirement that defendant first obtain waivers from those with reversionary interests is not based on the inherent rights of abutting property owners. Rather, the trial court's requirement that defendant can sell its interest in the golf course "only after the surrender or conveyance of the rights and interest by appropriate waivers, releases, deeds or condemnation proceedings of those having possible

rights as reversioners" is based on basic principles regarding estates in real property and caselaw. Specifically, our Supreme Court has repeatedly determined that "[i]f the estate was a fee upon condition subsequent, plaintiff could not enforce the reverter, because the possibility of reverter cannot be assigned before breach of condition." *Quinn, supra* at 152, citing *Halpin v Rural Agricultural School Dist,* 224 Mich 308, 313; 194 NW 1005 (1923). As a result, and in accordance with the trial court's determination, defendant is precluded from conveying the subject property while the reversionary rights of the Rackham heirs remain intact.

This restriction on a conveyance raises an issue regarding prohibitions against restraints on alienation of property. We determine that this is not a viable issue in this case because MCL 554.381 provides, "No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes." See also MCL 123.871. Because the agreement delineated in the Rackham deed requiring maintenance of the property as a public golf course for use by the public clearly qualifies as one invoking a public-welfare purpose, it is statutorily exempt as an unlawful restraint on alienation.

Although the trial court ruled that defendant had a right to sell the property, subject to removal of the reversioners' rights, it did not further limit defendant's right to convey the property on the basis of the status of the purchaser as either a public or a private entity. Defendant contends that its selection of a purchaser is not restricted to only another public entity, while plaintiffs assert the language of the deed does limit the nature of the entity qualified to serve as a potential buyer.

The Michigan Constitution provides: "Any city or village may acquire, own, establish and maintain, within or without its corporate limits, parks, boulevards, cemeteries, hospitals and all works that involve the public health or safety." Const 1963, art 7, § 23. MCL 117.4e(3) allows municipalities to provide in their charters "[f]or the maintenance, development, operation, of its property and upon the discontinuance thereof to lease, sell or dispose of the same subject to any restrictions placed thereupon by law[.]" Similarly, defendant's City Code contains provisions delineating the authority and procedure for the sale of "surplus real property and property used for public purposes." Detroit City Code, Article VIII, § 14-8-1 through § 14-8-11. This right to sell is consistent with our determination that a fee interest was conveyed to defendant; however, we must reconcile defendant's statutory right to sell property with any restrictions of conveyance contained in the Rackham deed.

Plaintiffs contend the language of the Rackham deed precludes the conveyance of this property to a private entity. Specifically, plaintiffs argue that the wording unequivocally requires "[t]hat the said premises shall be perpetually maintained by the said party of the second part exclusively as a *public golf course* for the *use of the public* . . . ." (Emphasis added.) Plaintiffs assert that the use of the term "public" twice within this sentence or provision is indicative of the grantor's intent that the property must remain publicly owned, thereby precluding any conveyance to a private entity. This reading of the deed language is consistent with the principle that " 'all the language of a deed must be harmonized and construed so as to make all of it meaningful . . . .' " *Carmody-Lahti, supra* at 372 (citation omitted). Use of the term "public" before golf course indicates nonprivate ownership, with the further

limitation that the property also is designated specifically "for the use of the public . . . ."

The language of the deed clearly evokes the intent of the Rackhams, as grantors, to restrict the use of the subject property. Specifically, the deed provides, in relevant part:

> [S]aid premises shall be perpetually maintained by said party of the second part exclusively as a public golf course for the use of the public under reasonable rules, regulations and charges to be established by second party. . . . First parties hereby reserve the right to restrict or limit the use of the premises hereby conveyed in such manner as to them shall seem proper in order to carry out and fulfill the purpose for which said *course* was built and improvements made. [Emphasis added.]

This is further shown by the retention of a right of reverter and is consistent with our Supreme Court's recognition that the Rackham " 'golf course was opened for the use of the public in August, 1924, being dedicated to the general public by the city of Detroit and operated as a governmental function supported by tax funds appropriated therefor and same has been used continuously since August, 1924, for public purposes.' " *Detroit v Oakland Co,* 353 Mich 609, 616; 92 NW2d 47 (1958), quoting a stipulation by the parties.

As acknowledged by the *Baldwin* Court, "[t]he right of a municipality to alter the status and use of property conveyed to and accepted by it for a specific purpose" has frequently been the subject of dispute. *Baldwin Manor, supra* at 429. As noted by the Court:

> A distinction is to be made between cases where a public square is dedicated without restriction and cases where the dedication is restricted to a particular purpose. In the former case, any reasonable public use may be made of the

> square, but in the latter, it must be devoted to the particular purpose indicated by the dedicator. [*Id.* at 430.]

In addition, "dedications made by individuals . . . are construed strictly according to the terms of the grant . . . ." *Id.* Quoting with approval 26 CJS, Dedication, § 65, pp 154-155, the *Baldwin* Court noted:

> "[I]f a dedication is made for a specific or defined purpose, neither the legislature, a municipality or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication; and this rule is not affected by the fact that the changed use may be advantageous to the public." [*Baldwin, supra* at 430-431.]

The only recognized exception to this rule is " 'under the right of eminent domain.' " *Id.* at 431. Given the unambiguous language used and the clearly stated intent of the grantors, we conclude that the Rackham deed contains an express covenant precluding the use of the subject property for any purpose other than a public golf course. Consequently, although defendant may sell the property, the trial court correctly indicated that it must first secure waivers from those retaining reversionary rights to the property. However, the trial court failed to recognize that additional restrictions requiring the golf course to remain *public* necessitated a further limitation on the type of entities to which defendant might convey the property. As a result, we determine that defendant may only sell the subject property to another public entity and not to a private entity, despite the retention of any conditions or assurances that the property would remain a golf course open to the public.

Finally, defendant and plaintiffs dispute both the meaning and effect of the language in the Baker deed regarding use of the land. Specifically, plaintiffs contend

the wording, "It is part of the consideration hereof that the land transferred by this deed shall be used only as a public park or golf course or for other similar purpose," comprises a restrictive covenant intended to run with the land. In contrast, defendant asserts that the language is merely a statement of purpose. Our focus is on "the intent of the parties as manifested in the plain language of the deed at issue . . . ." *Carmody-Lahti, supra* at 375.

The Baker deed specifically indicates that it is a conveyance of land "in Fee Simple." However, the instrument lacks a reverter clause or any words indicating the referenced provision pertaining to use of the property, which identifies it as a "condition." "The absence of a reverter clause is ordinarily controlling against construction of a provision as a condition." *Clark, supra* at 653. Typically, "where there is no reverter clause [in a deed], a statement of use is merely a declaration of the purpose of conveyance, without effect to limit the grant." *Quinn, supra* at 151. Defendant contends that successors in interest are not bound by the statement of intent, citing *Briggs v Grand Rapids,* 261 Mich 11, 14; 245 NW 555 (1932), which held that "[t]here was no obligation on the part of the city to maintain the park in perpetuity. . . . '[W]here there is no reverter clause, a statement of use is merely a declaration of the purpose of conveyance, without effect to limit the grant.' " (Citation omitted.) However, we note that *Briggs* is factually distinguishable because the property at issue was purchased for valuable consideration by the city and is not "a case where property was donated or dedicated for park purposes . . . ." *Id.*

When ruling on the effect of the Baker deed, the trial court stated, in relevant part:

> [T]he facts in the case at bar indicate the language was intended to serve as a restriction and not merely, quote, "a declaration of the purpose of conveyance," unquote, as in the *Briggs* case.

> It cannot be ignored that the property was originally platted for development and prior to the transfer to the Rackhams the plat was vacated by an action in this Court. The facts and records indicate the intention of Baker Land Company was that the property be used only as a public park or golf course. The absence of a reverter clause does not change the very clear intention as set forth in the deed.

Defendant contends that the trial court erred by determining that the restriction in the Baker deed to the Rackhams constituted a restrictive covenant that ran with the land rather than merely a statement of purpose. "A covenant is a contract created with the intention of enhancing the value of property and is a valuable property right." *Mable Cleary Trust v Edward-Marlah Muzyl Trust,* 262 Mich App 485, 491; 686 NW2d 770 (2004). Because such covenants are based in contract, the intent of the drafter is deemed controlling. *Stuart v Chawney,* 454 Mich 200, 210; 560 NW2d 336 (1997). We note as a recognized principle of construction regarding restrictive covenants that they are to be strictly construed against the party seeking their enforcement and that any doubts pertaining to their interpretation are to be resolved in favor of the free use of the property. *O'Connor v Resort Custom Builders, Inc,* 459 Mich 335, 341-342; 591 NW2d 216 (1999). Importantly, "when the intent of the parties is clearly ascertainable, courts must give effect to the instrument as a whole." *Village of Hickory Pointe Homeowners Ass'n v Smyk,* 262 Mich App 512, 515-516; 686 NW2d 506 (2004).

Relying on prior rulings of our Supreme Court, this Court has previously determined that restrictive covenants are to be

> construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction,

> whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property. [*Webb v Smith (After Remand),* 204 Mich App 564, 570; 516 NW2d 124 (1994), quoting *Brown v Hojnacki,* 270 Mich 557, 560-561; 259 NW 152 (1935) (additional citations and internal quotation marks omitted).]

In ascertaining whether restrictive covenants run with the land, our Supreme Court has indicated:

> The test as to whether a covenant runs with the land or is merely personal, is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership, but to have that effect the covenant must respect the thing granted or demised and the act to be done or permitted must concern the land or the estate conveyed. In order that a covenant may run with the land its performance or non-performance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment. [*Greenspan v Rehberg,* 56 Mich App 310, 321; 224 NW2d 67 (1974) (citations and internal quotation marks omitted).]

Applying the above definitions to the factual circumstances of this case, we concur with the trial court's determination that the language of the Baker deed, restricting use of the property to a "public park or golf course or for other similar purpose," despite the absence of a reversionary clause or other conditional language, comprises a restrictive covenant that runs with the land. As pointed out by the trial court, the property conveyed by the Baker deed, which ultimately became the Rackham Golf Course, was originally platted as part of a residential development. The Baker

Land Company specifically instituted legal proceedings to vacate that portion of the plat in order to develop the land as a public park or golf course. The language of the deed, coupled with the actions taken to distinguish this plat, expressly indicates the Baker Land Company's intention that the property not be developed for residential use, which would enhance the value of the surrounding area. Specifically, the restriction on use denoted in the Baker deed reflects the "pursu[it] of a general building plan for the development and improvement of the property." *Webb, supra* at 570 (citations and internal quotation marks omitted). Because we determine that the restriction concerns both the land conveyed and its future use, it comprises a covenant that runs with the land. As a result, the obligation to maintain the restricted use of the property passes to subsequent owners, *Greenspan, supra* at 321, and, thus, precludes the Rackhams, defendant, and future owners from using the land for any purpose other than as a public golf course.

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

WOLFORD v DUNCAN

Docket No. 277080. Submitted June 11, 2008, at Detroit. Decided July 17, 2008, at 9:00 a.m. Leave to appeal sought.

Drema Wolford, as personal representative of the estate of decedent Franklin Wolford, brought a wrongful-death medical-malpractice action against family practitioner Deborah L. Duncan, M.D., physician's assistant Deborah Wilson, and the Fenton Medical Center relating to the treatment the decedent received from the defendants. The court, Richard B. Yuille, J., entered judgment on a jury verdict of no cause of action. The plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by denying the plaintiff's motion to exclude the expert testimony of defendants' witness Ronald Nelson on the appropriate standard of care applicable to a physician's assistant. The defendants had contended that Nelson was not a qualified expert under MCL 600.2169(1)(a) or (c) because he was a physician's assistant to an internist while Wilson was a physician's assistant to a family practitioner. However, the matching-qualifications requirements of MCL 600.2169(1)(a) and (c) pertain only to expert witnesses who are specialists in or general practitioners of human medicine and thus do not apply to a physician's assistant testifying as an expert witness. Nelson was qualified under MCL 600.2169(1)(b)(*i*), which applies to all health professionals, because, during the year immediately preceding the death of the decedent, he devoted a majority of his professional time to the active clinical practice of the same health profession, physician's assistant, as Wilson.

2. The trial court did not err by denying the plaintiff's motion to strike the testimony of Dr. James Setchfield that the decedent probably died from an "intracranial process." During the trial, the plaintiff did not challenge, as she does on appeal, the testimony on the basis that it was speculative or lacked a proper foundation. Rather, the plaintiff cross-examined the witness with the witness's deposition testimony that the witness had no opinion on causation. Having failed to seek the trial court's intervention and having decided to present the jury an issue of witness credibility, the plaintiff cannot now claim that the trial court erred by not striking the testimony.

3. The trial court did not err by permitting Dr. James Martin to testify regarding the cause of the decedent's death. By failing to raise them below, the plaintiff failed to preserve for appeal claims that the witness had not been identified by the defense as a witness on causation and that the testimony was speculative. There is no plain error affecting the plaintiff's substantial rights with respect to this claimed error.

Affirmed.

WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

"Specialist" and "general practitioner," as used in the statute governing the qualification of expert witnesses in medical-malpractice actions, pertain to physicians only, not to other health professionals (MCL 600.2169[1][a], [c]).

Grysen & Associates (by *B. Elliott Grysen*) for the plaintiff.

Plunkett Cooney (by *Robert G. Kamenec* and *Hillary A. Dullinger*) for the defendants.

Before: WHITE, P.J., and WILDER and KELLY, JJ.

PER CURIAM. In this wrongful-death medical-malpractice action, plaintiff appeals as of right a jury verdict and court judgment of no cause of action. We affirm.

I

Plaintiff's decedent sought treatment from defendant Fenton Medical Center on July 24, 2001. He had symptoms of pain in the left side of his chest, left arm, and neck. Defendant Deborah Wilson, a licensed physician's assistant supervised by defendant Deborah Duncan, M.D., a family-practice physician, examined him. She found that his pulse and blood pressure were normal, and he was not short of breath, but he had sounds (i.e., "rales") in his lungs. He also had tender-

ness in his chest wall, and his chest pain did not increase with exertion. She ordered a chest x-ray and electrocardiogram (EKG). The EKG was normal, but the chest x-ray showed that some air sacs in his lungs had collapsed. Wilson diagnosed the decedent as having pneumonia and prescribed an antibiotic.

Two days later, the decedent complained of a severe headache, which made him feel like his head was bursting. An ambulance was called, but the decedent died before he arrived at the hospital. No autopsy was performed before the decedent's interment. His remains were exhumed a year later for a partial autopsy of his lungs and heart. The pathologist found blood clots in the decedent's lungs, but the parties' experts disputed whether these clots formed before or after his death.

Plaintiff brought this action alleging that the decedent's recent history of deep vein thrombosis should have alerted defendants to the possibility of a pulmonary embolism (blood clot or clots blocking the flow of blood to the lungs) or a cardiac problem requiring urgent care. Plaintiff alleged that a physician's assistant and a family-practice physician following the appropriate standard of care would have immediately hospitalized the decedent for treatment with blood-thinner medication and additional tests to confirm or rule out an acute pulmonary or cardiac condition. Defendants maintained that the decedent did not show any indications of a life-threatening condition when Wilson examined him, and they disputed plaintiff's claim that the decedent died from a pulmonary or cardiac condition caused by blood clots.

II

Plaintiff first argues that the trial court erred by denying her motion to strike Ronald Nelson as defen-

dants' expert witness regarding the appropriate standard of care for a physician's assistant. Plaintiff argues that Nelson was not qualified as an expert under MCL 600.2169(1) because his supervising physician specialized in internal medicine and Wilson's supervising physician, Dr. Duncan, specialized in family practice. This issue presents a question of statutory interpretation, which we review de novo. *Tomecek v Bavas*, 276 Mich App 252, 260; 740 NW2d 323 (2007).

MCL 600.2169(1) provides:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an

> accredited health professional school or accredited residency or clinical research program in the same specialty.
>
> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) Active clinical practice as a general practitioner.
>
> (*ii*) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

Defendants contend that the terms "specialist" and "general practitioner" refer only to physicians and that the criteria set forth in § 2169(1)(a) and (c) therefore apply only to physicians, not physician's assistants or other nonphysician health professionals. The statute does not define the terms "specialist" or "specialty."

In *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006), our Supreme Court construed the term "specialty" to mean "a particular branch of medicine or surgery in which one can potentially become board certified." In *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002), our Supreme Court held that MCL 600.2912a, which sets forth the applicable standards of care for general practitioners and specialists in medical-malpractice actions, does not establish a statutory standard of care for nurses. The Court held that the terms "general practitioner" and "specialist" apply only to physicians; therefore, nurses are subject to the common-law standard of care. *Id.* at 18-20. In *Brown v Hayes*, 270 Mich App 491, 499-500; 716 NW2d 13 (2006), rev'd in part on other grounds 477 Mich 966 (2006), this Court held that under *Cox*, the terms

"specialist" and "general practitioner" apply only to physicians, and therefore § 2961(1)(a) and (c) are not applicable in determining the qualifications necessary to testify regarding the appropriate standard of care for an occupational therapist. *Id.* at 499-500.

The trial court's denial of plaintiff's motion to exclude Nelson's testimony is consistent with this Court's decision in *Brown*, and with the Supreme Court's construction of "specialty" as "a particular branch of medicine or surgery in which one can potentially become board certified" in *Woodard*, *supra* at 561. Section 2961(1)(a) and (c) apply, respectively, to specialists and general practitioners, but these terms refer only to physicians, not other health professionals. A physician's assistant is not a physician; therefore, the criteria set forth in § 2961(1)(a) and (c) do not apply. *Brown*, *supra*. Further, the statutes pertaining to licensing for physician's assistants do not recognize board certification in any specialty. See MCL 333.17060 through 333.17082. A physician's assistant cannot be a specialist in accordance with the Supreme Court's construction of that term in *Woodard*, *supra.* It is significant that a physician's assistant need have no special certification to work under a physician who is a specialist. Both Wilson and Nelson were eligible to work under either a family-practice physician or an internal-medicine physician.

Plaintiff argues that notwithstanding the foregoing, a different result must obtain in the instant case because MCL 333.17078(2), a statute pertaining to physician's assistants, states that a physician's assistant "shall conform to minimal standards of acceptable and prevailing practice for the supervising physician." We disagree. While this provision states the standard of care applicable to a physician's assistant, and an expert witness must demonstrate familiarity with that stan-

dard to be qualified to offer expert testimony, it does not follow that physician's assistants are specialists under § 2961(1)(a).

Thus, neither § 2169(1)(a) nor § 2169(1)(c) apply to defendant's choice of an expert witness regarding the appropriate standard of care for Wilson; rather, the expert's qualifications are governed by § 2169(1)(b), which applies to both physicians (specialists and general practitioners) and other health professionals.[1] *Brown*, *supra* at 500. During the year preceding the decedent's death, Nelson devoted a majority of his professional time to active clinical practice as a physician's assistant, the same health profession to which Wilson belongs. Accordingly, he was qualified as an expert witness pursuant to § 2169(1)(b)(*i*).

III

Plaintiff next argues that the trial court erred by denying her motion to strike Dr. James Setchfield's testimony opining that the decedent probably died from an "intracranial process." Plaintiff argues that this testimony was improper because it was speculative and lacked foundation, contrary to MRE 702. She also complains that defendants failed to disclose Dr. Setchfield as an expert witness on the issue of causation and that he was not qualified to offer this opinion. We review preserved evidentiary issues for an abuse of discretion, *Woodard*, *supra* at 557, and unpreserved issues 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); MRE 103(a)(1).

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[1] Of course, Nelson's testimony was also subject to MRE 702. However, plaintiff does not challenge his testimony on this basis.

At trial, plaintiff cross-examined Dr. Setchfield on these issues and did not challenge his testimony until he was excused from the stand. At that point, plaintiff objected to the testimony on the ground that it was speculative, but did not object on the other grounds asserted on appeal. The trial court ruled:

> It can't be proved or it can't be disproved is the way he put it. He did have a medical basis at least in his mind for stating that opinion.
>
> I actually think it was improper, but I think as well that it is a theory that he supported with the record and I think [plaintiff's counsel] cross-examined him on the issue, and I am not going to strike it from the jury's consideration. I don't think it's worth much, but I am not going to tell them that.

Plaintiff never objected on the basis that defendant failed to alert plaintiff that Dr. Setchfield would offer causation testimony. Rather, plaintiff cross-examined Dr. Setchfield on his deposition testimony that he had no opinions on causation. Having opted not to seek the trial court's intervention on this basis, but rather to present it to the jury as an issue of credibility, plaintiff cannot now claim that the trial court erred by not striking the testimony on that basis. We find no plain error affecting plaintiff's substantial rights. *Hilgendorf*, *supra* at 700. Similarly, we review the court's decision to let the testimony stand in the context that plaintiff failed to object when the testimony was offered and chose instead to cross-examine on the issue, only to later move to strike the testimony on the basis that it was too speculative. The trial court did not abuse its discretion by ruling that at that point, in light of the fact that the witness offered a medical basis for his opinion, relating it to the decedent's symptoms, and also clearly acknowledged that it could not be proved or

disproved, the court would leave it to the jury to decide what weight to give to the testimony. *Woodard*, *supra* at 557.

IV

Plaintiff also argues that the trial court erroneously permitted Dr. James Martin to testify regarding the decedent's cause of death. We reject this claim for similar reasons. Defense counsel questioned Dr. Martin regarding the care given the decedent on July 24, 2001. Dr. Martin testified that he found nothing inappropriate in the treatment. Defense counsel continued:

> *Q*. Can you see anything on the 24th that was going to be a predictor of Mr. Wolford's death some three days later?
>
> *A*. Nothing there. No. Nothing.
>
> *Q*. And today is there any way to predict what caused his death?
>
> *A*. Autopsy.
>
> *Q*. Okay.
>
> *A*. Complete autopsy.
>
> *Q*. And we only have an autopsy of the lungs and the heart.
>
> *A*. That's what I understand.
>
> *Q*. Do those autopsy findings predict his death or tell us why he died?
>
> *A*. No.

Plaintiff's counsel then objected: "Objection. Foundation. He's not a pathologist. He has not established that within a year—in 2001 or a year prior that he was doing coronary work." The court overruled the objection. Defense counsel continued and told the witness that counsel was asking him to answer in his capacity as a family practitioner. Counsel then inquired whether Dr.

Martin reviewed autopsy results in his practice and asked a series of questions regarding whether patients who die from heart attacks and pulmonary embolisms have severe headaches immediately before death. Defense counsel then asked Dr. Martin whether, from a clinical standpoint, the fact that the decedent had a severe headache immediately before dying was significant. Dr. Martin answered that the decedent's massive headache caused him to "wonder if there isn't something cerebral going on, in his brain." Defense counsel continued:

Q. How can something in your brain kill you?

A. You can have several things. You can have a regular artery rupture and bleed or you can have an aneurysm. At the base of [sic] brain there is a little circle of vessels. Remember, if you're old enough to remember the old tires that would get a balloon on the side, well, that's sort of what an aneurysm is. It's a bulging out in a weak spot and when that ruptures that is like turning a fire hose loose in your living room and squirting your TV and your electrical and sound equipment, it goes out. That's what happened to Mr. Wolford. It sounds like he had that.

Q. Is there any—what else can cause sudden death?

A. Sudden death?

Q. Sudden death.

A. Something cerebrally in the brain, a heart attack, you could have an arrhythmia, and a big pulmonary embolus. Those cause sudden death.

Q. Anything other than a brain issue that you can think of that would cause sudden death in Mr. Wolford from your review?

A. You have to restate it. I couldn't hear you.

Q. Is there anything that you've seen about this case that points to the heart having caused the sudden death?

A. No.

Q. How about a [pulmonary embolism]?

A. No.

Plaintiff's counsel made no objection to the foregoing testimony, except the initial objection set forth above regarding the doctor's response to the autopsy question. We conclude that plaintiff failed to preserve the challenges raised on appeal. Our review is thus for plain error affecting plaintiff's substantial rights. *Hilgendorf*, *supra* at 700; MRE 103(a)(1).

We reject plaintiff's argument that the trial court's ruling on the initial objection "permitted Dr. Martin to ramble on for three pages as to the possible causes of Mr. Wolford's death." Nothing precluded plaintiff from objecting on the basis that Dr. Martin was not identified as a causation witness or that his testimony was speculative. Further, the court's initial ruling on the objection to the question whether the autopsy predicted the decedent's death or told why he died did not foreclose objection to the testimony plaintiff now challenges on appeal. We find no plain error affecting plaintiff's substantial rights. *Hilgendorf*, *supra* at 700.

Affirmed.

SMITH v PARKLAND INN/CASUALTY RECIPROCAL EXCHANGE

Docket No. 278676. Submitted June 10, 2008, at Detroit. Decided July 17, 2008, at 9:05 a.m. Leave to appeal sought.

Jana Smith sustained a disabling injury at her job at the Parkland Inn. At the time of her injury, Smith held a second job at a restaurant. Smith received an open award of workers' compensation benefits payable in full by Casualty Reciprocal Exchange, the Parkland Inn's workers' compensation insurer, pursuant to the dual employment provisions of the workers' compensation act, MCL 418.372. The insurer, as provided under MCL 418.372(1)(b), received quarterly reimbursements from the Second Injury Fund (SIF) for the portion of benefits based on Smith's second job. The insurer subsequently became insolvent, and the Michigan Property & Casualty Guaranty Association (MPCGA) began paying Smith's full benefits in place of the insolvent insurer pursuant to the Property and Casualty Guaranty Association Act, MCL 500.7901 *et seq.* The MPCGA initiated proceedings in the Workers' Compensation Agency, seeking reimbursement by the SIF for the portion of workers' compensation benefits based on Smith's second job. A workers' compensation magistrate and the Workers' Compensation Appellate Commission both issued decisions in favor of the MPCGA after determining that the MPCGA is an "insurer" entitled under MCL 418.372(1)(b) to reimbursement by the SIF for the portion of benefits based on Smith's second job. The SIF appealed by leave granted.

The Court of Appeals *held*:

MCL 418.601(a) of the workers' compensation act defines "insurer" as an organization that transacts the business of workers' compensation insurance within the state of Michigan. Under MCL 500.7911(3) of the Property and Casualty Guaranty Association Act, the MPCGA is subject to the laws of Michigan to the extent that it would be subject to those laws if it were an insurer organized and operating under MCL 500.5000 *et seq.*, to the extent that those laws are consistent with the Property and Casualty Guaranty Association Act. Under MCL 500.7931(2) of that act, the MPCGA assumes the rights of an insolvent insurer. In light of

these statutory provisions, the MPCGA is an insurer that is eligible for reimbursement by the SIF under MCL 418.372(1)(b).

Affirmed.

WORKERS' COMPENSATION — DUAL EMPLOYMENT — SECOND INJURY FUND — MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION.

The Michigan Property & Casualty Guaranty Association, when it assumes an obligation by an insolvent workers' compensation insurer to pay the full workers' compensation benefits of a dually employed injured worker, is entitled to reimbursement by the Second Injury Fund for those portions of benefits that are based on the injured worker's second job (MCL 418.372[1][b], 500.7911[3], 500.7931[2]).

Dykema Gossett PLLC (by *Suzanne Sahakian* and *Erica L. Keller*) for the Michigan Property & Casualty Guaranty Association.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Morrison Zack*, Assistant Attorney General, for the Second Injury Fund.

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

PER CURIAM. The Second Injury Fund, Dual Employment Provision (SIF), was granted leave to appeal a May 15, 2007, order of the Workers' Compensation Appellate Commission (WCAC) that affirmed a magistrate's decision to grant the request of the Michigan Property & Casualty Guaranty Association (MPCGA) for reimbursement from the SIF for a portion of benefits paid to plaintiff by the MPCGA. We affirm.

This case arises out of a disabling injury plaintiff suffered while she was working for the Parkland Inn. In December 1992, plaintiff was granted an open award of benefits. At the time of her injury, plaintiff was also employed by Andoni's Restaurant. Under the dual employment provision of MCL 418.372, Parkland Inn's

workers' compensation insurer, Casualty Reciprocal Exchange (CRE), paid plaintiff at her full rate of benefits (which was based on plaintiff's employment with both Parkland Inn and Andoni's Restaurant), but was reimbursed quarterly by the SIF for the portion of benefits CRE paid that was based on plaintiff's employment with Andoni's Restaurant.

Subsequently, however, CRE became insolvent. Consequently, by operation of the Property and Casualty Guaranty Association Act, MCL 500.7901 *et seq*., the MPCGA began paying plaintiff's full benefit in place of CRE. The MPCGA requested quarterly reimbursement from the SIF (consistent with the SIF's reimbursement of CRE), but the request was denied.

In light of the denial, the MPCGA initiated proceedings in the Workers' Compensation Agency seeking reimbursement from the SIF for the share of plaintiff's benefit that was attributable to plaintiff's employment at Andoni's Restaurant. In support of the claim for reimbursement, the MPCGA relied on MCL 418.372(1), which provides, in part:

> If an employee was engaged in more than 1 employment at the time of a personal injury or a personal injury resulting in death, the employer in whose employment the injury or injury resulting in death occurred is liable for all the injured employee's medical, rehabilitation, and burial benefits. Weekly benefits shall be apportioned as follows:
>
> * * *
>
> (b) If the employment which caused the personal injury or death provided 80% or less of the employee's average weekly wage at the time of the personal injury or death, the insurer or self-insurer is liable for that portion of the employee's weekly benefits as bears the same ratio to his or her total weekly benefits as the average weekly wage from the employment which caused the personal injury or death

> bears to his or her total weekly wages. The second injury fund is separately but dependently liable for the remainder of the weekly benefits. The insurer or self-insurer has the obligation to pay the employee or the employee's dependents at the full rate of compensation. The second injury fund shall reimburse the insurer or self-insurer quarterly for the second injury fund's portion of the benefits due the employee or the employee's dependents.

The determinative issue in this case is whether the MPCGA is an "insurer" under MCL 418.372(1)(b). For purposes of the Worker's Disability Compensation Act, "insurer" is defined as "an organization that transacts the business of worker's compensation insurance within this state." MCL 418.601(a). Both the magistrate and WCAC found that the MPCGA met this definition. We agree.

The MPCGA is an association of all insurers authorized to engage in the business of insurance (other than life or disability insurance) in Michigan. MCL 500.7911(1). Each insurer is a member of the association as a condition of its authority to transact insurance business in this state. *Id*. To fund the cost of the MPCGA's operations, all member insurers are levied assessments by the MCPGA. MCL 500.7941(1). The MPCGA is subject to the laws "of this state to the extent that it would be subject to those laws if it were an insurer organized and operating under [MCL 500.5000 *et seq*.], to the extent that those other laws are consistent with this chapter." MCL 500.7911(3).

The purpose of the MPCGA is to fulfill the obligations of an insolvent insurer in regard to "covered claims." MCL 500.7925(1) provides in part:

> "Covered claims" means obligations of an insolvent insurer that meet all of the following requirements:

> (a) Arise out of the insurance policy contracts of the insolvent insurer issued to residents of this state or are payable to residents of this state on behalf of insureds of the insolvent insurer.
>
> (b) Were unpaid by the insolvent insurer.
>
> (c) Are presented as a claim to the receiver in this state or the association on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.
>
> (d) Were incurred or existed before, at the time of, or within 30 days after the date the receiver was appointed.
>
> (e) Arise out of policy contracts of the insolvent insurer issued for all kinds of insurance except life and disability insurance.
>
> (f) Arise out of insurance policy contracts issued on or before the last date on which the insolvent insurer was a member insurer.

To effectuate the fulfillment of the MPCGA's purpose, the MPCGA assumes the rights of an insolvent insurer as follows:

> The association shall be a party in interest in all proceedings involving a covered claim and shall have the same rights as the insolvent insurer would have had if not in receivership, including the right to appear, defend, and appeal a claim in a court of competent jurisdiction; to receive notice of, investigate, adjust, compromise, settle, and pay a covered claim; and to investigate, handle, and deny a noncovered claim. The association shall not have a cause of action against the insureds of the insolvent insurer for any sums it has paid out, except those causes of action that the insolvent insurer would have had if the sums had been paid by the insolvent insurer, or except as otherwise provided by this chapter. [MCL 500.7931(2).][1]

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[1] The SIF advocates a narrow interpretation of MCL 500.7931(2) in regard to the rights of the MPCGA. The SIF argues that under the doctrine of *ejusdem generis*, because the general phrase "the same rights as the insolvent insurer" is followed by a specific list of rights that are

In light of the preceding statutory provisions, we conclude that the MPCGA is an "insurer" as defined by MCL 418.601(a). This Court must apply clearly worded statutory provisions as written,[2] and under the plain unambiguous language of MCL 418.601(a), all that is required to meet the definition of "insurer" is that "an organization" be one "that transacts the business of worker's compensation insurance" in Michigan. MCL 418.601(a).[3] Here, as an "association," MPCGA is an "organization." See *Random House Webster's College Dictionary* (1997), p 920. And, in our opinion, an association that is subject to the same laws as a workers' compensation insurer, assumes the obligations of an insolvent workers' compensation insurer, and has the same rights as the insolvent workers' compensation

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administrative and procedural in nature, the rights of the MPCGA are limited to those of a similar character. However, where, as here, the general term precedes the more specific terms, the doctrine of *ejusdem generis* does not apply. See *Brown v Farm Bureau Gen Ins Co of Michigan*, 273 Mich App 658, 664; 730 NW2d 518 (2007). The SIF also argues that under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) the rights of the MPCGA are limited to those rights listed in the statute. But this Court has held that "[a] fair reading of the language of § 7931(2) does not lead one to the conclusion that the rights enumerated therein are all-inclusive." *Felsner v McDonald Rent-A-Car Inc*, 173 Mich App 518, 523; 434 NW2d 178 (1988). Although *Felsner* is not binding authority, see MCR 7.215(J)(1), we agree with the decision. The doctrine of *expressio unius est exclusio alterius* "does not subsume the plain language of the statute when determining the intent of the Legislature." *Tuggle v Dep't of State Police*, 269 Mich App 657, 664; 712 NW2d 750 (2006). By prefacing the specific list of rights in MCL 500.7931(2) with the word "including," the Legislature clearly did not intend the list to be exclusive.

[2] See generally, *Rowell v Security Steel Processing Co*, 445 Mich 347, 353-354; 518 NW2d 409 (1994).

[3] The SIF focuses heavily on the absence of a contractual relationship between the MPCGA and an insured; however, under the plain language of MCL 418.601(a), no contractual relationship is required. Therefore, the fact that there is no contractual relationship does not preclude a finding that the MPCGA is an "insurer" under that provision.

insurer as to those obligations is one that "transacts the business of worker's compensation insurance." As a result, we agree with the magistrate and the WCAC that the MPCGA is an "insurer" under MCL 418.601(a) and therefore eligible for reimbursement from the SIF under MCL 418.372(1)(b).[4]

We affirm.

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[4] We decline to address the SIF's public policy arguments. Since the relevant statutory provisions are clear, they must be enforced as written, and this Court may not independently determine the best public policy. See *Tull v WTF, Inc*, 268 Mich App 24, 36; 706 NW2d 439 (2005).

GENESEE FOODS SERVICES, INC v MEADOWBROOK, INC

Docket No. 274517. Submitted December 11, 2007, at Detroit. Decided July 17, 2008, at 9:10 a.m. Leave to appeal sought.

Genesee Foods Services, Inc., and Genesee Management, LLC, brought an action against Meadowbrook, Inc., Rick Smith, and Steve Smith, alleging negligence, breach of fiduciary duty, and breach of a contractual obligation to obtain adequate casualty insurance coverage for the plaintiffs' business. The defendants moved for summary disposition, arguing that the plaintiffs' claims are barred by a release that their principals had executed in favor of Citizens Insurance Company of America (the insurer with whom the defendants had an agency agreement and arranged coverage for the plaintiffs) and its "agents [and] related companies" after settling their insurance claims against Citizens. The court, Joseph J. Farah, J., denied the motion, ruling that there is a question of fact regarding whether the defendants were agents of Citizens or of the plaintiffs. The defendants appealed by leave granted.

The Court of Appeals *held*:

1. An independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer. The defendants conceded that they are independent insurance agents. As such, they were not released from liability under the terms of the release executed by the plaintiffs' principals.

2. There remains a question of fact regarding whether Meadowbrook is a "related company" of Citizens for purposes of the release.

Affirmed.

KELLY, J., dissenting, stated that Meadowbrook is an agent of Citizens under an agreement those parties executed and that the unambiguous release in favor of Citizens and its agents should be enforced as written. She would reverse the trial court's decision.

INSURANCE — INDEPENDENT AGENTS — AGENCY.

An independent insurance agent, when facilitating an insurance agreement between the insurer and the insured, is an agent of the insured, not the insurer.

Klemanski & Associates, P.C. (by *James C. Klemanski*), for the plaintiffs.

Mellon, McCarthy & Pries, PC (by *Daniel J. McCarthy* and *Brian R. Harris*), for the defendants.

Before: SAAD, C.J., and OWENS and KELLY, JJ.

OWENS, J. Defendants appeal by leave granted the trial court's order denying their MCR 2.116(C)(7) motion for summary disposition. We affirm.

Genesee Foods Services, Inc. (Genesee Foods), is a food wholesaler and distribution business incorporated by Robert Grabowski and Robert Jackier in April 1999. Its principal place of business was at G-4309 South Dort Highway in Burton, on property owned by Genesee Management, LLC, which Grabowski had organized as a limited liability company in April 1999. The Dort Highway property contained two buildings, an approximately 17,000-square-foot cold storage building and an approximately 800-square-foot one-family house.

Defendant Meadowbrook, Inc. (Meadowbrook), is a commercial insurance agency; defendants Rick and Steve Smith are licensed insurance agents and Meadowbrook employees. In 1988, Meadowbrook signed an agreement to become an agent for Citizens Insurance Company of America (Citizens).[1] The 1988 agreement between Meadowbrook and Citizens began:

> By signing this agreement you become an Agent for the Companies indicated above. You promise to follow our underwriting rules and regulations and the provisions of

[1] We will refer to this agreement as the 1988 agreement. In this agreement, Meadowbrook also agreed to become an agent of two other insurance companies. For this reason, the plural form is used in the agreement to refer to these companies.

> this agreement. "You" and "your" mean the Agent named above. "We", "us", and "our" mean the Companies named above.
>
> Throughout this agreement, the singular indicates the plural and the plural the singular, where appropriate. The contractual obligations running between each of the Companies and the Agent are severable and distinct. However, any breach of your duties or responsibilities to any of the Companies, or the occurrence of any condition justifying the termination of the contract with any of the Companies, will also give us the right to modify, suspend, or terminate the agreement with any or all of the Companies.

The 1988 agreement also described defendants' authority, duties, and relationship with Citizens. In particular, the 1988 agreement gave Meadowbrook the authority to accept and bind contracts of insurance that Citizens was licensed to write.

According to plaintiffs, in March 2001, Grabowski met with Steve and Rick Smith to discuss obtaining commercial general liability and property insurance from a third-party insurer. Defendants arranged for plaintiffs to purchase an insurance policy through Citizens. When plaintiffs renewed their policy to insure their property for the period between March 2003 and March 2004, the policy provided $771,750 in coverage for the cold storage building, $374,500 in coverage for personal property in the cold storage building, $500,000 in coverage for combined business income and extra expenses, and $105,000 in coverage for the house.

On August 15, 2003, a fire destroyed most of the Dort Highway property and its contents, rendering the businesses inoperable. In October 2003, plaintiffs submitted a claim to Citizens for property damage and business interruption losses sustained in the fire. On November 20, 2005, plaintiffs and Citizens reached a settlement regarding plaintiffs' insurance claims and ex-

ecuted a "Compromise Settlement Release and Hold Harmless Agreement" (2005 release). The 2005 release, signed by both Jackier and Grabowski, read in pertinent part:

> The Undersigned, Genesee Foods Services, Inc., Genesee Management, L.L.C., Robert Jackier and Robert Grabowski, hereby acknowledge receipt from the Citizens Insurance Company of America, the sum of Five Hundred and Fifty Thousand and 00/100 Dollars ($550,000.00), by its checks totaling that amount and made payable as follows: Genesee Foods Services, Inc., Genesee Management, L.L.C., Food Delivery Service, Inc., Robert Jackier and Robert Grabowski, Fifth Third Bank, Associated Adjusters, Inc., and Jackier Gould, P.C. In consideration of said payments, and previous payments made in the form of advances in the amount of Six Hundred and Thirty Thousand Six Hundred and Sixty-Three and 73/100 ($630,663.73) Dollars, the Undersigned do hereby release and forever discharge the Citizens Insurance Company of America and each of its servants, agents, adjusters, employees, attorneys, related companies, parent companies and subsidiaries (hereinafter "Citizens Releasees") of and from any and all claims, debts, dues, actions, causes of actions and demands, whatsoever, which the Undersigned now have or may have against the Citizens Releasees for or on account of any matter or thing that has at any time heretofore occurred, particularly, but without limiting the generality hereof all claims and demands arising out of its policy number 01 MPC 0560795 issued to Genesee Foods Services, Inc., for the premises located at G-4309 South Dort Highway, Burton, Michigan, by reason of fire, smoke, water or other loss to property described within the said Policy occurring on or about June 30, 2003 and August 15, 2003 and all claims and demands arising out of anything said or done by Citizens Releasees, in investigating the said claims, the causes thereof, and/or any other claims of the Undersigned including claims for bad faith, consequential and/or punitive damage.

On November 23, 2005, Citizens issued a final check in the amount of $9,048 to plaintiffs, noting that the check was the full and final payment of claims involving the buildings and of all claims.

Both Grabowski and Jackier claimed that it was not their intent to release defendants from legal liability in connection with procuring insurance policies for plaintiffs and maintained that if defendants had procured adequate insurance coverage for plaintiffs, plaintiffs' payment and settlement would have been significantly greater. Plaintiffs filed an action against defendants on December 16, 2005, alleging that defendants were negligent, breached their fiduciary duty to plaintiffs, and breached their contractual agreement to provide insurance agency services to plaintiffs when they failed to ensure that the insurance policy that they arranged for plaintiffs to purchase would provide plaintiffs with sufficient coverage in the event of a loss. Defendants thereafter moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that when plaintiffs entered the 2005 release with Citizens, they also released defendants of any liability with regard to the 2003 fire. In response, plaintiffs argued that defendants were their agents, not Citizens' agents, and alleged that they were unaware that an agency agreement existed between defendants and Citizens when they executed the release. The trial court denied defendants' motion for summary disposition, concluding that a question of fact remained regarding whether defendants were agents of Citizens or of plaintiffs, but granted defendants' motion for a stay of proceedings pending resolution of this appeal.

Defendants argue that plaintiffs' claims against them were barred by the terms of the 2005 release and that the trial court erred when it failed to grant their

MCR 2.116(C)(7) motion for summary disposition. We disagree. We review de novo a trial court's denial of a motion for summary disposition pursuant to MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo questions regarding the proper interpretation of a contract and whether the language of a contract is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

The central issue presented in this appeal is whether the business relationship between defendants and Citizens was such that defendants were "Citizens Releasees" pursuant to the terms of the 2005 release between Citizens and plaintiffs and, therefore, were released from liability arising from the 2003 fire that destroyed plaintiffs' property.

Although an insurance policy is a contractual agreement between the insurer and the insured, *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 530; 547 NW2d 52 (1996), an insurance agent typically acts on behalf of the parties to facilitate the sale and execution of the policy. The fiduciary duty that the insurance agent owes each party varies in relation to the agent's status as an independent or exclusive agent.

Although no determination was made in the trial court regarding whether defendants were exclusive agents of Citizens or independent insurance agents, defendants conceded at oral arguments that they are independent insurance agents. When an insurance policy "is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998).

Defendants argue that the plain language of the 2005 release indicates that plaintiffs released both Citizens and defendants from additional liability arising from the 2003 fire. The relevant portion of the contract states that

> the Undersigned do hereby release and forever discharge the Citizens Insurance Company of America and each of its servants, agents, adjusters, employees, attorneys, related companies, parent companies and subsidiaries (hereinafter "Citizens Releasees") of and from any and all claims, debts, dues, actions, causes of actions and demands, whatsoever, which the Undersigned now have or may have against the Citizens Releasees . . . .

The plain language of the 2005 release indicates that "Citizens Releasees" were released from liability arising from the 2003 fire. " 'A release of liability is valid if it is fairly and knowingly made.' " *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996), quoting *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 201; 428 NW2d 26 (1988). This Court set forth the following rules regarding the scope and interpretation of a release:

> The scope of a release is controlled by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become "subjective, and irrelevant," and the legal effect of the language is a question of law to be resolved summarily. [*Gortney v Norfolk & W R Co*, 216 Mich App 535, 540-541; 549 NW2d 612 (1996) (citations omitted).]

"We read contracts as a whole and accord their terms their plain and ordinary meaning." *Scott v Farmers Ins Exch*, 266 Mich App 557, 561; 702 NW2d 681 (2005). "[U]nambiguous contracts . . . are to be enforced as written unless a contractual provision violates law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005).

The 1988 agreement between Meadowbrook and Citizens created a contractual relationship between those parties; Meadowbrook was given the authority to sell, accept, and bind Citizens to contracts of insurance that Citizens was licensed to write in exchange for a commission on the sale. Pursuant to this agreement, Meadowbrook was authorized to act for or on behalf of Citizens for purposes of accepting and binding Citizens to insurance contracts.

Although defendants had a limited fiduciary relationship with Citizens for purposes of accepting and binding Citizens according to the terms of the 1988 agreement, because defendants were independent insurance agents when they assisted plaintiffs, their primary fiduciary duty of loyalty rested with plaintiffs, who could depend on this duty of loyalty to ensure that defendants were acting in their best interests, both in terms of finding an insurer that could provide them with the most comprehensive coverage and in ensuring that the insurance contract properly addressed their needs. The primacy of this relationship between an insured and an independent insurance agent is reflected in Michigan caselaw, which, as stated earlier, holds that "the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *West American Ins Co*, *supra* at 310. Accordingly, because defendants were agents of plaintiffs, not Citizens, defendants were not released from liability arising from the 2003 fire when

plaintiffs signed the 2005 agreement releasing Citizens and its agents from liability. Were we to hold otherwise, we would have to conclude that plaintiffs, in signing the release of Citizens and its agents, intentionally released their own agents (defendants) regarding the very transaction for which defendants owed plaintiffs the primary duty of loyalty and expertise. Such a conclusion would violate reason and common sense.

Defendants also argue that Meadowbrook is a "Citizens Releasee" because it is a "related company." This term is not defined in the 2005 release. This term could have a variety of meanings, as the parties could have intended a "related company" to include a wide variety of organizations affiliated with, working for, or receiving services from Citizens. No clues are provided in the 2005 agreement to further discern the term's meaning and, accordingly, the term is ambiguous. A factual determination is necessary regarding whether the parties intended for Meadowbrook to be released from liability as a "related company" to Citizens.

Defendants also argue that the November 23, 2005, check issued by Citizens in payment for "Full and Final Building & Full and Final All Claims" and accepted by plaintiffs constituted accord and satisfaction of the 2005 agreement. The parties do not dispute that Citizens compensated plaintiffs for their property loss in accordance with the terms of the 2005 agreement. Because defendants are not agents of Citizens and, therefore, would not have been released from liability under this provision of the 2005 agreement, Citizens' issuance of the November 23, 2005, check would not satisfy plaintiffs' claims against defendants. To the extent that a question of fact remains regarding whether Meadowbrook is a "related company" of Citi-

zens, resolution of this issue is premature and we decline to address it at this time.

Affirmed.

SAAD, C.J., concurred.

KELLY, J. (*dissenting*). I respectfully dissent because the terms of the settlement agreement and release are unambiguous and should be enforced as written.

As we stated in *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996):

> "Summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties. MCR 2.116(C)(7). A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release.
>
> "If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become 'subjective, and irrelevant,' and the legal effect of the language is a question of law to be resolved summarily." [Citations omitted.]

The rules regarding the interpretation of a release are well established. "The scope of a release is controlled by the language of the release, and where . . . the language is unambiguous," it is construed as written. *Adair v Michigan*, 470 Mich 105, 127; 680 NW2d 386 (2004), citing *Batshon v Mar-Que Gen Contractors, Inc,* 463 Mich 646, 650; 624 NW2d 903 (2001). A release is knowingly made even if it is not labeled a "release," or the releasor failed to read its terms, or thought the

terms were different, absent fraud or intentional misrepresentation designed to induce the releasor to sign the release through a strategy of trickery. *Xu v Gay*, 257 Mich App 263, 273; 668 NW2d 166 (2003), citing *Dombrowski v City of Omer*, 199 Mich App 705, 709-710; 502 NW2d 707 (1993).

The settlement agreement at issue here, entitled "Compromise Settlement Release and Hold Harmless Agreement" states that in exchange for payments totaling $1,180,663.73, plaintiffs and their principals

> hereby *release and forever discharge the Citizens Insurance Company of America and each of its servants, agents, adjusters, employees, attorneys, related companies, parent companies and subsidiaries* (hereinafter "Citizens Releasees") of and *from any and all claims, debts, dues, actions, causes of actions and demands, whatsoever*, which [plaintiffs] now have or may have against the Citizens Releasees for or on account of any matter or thing that has at any time heretofore occurred, particularly, but without limiting the generality hereof all claims and demands arising out of its policy number 01 MPC 0560795 issued to Genesee Food Services Inc., for the premises located at G-4309 South Dort Highway, Burton, Michigan, by reason of fire, smoke, water or other loss to property described within said Policy occurring on or about June 30, 2003 and August 15, 2003 and all claim and demands arising out of anything said or done by Citizens Releasees, in investigating the said claims, the causes thereof, and/or any other claims of the [plaintiffs] including claims for bad faith, consequential and/or punitive damage. [Emphasis added.][2]

[2] The agreement further states that plaintiffs accepted the consideration "in full compromise, settlement, satisfaction and discharge of any liability" and that plaintiffs agree "to indemnify and hold the Citizens Releasees harmless against all actions, proceedings, claims . . . arising under the Policy for loss and damage to the property insured . . . or by reason of the claims of any person or entity who may claim an interest in the proceeds payable under the Policy."

It is uncontested that an agency agreement was executed between Meadowbrook, Inc. (Meadowbrook), and Citizens Insurance Company of America (Citizens) in June 1988 and was effective on January 1, 1989. This agreement created a contractual relationship between Meadowbrook and Citizens; Meadowbrook was given the authority to sell, accept, and bind Citizens to contracts of insurance that Citizens was licensed to write in exchange for a commission on the sale. Pursuant to this agreement, Meadowbrook was an agent of Citizens for the purpose of accepting and binding insurance policies on behalf of Citizens, including the insurance policy covering plaintiffs' warehouse and its contents. Meadowbrook and its agents were acting within the scope of this agency when they sold the Citizens policy to plaintiffs. The language of the settlement agreement is expansive and all-inclusive. Plaintiffs released agents of Citizens for "any and all claims, debts, dues, actions, causes of actions and demands, whatsoever, which [plaintiffs] now have or may have against the Citizens Releasees [which include Meadowbrook] for or on account of any matter or thing that has at any time heretofore occurred[.]" The very broad language of the settlement agreement releases and discharges any claims plaintiffs may have against Citizens' agents arising out of the fire loss and the policy issued by Citizens to plaintiffs.

Plaintiffs argue that they were unaware of the agency agreement between Meadowbrook and Citizens. That may or may not be true. However, this Court does not consider a unilateral mistake sufficient to modify or reform a previously negotiated agreement. *Casey v Auto- Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006); *Hilley v Hilley*, 140 Mich App 581, 585-586; 364 NW2d 750 (1985). Further, plaintiffs have identified nothing that prevented them from discovering the agency relationship between Meadowbrook and Citi-

zens, and they have made no allegations of fraud, misrepresentation, or trickery that might suggest that the release was not knowingly made. See *Xu*, *supra* at 272-273. Moreover, at the time they entered into the settlement agreement, plaintiffs were actively contemplating filing the instant suit, and, in fact, did so approximately two weeks after executing the settlement agreement. Nothing prevented them from including or incorporating this anticipated litigation into the settlement agreement. See, e.g., *James v State Farm Fire & Cas Co*, 480 Mich 1014.

Finally, I believe that the trial court erred in effectively reforming the release by refusing to enforce it as written. In *Casey*, *supra* at 388 we held:

> " 'A court of equity has power to reform the contract to make it conform to the agreement actually made.' To obtain reformation, a plaintiff must prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence. A unilateral mistake is not sufficient to warrant reformation. A mistake in law—a mistake by one side or the other regarding the legal effect of an agreement—is not a basis for reformation." [Citations omitted.]

Here, there was no "mutual mistake of fact, or mistake on one side and fraud on the other." Instead, the parties negotiated and entered into an arm's length transaction that resulted in releasing Meadowbrook from liability. Any "mistake" was solely attributable to plaintiffs, and they should not now be heard to complain.

In my opinion, the unambiguous language of the settlement agreement bars plaintiffs' claims against defendants. I would reverse.

DETROIT INTERNATIONAL BRIDGE COMPANY
v COMMODITIES EXPORT COMPANY

Docket No. 276225. Submitted July 10, 2008, at Detroit. Decided July 22, 2008, at 9:00 a.m.

The Detroit International Bridge Company, which owns and operates the Ambassador Bridge, brought an action in the Wayne Circuit Court to condemn land owned by defendants Commodities Export Company and Walter Lubienski in order to improve bridge access on the Detroit end of the bridge. The court, Prentis Edwards, J., ruled that the plaintiff lacked the power to condemn and granted the defendants' motion for summary disposition, but denied their request for attorney fees. The plaintiff appealed, and the defendants cross-appealed.

The Court of Appeals *held*:

1. The trial court did not err by denying the plaintiff's motion to amend its complaint to include the argument that the condemnation power it had been granted in 1921 PA 84 was preserved by §§ 189 and 192 of 1931 PA 327. Apart from the fact that § 189 was repealed in 1982, it expressly preserved only those powers that derived from the constitution, and the condemnation power on which the plaintiff sought to rely was merely statutory. Further, § 192 protected only those rights that had already accrued when 1931 PA 327 was enacted, and the plaintiff had neither a general accrued right to exercise the power of condemnation at that time nor a judgment allowing it to condemn the defendants' property. Accordingly, amending the complaint to include this argument would have been futile.

2. The plaintiff's claim that it had the power to condemn under the Railroad Code, MCL 462.101 *et seq*., is without merit. The provisions on which the plaintiff relies apply only to those bridge companies that are engaged in the operation of a railroad, which the plaintiff is not. The fact that the analogous Canadian act authorizing the plaintiff's Canadian counterpart contemplated that the Ambassador Bridge would carry railway traffic is irrelevant because the bridge does not currently carry railway traffic and no such use is being contemplated.

3. The plaintiff does not have the implied power to condemn based on its authority to construct and maintain the bridge because condemnation power must be derived from the constitution or a statute.

4. The doctrine of judicial estoppel did not prevent the defendants from asserting that the plaintiff lacked condemnation power. Although the defendants successfully alleged in a previous case that the plaintiff, as the alter ego of another company, did have condemnation power, the jurisdictional conditions underlying the condemnation power may not be based on technical waiver or estoppel.

5. Denying the defendants attorney fees and costs is an absurd result in light of the fact that the plaintiff explicitly held itself out as an entity with condemnation power and forced the defendants to incur significant expenses to retain their property. There is no basis on which to conclude that the Legislature intended that entities having condemnation power would be liable for paying expenses related to an improper condemnation attempt while entities not having that power would not be liable for paying such expenses. Accordingly, under the absurd-results rule, which the Michigan Supreme Court had disavowed but has since rehabilitated, the defendants were entitled to attorney fees and costs.

Affirmed in part and reversed in part.

1. EMINENT DOMAIN — CONDEMNATION POWER — RAILROAD CODE.

The power of bridge companies to condemn private property under the Railroad Code applies only to those bridge companies that are engaged in the operation of a railroad (MCL 462.101 *et seq*.).

2. COURTS — STATUTORY INTERPRETATION — ABSURD-RESULTS DOCTRINE.

Michigan courts construe statutes to avoid absurd results that are manifestly inconsistent with legislative intent.

Dykema Gossett (by *Craig L. John*, *Mark H. Sutton*, *Joseph A. Doerr*, and *Steven P. Cares*) and *Seikaly & Stewart PC* (by *Jeffrey T. Stewart*) for the plaintiff.

Roger E. Craig and *Kenneth C. Harrison* for the defendants.

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

METER, P.J. Plaintiff appeals as of right the trial court's order granting summary disposition to defendants in this condemnation case. Plaintiff, which owns and operates the Ambassador Bridge connecting Detroit, Michigan, with Windsor, Ontario, had attempted to condemn defendants' land in order to improve access on the Detroit end of the bridge.[1] The trial court concluded that plaintiff did not have the power to condemn. It granted summary disposition to defendants under MCR 2.116(8), but denied defendants' request for attorney fees. In their cross-appeal, defendants argue that the court erred in denying this request. We affirm the grant of summary disposition and reverse the denial of the attorney-fee request. Of particular note is our conclusion that the so-called "absurd-results rule" applies in Michigan.

Detroit Int'l Bridge Co v American Seed Co, 249 Mich 289, 293; 228 NW 791 (1930), sets forth background information about plaintiff:

> Plaintiff was organized June 20, 1927, under Act No. 84, Pub. Acts 1921 . . ., the corporation code, as a corporation for pecuniary profit, but with nominal capital, for the purpose of "constructing, owning and/or operating a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich,[2] Province of Ontario, Canada."
>
> On August 4, 1927, plaintiff amended its articles to increase its capital stock and to change its corporate purposes to read:
>
> "To construct, own and/or operate a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches thereto.

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[1] Plaintiff alleges that condemnation is necessary in order for it to comply with the Ambassador Bridge/Gateway Project Agreement, an agreement entered into by plaintiff and the Michigan Department of Transportation for the improvement of access to the bridge. Defendants maintain that plaintiff does not need to condemn the land in order to comply with the agreement.

[2] Sandwich was the prior name of Windsor.

> "To maintain and operate such bridge and the approaches thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

Under 1921 PA 84, as amended by 1925 PA 232 and 1927 PA 335, plaintiff had the power to condemn land:

> Any corporation organized for the purpose of constructing, owning or operating any highway bridge or tunnel, across or under any river, stream or other waterway forming a part of the boundary between this state and any other state or country, shall, in addition to all other powers by this act conferred, have the power to condemn any and all real estate, or interest therein, or pertaining thereto deemed necessary for the purposes of such corporation, when no mutual agreement can be reached for the purchase thereof, and in which condemnation said corporation shall proceed as in the condemnation of lands or franchises for railroad purposes under chapter one hundred fifty-seven of the compiled laws of nineteen hundred fifteen, as amended. [1927 PA 335, part 2, ch 1, § 2.]

In 1931, the Legislature enacted a new corporation code—1931 PA 327—that replaced 1921 PA 84. 1931 PA 327 expressly repealed 1921 PA 84, 1925 PA 232, and 1927 PA 335, and the replacement statute did not contain a comparable reference to condemnation. However, § 189 of the 1931 act stated:

> Every corporation heretofore organized and incorporated under any law of this state, which if now incorporated would be required to incorporate under and subject to this act, shall hereafter be subject to the provisions of this act . . . . *Nothing in this act shall be construed as attempting to deprive any such corporation of any constitutional power, right, privilege or franchise which any such corporation now enjoys*. [Emphasis added.]

Moreover, § 192 of the 1931 act, currently in effect as MCL 450.192, states:

> This act shall not impair or affect any act done, offense committed or right accruing, accrued, or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed.

Plaintiff argued below that §§ 189 and 192 of the 1931 act preserved the condemnation power plaintiff had been granted earlier. Plaintiff raised this argument in a motion for leave to file an amended complaint, after the trial court had already granted defendants' motion for summary disposition. In ruling on plaintiff's motion for leave, the trial court stated:

> I guess from a procedural standpoint all of the matters that were before this [c]ourt were decided in the [m]otion for [s]ummary [d]isposition, so insofar as the motion is concerned, really, there's nothing before this [c]ourt to amend based on the ruling in the summary disposition motion, so I will deny the motion.

Plaintiff again argues on appeal that §§ 189 and 192 of the 1931 act preserved the condemnation power set forth earlier and additionally argues that the trial court erred in refusing to allow the amendment of the complaint. We disagree.

We review a denial of leave to amend a complaint for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). Leave to amend may be denied if the amendment would be futile. *Id*. at 189-190. In addition, we review issues of statutory construction de novo. *Rinke v Potrzebowski*, 254 Mich App 411, 414; 657 NW2d 169 (2002).

> The rules of statutory construction require the courts to give effect to the Legislature's intent. This Court should first look to the specific statutory language to determine the intent of the Legislature. The Legislature, of course, is

> presumed to intend the meaning that the words of the statute plainly express . . . . If . . . the language is clear and unambiguous, the plain and ordinary meaning of the statute reflects the legislative intent and judicial construction is neither necessary nor permitted. [*Id.*]

First, and significantly, we note that § 189 of 1931 PA 327 was explicitly repealed by § 1098 of 1982 PA 162. Accordingly, plaintiff's attempt to rely on this provision to invoke the power of condemnation is unavailing. Even if § 189 had *not* been repealed, however, it would provide no basis for the relief plaintiff seeks. Section 189 stated that "[n]othing in this act shall be construed as attempting to deprive any such corporation of any *constitutional* power, right, privilege or franchise which any such corporation now enjoys." (Emphasis added.) This language is clear and unambiguous and must be applied as written. *Rinke*, *supra* at 414. The condemnation power granted to plaintiff by way of earlier legislation was merely statutory in nature and was not "constitutional." It was in contrast to certain powers that were in fact granted by the 1908 Michigan Constitution.

Nor does the saving clause cited by plaintiff—MCL 450.192—serve to retain plaintiff's historical power to condemn. As noted in *Hurt v Michael's Food Ctr*, 249 Mich App 687, 691-692; 644 NW2d 387 (2002), "[i]n general, when the Legislature repeals a statute, the right to proceed under the repealed statute is terminated for all future cases." "However, the repeal of a statute does not take away a vested right, which remains enforceable despite the repealer." *Id*. at 692. MCL 450.192 is in accordance with this latter doctrine, stating that the 1931 act "shall not . . . affect any . . . right . . . accrued . . . ."[3] We hold that no accrued or

[3] Plaintiff makes no argument that the phrase "accrued right" should be interpreted differently from the phrase "vested right."

vested right is at issue here. As noted in *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959): "It is the general rule that that which the [L]egislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." Plaintiff had no general accrued right to exercise the power of condemnation even after the repeal of the earlier statutes granting it that power. If plaintiff had, at the time of the repeal, already obtained a judgment allowing it to condemn defendants' property, certain rights to that condemnation may have survived the repeal, but that, of course, was not the case here.

Given that plaintiff's arguments regarding §§ 189 and 192 of the 1931 act are unavailing, the amendment of the complaint would have been futile, and thus the trial court did not commit an error requiring reversal by denying the amendment. *Franchino*, *supra* at 189-190. Although the trial court gave differing reasoning for denying the amendment, we will not reverse a trial court if it reached the right result for an alternative reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Plaintiff also argued below that it had the power to condemn by virtue of MCL 462.241, a provision of the Railroad Code, MCL 462.101 *et seq*. MCL 462.241 states:

> If a railroad, bridge, or tunnel company,[4] including a non-Michigan railroad company authorized to own and operate a railroad in this state, is unable to agree for the purchase of any real or personal property or franchises

[4] In contrast to this reference to "a railroad, bridge, or tunnel company," other portions of the Railroad Code use slightly different language. See, e.g., MCL 462.201(1) ("corporation . . . constructing, operating, and maintaining a railroad, railroad bridge, or railroad tunnel") and MCL 462.247 ("railroad bridge or tunnel company").

> required for the purpose of its incorporation, including, but not limited to, yards, terminals, depots, and freight service facilities, it may acquire title to the property in the manner and by the proceedings prescribed in the uniform condemnation procedures act . . . . However, a railroad, bridge, or tunnel company shall not, except for crossing, take the track or right-of-way of any other railroad company.

The trial court rejected plaintiff's reliance on this statute in ruling on defendants' motion for summary disposition. The court stated:

> The bridge company next contend[s] that they are [sic] authorized to condemn under the Railroad Code of 1993 . . . . The introduction to that statute says that this is an act to be known as the Railroad Code. References throughout the act refer to railroads, railroad bridges, railroad tunnels, and in some cases there are references to bridges and tunnels.
>
> It's interesting that one of the provisions found at 462.201 indicates that persons may form corporations for the purpose of constructing, operating and maintaining railroads, railroad bridges and railroad tunnels.
>
> I think it's pretty clear that the legislation that we're talking about here was intended to address considerations for railroads, railroad bridges and railroad tunnels and not as being asserted by the [p]laintiff in this case.

Plaintiff argues that the trial court erred in failing to find that it had the power to condemn by virtue of MCL 462.241. We disagree. We review de novo a trial court's decision with regard to a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). The pertinent question is "whether the claim is so clearly unenforceable as a matter of law that no factual development

could establish the claim and justify recovery." *Id*. When a court reviews the motion, "[a]ll factual allegations supporting the claim, and any reasonable inference[s] or conclusions that can be drawn from the facts, are accepted as true." *Id*.

MCL 462.337, another provision of the Railroad Code, states:

> This act shall apply to any individual, partnership, association, or corporation, and their respective lessees, trustees, or receivers, appointed by a court, while engaged in the operation of a railroad within this state, or while owning, leasing, or otherwise having under his or her or their jurisdiction or control the land on which, or adjacent to which, there may be located and operated any railroad track or sidetrack that is a part of or is in any way connected with a railroad.

This provision makes clear that MCL 462.241 does not apply to plaintiff simply because plaintiff is a "bridge company." Instead, for the statute to apply, plaintiff must be "engaged in the operation of a railroad" or must otherwise have a connection with a railroad. MCL 462.337. Plaintiff does not satisfy this requirement. We reject its argument that it falls within the purview of MCL 462.337 because the Canadian act authorizing the counterpart Canadian corporation originally contemplated that the bridge would carry "railway and general traffic . . . ." There is simply no evidence that the bridge currently carries railway traffic or that such a use is currently being contemplated.

Plaintiff additionally argued below that it had the power to condemn by virtue of "implied necessity." The trial court rejected this argument in ruling on defendants' motion for summary disposition, stating, "I can find no authority that would give the bridge company in this case any [implied] authority." Plaintiff contends

that the trial court erred by failing to rule that plaintiff had implied condemnation power. It alternatively contends that the trial court should have held an additional hearing with regard to the issue. We disagree.

Plaintiff cites *City of Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 631-632; 502 NW2d 638 (1993), in which the Supreme Court held that a municipality has no inherent power to condemn and therefore must derive such power from a statute or the constitution "or by necessary implication from delegated authority." Plaintiff appears to argue that *Edward Rose* may be analogized to the instant case[5] and that plaintiff has the "delegated authority" to condemn because its grant of authority to construct and maintain the bridge must, by necessity, include the power of condemnation. We cannot agree with plaintiff's broad proclamation. Indeed, condemnation power must be derived from the constitution or from statutes, see, e.g., *City of Allegan v Iosco Land Co*, 254 Mich 560, 563; 236 NW 863 (1931), and no constitutional provision or statute currently in effect authorizes plaintiff to condemn land. Plaintiff cites no authority for the proposition that implied authority to condemn certain property may be found even in the absence of a law authorizing *some type* of condemnation power. Accordingly, plaintiff has established no basis for reversal or for a remand for an evidentiary hearing.[6]

Plaintiff also argued below that judicial estoppel prevented defendants from asserting that plaintiff

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[5] It is doubtful that the reference in *Edward Rose* to condemnation power derived by "necessary implication from delegated authority" even applies in this case, because *Edward Rose*, in making that reference, was specifically referring to the powers of local governments. *Edward Rose*, *supra* at 632 n 5.

[6] As noted by defendants, if plaintiff believes it must acquire defendants' land in order to operate the bridge properly, it may seek the enactment of further legislation.

lacked condemnation power because, in an earlier case, defendants, in arguing that plaintiff was the alter ego of another company, had successfully alleged that plaintiff had condemnation power. The trial court, in ruling on defendants' motion for summary disposition, stated that defendants did "not have the authority to confer upon a private company the right to condemn, notwithstanding the assertion of the judicial estoppel theory." Plaintiff contends that the trial court erred in its analysis of the estoppel theory.

Under the doctrine of judicial estoppel, a party that has unequivocally and successfully set forth a position in a prior proceeding is estopped from setting forth an inconsistent position in a later proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). Here, even assuming that defendants' assertion in the prior case regarding plaintiff's condemnation power could be considered unequivocal, we find no basis for reversal. As noted in *In re Petition of Rogers*, 243 Mich 517, 522; 220 NW 808 (1928), the jurisdictional conditions underlying eminent domain power "may not rest upon technical waiver or estoppel." See also *Lookholder v State Hwy Comm'r*, 354 Mich 28, 38 n 8; 91 NW2d 834 (1958), and *State Hwy Comm'r v Jones*, 4 Mich App 420, 427; 145 NW2d 231 (1966). Moreover, in *Detroit Sharpshooters' Ass'n v Hamtramck Hwy Comm'rs*, 34 Mich 36, 37 (1876), the Court stated:

> The rule is well settled, that in all cases where the property of individuals is sought to be condemned for the public use by adverse proceedings, the laws which regulate such proceedings must be strictly followed, and especially that every jurisdictional step, and every requirement shaped to guard the rights and interests of parties whose property is meant to be taken, must be observed with much exactness.

This case provides additional support for the conclusion that plaintiff's estoppel argument is without merit. Reversal is unwarranted.[7]

On cross-appeal, defendants argue that the trial court erred in denying their request for attorney fees and costs. This argument involves statutory interpretation, which, as noted earlier, we review de novo. *Rinke*, *supra* at 414.

In its complaint for condemnation, plaintiff relied on the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*. That act, in MCL 213.51, defines an "agency" as an entity "authorized by law to condemn property." See MCL 213.51(1)(c), (h), and (j). Additionally, MCL 213.66(2) states:

> If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

Plaintiff argued below that if the court rejected its condemnation arguments, it could not be forced to pay attorney fees and other expenses under these statutes because it would not be an entity "authorized by law to condemn property." MCL 213.51(1)(h) and (j). In a brief ruling from the bench, the trial court agreed. Defendants contend that such a result is absurd and that an award of attorney fees and expenses is warranted here. We agree with defendants.

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[7] In a supplemental brief, plaintiff cites *Detroit v Ambassador Bridge Co*, 481 Mich 29; 748 NW2d 221 (2008), which was decided after the trial court's ruling. Plaintiff argues that this opinion supports the conclusion that plaintiff has condemnation power. However, that case dealt with whether plaintiff is exempt from zoning regulations and is not germane to whether plaintiff has the statutory or constitutional authority to condemn property.

It is true that we have concluded in this opinion, as did the trial court in its opinion below, that plaintiff is not authorized by law to condemn property. However, to use these opinions as a basis to deny attorney fees and costs to defendants would be absurd, when plaintiff explicitly held itself out as an entity with condemnation power and forced defendants to incur significant expenses in order to retain their property. Historically, Michigan followed the absurd-results rule, which dictates that a statute "should be construed to avoid absurd results that are manifestly inconsistent with legislative intent . . . ." See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 110-112; 718 NW2d 784 (2006) (KELLY, J.). In *People v McIntire*, 461 Mich 147, 155-156 n 2; 599 NW2d 102 (1999), the Michigan Supreme Court retreated from this doctrine and indicated that a statute must be applied literally even if the application leads to an absurd result. Several years later, however, a majority of Supreme Court justices repudiated that holding in *Cameron*, *supra* at 79 (MARKMAN, J.), 103-104 n 12 (CAVANAGH, J.), 104 n 1 (WEAVER, J.), 109 (KELLY, J.). As noted in *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), if the Supreme Court discusses and decides an issue germane to a controversy, even if it is not decisive of the controversy, the decision constitutes binding precedent. "A decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case." *Id*. (citation and quotation marks omitted). Accordingly, we accept the conclusion of Justices MARKMAN, CAVANAGH, WEAVER, and KELLY as authoritative.[8]

[8] We are aware that this Court, in opinions issued after *Cameron*, has cited *McIntire* in concluding that the absurd-results rule does not apply in Michigan. See *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 202-203; 731 NW2d 481

Therefore, to paraphrase Justice MARKMAN in *Cameron*, *supra* at 80, a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result. Here, there is simply no basis on which to conclude that the Legislature intended that (1) an entity having the power to condemn would be liable for paying expenses related to an improper condemnation attempt, but (2) an entity *not* having the power to condemn would *not* be liable for paying expenses related to an improper condemnation attempt, even though that entity held itself out as having the power of condemnation. Such a result would be patently absurd and "unthinkable." *Id*. at 84 (MARKMAN, J.) (citation and quotation marks omitted). As noted in *Escanaba & L S R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 814-815; 402 NW2d 505 (1986), property owners may not be forced to suffer because of an action that they did not initiate and that endangered, through condemnation proceedings, their right to private property. Defendants were entitled to attorney fees and costs under MCL 213.66(2).

Affirmed in part, reversed in part, and remanded for further proceedings related to attorney fees and costs. We do not retain jurisdiction.

(2007), lv granted 481 Mich 862 (2008), and *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569; 753 NW2d 265 (2008); see also *Cairns v East Lansing*, 275 Mich App 102, 118; 738 NW2d 246 (2007) (absurd-results rule is inapplicable "in those circumstances in which a statute is unambiguous"). However, none of these opinions cites or discusses *Cameron*. Moreover, *United States Fidelity* relied in large part on *Decker v Flood*, 248 Mich App 75, 84; 638 NW2d 163 (2001), and *Cairns* relied in large part on *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 207; 725 NW2d 84 (2006). Both *Decker* and *Taylor* were issued before *Cameron*. Under these circumstances, the applicable portions of *United States Fidelity*, *Cairns*, and *Kimmelman* are not binding on us under MCR 7.215(J)(1).

ESTATE OF DALE v ROBINSON

Docket Nos. 269352, 269353, and 269354. Submitted July 2, 2008, at Lansing. Decided July 22, 2008, at 9:05 a.m.

R. J. Nunley, the personal representative of the estate of C. Joyce Dale, deceased, served a notice of intent to bring a wrongful-death medical-malpractice action on Stephen W. Robinson, Jr., M.D., other physicians, and several health facilities. Dawn Merlone, the successor personal representative of the estate, subsequently brought the action in the Calhoun Circuit Court. Peter W. Barrett, M.D., Doctors Group, P.C., and Jin-Chul Kim, M.D., moved for summary disposition on statute-of-limitations grounds, arguing that Nunley had sent the notice after the period of limitations expired and that the notice had not tolled the wrongful-death saving period set forth in MCL 600.5852, which allows personal representatives additional time to file suit. Battle Creek Health System and Cancer Care Center also moved for summary disposition on the same grounds and on the ground that Merlone's appointment as the successor personal representative did not give her an additional two-year period within which to bring the action. Robinson and Second Opinion, P.C., also moved for summary disposition on the same grounds as those raised in the other two motions. The court, Conrad J. Sindt, J., denied the motions, concluding that *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29 (2003), allowed a successor personal representative such as Merlone two years from the date of her appointment to bring an action and that she had filed the complaint in a timely fashion. The defendants sought leave to appeal in three separate applications. The Court of Appeals denied the applications, but the Supreme Court remanded the matters to the Court of Appeals for consideration as on leave granted. 474 Mich 1098 (2006). The Court of Appeals consolidated the appeals and twice held them in abeyance pending the decisions by special panels of the Court convened for cases involving similar or related issues.

The Court of Appeals *held*:

The trial court did not err by denying the defendants summary disposition. Merlone's complaint was timely under *Eggleston*. She filed the complaint as the personal representative of Dale's estate

within two years after her letters of authority were issued and within three years after the period of limitations had run, as required by MCL 600.5852. The two-year period is measured from the date that letters of authority are issued to any personal representative, regardless of whether that person is the initial personal representative or a successor. Further, a successor personal representative may rely on the notice of intent filed by a predecessor personal representative.

Affirmed.

NEGLIGENCE — MEDICAL MALPRACTICE — LIMITATION OF ACTIONS — PERSONAL REPRESENTATIVES — WRONGFUL-DEATH ACTIONS — SAVING PERIOD.

The two-year saving period for a personal representative to bring an action on behalf of a decedent's estate is measured from the date that letters of authority are issued to the personal representative, regardless of whether that person is the initial personal representative or a successor personal representative (MCL 600.5852).

Aardema, Whitelaw & Sears-Ewald, PLLC (by *Dolores Sears-Ewald* and *Timothy P. Buchalski*), for Steven W. Robinson, Jr., M.D., and Second Opinion, P.C.

Johnson & Wyngaarden, P.C. (by *Robert M. Wyngaarden* and *Michael L. Van Erp*), for Battle Creek Health System and Cancer Care Center.

Plunkett & Cooney (by *Robert G. Kamenec*) for Peter W. Barrett, M.D., Doctors Group, P.C., and Jin-Chul Kim, M.D.

Before: SAWYER, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM. These consolidated appeals are before us for consideration as on leave granted. In Docket No. 269352, defendants Stephen William Robinson, Jr., M.D., and Second Opinion, P.C. (collectively "the Robinson defendants"), appeal the trial court's order denying their motion for summary disposition. In Docket No. 269353, defendants Battle Creek Health System and Cancer Care Center (collectively "BCHS") appeal

the same order denying their motion for summary disposition. In Docket No. 269354, defendants Peter Walter Barrett, M.D., Doctors Group, P.C., and Jin-Chul Kim, M.D. (collectively "the Barrett defendants"), also appeal the same order denying their motion for summary disposition. All defendants argue (1) that the complaint filed by plaintiff Dawn Merlone, the successor personal representative of the estate of C. Joyce Dale, was barred by the statute of limitations and (2) that Merlone did not properly commence this medical-malpractice action because she is not the same person who served the notice of intent on defendants. We affirm.

I

These appeals stem from the alleged misdiagnosis and mistreatment of cancer. Merlone's claims on behalf of the estate arise from the death of C. Joyce Dale, who was treated by defendants and at the defendant facilities in mid-2000. It is undisputed that Dale died on December 15, 2000.

The Calhoun County Probate Court issued letters of authority appointing R. J. Nunley as personal representative of Dale's estate on February 23, 2001. On February 19, 2003, Nunley served defendants with a notice of intent (NOI) to file a medical-malpractice claim. On August 15, 2003, Merlone (hereinafter "plaintiff" or "Merlone") was appointed successor personal representative of Dale's estate. On August 22, 2003, plaintiff filed a complaint, seeking to commence a medical-malpractice action against defendants.

In February 2005, the Barrett defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the statute of limitations barred plaintiff's complaint. They contended that the NOI was not sent

until after the period of limitations had expired and that there was consequently no time remaining to be tolled under MCL 600.5856. The Barrett defendants also argued that, pursuant to *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), the NOI did not toll the two-year wrongful-death saving period of MCL 600.5852, which affords personal representatives additional time in which to pursue a legal action on behalf of a decedent's estate. The Barrett defendants argued that *Waltz* applied retroactively.

BCHS then moved for summary disposition, concurring with the Barrett defendants' arguments. BCHS additionally argued that plaintiff's appointment as successor personal representative did not create an additional two-year period within which to file suit. BCHS attempted to distinguish *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), from the instant case on the ground that the first personal representative in *Eggleston* died only five months after his appointment. BCHS argued that the first personal representative in this case, Nunley, had served for two years without filing suit and that Merlone's appointment as successor personal representative had nothing to do with Nunley's inability to serve as personal representative. BCHS further argued that applying *Eggleston* in cases such as this one would allow a plaintiff to simply "switch" personal representatives to rectify the first personal representative's failure to timely commence proceedings. BCHS also argued that plaintiff's complaint was untimely under *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997).

Thereafter, the Robinson defendants moved for summary disposition, reiterating the arguments raised in the other defendants' motions.

Plaintiff responded by asserting that defendants' arguments were erroneous and were not consistent with *Eggleston*. She also contended that applying *Waltz* to this case would be unfair because it would shorten the limitations period after the complaint had already been filed. Plaintiff argued that her complaint was timely under *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000).[1]

In a supplemental brief filed in support of their motion for summary disposition, the Robinson defendants argued that, in addition to being untimely, plaintiff's complaint was defective because it had not been filed by the same person who filed the NOI. The Robinson defendants relied on *Halton v Fawcett*, 259 Mich App 699; 675 NW2d 880 (2003), to support their argument. The other defendants concurred with this argument. In addition, BCHS argued that *Eggleston* was fact-specific and was not applicable to this case.

Plaintiff contended that, pursuant to *Waltz* and MCL 600.5852, she had five years from the date of decedent's death to timely file her complaint. Plaintiff also asserted that she had recently sent her own NOI and that her complaint therefore should not be dismissed. In response to plaintiff's argument, BCHS argued that plaintiff's reading of MCL 600.5852 rendered the first sentence of the statute nugatory. The Barrett defendants concurred with BCHS's argument in this regard. In addition, the Robinson defendants argued that plaintiff's reading of MCL 600.5852 was contrary to the statute's plain language.

After entertaining oral arguments, the trial court ruled that *Eggleston* was dispositive and allowed a successor personal representative two years from the

[1] *Omelenchuk* was overruled in part by *Waltz* in 2004.

date of appointment to file a complaint. The trial court determined that the plaintiff's complaint had been filed within two years after she became the successor personal representative "and certainly well within the three year period after expiration of the two year limitations period provided for in MCL 600.5852." The trial court also observed that our Supreme Court had rejected the holding in *Halton*, i.e., that a medical-malpractice plaintiff must be the same person who sent the NOI. The trial court entered an order denying defendants' motions for summary disposition. The court thereafter denied defendants' motions for reconsideration.

This Court initially denied defendants' applications for leave to appeal,[2] but our Supreme Court remanded the matters for consideration as on leave granted. *Estate of Dale v Robinson*, 474 Mich 1098 (2006). This Court then consolidated the appeals. *Estate of Dale v Robinson*, unpublished order of the Court of Appeals, entered April 27, 2006 (Docket Nos. 269352, 269353, and 269354).

This Court entered an order holding these appeals in abeyance pending the decision of a conflict panel in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006) (*Mullins I*). *Estate of Dale v Robinson*, unpublished order of the Court of Appeals, entered July 11, 2006 (Docket Nos. 269352, 269353, and 269354). This Court then entered an additional order holding these appeals in abeyance pending the decision of another conflict panel in *Braverman v Garden City Hosp*, 275 Mich App 705; 740 NW2d 744 (2007) (*Braver-*

[2] *Estate of Dale v Robinson*, unpublished order of the Court of Appeals, entered November 1, 2005 (Docket No. 263680); *Estate of Dale v Robinson*, unpublished order of the Court of Appeals, entered November 1, 2005 (Docket No. 263915); *Estate of Dale v Robinson*, unpublished order of the Court of Appeals, entered November 1, 2005 (Docket No. 263947).

man I). *Estate of Dale v Robinson*, unpublished order of the Court of Appeals, entered March 16, 2007 (Docket Nos. 269352, 269353, and 269354).

II

We review de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). In reviewing a motion for summary disposition under subrule C(7), we accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. In doing so, we consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). "If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720; 742 NW2d 399 (2007). We review de novo questions of statutory interpretation. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002).

III

Defendants argue that the trial court erred by denying their motions for summary disposition because the successor personal representative failed to file her complaint within two years of the issuance of the original letters of authority. We disagree.

"Because an underlying claim 'survives by law' and must be prosecuted under the wrongful-death act, . . . any

statutory or common-law limitations on the underlying claim apply to a wrongful-death action." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 89; 746 NW2d 847 (2008). Accordingly, a wrongful-death medical-malpractice action is governed by the statute of limitations and the accrual statute applicable to medical-malpractice claims. *Jenkins v Patel*, 471 Mich 158, 164-165; 684 NW2d 346 (2004); *Lipman v William Beaumont Hosp*, 256 Mich App 483, 489-490; 664 NW2d 245 (2003). A plaintiff in a medical-malpractice action has two years from the date the cause of action accrued in which to file suit, MCL 600.5805(6), and a medical-malpractice claim generally "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim," MCL 600.5838a(1).[3]

However, the Legislature has afforded personal representatives additional time in which to pursue legal action on behalf of a decedent's estate. The wrongful-death saving statute, MCL 600.5852, provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

In *Waltz*, 469 Mich at 650-651, 655, our Supreme Court held that pursuant to MCL 600.5856, the filing of

[3] MCL 600.5838a(2) also gives a medical-malpractice plaintiff until "6 months after the plaintiff discovers or should have discovered the existence of the claim" to file suit. However, this discovery rule is not at issue in these appeals.

an NOI during the two-year malpractice period of limitations tolls the limitations period of MCL 600.5805(6), but does not toll the saving period of MCL 600.5852, which constitutes "an *exception* to the limitation period" and not a period of limitations itself.

This Court's conflict panel in *Mullins I* held that *Waltz* applied retroactively. Our Supreme Court, however, reversed this Court's judgment and provided a window within which *Waltz* does not apply. Our Supreme Court in *Mullins* stated in pertinent part:

> We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (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. All other causes of action are controlled by *Waltz*. [*Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins II*).]

Thereafter, another conflict panel of this Court was convened in *Braverman I*. Although this conflict panel was convened to address an NOI-related issue, *Braverman I* also involved a successor personal representative appointed following the resignation of the original personal representative. *Braverman I*, 275 Mich App at 708. The original personal representative in that case was appointed on October 29, 2002, and served an NOI on July 8, 2004. The plaintiff, as the successor personal representative, was appointed on August 18, 2004. The plaintiff filed a complaint on October 29, 2004, but the action was dismissed because the requisite 182-day waiting period following the NOI had not expired. See MCL 600.2912b(1). The plaintiff then filed a second action on January 25, 2005. *Braverman I*, 275 Mich App at 708-709.

In affirming the conflict panel's judgment, our Supreme Court addressed the applicability of its previous order in *Mullins II* to the facts of *Braverman*:

> Plaintiff initially contends that *Mullins* [*II*] saves her complaint. *Mullins* [*II*], however, does not apply to this case because the saving period did not expire "between the date that *Omelenchuk* . . . was decided and within 182 days after *Waltz* . . . was decided." Nevertheless, plaintiff's complaint, filed by the successor personal representative within two years of his appointment, was timely under *Eggleston* . . . . [*Braverman v Garden City Hosp*, 480 Mich 1159 (2008) (*Braverman II*) (citation omitted).]

As in *Braverman II*, our Supreme Court's order in *Mullins II* does not save plaintiff's complaint in the instant case because the saving period did not expire between the time that *Omelenchuk* was decided and 182 days after *Waltz* was decided. The saving period in this case expired on August 15, 2005, two years after plaintiff's appointment as personal representative on August 15, 2003. Nevertheless, as in *Braverman II*, we conclude that plaintiff's complaint in the instant case was timely under *Eggleston*.[4]

In *Eggleston*, 468 Mich at 30, our Supreme Court addressed "whether a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful-death saving statute, MCL 600.5852, or whether the two-year period is measured from the appointment of the initial personal representative." Our Supreme Court observed:

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[4] We note that this case involves the question that our Supreme Court specifically declined to address in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007), that being "whether a successor personal representative is entitled to his own two-year saving period after the first personal representative served a full two-year term but failed to file a claim within that time."

> [MCL 600.5852] simply provides that an action may be commenced by the personal representative "at any time within 2 years after letters of authority are issued although the period of limitations has run." The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative.
>
> Plaintiff was "the personal representative" of the estate and filed the complaint "within 2 years after letters of authority [were] issued," and "within 3 years after the period of limitations ha[d] run." MCL 600.5852. The action was therefore timely. [*Id.* at 33 (citation omitted).]

Similarly, in the instant case, plaintiff was "the personal representative" of the estate, and she filed her complaint " 'within 2 years after letters of authority [were] issued,' and 'within 3 years after the period of limitations ha[d] run.' " See *id*. As our Supreme Court recognized in *Eggleston*, MCL 600.5852 does not provide that the two-year saving period is measured from the date that letters of authority are issued to the initial personal representative; instead, the statute provides that the two-year period is measured from the date that letters of authority are issued to *any* personal representative, regardless of whether that person is the initial personal representative or a successor personal representative. Plaintiff was issued letters of authority on August 15, 2003, and filed her complaint seven days later, well within the two-year saving period. Thus, under *Eggleston* and MCL 600.5852, plaintiff's complaint was timely.[5]

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[5] We recognize that this Court has previously reached a contrary holding on this issue in an unpublished decision. In *Washington v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 258691), p 4, this Court stated that a successor personal representative may not commence an action "at least

We note that our conclusion that plaintiff's complaint was timely filed is not inconsistent with this Court's decision in *McMiddleton v Boling*, 267 Mich App 667; 705 NW2d 720 (2005). In that case, the initial personal representative filed a complaint more than two years after she was appointed. Thereafter, a successor personal representative was appointed. *Id*. at 669. This Court held that *Eggleston* did not support the plaintiff's argument that the complaint was timely filed. This Court stated that "applying MCL 600.5852 and the Supreme Court's ruling in *Eggleston*, it is clear that a successor personal representative cannot rely on the untimely filed complaint that was filed before she was appointed." *Id*. at 673. In other words, the complaint filed by the initial personal representative in *McMiddleton* was untimely under MCL 600.5852, and the appointment of a successor personal representative did not revive the untimely complaint filed by the initial personal representative. No such concerns are present in the instant matter because the initial personal representative in this case did not file the complaint.

Turning back to the case at bar, the Barrett and Robinson defendants contend that allowing plaintiff's

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where, as here, the original personal representative had the benefit of the full two-year savings period, but neglected to file suit timely due to an error in determining when the complaint must be filed." The *Washington* panel, however, relied on *McLean v McElhaney*, 269 Mich App 196, 201-202; 711 NW2d 775 (2005) (*McLean I*), which our Supreme Court reversed after the *Washington* opinion had already been issued. *McLean v McElhaney*, 480 Mich 978 (2007) (*McLean II*). Further, this Court in *McLean I* distinguished the facts of *Eggleston* on questionable grounds and did not even address the language of MCL 600.5852. *McLean I* is not binding on us because that decision has been reversed by our Supreme Court on an independent, dispositive ground, *Dunn v DAIIE*, 254 Mich App 256, 266; 657 NW2d 153 (2002), and *Washington* is not binding on us because unpublished opinions lack precedential value under the rule of stare decisis, MCR 7.215(C)(1).

action to proceed would render nugatory the two-year time limit contained in MCL 600.5852 and would give effect only to the three-year ceiling provided in the last sentence of MCL 600.5852. We disagree. Although the two-year time limit may be effectively avoided by the appointment of a successor personal representative, the statutory language is not thereby rendered nugatory. The two-year provision continues to apply in all cases in which a successor personal representative is not appointed and new letters of authority are not issued. The fact that the statutory language does not apply in all cases does not render it nugatory.

Lastly, BCHS and the Barrett defendants argue that allowing plaintiff's action to proceed would be inconsistent with *Lindsey*. Our Supreme Court addressed this very argument in *Braverman II*, 480 Mich at 1159 n 1, stating:

> Defendants argue that *Lindsey v Harper Hosp*, 455 Mich 56 (1997), should apply. However, *Lindsey* relied on the Revised Probate Code, and in particular on then-current MCL 700.179, which indicated that a temporary personal representative who was reappointed personal representative "shall be accountable as though he were the personal representative from the date of appointment as temporary personal representative." *Lindsey*, *supra* at 66. After *Lindsey* was decided, the Revised Probate Code was repealed and replaced by the Estates and Protected Individuals Code. MCL 700.8102(c). The Estates and Protected Individuals Code does not contain a provision similar to MCL 700.179. Therefore, the holding of *Lindsey*, which relied on this statutory provision, no longer controls.

Accordingly, the argument of BCHS and the Barrett defendants is without merit.

In sum, we conclude that this action was timely commenced because, although the initial personal rep-

resentative had already served for two years, the complaint was filed within two years of the issuance of the successor personal representative's letters of authority and within three years after the period of limitations had expired.[6] MCL 600.5852; see also *Braverman II*, 480 Mich at 1159. The trial court did not err by declining to grant summary disposition for defendants on statute-of-limitations grounds.[7]

IV

In the alternative, defendants argue that a successor personal representative may not rely on the previous personal representative's NOI, but must file his or her own NOI. We disagree.

We held the instant appeals in abeyance pending the decision of the conflict panel in *Braverman I*, which addressed this very issue. There, this Court determined that a successor personal representative may rely on the NOI of a previous personal representative. *Braverman I*, 275 Mich App at 716. Our Supreme Court affirmed this Court's judgment, specifically agreeing with its determination: "[P]laintiff, as successor personal representative, may rely on the notice of intent filed by the previous personal representative because the office of personal representative is a 'person' under

[6] Because the decedent was treated by defendants in mid-2000, any medical-malpractice claims accrued at that time, MCL 600.5838a(1), and the two-year period of limitations consequently expired sometime in mid-2002, MCL 600.5805(6). Plaintiff's complaint, filed on August 22, 2003, was accordingly filed "within 3 years after the period of limitations ha[d] run." MCL 600.5852.

[7] Although the judgment has now been vacated by our Supreme Court, we note that our conclusion that plaintiff's complaint was timely filed is also consistent with this Court's holding in *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383, 389; 715 NW2d 72 (2006), vacated 481 Mich 874 (2008).

MCL 600.2912b." *Braverman II*, 480 Mich at 1159. Defendants' argument in this regard is therefore without merit.

Affirmed.

UNIVERSITY REHABILITATION ALLIANCE, INC
v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 272615. Submitted November 15, 2007, at Lansing. Decided July 22, 2008, at 9:10 a.m. Leave to appeal sought.

University Rehabilitation Alliance, Inc., brought an action in the Ingham Circuit Court against Farm Bureau General Insurance Company of Michigan, seeking no-fault personal protection insurance (PIP) benefits relating to care provided to Kimberly Sterling, an insured of the defendant. Sterling sustained injury when she fell out of a moving car after jumping or being forced out by her boyfriend. The defendant had initially denied the claim for PIP benefits on the ground that PIP benefits are not payable for injury from an assault. After the boyfriend was acquitted of assault, the defendant paid benefits with interest, but denied liability for the plaintiff's attorney fees. The court, James R. Giddings, J., granted summary disposition for the plaintiff on the claim for attorney fees calculated pursuant to a contingent-fee agreement, ruling that the defendant had unreasonably delayed paying benefits and that the contingent fee was reasonable. The defendant appealed.

The Court of Appeals *held*:

1. An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits that are overdue. MCL 500.3148(1). An insurer's delay in making payments under the no-fault act is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. In this case, the trial court did not err in determining that the defendant's initial refusal to pay benefits had been unreasonable. Sterling sustained accidental bodily injury arising out of the operation of a motor vehicle as a motor vehicle. There was no evidence that Sterling had intentionally attempted to harm herself so as to preclude benefits. MCL 500.3105(4). Sterling's injuries directly resulted from falling out of the motor vehicle while it was being used for transportation.

2. The trial court did not abuse its discretion by awarding the contingent fee as a reasonable attorney fee. The no-fault act

provides for an award of reasonable attorney fees to a claimant if the insurer unreasonably refused to pay the claim. MCL 500.3148(1). A reasonable fee under MCL 500.3148(1) is determined by considering the totality of the circumstances, and a contingent fee is neither presumptively reasonable nor presumptively unreasonable. The attorney-fee award in this case was within the range of reasonable and principled outcomes. The trial court considered (1) the professional standing and experience of the plaintiff's attorneys, (2) the skill, time, and labor involved, (3) the amount in question and the results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship with the client. The trial court also correctly determined that the defendant created the situation that prompted the contingent-fee agreement and that not awarding the contingent fee would reward the defendant and punish the plaintiff.

Affirmed.

HOEKSTRA, J., dissenting, would reverse the award of attorney fees, stating that the defendant's delay in paying benefits was not unreasonable, given caselaw exempting from no-fault coverage all injuries resulting from an assault occurring in a motor vehicle.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — ACCIDENTAL BODILY INJURY — MOTOR VEHICLES.

An insured who did not intend self-inflicted injury when falling or being forced out of a moving motor vehicle being used for transportation, if injured, will have sustained accidental bodily injury for purposes of personal protection insurance coverage under the no-fault act (MCL 500.3105[1], [4]).

2. INSURANCE — NO-FAULT — INSURER'S DELAY IN PAYING BENEFITS — ACTIONS — ATTORNEY FEES.

A reasonable attorney-fee award for a plaintiff in an action against a no-fault insurer that has unreasonably delayed paying no-fault benefits is determined by considering the totality of the circumstances; a contingent fee is neither presumptively reasonable nor presumptively unreasonable (MCL 500.3148[1]).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas*, *Timothy J. Donovan*, and *Steven A. Hicks*), for the plaintiff.

Willingham & Coté, P.C. (by *Toree J. Breen* and *Matthew K. Payok*), for the defendant.

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

MARKEY, J. Defendant appeals by right the order granting summary disposition to plaintiff and awarding plaintiff attorney fees in this no-fault insurance case. We affirm.

This case arose when Kimberly Sterling was either pushed from or jumped out of a moving motor vehicle, hit the ground, and sustained serious brain injuries. Defendant, Sterling's no-fault insurer, originally refused to pay plaintiff's claim for no-fault benefits because it asserted that injuries resulting from assaults are exempt from any no-fault coverage. After Sterling's boyfriend was acquitted of assault, defendant agreed to pay the claim with interest, but denied that it owed attorney fees. The trial court ruled that the original denial was unreasonable because even if Sterling had been assaulted, the claim would not be barred: the injuries occurred because Sterling fell out of the moving vehicle while the vehicle was being used for transportation. The trial court later determined that the 25 percent contingent fee to which plaintiff agreed was fair and granted plaintiff attorney fees consistent with the contingent-fee agreement.

The trial court's decision to grant or deny attorney fees under the no-fault act presents a mixed question of law and fact. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). "What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Id*. We review de novo questions of law, but review the trial court's findings of fact for clear error. *Id*. A finding is clearly erroneous where this Court is left with the definite and firm conviction that a mistake has been made. *Id*.

> 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. [MCL 500.3148(1).]

An insurer's delay in making payments under the no-fault act is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Ross*, *supra* at 11. Whether attorney fees are warranted under the no-fault act depends not on whether coverage is ultimately determined to exist, but on whether the insurer's initial refusal to pay was unreasonable. If an insurer refuses to pay or delays paying no-fault benefits, the insurer must meet the burden of showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Id*.

Under MCL 500.3105(1), no-fault personal protection insurance (PIP)[1] benefits are payable for "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(4) provides that bodily injury "is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant." Thus, injuries to a person can be "accidental" for purposes of PIP benefits where the *injured person* is not complicit in causing the injury even if another person

[1] "What are commonly called 'PIP benefits' are actually personal protection insurance (PPI) benefits by statute. MCL 500.3142. However, lawyers and others call these benefits PIP benefits to distinguish them from property protection insurance benefits." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66 n 4; 737 NW2d 332 (2007).

intentionally caused the injury. See *Detroit Automobile Inter-Ins Exch v Higginbotham*, 95 Mich App 213, 220; 290 NW2d 414 (1980). Here, defendant has never claimed that it initially denied benefits because Sterling intended to injure herself. Instead, it asserted that no-fault benefits are not payable for injuries arising from assaults. This is a crucial fact because, as noted above, the insurer must show that its refusal or delay stemmed from a legitimate question of statutory construction, constitutional law, or factual uncertainty. See, e.g., *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 201; 536 NW2d 784 (1995).

In order for an injury to arise out of the use of a motor vehicle as a motor vehicle, and thus be entitled to coverage for purposes of PIP benefits, the injury must be "closely related to the transportational function of automobiles." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 215; 580 NW2d 424 (1998).

Defendant essentially argues that because it initially did not know whether Sterling was assaulted or fell out of the vehicle, it did not unreasonably deny benefits at the outset because PIP benefits are not payable for injuries from assaults. In particular, defendant emphasizes the statement in *McKenzie*, *supra* at 222, that the holdings in *Thornton v Allstate Ins Co*, 425 Mich 643, 660-661; 391 NW2d 320 (1986), and *Bourne v Farmers Ins Exch*, 449 Mich 193, 203; 534 NW2d 491 (1995), "support the approach articulated here because assaults occurring in a motor vehicle are not closely related to the transportational function of a motor vehicle." Any argument, however, that this language supports defendant's initial denial of PIP benefits here as reasonable because Sterling claimed that her injuries occurred when she was pushed out of a moving vehicle, i.e., assaulted, requires this language to be read totally

out of context. Moreover, the language taken out of context also conflicts with the clear language of the statute, and the circumstances in *Thornton* and *Bourne* differ considerably from Sterling's version of events in the present case. Nor do those cases provide the requisite legal support for defendant's position. In particular, *Thornton* involved a taxi driver who was shot by a passenger who had called his cab in order to rob him. *Thornton*, *supra* at 646.

Bourne involved a man who was forced by two men at gunpoint to drive to a location where one of the assailants struck him and threw him to the ground. They then drove away in the injured man's car. *Bourne, supra* at 196. In both cases the injuries were inflicted by means that did not directly involve the use of a motor vehicle, i.e., the gunshot in *Thornton* and the physical attack outside the vehicle in *Bourne*. Rather, the motor vehicle involved in *Thornton* was simply where the victim was shot, a situation no different from a home's being the site of a crime. And in *Bourne,* the assailants used the vehicle to transport the victim to the location of the assault. Thus, the essence of *Thornton* and *Bourne* is that where a motor vehicle is merely the location of an assault or a backdrop of an assault, there is insufficient connection between the injuries and the use of a motor vehicle as a motor vehicle to impose liability for PIP benefits under MCL 500.3105(1). There is, however, no rule precluding PIP benefits for injuries resulting from an assault. The present case is markedly distinguished from *Thornton* and *Bourne* because Sterling's injuries directly resulted from her falling out of the motor vehicle while it was in motion and being used for transportation. Nor has there ever been any suggestion or evidence that she intentionally attempted to harm herself; consequently, Sterling suffered an accidental injury as defined by MCL 500.3105(4).

Moreover, in *McKenzie*, our Supreme Court stated that "moving motor vehicles are quite obviously engaged in a transportational function." *McKenzie*, *supra* at 221. Sterling's injuries were a direct result of the vehicle's movement, not merely incidental to it. Unlike getting out of a stopped car, getting out of a car while it is being driven is extremely hazardous and likely to result in injury. Whether Sterling was pushed or stepped out, her head trauma was patently the direct result of her getting or being forced out of a moving vehicle, not simply a direct result of being shoved by the driver (if that actually occurred). Thus, even if there had been an assault, Sterling's injuries would still be a direct result of being forced out of a moving vehicle. This means that the vehicle was not merely the location of an assault: The use of the motor vehicle for transportation was closely related to, and indeed was a direct, active cause of, Sterling's injuries. So, regardless of whether she was shoved out or voluntarily got out of the vehicle, there is no evidence that Sterling intended to hurt herself, and her injuries were directly related to the use of the vehicle as a mode of transportation. Defendant's argument that it delayed in paying the benefits because it believed that injuries resulting from assaults were not covered by the no-fault statute is inconsistent with the plain language of the statute, nor is there any caselaw supporting or somehow overruling this plain language. Defendant's justification for delaying payment—ostensibly an attempt to construe the statutory language—does not satisfy the requisite burden of showing that the delay was the product of a legitimate question of statutory construction or either of the other two possible reasons. Consequently, at no time did defendant have a reasonable basis for denying plaintiff PIP benefits under the facts of this case and the plain language of the statute. Accordingly, the trial

court did not clearly err by ruling that defendant's initial denial of benefits was unreasonable.

Defendant next claims that the trial court erred when it set the amount of the reasonable attorney fee awarded under MCL 500.3148(1). Defendant argues that basing it on the contingent-fee agreement between plaintiff and its counsel was an abuse of discretion because the fee calculates to over $1,600 an hour for a case that turned out to be not very difficult. We disagree.

A trial court's determination of the reasonableness of an attorney-fee award is reviewed for an abuse of discretion. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982). "The no-fault act provides for an award of reasonable attorney fees to a claimant if the insurer unreasonably refuses to pay the claim." *Ross*, *supra* at 10-11. A trial court does not abuse its discretion when the result reached falls within the range of reasonable and principled outcomes. *Patrick v Shaw*, 275 Mich App 201, 204; 739 NW2d 365 (2007), citing *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Because the Legislature did not define or specify a method for determining "a reasonable attorney fee" under MCL 500.3148(1), our Supreme Court in *Wood*, *supra* at 588, adopted a multifactor analysis patterned after rules governing professional conduct that this Court had first used in another context. This Court opined in *Liddell v Detroit Automobile Inter-Ins Exch*, 102 Mich App 636, 651-652; 302 NW2d 260 (1981), quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> "There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. See generally 3 Michigan Law & Practice, Attorneys and Counselors, § 44, p 275 and Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics."

The *Wood* Court observed that although "a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination. Further, the trial court need not detail its findings as to each specific factor considered." *Wood*, *supra* at 588. In addition, "a contingent fee agreement may be considered as one factor in determining the reasonableness of a fee, [although] it is not by itself determinative." *Liddell*, *supra* at 652. The current pertinent rule of professional conduct lists "whether the fee is fixed or contingent" as one of eight factors to consider when determining whether an attorney fee is excessive or reasonable. MRPC 1.5(a)(8).

This Court in *Liddell*, *supra* at 651-652, rejected the claim that a contingent fee is always reasonable. But in *Hartman v Associated Truck Lines*, 178 Mich App 426, 430-431; 444 NW2d 159 (1989), this Court held that the trial court abused its discretion by not considering a contingent-fee agreement when determining a reasonable attorney fee. We also find instructive our Supreme Court's discussion in *Dep't of Transportation v Randolph*, 461 Mich 757; 610 NW2d 893 (2000), regarding reimbursement under the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., of a property owner's reasonable attorney fee. The *Randolph* Court contrasted the specific multistep analysis required by

MCL 213.66(3)[2] with "other fee-shifting statutes that simply authorize the trial court to award 'reasonable attorney fees' without regard to the fees actually charged." *Randolph*, *supra* at 765-766. With statutes like MCL 500.3148(1), "the [trial] court is free to award *any* fee as long as it is reasonable." *Randolph*, *supra* at 766 (emphasis in the original). The *Randolph* Court instructed trial courts in determining reasonableness to "consider the eight factors listed in MRPC 1.5(a)" and rejected both a contingent fee as presumptively reasonable and also the so-called "lodestar" method of multiplying the reasonable number of hours worked by a reasonable hourly rate as the preferred way of determining the reasonableness of attorney fees. *Id*. at 766 n 11. Thus, a reasonable attorney fee is determined by considering the totality of the circumstances. While a contingent fee is neither presumptively reasonable nor presumptively unreasonable, multiplying the reasonable number of hours worked by a reasonable hourly rate is not the preferred method.[3]

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[2] MCL 213.66(3) provides that "the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer . . . ."

[3] We acknowledge that our Supreme Court has recently held in a plurality opinion that a trial court, when determining a reasonable attorney fee as part of case-evaluation sanctions under MCR 2.403(O), must first determine a "baseline" fee by multiplying the reasonable hourly rate—the fee customarily charged in the locality for similar legal services—by the reasonable number of hours necessitated by case-evaluation rejection. *Smith v Khouri*, 481 Mich 519, 522, 537; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). This "baseline" reasonable fee may then be adjusted upward or downward according to the factors in *Wood* and MRPC 1.5(a). *Smith* does not affect our analysis in this case of the question whether the trial court abused its discretion when determining a reasonable attorney fee under MCL 500.3148(1). First, *Smith* addressed MCR 2.403(O)(6)(b), which explicitly requires that the reasonable-attorney-fee portion of actual costs be based on a reasonable

Here, the trial court employed the multifactor analysis required by *Wood* and *Liddell* in ultimately concluding that the contingent-fee agreement between plaintiff and its attorneys established "a reasonable attorney fee" under MCL 500.3148(1). The court found that plaintiff's attorneys were highly qualified and skilled attorneys who obtained payment of $211,965 to plaintiff. Further, the court concluded that plaintiff's attorney's hourly rates were reasonable and that plaintiff could have incurred substantial attorney fees had plaintiff retained counsel on that basis and had defendant continued to contest coverage. Indeed, defendant's representative conceded that had Sterling's boyfriend been convicted of assault, defendant would have litigated coverage through trial and the appellate process, if necessary. Thus, although the case proved to be fairly short-lived and required only 30 hours of plaintiff's attorney's time through payment of the claim in full, the trial court weighed the potential for extensive litigation at an hourly rate as a reasonable reason for plaintiff to retain counsel on a contingent-fee basis. In essence, the trial court reasoned that defendant created the situation that prompted the contingent-fee agreement. So not awarding it as a reasonable attorney fee would reward defendant and punish plaintiff, a situation the court found would be fundamentally unfair. Ultimately, the trial court determined, "applying all the factors from *Wood*, I think the fee, in light of the result, in light of the testimony imminently [sic] fair and reasonable."

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hourly or daily rate as determined by the trial court. Second, while two justices would have held that whether an attorney has a contingent-fee agreement with a client is not an appropriate factor when considering a reasonable attorney fee as a case-evaluation sanction, *Smith*, *supra* at 534 n 20, that part of the opinion is not binding precedent because a majority of justices did not agree. See *People v Sexton*, 458 Mich 43, 65; 580 NW2d 404 (1998); *Young v Nandi*, 276 Mich App 67, 71-72; 740 NW2d 508 (2007).

Defendant argues that plaintiff's attorneys were awarded as a reasonable attorney fee more than $50,000 for about 30 hours worth of work, amounting to more than $1,600 an hour when considered on an hourly basis. Although this amount is significantly higher than the $300 an hour top rate of plaintiff's attorneys, the trial court considered this fact, along with many others, in determining that the contingent-fee agreement represented a reasonable attorney fee under all the facts and circumstances of this case. In particular, it was defendant's actions that prompted plaintiff to enter the contingent-fee agreement. Whatever reasonable attorney fee the trial court determined under MCL 500.3148(1), plaintiff would still be required to honor the contingent-fee agreement. "Once the client recovers, however, the client is obligated to pay the attorney fees under the terms of the contingent fee agreement, notwithstanding the amount which a trial court may determine to be reasonable." *Hartman*, *supra* at 431. Consequently, we find no error in the trial court's reasoning that not awarding the contingent fee as a reasonable attorney fee would reward defendant and punish plaintiff for a situation that defendant created. Thus, the trial court did not abuse its discretion because awarding the contingent fee as a reasonable fee is within the range of reasonable and principled outcomes. *Patrick*, *supra* at 204.

The trial court also correctly ruled that *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326; 454 NW2d 610 (1990), is inapposite to this case. In *Temple*, this Court found it unreasonable to award an attorney fee based on a contingent-fee agreement as part of actual costs in assessing mediation sanctions under MCR 2.403(O) because it worked out to more than $1,000 an hour. *Temple*, *supra* at 332-333. But MCR 2.403(O)(6)(b) explicitly requires that a reasonable attorney fee under the rule be determined on

the basis of a reasonable hourly or daily rate determined at the trial court's discretion. There is no such restriction on reasonable attorney fees awarded under MCL 500.3148(1). In determining a reasonable attorney fee under the statute, the trial court may consider a contingent-fee agreement. MRPC 1.5(a)(8); *Liddell*, *supra* at 652.

Finally, defendant's claim that the trial court erred when it considered time plaintiff's attorney worked after defendant had paid the claim is without merit. It is true that MCL 500.3148(1) only permits the award of an attorney fee for collecting an overdue benefit, and, once paid, benefits are no longer overdue. *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 48-49; 586 NW2d 395 (1998). But in this case, plaintiff's attorney testified that 30 hours were devoted to collecting the overdue benefits that were fully paid on January 20, 2006. During her cross-examination of plaintiff's counsel, defense counsel sought and obtained confirmation that plaintiff's counsel worked 30 hours up to January 2006. Defense counsel also used this figure, 30 hours, to argue that the attorney fee requested amounted to an award of $1,600 an hour. The trial court, in stating its reasons for its determination of a reasonable attorney fee, also noted that plaintiff's attorneys worked 30 hours on the case. More importantly, because the trial court determined that the contingent-fee agreement between plaintiff and its counsel established a reasonable attorney fee in this case, given all the facts and circumstances, the number of hours plaintiff's counsel actually worked was not a critical factor in determining a reasonable attorney fee. Thus, the only important question is whether the trial court abused it discretion by determining that the contingent fee in this case was a reasonable attorney fee under MCL 500.3148(1). For the reasons already discussed, we conclude that the

trial court did not abuse its discretion by awarding the contingent fee as a reasonable attorney fee: it is within the range of reasonable and principled outcomes.

We affirm.

DONOFRIO, P.J., concurred.

HOEKSTRA, J. (*dissenting*). I respectfully dissent from the majority's conclusion that defendant's delay in making personal protection insurance (PIP) benefit payments to plaintiff was unreasonable.

Kimberly Sterling, defendant's insured, suffered severe brain injuries when her boyfriend allegedly pushed her from a moving motor vehicle. Defendant denied plaintiff's claim for PIP benefits. It claimed that, because Sterling's injuries were caused by a criminal assault, her injuries were exempt from no-fault coverage under MCL 500.3105(4). Plaintiff filed the present action, challenging the propriety of defendant's denial of PIP benefits. After a jury acquitted Sterling's boyfriend of assault, defendant paid the PIP benefits. Thereafter, plaintiff, claiming that defendant's delay in paying the PIP benefits was unreasonable, moved for attorney fees under MCL 500.3148(1). The trial court held that defendant's delay was unreasonable, and it awarded attorney fees to plaintiff. This appeal ensued.

In my opinion, the controlling issue in the present case is whether the trial court erred in holding that defendant's initial denial of plaintiff's claim for PIP benefits was unreasonable. Since submission of this case for decision, our Supreme Court has decided *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008). In *Ross*, the Court held that the plaintiff, the sole employee and shareholder of a subchapter S corporation that lost more money than it paid in wages, was

entitled to work-loss benefits under MCL 500.3107(1)(b). *Id.* at 7-8. Nonetheless, the Court held that the defendant's initial refusal to pay the work-loss benefits was not unreasonable and, therefore, the plaintiff was not entitled to attorney fees under MCL 500.3148(1). *Id.* at 15. In its opinion, the Court stated:

> The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.
>
> The trial court correctly set forth this rule of law in determining that plaintiff was entitled to attorney fees. The issue is whether it clearly erred in applying this rule and finding that defendant's refusal was not based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. The determinative factor in our inquiry is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable. [*Id.* at 11.]

The Court determined that the defendant's denial of work-loss benefits was reasonable because the "[d]efendant [had] relied on a factually similar Court of Appeals decision to adopt a reasonable position on an issue of first impression." *Id.* at 15. For this same reason, I would reverse the award of attorney fees in the present case.

If defendant had not paid the PIP benefits after Sterling's boyfriend was acquitted of assault and we were forced to decide whether defendant was responsible for paying PIP benefits, we would be addressing an issue of first impression. Plaintiff's attorney acknowledged at oral argument that no Michigan case has addressed the issue of no-fault coverage in the factual

context presented here, and the majority's extensive analysis confirms it. Further, in addressing assaults in motor vehicles occurring in different factual circumstances, the Supreme Court held that no-fault benefits were not available to the assault victims. See *Bourne v Farmers Ins Exch*, 449 Mich 193; 534 NW2d 491 (1995); *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986). In addition, the Court in *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 222; 580 NW2d 424 (1998), stated that "assaults occurring in a motor vehicle are not closely related to the transportational function of a motor vehicle."

I acknowledge that these precedents are distinguishable and, therefore, are not controlling regarding whether defendant would be ultimately responsible for paying PIP benefits. "However, the inquiry is not whether defendant is responsible for the benefits, but only whether defendant's refusal to pay them was unreasonable." *Ross, supra* at 14. Here, I would conclude that it was reasonable, particularly in light of *McKenzie*'s apparent blanket statement of exempting from no-fault coverage all injuries resulting from an assault occurring in a motor vehicle, for defendant to maintain that Sterling's injuries were exempt from no-fault coverage.

I would reverse.

WALTERS v LEECH

Docket No. 277180. Submitted July 2, 2008, at Grand Rapids. Decided July 22, 2008, at 9:15 a.m. Leave to appeal sought.

Lori Walters was ordered to pay child support for her minor child whose father, Brian K. Leech, has physical custody of the child. While attempting to recover an accumulated support arrearage, the Kent County Friend of the Court (FOC) learned of real property owned by Lori Walters and her spouse as a tenancy by the entirety and filed a motion to impose a child-support lien against the property. A Kent Circuit Court, Family Division, referee signed a proposed lien order. Lori Walters filed a timely objection. The Kent Circuit Court, Family Division, Daniel V. Zemaitis, J., denied a motion by the FOC, as an intervening party, for a lien against the property. The FOC appealed by leave granted.

The Court of Appeals *held*:

1. As a general proposition under the common law, property that is held as a tenancy by the entirety is not reachable for the individual debts of either party. The Legislature codified this proposition with respect to judgment liens in MCL 600.2807.

2. MCL 552.625a and MCL 552.625b provide for child-support liens against a payer's real and personal property. A "payer" is defined as an individual who is ordered by the circuit court to pay support. MCL 552.602(v). Under the common law, property held as a tenancy by the entirety cannot be the real property of a payer (an individual).

3. The common-law principles codified in MCL 600.2807 and the law on liens for child support articulated in MCL 552.625a and 552.625b are *in pari materia* and must be read together as one law. Property held as a tenancy by the entirety may not be reached to enforce a child-support order entered against only the husband or the wife.

Affirmed.

PARENT AND CHILD — CHILD-SUPPORT LIENS — TENANCY BY THE ENTIRETY.

A child-support lien may not be imposed against property held as a tenancy by the entirety by a husband and a wife to satisfy a child-support order that was entered against only the husband or the wife (MCL 552.625a, 552.625b, 600.2807).

Mika Meyers Beckett & Jones PLC (by *Elizabeth K. Bransdorfer*) for Lori Walters.

Daniel J. Fojtik for the Kent County Friend of the Court.

Before: MURPHY, P.J., and BANDSTRA and BECKERING, JJ.

BECKERING, J. Intervenor Kent County Friend of the Court (FOC) appeals by leave granted the trial court's March 15, 2007, order denying its motion to impose a child-support lien against real property owned by plaintiff and her spouse under a tenancy by the entirety. We affirm.

I

This matter involves a minor child, the parents of whom are plaintiff Lori Walters and defendant Brian K. Leech. The FOC represents that defendant has physical custody of the child, that plaintiff is obligated to pay child support, and that plaintiff has accumulated a support arrearage of $44,977.40. While attempting to recover the arrearage, the FOC located real property owned by plaintiff and her spouse. Plaintiff lives on the property with her spouse and their three children. In November 2006, the FOC filed a motion to impose a child-support lien against the property. A family-court referee subsequently signed a proposed lien order. Plaintiff filed a timely objection to the proposed order

and, in March 2007, the trial court denied the FOC's motion for a lien against the property because plaintiff and her spouse own the property as tenants by the entirety. We subsequently granted the FOC's application for leave to appeal. *Walters v Leech*, unpublished order of the Court of Appeals, entered August 2, 2007 (Docket No. 277180).

The issue before us on appeal is whether the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*., specifically MCL 552.625a and 552.625b, allows child-support liens against property held as a tenancy by the entirety. This is an issue of first impression involving statutory interpretation and a question of jurisprudential significance.

II

The proper construction of a statute is a question of law, which we review de novo. *Washburn v Makedonsky*, 271 Mich App 95, 98; 718 NW2d 842 (2006). As this Court stated in *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996):

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [Citations omitted.]

Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to

one another and were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). "Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 147; 662 NW2d 758 (2003). The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). If statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.*; *House Speaker v State Administrative Bd*, 441 Mich 547, 568-569; 495 NW2d 539 (1993).

In construing the language of a statute, courts must also keep in mind that "the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). As our Supreme Court stated in *Wold Architects & Engineers v Strat*, 474 Mich 223, 233-234; 713 NW2d 750 (2006):

> The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed. Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent. . . .
>
> Michigan courts have uniformly held that legislative amendment of the common law is not lightly presumed. . . .
>
> * * *
>
> The Legislature is presumed to know of the existence of the common law when it acts. [Citations omitted.]

Further, "statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law." *Nation*, *supra* at 494 (quotation marks and cita-

tion omitted). In other words, when an ambiguous statute contravenes the common law, courts must construe the statute so that it results in the least change in the common law. *Id*. But, when a comprehensive statute "prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions," the Legislature will generally "be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Wold Architects & Engineers, supra* at 233 (quotation marks and citations omitted).

III

Our longstanding common law provides that, when a deed is conveyed to a husband and wife, the property is held as a tenancy by the entirety. *Morgan v Cincinnati Ins Co*, 411 Mich 267, 284; 307 NW2d 53 (1981) (opinion by FITZGERALD, J.). In a tenancy by the entirety, the husband and wife are considered one person in the law. *Id*. They cannot take the property in halves. *Id*. Rather, the property is seised by the entirety. *Id*. The consequence is that neither the husband nor the wife can dispose of the property without the assent of the other and the whole property must remain to the survivor. *Id*. Therefore, at the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property. 1 Cameron, Michigan Real Property Law (3d ed), § 9.14, p 328.

As a general proposition under the common law, property that is held as a tenancy by the entirety is not liable for the individual debts of either party.[1] *Id*. at

[1] The exception to this general common-law rule is in the case of fraud. 1 Cameron, § 9.16, p 330; *Cross v Wagenmaker*, 329 Mich 100, 105; 44 NW2d 888 (1950) (stating that tenancies by the entirety cannot be

§ 9.16, p 330; *Rossman v Hutchinson*, 289 Mich 577, 588; 286 NW 835 (1939) (stating that "[e]ntireties property is liable to execution for joint debts of husband and wife"). Our Legislature codified this proposition with respect to judgment liens in MCL 600.2807. MCL 600.2807 became effective September 1, 2004, and provides that "[a] judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife." MCL 600.2807(1).

MCL 552.625a and 552.625b provide for child-support liens against a payer's real and personal property. These sections were enacted in 1998 and amended in 2002 and 2004. The amendments became effective December 1, 2002, and January 1, 2006, respectively.

The current version of MCL 552.625a(1) states, in relevant part:

> The amount of past due support that accrues under a judgment as provided in [MCL 552.603] [2] or under the law

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created to defraud creditors). If there is fraud, then the creditors of one party can reach the entirety property. *Id.* at 105. Our Supreme Court recently held, however, that an action under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*., will not reach entirety property transferred pursuant to a divorce judgment unless both spouses are debtors on the claim that is the subject of the action. *Estes v Titus*, 481 Mich 573; 751 NW2d 493 (2008). Under the UFTA, a "transfer" includes "disposing of or parting with an asset or an interest in an asset . . . ." MCL 566.31(*l*). The *Estes* Court found that because the UFTA's definition of an "asset" specifically excludes entirety property "to the extent it is not subject to process by a creditor holding a claim against only 1 tenant," MCL 566.31(b)(*iii*), the distribution of entirety property in a divorce judgment is not a transfer for purposes of the UFTA. *Estes*, *supra* at 576. The *Estes* Court reasoned that it "is difficult to comprehend how disposing of property that a creditor cannot reach could 'defraud' that creditor." *Id.* at 582.

[2] MCL 552.603(2) provides that "a support order that is part of a judgment or is an order in a domestic relations matter is a judgment . . . with the full force, effect, and attributes of a judgment of this state . . . ."

> of another state constitutes a lien in favor of the recipient of support against the real and personal property of a payer . . . . The lien is effective at the time that the support is due and unpaid and shall continue until the amount of past due support is paid in full or the lien is terminated by the title IV-D agency.

Pursuant to MCL 552.625b(4)(c), when a child-support lien arises against the real or personal property of a payer, the property is subject to seizure unless the payer responds by paying the arrearage or requesting a review of the lien order. Additionally, MCL 552.625b(8) provides that in order to enforce the lien, the real property may be sold. MCL 552.625a(6) provides exceptions to a lien under MCL 552.625a(1), listing real and personal property against which child-support liens may not arise. The Legislature did not include property held as a tenancy by the entirety in the list of exceptions. Subsection 6 was part of the amendment of MCL 552.625a that became effective January 1, 2006.

IV

In light of our longstanding common law regarding property held as a tenancy by the entirety, which was recently codified with respect to judgment liens in MCL 600.2807, and the plain language of MCL 552.625a and 552.625b, we conclude that child-support liens may not be imposed against property held as a tenancy by the entirety. Our conclusion is consistent with the common law and gives effect to the legislative intent expressed in both MCL 600.2807 and the law on liens for child support articulated in MCL 552.625a and 552.625b.

In determining whether child-support liens may be imposed against property held as a tenancy by the entirety under MCL 552.625a and 552.625b, we must

consider the common law in existence before the legislation was enacted. As we have already discussed, we must presume that the Legislature acted with an understanding of the common law, *Nation*, *supra* at 494, and that the common law remains in force unless it was intentionally amended or repealed, *Wold Architects & Engineers*, *supra* at 233. MCL 552.625a(1) states that a child-support lien may be imposed "against the real and personal property *of a payer* . . . ." (Emphasis added.) "Payer" is defined as "an *individual* who is ordered by the circuit court to pay support." MCL 552.602(v) (emphasis added). Under the common law, however, a husband and wife holding property as tenants by the entirety are considered one person in the law and the property may only be seized in its entirety.[3] *Morgan*, *supra* at 284. Neither the husband nor the wife has an interest in the property that is separate or distinct from that of their spouse. 1 Cameron, § 9.14, p 328. Therefore, under the common law, property held as a tenancy by the entirety cannot be the real property of a payer, i.e., the individual person ordered by the court to pay support. MCL 552.602(v) and 552.625a(1).

Furthermore, we find that the common-law principles codified in MCL 600.2807, and the law on liens for child support articulated in MCL 552.625a and 552.625b, are *in pari materia* and must be read together as one law. *State Treasurer*, *supra* at 417. Under the common law, property held as a tenancy by the entirety is not ordinarily reachable for the individual debts of either the husband or the wife and, pursuant to MCL 600.2807, a judgment lien may not arise against the

[3] *Merriam-Webster's Collegiate Dictionary* (2007) defines the term "entirety" as "the state of being entire or complete" and the term "entire" as "having no element or part left out: whole; complete in degree: total; consisting of one piece."

property unless the judgment is entered against both parties. For purposes of the law on liens for child support in MCL 552.625a and 552.625b, a child-support order is "a judgment . . . with the full force, effect, and attributes of a judgment of this state . . . ." MCL 552.603(2). Judgments in this state may be enforced through judgment liens. MCL 600.2801 *et seq*. Therefore, although MCL 600.2807 relates to real property held by debtors in general and MCL 552.625a and 552.625b relate to real or personal property held by child-support debtors in particular, the statutes share the common purpose of allowing judgment liens to attach to the property of a debtor.[4] *State Treasurer*, *supra* at 417; *Houghton Lake Area Tourism & Convention Bureau*, *supra* at 147. In reading the statutes together as one law, we conclude that property held as a tenancy by the entirety may not be reachable for enforcing a child-support order entered against only the husband or the wife. Our conclusion gives effect to the legislative purpose found in both statutes and avoids conflicting interpretations. *Webb*, *supra* at 274; *House Speaker*, *supra* at 568-569.

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[4] We are unpersuaded by the FOC's assertion that because a child-support lien is a "cumulative" remedy that may be enforced by the FOC, it is also a "unique" remedy that must be enforced differently than other judgment liens. While MCL 552.625b(1) states that "[a] remedy provided by this section is cumulative and does not affect the availability of another remedy under this act or other law," nothing in the statute indicates that a child-support lien should be uniquely enforced. To the contrary, as already discussed, MCL 552.625a(1) provides that a child-support lien may be imposed for past-due child support accruing under a judgment as provided in MCL 552.603, and MCL 552.603(2) specifically states that "a support order that is part of a judgment or is an order in a domestic relations matter is a judgment . . . with the full force, effect, and attributes of a judgment of this state . . . ." The language of the statute does not support the assertion that child-support liens must be enforced differently than other judgment liens, and we will not read language into a plain, unambiguous statute. *USAA Ins Co*, *supra* at 389-390.

According to the FOC's arguments on appeal, we must presume that the Legislature intended for child-support liens to arise against property held as a tenancy by the entirety because neither MCL 552.625a nor MCL 552.625b states otherwise. We disagree. When the Legislature enacted MCL 552.625a and 552.625b in 1998, it was well aware of our longstanding common law regarding property held as a tenancy by the entirety, and there is nothing in the language of the statutes indicating that the Legislature intended to abrogate the common law. *Wold Architects & Engineers, supra* at 233; *Nation*, *supra* at 494. Rather, in 2004, the Legislature codified the common law with respect to judgment liens in MCL 600.2807. Thereafter, the Legislature amended MCL 552.625a, listing property against which child-support liens may not arise. MCL 552.625a(6). Although the Legislature did not include property held as a tenancy by the entirety in this list of exceptions, MCL 600.2807 already precluded judgment liens from arising against entirety property where the underlying judgment was issued against only one party. Therefore, we must conclude that in amending MCL 552.625a, the Legislature intended to supplement MCL 600.2807. See *House Speaker*, *supra* at 579 (stating that statutes that are *in pari materia* must be read together "as part of one system, and later statutes should be construed as supplementary or complementary to those preceding them"), quoting *Wayne Co v Auditor General*, 250 Mich 227, 232-233; 229 NW 911 (1930) (quotation marks omitted).

Additionally, the FOC argues that child-support liens may be imposed against property held as a tenancy by the entirety on the basis of the United States Supreme Court's reasoning in *United States v Craft*, 535 US 274; 122 S Ct 1414; 152 L Ed 2d 437 (2002). In *Craft*, the Court held that federal tax liens may be imposed

against property held as a tenancy by the entirety pursuant to the federal tax-lien statute, 26 USC 6321. But, contrary to the FOC's argument on appeal, the Court's holding in *Craft* was specifically limited to federal tax liens and need not be extended to state child-support liens. In articulating its holding, the Court stated, in part:

> We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. We recognize that Michigan makes a different choice with respect to state law creditors: "Land held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." *Sanford v. Bertrau*, 204 Mich. 244, 247[;] 169 N.W. 880, 881 (1918). But that by no means dictates our choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law. [*Craft*, *supra* at 288.]

See also *In re Raynard*, 354 BR 834, 839 (Bankr App CA 6, 2006) (stating that "[w]hether outside of a bankruptcy estate or inside it, a debtor's interest in property held as a tenant by the entireties is exempt from the claims of his or her individual creditors pursuant to the common law of Michigan").

The FOC further argues that because both the federal tax-lien statute and the law articulated in MCL 552.625a and 552.625b on liens for child support are broadly stated, we should extend the Court's holding in *Craft* and find that child-support liens may arise against "virtually any property interest that the payer may hold." As stated by the FOC, the *Craft* Court found that the "statutory language authorizing the tax lien 'is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might

have.' " *Craft*, *supra* at 283, quoting *United States v Nat'l Bank of Commerce*, 472 US 713, 719-720; 105 S Ct 2919; 86 L Ed 2d 565 (1985). However, we do not agree that our law on liens for child support is so broadly stated. Whereas 26 USC 6321 permits federal tax liens against "all property and rights to property, whether real or personal, belonging to [a debtor]," MCL 552.625a(1) only allows child-support liens against "the real and personal property of a payer . . . ." The language "all property and rights to property" in 26 USC 6321 indicates that a federal tax lien may arise if a debtor has a *right to* or an *interest in* any classification of property and is, therefore, significantly broader than the language "property of a payer" in MCL 552.625a(1). Moreover, MCL 552.625a(6) specifically limits the enforcement of a lien under MCL 552.625a(1), listing property against which child-support liens may not arise. Therefore, we will not extend the *Craft* Court's holding regarding the federal tax-lien statute to our law on liens for child support.

Finally, we are unpersuaded by the FOC's argument that child-support liens should be imposed against property held as a tenancy by the entirety because Michigan public policy favors strong enforcement of child-support obligations. Although there is an important interest in children being supported by their noncustodial parents, there is also an important interest in protecting an innocent spouse's property. MCL 552.625b(4)(c) provides that when a child-support lien arises against the real or personal property of a payer, the property may be subject to seizure. Additionally, MCL 552.625b(8) provides that in order to enforce the lien, the real property may be sold. Selling a married couple's home in order to satisfy the debt of only one spouse is certainly against public policy. The FOC's assertions that a payer's "individual interest remains

inchoate until the tenancy by the entireties property terminates," that a "forced sale could not take place until that time," and that "the creditor gets whatever the [payer] possesses after termination" are without merit. A payer's interest in property held as a tenancy by the entirety is not "inchoate"; the payer's interest is unified with that of his or her spouse, and the property cannot be liable for the payer's individual debt. A child-support lien may only be imposed against the property if the tenancy by the entirety terminates *and* the payer is left with an individual interest in the property against which a lien may arise.

Although there is a strong public-policy interest in enforcing child-support obligations, considering our longstanding common law and the legislative intent expressed in both MCL 600.2807 and the law on liens for child support articulated in MCL 552.625a and 552.625b, we conclude that child-support liens may not be imposed against property held as a tenancy by the entirety.

Affirmed.

MORALES v STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

Docket No. 275224. Submitted May 13, 2008, at Detroit. Decided May 27, 2008. Approved for publication July 24, 2008, at 9:00 a.m.

Jorge Morales brought an action in the Macomb Circuit Court against State Farm Mutual Automobile Insurance Company and Kenneth Luick, seeking no-fault benefits for injuries he suffered in an automobile accident. A jury found that Morales's inability to work and his need for attendant care resulted from injuries caused by the accident rather than the various unrelated disabling conditions from which he suffered. The court, Diane M. Druzinski, J., entered a judgment for Morales of nearly $600,000, which included expenses, work-loss benefits, attorney fees and costs, and penalty interest. State Farm appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by admitting evidence related to the manner in which State Farm processed Morales's claim. Although an insurer is liable for penalty interest if benefits are overdue regardless of why the benefits were not timely paid, Morales bore the burden of proving a loss after which State Farm failed to pay the claims within 30 days. Accordingly, the claims-handling evidence was relevant to facts that were of consequence to the action. It was not necessary for the evidence to directly prove an element of Morales's claim because the evidence was material to whether State Farm fairly reviewed Morales's claim.

2. The trial court did not abuse its discretion by admitting the testimony of a registered nurse on the subject of the cost of attendant care. The nurse's testimony was admissible under MRE 703 because, as the trial court permissibly inferred, it was based on her own direct, personal knowledge of the pay range of in-home health-care aides and not on a hearsay source. Further, her testimony on this point was corroborated by the Morales's economist. Accordingly, the trial court did not err by denying State Farm's motion for judgment notwithstanding the verdict on this basis.

3. The fact that Morales successfully asserted a claim for disability benefits from the Department of Veterans Affairs (VA)

does not judicially estop him from maintaining a claim for no-fault benefits because the application for VA benefits was based on disabilities incurred during his service in Vietnam, and was therefore not wholly inconsistent with his position in seeking no-fault benefits on the basis of injuries incurred in the motor-vehicle accident.

4. In light of the fact that there was no error warranting reversal or other relief, there is no basis on which to vacate the attorney-fee award.

Affirmed.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — EVIDENCE — CLAIMS HANDLING.

Testimony regarding an insurer's claims-handling practices in connection with a claim for no-fault personal protection insurance benefits is relevant to whether the insurer fairly reviewed the plaintiff's claim and to whether the insurer is liable for penalty interest (MCL 500.3107, 500.3142; MRE 402).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — EVIDENCE — ATTENDANT-CARE RATES.

Testimony relating to the cost of in-home attendant care in connection with a claim for no-fault personal protection insurance benefits may be based on an expert's personal knowledge (MRE 703).

Law Offices of Paul Zebrowski (by *Paul Z. Zebrowski* and *Thomas A. Biscup*) (*Bendure & Thomas*, by *Mark R. Bendure*, of counsel), for Jorge Morales.

Hewson & Van Hellemont, P.C. (by *James F. Hewson*), and *Gross, Nemeth & Silverman, P.L.C.* (by *James G. Gross*), for State Farm Mutual Automobile Insurance Company.

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

PER CURIAM. Defendant State Farm Mutual Automobile Insurance Company appeals by right the judgment entered on a jury award of no-fault benefits under MCL 500.3107 for the plaintiff, Jorge Morales. No-fault per-

sonal protection insurance benefits (so-called "PIP benefits") are payable for "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1). The jury found that plaintiff sustained an injury in an automobile accident, thereby incurring reasonable and reasonably necessary allowable expenses of $216,000, work-loss benefits of $76,032, and replacement services expenses of $21,900. The jury also awarded $62,786 as penalty interest under MCL 500.3142. Subsequently, the trial court awarded plaintiff attorney fees of $148,562.50 under MCL 500.3148(1), taxable costs of $12,478.54, and judgment interest. The court entered judgment for plaintiff in the amount of $597,351.40. We affirm.

I. FACTUAL BACKGROUND

Plaintiff was injured in a rollover accident on June 12, 2002, while driving a boom truck in the course of his electric-sign-repair business. Before the accident, plaintiff had various health problems: he had a heart attack in 1993, was an insulin-dependent diabetic, and suffered hypertension and arteriosclerosis. Plaintiff's family doctor, Dr. Robert Brateman, diagnosed plaintiff with a closed head injury as a result of the accident, but on November 11, 2002, Dr. Brateman released plaintiff to return to work. Plaintiff and his wife maintain that he tried to return to work in a supervisory capacity, but the attempt lasted only one or two weeks because plaintiff experienced dizziness, could not distinguish color-coded wiring, made unsafe decisions, and argued with employees. Defendant initially paid plaintiff work-loss benefits but stopped after three months and did not pay any further no-fault benefits.[1]

[1] Defendant did pay plaintiff three years of benefits under a separate disability policy.

On December 17, 2002, plaintiff experienced an acute cardiac event resulting in his hospitalization. Although this was initially thought to have been another myocardial infarction (heart attack), the incident was diagnosed as unstable angina and treated with angioplasty. Plaintiff does not dispute that this incident was temporarily disabling for the period of hospitalization and few days of recovery.

In February 2003, plaintiff suffered an incident of confusion and disorientation, which was attributed to a transient ischemic attack (TIA). Dr. Brateman testified that the TIA had only temporary effects and would not permanently disable plaintiff. Dr. Brateman conceded that plaintiff might also have small vessel disease of the brain caused by his diabetes and arteriosclerosis, which could produce similar symptoms of confusion, memory loss, dizziness, or sometimes a TIA.

On November 3, 2003, plaintiff signed an application for a pension or compensation from the federal Department of Veterans Affairs (VA). Plaintiff testified that his wife filled out all the forms for him. Plaintiff's wife testified that someone had suggested to her that because her husband was a veteran, the VA might provide benefits. Plaintiff's wife asked Dr. Brateman to write letters supporting the benefit application. Dr. Brateman wrote a letter for the purpose of the VA-benefits application on November 3, 2003, that listed, among plaintiff's other ailments, "ischemic heart disease, post myocardial infarction with congestive heart failure and a second myocardial infarction in 2002" and indicated plaintiff's "inability to work secondary to ischemic heart disease, diabetes neuropathy, and peripheral vascular occlusive disease." This letter did not mention plaintiff's motor vehicle accident or plaintiff's having a closed head injury. Apparently, the VA responded to the

application with a letter dated December 3, 2003, which requested that plaintiff sign medical releases and submit additional information to support his claim. Dr. Brateman wrote a second letter on December 14, 2003, that was sent directly to the VA representative processing plaintiff's claim. In this letter, Dr. Brateman listed plaintiff's problems as "1) ischemic heart disease, post myocardial infarction x2 with congestive heart failure; 2) motor vehicle accident 6/12/02 with closed head injury, memory impairment, and subsequent inability to work; 3) chronic vertigo, caused by the auto accident note above; 4) type I, diabetes mellitus; 5) CVA (stroke); 6) diabetic neuropathy; 7) hypertension; 8) traumatic brain injury, as above." Plaintiff also signed a form dated December 15, 2003, which said that he had signed medical releases at the local veterans' office to release all his medical records and asked that his claim be processed on the basis of his medical records.

Plaintiff and his wife met several times with a VA representative. Several different VA doctors examined plaintiff. Plaintiff's wife testified that plaintiff's eligibility for VA benefits arose from plaintiff's service in Vietnam and exposure to Agent Orange, which was believed to be a causative factor in plaintiff's diabetes and related circulatory problems. At some point before September 15, 2004, the VA had evidently awarded plaintiff benefits, because on that date, the VA issued a decision increasing plaintiff's disability rating as follows:

DECISION

1. Evaluation of coronary artery disease status post two myocardial infarctions; with stent placement, which is currently 60 percent disabling, is increased to 100 percent effective November 19, 2002.

> 2. Service connection for peripheral vascular disease of the right lower extremity is granted with an evaluation of 40 percent effective November 19, 2003.
>
> 3. Service connection for peripheral vascular disease of the left lower extremity is granted with an evaluation of 20 percent effective November 19, 2003.
>
> 4. Entitlement to special monthly compensation based on Housebound criteria being met is granted from November 19, 2002.
>
> 5. Evaluation of diabetic retinopathy, which is currently 0 percent disabling, is increased to 30 percent effective November 19, 2002. Entitlement to increased evaluation is deferred.
>
> 6. A decision on entitlement to compensation for Meniere's syndrome is deferred.

The VA decision listed the evidence on which the decision was based: (1) claims file review, (2) the medical report of Dr. Bruce R. Garretson, dated August 13, 2004, and (3) outpatient treatment reports from the VA hospital in Detroit from January 13, 2004, through July 30, 2004.

Against this background, the major issue of this case was tried: Were plaintiff's inability to work and his need for attendant care causally related to injuries he received in the June 12, 2002, rollover accident, or had he recovered from any auto-accident injuries by November 2002 and subsequently become disabled by his preexisting diabetes-related diseases that gave rise to the 100 percent VA disability rating? Defendant's theory of the case was the latter. Plaintiff's theory of the case was that while he had serious preexisting diabetes-related ailments, they did not prevent him from working before the accident and, but for the accident, he would have continued working except for the brief hospitalization and recovery days after his December 2002 heart incident and February 2003 TIA. Plaintiff argued that his

preexisting condition made him more susceptible to the disabling effects of a closed head injury. Plaintiff also theorized that defendant should have had his claim reviewed after November 2002 by properly qualified medical personnel, such as a neuropsychologist who specialized in closed head injuries, and that its failure to do so was improper and unfair. A summary of the expert testimony presented at trial on the major issue of the case follows.

Dr. Brateman, plaintiff's family physician, diagnosed plaintiff as sustaining a closed head injury in the accident, noting that plaintiff suffered from dizziness, confusion, memory loss, chronic vertigo, and headaches. According to Dr. Brateman, plaintiff's closed head injury disabled him from working. Dr. Brateman also noted a change in plaintiff's personality after the accident. Dr. Brateman further testified that plaintiff required constant attendant care. With respect to the December 2002 heart incident requiring angioplasty, Dr. Brateman testified that, absent the closed head injury from the auto accident, plaintiff would have only been off work for a "number of days to maybe a few weeks." Similarly, Dr. Brateman testified that the TIA plaintiff suffered in February 2003 had temporary effects that resolved quickly, unlike the closed head injury from the accident "with an actual bruise to the brain" that caused long-lasting symptoms.

In July 2003, plaintiff's treating neurologist referred him to clinical neuropsychologist Dr. Michael Vredevoogd for an evaluation. Dr. Vredevoogd testified at trial that after reviewing plaintiff's medical history and performing numerous tests, he had concluded that plaintiff's closed head injury interacted with his diabetes-related vascular condition so as to disable him. Dr. Vredevoogd opined that plaintiff's vascular condition alone would not have been

disabling, but it made plaintiff more susceptible to being disabled by his closed head injury. Although he learned of the closed head injury from plaintiff's medical history, Dr. Vredevoogd reached the same diagnosis from his own testing data.

Plaintiff's neurologist also referred plaintiff to speech pathologist Debra Thomas in September 2003. After conducting a cognitive assessment of plaintiff's speech and language, Ms. Thomas concluded that plaintiff had mild to moderate deficits resulting from a closed head injury sustained in an automobile accident.

Dr. John Blase, another neuropsychologist, examined plaintiff in June 2005. Dr. Blase opined at trial that a TIA would not have a lasting disabling effect. After administering a battery of tests to plaintiff, Dr. Blase formed the opinion that plaintiff suffered from a traumatic brain injury. He further opined that plaintiff's brain injury was disabling with regard to plaintiff's ability to work and to care for his own needs and that plaintiff required constant supervision. Although Dr. Blase administered a different battery of tests to plaintiff than did Dr. Vredevoogd in 2003, he reached the same conclusion relative to plaintiff's preexisting diabetes-related vascular condition. Plaintiff's diabetes, hypertension, and vascular disease, which were not disabling before the accident, rendered plaintiff subject to greater behavioral impairment as a result of the traumatic brain injury received in the accident.

Defendant required plaintiff to submit to an independent medical examination by Dr. Choo Sun Rim, a neurologist, who did not testify at trial. Dr. Rim's report, apparently admitted at trial as part of the defendant's claim records, indicated that plaintiff had suffered a head injury in the accident but that it appeared to be relatively minor. The head injury was

noted as possibly explaining the dizziness and headaches plaintiff experienced. Dr. Rim also opined in his report that the intellectual and behavioral alteration plaintiff experienced did not seem to be related to brain injury but to small vessel disease of the brain.

Defendant did present at trial the deposition testimony of Dr. Gerald Levinson, a cardiologist who examined plaintiff at defendant's request. Dr. Levinson claimed to have not found any indication in plaintiff's medical records, other than Dr. Brateman's opinion, to document plaintiff having a closed head injury. But Dr. Levinson admitted that he did not have the expertise to diagnose a closed head injury and that he would defer to a neuropsychologist in that regard.

After the proofs were closed and counsel argued their positions, the trial court instructed the jury with M Civ JI 35.02 regarding plaintiff's burden of proof on the critical issue of the case. Specifically, the court instructed the jury that the plaintiff had the burden of proving (1) that his injuries arose out of the operation or use of a motor vehicle as a motor vehicle and (2) that plaintiff suffered a loss of income from work that he would have performed during the first three years after the accident had he not been injured. Counsel for both parties expressed satisfaction with the trial court's instructions to the jury. The jury was also provided a detailed jury-verdict form approved by both parties. The jury completed the verdict form and found in plaintiff's favor, and judgment was entered accordingly.

II. EVIDENTIARY ISSUES

A

Defendant first argues that it was denied a fair trial by the admission of irrelevant and prejudicial evidence

regarding the manner in which it processed plaintiff's claim for no-fault benefits. This evidence came through the testimony of a former claims executive for defendant who was qualified as an expert in handling insurance claims and from cross-examination of those of defendant's employees who were involved with plaintiff's claim. The trial court ruled that the testimony of plaintiff's expert was relevant to whether plaintiff submitted reasonable proof of loss to defendant, thus rendering plaintiff's claimed benefits overdue and entitling plaintiff to statutory penalty interest. We conclude the trial court did not abuse its discretion by admitting the claims-handling evidence and, even if it did, reversal is not warranted.

A trial court's decision whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). The trial court abuses its discretion if its decision is outside the range of principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Lewis v LeGrow*, 258 Mich App 175, 200, 214; 670 NW2d 675 (2003). Moreover, even if a court abuses its discretion in admitting or excluding evidence, the error will not merit reversal unless a substantial right of a party is affected, MRE 103(a), and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice, MCR 2.613(A). See *Chastain v Gen Motors Corp*, 467 Mich 888 (2002); *Lewis, supra* at 200.

Generally, all relevant evidence is admissible and irrelevant evidence is not. MRE 402; *Waknin v Chamberlain,* 467 Mich 329, 333; 653 NW2d 176 (2002). Evidence is relevant if it has any tendency to make the

existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Waknin, supra* at 333. The trial court also has discretion to exclude even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Lewis, supra* at 199. " 'Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.' " *Waknin, supra* at 334 n 3, quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Defendant argues that the claims-handling evidence was not relevant to penalty interest under MCL 500.3142 because an insurer is liable for penalty interest if benefits are overdue regardless of the reason the insurer does not timely pay the benefits. "Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits." *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002), citing *Davis v Citizens Ins Co of America*, 195 Mich App 323, 328; 489 NW2d 214 (1992). While we agree with the premise of defendant's argument, it does not follow that the claims-handing evidence was irrelevant. MCL 500.3142(2) provides in part: "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." Whether plaintiff provided reasonable proofs of loss and whether, after so doing, the defendant failed to pay the claims within 30 days were questions before the jury that plaintiff bore the burden of proving. See M Civ JI

35.04. The focus of the evidence in this regard was on what plaintiff provided defendant and whether it constituted "reasonable proof of the fact and of the amount of loss sustained." The claims-handling evidence was therefore relevant to facts that were of consequence to the action, whether plaintiff provided defendant reasonable proof of the fact and amount of the loss sustained for purpose of penalty interest under MCL 500.3142(2).

Additionally, defendant's view of relevancy with respect to the main causation issue in this case is too narrow. A material fact need not directly prove an element of a claim or defense provided it is within the range of litigated matters in controversy. *People v Mills,* 450 Mich 61, 67-68; 537 NW2d 909, modified 450 Mich 1212 (1995). To be relevant under MRE 401, a fact must be material, i.e., it must be of consequence to the action. *Id*. at 66-67. " 'Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.' " *Id*. at 67, quoting 1 McCormick, Evidence (4th ed), § 185, p 773. A fact at issue in this case was whether defendant fairly reviewed plaintiff's claim. Plaintiff's theory of the case was that defendant had not fairly reviewed his claim. Defendant, on the other hand, believed not only that had it fairly reviewed and denied plaintiff's no-fault claim, but also that it had overpaid it. Consequently, whether defendant fairly reviewed plaintiff's claim was within the range of the litigated controversy and was a fact of consequence to the action. Although the evidence does not directly prove an element of plaintiff's claim for PIP benefits, it is still consequential because, if believed, it makes plaintiff's theory of the case more probable than it would be without the evidence. The evidence was

relevant to whether plaintiff's claim was denied because it was not causally related to the accident (defendant's position) or because it was a valid claim that was not handled fairly (plaintiff's theory). The evidence was a brick in the wall that was plaintiff's case. See, e.g., *People v Brooks*, 453 Mich 511, 519; 557 NW2d 106 (1996), quoting 1 McCormick, Evidence (4th ed), § 185, p 776.

Defendant also argues that even if the evidence were relevant, and therefore properly admitted into evidence, its probative value was substantially outweighed by the danger of unfair prejudice. MRE 403. Defendant conflates with this argument alleged improper argument by plaintiff's counsel. But other than moving for a mistrial after plaintiff's opening statement, which was denied and not appealed, defendant has neither properly preserved nor appealed a claim of misconduct by counsel. Further, the jury verdict of only 40 percent of what plaintiff requested does not reflect a decision based on passion or bias. Moreover, to the extent that the trial court abused its discretion either by admitting the claims-handling evidence or by failing to exclude the evidence under MRE 403, our review of the trial record as a whole convinces us that reversal is not warranted because it does not affirmatively appear that the failure to grant relief is inconsistent with substantial justice. MCR 2.613(A); *Chastain, supra*; *Lewis, supra* at 200.

B

Defendant next takes issue with the testimony of registered nurse Laura Kling regarding the cost of attendant care. Defendant contends that Kling testified as an expert and her testimony was supported by inadmissible hearsay contrary to MRE 703, which now requires that the facts underlying an expert's opinion

be in evidence. Defendant argues that because this testimony was inadmissible and the only evidence regarding the cost of attendant care, the trial court should have granted defendant a judgment notwithstanding the verdict (JNOV). We disagree.

We review de novo the trial court's ruling on a motion for JNOV. *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 491; 668 NW2d 402 (2003). The trial court should grant a JNOV motion only when the evidence and all legitimate inferences viewed in a light most favorable to the nonmoving party fail to establish a claim as a matter of law. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005). To succeed on this issue, defendant must establish not only that the trial court abused its discretion by admitting Kling's testimony, but also that there was no other admissible evidence to support the jury's award of benefits for attendant care.

The trial court denied defendant's motion for JNOV on this issue, reasoning that Kling's testimony was admissible under MRE 703 because it was based on Kling's own direct, personal knowledge, citing *Brzozowski v Wondrasek,* unpublished opinion per curiam of the Court of Appeals, issued November 10, 2005 (Docket Nos. 256701 and 259098), p 5.

Having reviewed the record de novo, we find no error of law in the trial court's analysis and no abuse of discretion in admitting Kling's testimony. Moreover, contrary to defendant's argument on appeal, the testimony, of plaintiff's economist, Nitin Paranjpe, corroborated Kling's testimony regarding the cost of attendant care. Although Paranjpe based his calculation for attendant care on Kling's numbers, he testified about independent sources, which it may fairly be inferred Paranjpe found were consistent with Kling's testimony.

Kling testified that she was a registered nurse with 20 years' experience working in rehabilitation settings in hospitals, homes, and other facilities. She had worked for many years with clients who had closed head injuries, providing case management and life care planning. She had personally reviewed plaintiff's care needs and determined he needed 24-hour daily care by a home-health-care aide. Kling then testified:

> *Q*. All right. Now, you have experience or background in the home health aide agency setting, correct?
>
> *A*. Correct.
>
> *Q*. You understand what they charge?
>
> *A*. That's correct.
>
> *Q*. Are here [sic] good agencies and bad agencies?
>
> *A*. There are good agencies, there are bad agencies, there is bad home health aide, there's good home health aid[e]s. My experience when I provide attendant care to a client, we have to make some changes along the way. We have to really—a case manager has to monitor the situation closely.
>
> * * *
>
> *Q*. All right. Now, with these home health agencies they have rates they charge?
>
> *A*. Correct.
>
> *Q*. And do they vary?
>
> *A*. Yes.
>
> *Q*. Do you have experience with what they charge?
>
> *A*. Yes.

Defendant then interposed an objection to Kling's testifying about the cost of home-health-care aides on the bases of lack of foundation and hearsay. With respect to the former, defendant clarified that Kling had

not specified to what agencies she was referring. With respect to the hearsay objection, defense counsel argued that Kling's knowledge had to be based on hearsay. But defense counsel did not request an opportunity to voir dire the witness to confirm his assumption regarding the source of Kling's knowledge. Nor did counsel specifically object on the basis of MRE 703 that the facts or data on which Kling based her opinion must be in evidence. Viewing the existing record in the light most favorable to plaintiff, the trial court did not err by inferring that Kling had personal, nonhearsay knowledge on which to base her testimony that aides in 2005 were paid in the range of $18 to $24 an hour.[2] MRE 703 does not preclude an expert from basing an opinion on the expert's personal knowledge. *Brzozowski, supra* at 5; see also Dubin, Weissenberger, & Stephani, Michigan Evidence: 2008 Courtroom Manual, pp 251-252. So, the trial court's decision to admit Kling's testimony was within the range of reasonable and principled outcomes. *Orr*, *supra* at 588-589. It follows that the trial court properly denied defendant's motion for JNOV. *Foreman, supra* at 136; *Wiley, supra* at 492.

In addition, Paranjpe, an economist and statistician employed by an econometrics and employment research firm, testified that his company had conducted surveys regarding home-health-care aides in 2002 and 2005. Paranjpe also obtained information from the state of Michigan's website that the state paid home-health-care aides at the rate of $17.50 an hour in 2002. These sources, Paranjpe testified, were "indications as to what the market rate might be." Thus, although Paranjpe

[2] Contrary to defendant's argument on appeal, viewed in the light most favorable to plaintiff, Kling's personal knowledge regarding home-health-care aides was not 20 years old; rather, she had more than 20 years' experience in case management and life-care planning.

used Kling's numbers to calculate attendant-care benefits, it is fair to infer from his testimony that he independently verified Kling's data. Defendant argues that Paranjpe also relied on hearsay, but his own company's surveys would not be hearsay and, if they were, they would be admissible under MRE 803(17), which excepts from the rule against hearsay "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." This same hearsay exception applies to government information on wages for different occupations such as a health-care aide, even though the information was obtained from the Internet. See *State v Erickstad*, 620 NW2d 136, 145-146 (ND, 2000) (affirming the admission in evidence under the identical hearsay exception of a police officer's testimony regarding the value of a pickup truck based on accessing the Kelley Blue Book Internet website).

III. JUDICIAL ESTOPPEL

Defendant argues that plaintiff is judicially estopped from asserting a claim for work-loss benefits or replacement services after his December 17, 2002, heart incident because he successfully asserted a claim for VA disability benefits based on causes unrelated to his motor vehicle accident. Because defendant raised this issue on a motion for directed verdict and on its motion for JNOV and because it presents a question of law, our review is de novo. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001); *Wiley*, *supra* at 491.

The doctrine of judicial estoppel is intended to maintain the consistency of court rulings and to keep litigants from playing "fast and loose" with the legal system. See *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). Under the doctrine of

judicial estoppel, " 'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.' " *Id*. at 509, quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990) (emphasis omitted). The "prior success" model of the doctrine applies in Michigan. *Paschke*, *supra* at 509.

> Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. [*Id*. at 510 (citations omitted).]

As in *Paschke*, we conclude that the doctrine of judicial estoppel has no application to the facts of this case because the position plaintiff took with respect to his application for benefits from the VA was not "wholly inconsistent" with his position in claiming no-fault benefits. Veterans' benefits are dependent on establishing a service-connected disability. The application plaintiff submitted to the VA was for benefits based on plaintiff's service in Vietnam and exposure to Agent Orange, which is allegedly causally linked to diabetes and vascular disease. Plaintiff signed an application for benefits, signed medical releases for his medical records, and requested that the VA review his medical records and award benefits. Other than an initial letter written by plaintiff's family doctor that does not mention the motor vehicle accident, defendant does not identify any evidence plaintiff ever asserted to the VA that he was not also injured in a motor vehicle accident. In fact, Dr. Brateman's second letter to the VA on December 14, 2003, clearly notes that plaintiff received a closed head injury in the June 12, 2002, motor vehicle

accident. The fact that the VA, on the bases of plaintiff's medical records and its own treatment reports regarding plaintiff, determined that plaintiff's coronary artery disease was 100 percent disabling does not preclude plaintiff from being disabled by other factors as well. Indeed, the VA determination also lists plaintiff as having other service-connected disabilities based on other ailments such as peripheral vascular disease (40 percent right lower—20 percent left lower) and diabetic retinopathy (30 percent). Similarly, plaintiff did not assert in the present case for no-fault benefits that his closed head injury was the sole factor causing his disability. Rather, he asserted that his preexisting condition made him more susceptible to the disabling effects of the closed head injury he suffered in the accident. In sum, plaintiff's position in his application for VA benefits is not "wholly inconsistent" with his claim for no-fault benefits. Therefore, judicial estoppel does not apply. *Paschke*, *supra* at 509-510.

Moreover, defendant relies on *MacDonald v State Farm Mut Ins Co*, 419 Mich 146; 350 NW2d 233 (1984), for its argument on this issue. That case was not decided on the ground of judicial estoppel but rather on the basis that MCL 500.3107(1)(b) relieves an insurer from liability for work-loss benefits if a supervening cause would have prevented the claimant from working even if the motor vehicle accident had not occurred. In MacDonald's case, he suffered a heart attack two weeks after the auto accident, and "[a]fter that date [MacDonald] would have earned no wage even had the accident not occurred and, therefore, is ineligible for work-loss benefits after that date under [former MCL 500.3107(b), now MCL 500.3107(1)(b)]." *MacDonald*, *supra* at 152. The Court held that this result was not altered by former MCL 500.3107a, now MCL 500.3107(1)(a), which concerns those who are tempo-

rarily unemployed. *MacDonald*, *supra* at 152-154. In sum, under MCL 500.3107(1)(b) as interpreted by *MacDonald*, a supervening cause may apply to preclude work-loss benefits if the claimant would not have been able to work even if no auto accident had occurred. Stated otherwise, there is a "but for" factual issue like proximate causation: if, but for the accident, plaintiff would have been able to work, work-loss benefits are payable. On the other hand, even if no accident had occurred but plaintiff would not have been able to work, no work-loss benefits would be payable.

The essence of defendant's defense at trial was that plaintiff's preexisting medical conditions became disabling after, but not because of, any injuries he received in the motor vehicle accident. But plaintiff presented testimony from his family doctor, two neuropsychologists, and other health professionals that it was plaintiff's closed head injury from his motor vehicle accident interacting with plaintiff's susceptible diabetes-caused condition that kept him from working. One of defendant's own experts conceded that plaintiff suffered a closed head injury in the accident, albeit a mild one, and defendant's other expert, cardiologist-internist Dr. Levinson, testified that he would defer to a neuropsychologist to diagnose a closed head injury. Although defense counsel ably contested plaintiff's case by presenting evidence that plaintiff's symptoms could be explained by small vessel brain disease, in the end, this was a factual question for the jury to decide. All the medical evidence and the VA decision regarding plaintiff's service-connected disabilities went to the jury. The trial court instructed the jury regarding the statutory element of plaintiff's work-loss claim and the "but for" test that formed the basis for the *MacDonald* decision: "That Jorge Morales suffered a work loss which consists of a loss of income from work the plaintiff would have performed during the first three years after the acci-

dent had he not been injured." Defendant requested no additional instruction based on *MacDonald* and, in fact, expressed satisfaction with the trial court's instructions. The jury decided this issue in plaintiff's favor, and there is no reason to set aside the jury's verdict.

IV. ATTORNEY FEES

After the jury's verdict, plaintiff moved the trial court for attorney fees pursuant to MCL 500.3148(1), which provides that an attorney representing a claimant for no-fault benefits may be awarded a reasonable fee as a charge against the no-fault insurer "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." The trial court made such a finding in this case and granted plaintiff's motion for a reasonable attorney fee, which the court determined to be $148,562.50 under the facts and circumstances of this case. Defendant does not contest the substantive merits of the attorney-fee award. Instead, defendant only argues that this Court should vacate the attorney-fee award if the Court grants relief on one or more of the other issues defendant raises on appeal. Because we have found no error warranting reversal or other relief, defendant's request for relief on this issue also fails.

We affirm.

VERBRUGGHE v SELECT SPECIALTY
HOSPITAL-MACOMB COUNTY, INC (ON REMAND)

Docket No. 263686. Submitted June 24, 2008, at Lansing. Decided July 24, 2008, at 9:05 a.m. Leave to appeal sought.

Suzanne Verbrugghe, as personal representative of the estate of George Verbrugghe, deceased, brought an action in the Macomb Circuit Court against Select Specialty Hospital-Macomb County, Inc., and others, claiming medical malpractice. The plaintiff is the second personal representative of the decedent's estate. The first personal representative brought a similar suit that was dismissed on the basis that the period of limitations had expired. However, just before the dismissal, the plaintiff was appointed as the successor personal representative, replaced the initial personal representative on the caption of the complaint, and filed the instant second lawsuit. The court, Richard L. Caretti, J., dismissed this second lawsuit with prejudice, ruling that the action was not filed within the period of limitations, that res judicata barred the action, and that the plaintiff failed to file a notice of intent to sue as required by MCL 600.2912b(1). The plaintiff appealed. The Court of Appeals, MURRAY, P.J., and JANSEN and KELLY, JJ., held that the plaintiff's claim was not barred by the statute of limitations because it was timely filed under MCL 600.5852, as enforced by *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29 (2003), and that the second lawsuit was not barred on res judicata grounds because the dismissal of the first lawsuit on statute of limitations grounds did not constitute an adjudication on the merits for the purposes of res judicata, but the Court also held that the second lawsuit was subject to dismissal without prejudice because the successor personal representative failed to serve notice of intent before commencing the lawsuit. The Court of Appeals therefore reversed the trial court's order dismissing the action with prejudice and remanded the case to the trial court for the entry of an order of dismissal without prejudice. 270 Mich App 383 (2006). The Supreme Court, after holding the plaintiff's application for leave to appeal in abeyance pending its decision in another case and in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the matter to the Court of Appeals for reconsideration in light of *Washington v Sinai*

Hosp of Greater Detroit, 478 Mich 412 (2007), and *Braverman v Garden City Hosp*, 480 Mich 1159 (2008). 481 Mich 874 (2008).

On remand, the Court of Appeals *held*:

The Supreme Court held in *Washington* that the dismissal of an untimely complaint on statute of limitations grounds is an adjudication on the merits. The trial court's dismissal of the plaintiff's claim with prejudice must be affirmed on the ground that the second lawsuit was barred by res judicata because the first action was decided on the merits, the matter contested in the second action was or could have been resolved in the first, and the plaintiff represents the same legal right that the initial personal representative represented and both actions involve the same parties or their privies.

Affirmed.

LIMITATION OF ACTIONS — RES JUDICATA.

The dismissal of an untimely complaint on statute of limitations grounds is an adjudication on the merits for purposes of res judicata.

Hertz Schram P.C. (by *Steve J. Weiss* and *Gary P. Supanich*) for Suzanne Verbrugghe.

Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C. (by *Karen W. Magdich*), for Select Specialty Hospital-Macomb County, Inc.

Plunkett & Cooney (by *Joseph F. Babiarz, Jr.*, and *Robert G. Kamenec*) for Arsenio V. De Leon, M.D.

ON REMAND

Before: MURRAY, P.J., and JANSEN and KELLY, JJ.

PER CURIAM.

I. INTRODUCTION

This case is before us on remand from our Supreme Court, which vacated our original judgment and remanded to this Court for reconsideration in light of

Washington v Sinai Hosp of Greater Detroit, 478 Mich 412; 733 NW2d 755 (2007), and *Braverman v Garden City Hosp*, 480 Mich 1159 (2008). See *Verbrugghe v Select Specialty Hosp Macomb Co, Inc*, 481 Mich 874 (2008).

In our original opinion, we addressed the second medical-malpractice lawsuit filed on behalf of the estate of George Verbrugghe against these defendants. In the first lawsuit, the Macomb Circuit Court dismissed the case on statute of limitations grounds, a decision that we upheld in an unpublished opinion. See *Verbrugghe v Select Specialty Hospital-Macomb Co, Inc,* unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 262748). However, just before that first dismissal, a successor personal representative was appointed. The successor representative not only replaced the initial representative on the caption of the complaint before the dismissal occurred in the first lawsuit, but she also filed the instant second lawsuit in the same circuit court.

The trial court also dismissed the second lawsuit with prejudice on statute of limitations grounds, MCR 2.116(C)(7), as well as on the alternative grounds of res judicata and failure to file a notice of intent. On appeal, we held that (1) plaintiff's claim was not time-barred by the statute of limitations because it was timely filed under MCL 600.5852, as enforced by *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29; 658 NW2d 139 (2003), (2) the second lawsuit was not barred by res judicata because the dismissal of the first lawsuit "on statute of limitations grounds did not constitute an adjudication on the merits for purposes of res judicata," but (3) the second lawsuit "was subject to dismissal [without prejudice] because the successor personal representative failed to serve a notice of intent on defen-

dants . . . ." *Verbrugghe v Select Specialty Hospital-Macomb Co, Inc*, 270 Mich App 383, 396-397; 715 NW2d 72 (2006). We therefore reversed the trial court's order dismissing this case with prejudice and remanded for entry of an order of dismissal without prejudice. *Id*. at 397.

II. ANALYSIS

After consideration of *Washington*, we affirm the trial court's order dismissing the case with prejudice on the ground that the second lawsuit was barred by res judicata.

The determination whether res judicata bars a lawsuit involves a question of law, which we review de novo. *Chestonia Twp v Star Twp,* 266 Mich App 423, 428; 702 NW2d 631 (2005), citing *Adair v Michigan,* 470 Mich 105, 119; 680 NW2d 386 (2004). In *Dart v Dart,* 460 Mich 573, 586; 597 NW2d 82 (1999), the Supreme Court outlined the general principles governing res judicata:

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs v Schultz,* 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.* at 375-376.

In *Washington*, our Supreme Court held that the dismissal of an untimely complaint on statute of limitations grounds is "an adjudication on the merits." *Washington, supra* at 414, 417, 419. Since plaintiff's complaint is identical to the first complaint that was dismissed, it follows that the matter contested in the second action was or could have been resolved in the first. *Id*. at 420-421. And, since plaintiff represents the

same legal right that the initial personal representative represented, both actions involve the same parties or their privies. *Id*. at 422. We therefore affirm the dismissal of plaintiff's claim with prejudice on the ground that it is barred by res judicata.[1] *Id.* at 419-422; *Dart, supra* at 586.

Affirmed.

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[1] In her motion for supplemental briefing on remand, plaintiff, quoting *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007), argues that under the Supreme Court's order in *Mullins*, the initial complaint of the first personal representative, Steven Verbrugghe, may have been improperly dismissed because *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), may not have been applicable because the initial lawsuit was one allegedly " '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.' " If that is the case, plaintiff argues, the initial lawsuit and dismissal could not form the basis for res judicata in this case. However, since the trial court has yet to determine whether the initial complaint should be reinstated pursuant to MCR 2.612(C)(1)(e) and (f), it cannot impact our decision today. If the trial court elects to reinstate the first lawsuit, the personal representative of the Verbrugghe estate will be able to pursue the claims through the first complaint in the initial lawsuit, rendering moot plaintiff's request to reverse the trial court's order dismissing the second lawsuit.

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would limit the religious institution's right to choose who will perform particular spiritual functions; however, the exception does not apply to all employment decisions by religious institutions or all claims by ministers. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150.

PROHIBITION OF UNFUNDED MANDATES

3. A unit of local government, in order to demonstrate the existence of offloading of state funding responsibilities to the unit and actual or imminent injury, need only establish an increase in the level of activity or services mandated by the state and a complete failure on the part of the state to provide any funding to offset the necessary costs to be incurred by the unit in the provision of the increased level of services or activities (Const 1963, art 9, § 29). *Adair v State of Michigan (On Second Remand)*, 279 Mich App 507.
4. Federal mandates enforced by the state do constitute state requirements for purposes of the constitutional provisions regarding state financing of activities or services required of local units of government (Const 1963, art 9, § 29). *Adair v State of Michigan (On Second Remand)*, 279 Mich App 507.
5. The constitutional prohibition of unfunded mandates placed on a unit of local government by the state does not permit the Legislature to appropriate to school districts a certain level of discretionary funds and then remove some of the discretion afforded the districts by mandating how some of those funds should be spent (Const 1963, art 9, § 29). *Adair v State of Michigan (On Second Remand)*, 279 Mich App 507.

CONTINGENT FEES—*See*

ATTORNEY AND CLIENT 1

CONTRACTS

See, also, DIVORCE 2

FORUM-SELECTION CLAUSES

1. The enforcement of contractual forum-selection clauses is premised on the parties' freedom to contract; Michigan honors the parties' contractual choice of forum, in the absence of certain factors, by requiring Michigan courts to dismiss, or stay, actions in which it is demon-

strated that the parties have agreed that a forum other than Michigan shall be the exclusive forum for resolution of their dispute; a valid forum-selection clause does not divest the Michigan courts of personal jurisdiction over the parties (MCL 600.745[3]). *Robert A Hansen Family Trust v FGH Industries, LLC*, 279 Mich App 468.

THIRD-PARTY BENEFICIARIES

2. A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person; an objective standard is used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status (MCL 600.1405). *Vanerian v Charles L Pugh Co, Inc*, 279 Mich App 431.

CONTROLLED SUBSTANCES

ANABOLIC STEROIDS

1. The Board of Pharmacy rule that identifies the anabolic steroids that are prohibited schedule 3 controlled substances and that exempts from schedule 3 an anabolic steroid that is expressly intended for administration through implants to cattle or other nonhuman species and that has been approved by the United States Drug Enforcement Administration for such administration is not unconstitutionally vague; the rule gives adequate notice that the possession of an anabolic steroid listed in schedule 3 with the intent that it be consumed by a human is illegal while the possession of an anabolic steroid listed in schedule 3 with the intent that it be administered through implants to cattle is not illegal; the legality of such possession is not determined by the physical form of the anabolic steroid at the time it is possessed but by the possessor's intent regarding its use (Mich Admin Code, R 338.3122). *People v Brown*, 279 Mich App 116.

COURTS

JURISDICTION

1. When determining whether the doctrine of primary jurisdiction applies in a given case, a court should consider to what extent the agency's specialized expertise makes it a preferable forum for resolving the issue,

the need for uniformity and consistency in resolution of the issue, and whether the judicial resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities. *Psychosocial Service Assoc, PC v State Farm Mut Automobile Ins Co*, 279 Mich App 334.

2. Courts are just as capable as the Board of Psychology of interpreting the statutes governing licensure of the practice of psychology (MCL 333.18201[1][b]). *Psychosocial Service Assoc, PC v State Farm Mut Automobile Ins Co*, 279 Mich App 334.

STATUTORY INTERPRETATION

3. Michigan courts construe statutes to avoid absurd results that are manifestly inconsistent with legislative intent. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662.

CRIMINAL LAW

CRIMINAL SEXUAL CONDUCT

1. A defendant may be found to have committed criminal sexual conduct by sexual penetration through the use of force or coercion where the defendant engaged in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable; the presence of consent by the victim is not necessarily the factual equivalent of the absence of coercion; any inquiry regarding consent must focus on the validity of such consent (MCL 750.520b[1][f][*iv*]). *People v Bayer*, 279 Mich App 49.

CRIMINAL SEXUAL CONDUCT—*See*

CONSTITUTIONAL LAW 1

CRIMINAL LAW 1

DAMAGES—*See*

NUISANCE 1

DECLARATORY JUDGMENTS

ACTUAL CONTROVERSIES

1. The existence of an actual controversy is a condition precedent to invocation of declaratory relief; this requirement prevents a court from deciding hypothetical issues; the purpose of declaratory relief is to provide

litigants with court access in order to preliminarily determine their rights; an actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct before actual injuries or losses have occurred. *City of Huntington Woods v City of Detroit*, 279 Mich App 603.

DEEDS

FEE SIMPLE DETERMINABLE

1. A fee simple determinable is a fee subject to special limitation that expires automatically on the happening or nonhappening of a specified event; a fee simple subject to a condition subsequent is subject to a power by the grantor to terminate the estate on the happening of a specified event, such as a breach of a condition; a fee simple determinable is a limited grant while a fee simple subject to a condition subsequent is an absolute grant to which a condition is applied. *City of Huntington Woods v City of Detroit*, 279 Mich App 603.

DELEGATION OF LEGISLATIVE POWERS—*See*

CONSTITUTIONAL LAW 1

CRIMINAL LAW 1

DEPARTURES FROM SENTENCING GUIDELINES—*See*

SENTENCES 1

DISSOLUTION—*See*

MUNICIPAL CORPORATIONS 3

DIVORCE

CHILD SUPPORT

1. As long as the minimum protections of due process are afforded to the party ordered to pay child support, the child-support obligation is, by statute, not subject to retroactive modification, except with respect to the period during which these is a properly filed and served petition for support modification, and the circuit court may not rely on the court rule governing relief from judgment to retroactively modify the child-support order (MCL 552.603[2]; MCR 2.612[C]). *Malone v Malone*, 279 Mich App 280.

CONTRACTS

2. A contract that anticipates and encourages a future

separation or divorce is against public policy in Michigan and is not enforceable. *Wright v Wright*, 279 Mich App 291.

DUAL EMPLOYMENT—*See*

WORKERS' COMPENSATION 1

DUTY TO DEFEND INSURED—*See*

INSURANCE 1

DUTY TO WARN THIRD PARTIES—*See*

MENTAL HEALTH 1

STATUTES 1

ELECTRICAL ADMINISTRATIVE ACT—*See*

LICENSES 1

EMINENT DOMAIN

CONDEMNATION POWER

1. The power of bridge companies to condemn private property under the Railroad Code applies only to those bridge companies that are engaged in the operation of a railroad (MCL 462.101 *et seq*.). *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662.

EMOTIONAL DISTRESS—*See*

INJUNCTIONS 1

EMPLOYEES' SPOUSES—*See*

INSURANCE 3

EMPLOYER-OWNED AUTOMOBILES—*See*

INSURANCE 3

ENVIRONMENT

ENVIRONMENTAL CONTAMINATION

1. The Natural Resources and Environmental Protection Act provides that the proper environmental-cleanup criteria applicable to a remedial-action plan for property should be consistent with the current zoning and use of the property at the time of the remedial action (MCL 324.20120a[6]). *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346.

dents that are affected by a zoning decision; a municipality may have standing to contest a zoning decision if it can show that it has suffered a concrete, particularized injury distinct from the interest of the general public. *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25.

2. A political subdivision whose power is derivative and not sovereign cannot sue as *parens patriae* to assert the alleged interest of its citizens. *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25.

TOWNSHIP PARK COMMISSIONS

3. The statute that governs the establishment of a township park commission through voter petition and referendum does not provide a procedure for the dissolution of such commission, and no other provision of Michigan law addresses dissolution of a voter-established township park commission (MCL 41.426). *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389.

NEGLIGENCE

MEDICAL MALPRACTICE

1. The two-year saving period for a personal representative to bring an action on behalf of a decedent's estate is measured from the date that letters of authority are issued to the personal representative, regardless of whether that person is the initial personal representative or a successor personal representative (MCL 600.5852). *Estate of Dale v Robinson*, 279 Mich App 676.

NEW TRIAL—*See*

MOTIONS AND ORDERS 1

NO-FAULT—*See*

INSURANCE 3, 4, 5, 6, 7

NOTES SECURED BY MORTGAGES—*See*

SECURED TRANSACTIONS 1

NUISANCE

TEMPORARY NUISANCES

1. Damage to property affected by a temporary nuisance, that is, one that is abatable by reasonable curative or remedial action, is recurrent, and monetary damages may be recovered from time to time until the nuisance is

abated. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346.

PARENS PATRIAE DOCTRINE—*See*

MUNICIPAL CORPORATIONS 2

PARENT AND CHILD

See, also, INJUNCTIONS 1

ACKNOWLEDGMENT OF PARENTHOOD

1. The statute that governs claims for the revocation of an acknowledgment of parentage requires a court presented with such a claim to consider the equities of the case; in doing so, it is proper for the court to draw on equitable principles applicable in family-law cases: the best interest of the child, the fitness of the competing parents, and the past relationships of the parties (MCL 722.1011[3]). *Sinicropi v Mazurek*, 279 Mich App 455.

CHILD-SUPPORT LIENS

2. A child-support lien may not be imposed against property held as a tenancy by the entirety by a husband and a wife to satisfy a child-support order that was entered against only the husband or the wife (MCL 552.625a, 552.625b, 600.2807). *Walters v Leech*, 279 Mich App 707.

CONSTITUTIONAL LAW

3. A state may not, consistent with due process of law, create the conditions that will strip an individual of an interest protected under the Due Process Clause; a state may not set out with the overt purpose of virtually assuring the creation of the grounds for the termination of a person's parental rights. *In re B and J, 279 Mich App 12.*

TERMINATION OF PARENTAL RIGHTS

4. A state, in order to comply with the guarantees of substantive due process, must prove parental unfitness by at least clear and convincing evidence before terminating parental rights; a court, however, may exercise jurisdiction over a child when the court determines by a preponderance of the evidence that the child comes within the statutory requirements for the court to take jurisdiction (MCL 712A.2; MCL 712A.19b[3]). *In re B and J, 279 Mich App 12.*

PARKS—*See*

PUBLIC LANDS 1

SECURED TRANSACTIONS

UNIFORM COMMERCIAL CODE

1. An interest in a note secured by a mortgage constitutes an interest in personal property, not real property, under the version of Article 9 of Michigan's Uniform Commercial Code in effect before July 1, 2001 (MCL 440.9101 *et seq*.). *Prime Financial Services LLC v Vinton*, 279 Mich App 245.

SENTENCES

DEPARTURES FROM SENTENCING GUIDELINES

1. A sentencing court must articulate substantial and compelling reasons for a departure from the minimum sentence range recommended by the sentencing guidelines and the reasons must be based on objective and verifiable factors; although a sentencing court's belief that the defendant is a danger to himself or herself and others is not in itself an objective and verifiable reason, objective and verifiable factors underlying the court's belief, such as repeated offenses, failures at rehabilitation, or uncontrollable urges to commit certain offenses constitute an acceptable justification for an upward departure; specific characteristics of an offense and an offender that strongly presage future criminal acts may justify an upward departure if they are objective and verifiable, and if they are not already adequately contemplated by the guidelines. *People v Horn*, 279 Mich App 31.

SNIFF BY NARCOTICS-DETECTION CANINE—*See*

SEARCHES AND SEIZURE 1

STALKING—*See*

INJUNCTIONS 1

STANDING—*See*

MUNICIPAL CORPORATIONS 1

PUBLIC LANDS 1

STATE ACTION—*See*

CIVIL RIGHTS 1

STATE TENURE COMMISSION—*See*

SCHOOLS 1